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Immigration Federalism: Rebalancing Immigration Law Through State Power

Jennifer Chacón

ABSTRACT. In past decades, the Supreme Court has interpreted federal immigration statutes in ways that have been reasonably consistent with the pluralistic views toward immigration regulation that are represented in federal immigration legislation. More recently, however, and over the past seven years in particular, the Court has moved away from modulating readings of immigration-enforcement power, even where such readings are readily supported by precedent and statutory text.

Given the expansive executive immigration-enforcement policies of the moment, ongoing congressional quiescence, and the growing asymmetries in the Court's interpretations of existing immigration law, this Essay argues there may be only one significant space left for a rebalancing: federalism. Several cities and states have enacted laws and adopted policies designed to effectuate some of the inclusionary elements of federal immigration law the Court has recently helped to suppress. Through these measures, states and localities have undertaken important work to rebalance immigration policy, aligning it more closely in practice with the policy compromises made by Congress in enacting these laws, as required by the competing preferences of the people Congress represents.

To be clear, federalism is not the ideal way to rebalance immigration law. A unified national approach to immigration law—including nationwide protection of the fundamental rights of immigrant residents—would best effectuate both national foreign-policy interests and domestic constitutional guarantees. But, in this political moment, subfederal regulation is the only countervailing force available against maximally restrictive interpretations of federal immigration policy, and is therefore worthy of exploration.

INTRODUCTION

On June 12, 2025, U.S. Secretary of Homeland Security Kristi Noem vowed to "liberate" the people of Los Angeles from their duly elected mayor, Karen Bass, and governor, Gavin Newsom.[1] During the press conference, federal agents

1. Sophia Bollag, *The Words that Led Sen. Padilla to Confront Kristi Noem—and Set Off a Political Storm*, S.F. CHRON. (June 13, 2025), https://www.sfchronicle.com/politics/article/words-led-padilla-confront-noem-set-storm-20376193.php [https://perma.cc/VLH7-EV4F].

forcibly restrained and wrestled to the ground California's U.S. Senator Alex Padilla when he tried to ask Secretary Noem a question.[2] The incidents graphically illustrated both the nation's deeply divided views on immigration policy and the Trump Administration's practice of expanding executive power through immigration-policy initiatives.

It is certainly not the case that Californians are unified on questions of immigration policy. Deep policy disagreements are evident at all levels — state, county, and local.[3] The state has some of the nation's broadest laws limiting voluntary state cooperation with federal immigration-enforcement efforts. These include the California Values Act of 2017, which prohibits state officials from assisting in immigration-enforcement efforts or voluntarily sharing certain information with federal immigration agents,[4] and the California TRUST Act of 2014, which limits the ability of county-jail officials to extend the detention of arrested noncitizens in response to ICE detainer requests.[5] Some jurisdictions have maintained these sorts of anti-cooperation policies for decades.[6] But, some county sheriffs have pushed back on these limitations, and a number of county and local officials have turned a blind eye, or even offered encouragement, when cooperative efforts push the envelope of what is permitted under California law.[7] Governor Newsom has also recently called for rollbacks to the state's healthcare

2. *Id.*

3. For a discussion of county and local variations in Californians' approaches to immigration policy, see Jennifer M. Chacón, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1355-76 (2019).

4. California Values Act, ch. 495, § 3, 2017 Cal. Stat. 3733, 3735-3741 (codified at CAL. GOV'T CODE §§ 7284-7284.12 (West 2024)) (prohibiting the use of state funds and resources to assist in federal immigration enforcement, with certain exceptions).

5. California TRUST Act, ch. 570, § 2, 2013 Cal. Stat. 4650, 4651-54 (codified as amended at CAL. GOV'T CODE §§ 7282, 7282.5 (West 2024)) (limiting the circumstances in which state and local law enforcement can comply with Immigration and Customs Enforcement (ICE) detainer requests).

6. *See, e.g.*, *Office of the Chief of Police: Special Order No. 40*, L.A. POLICE DEP'T 1 (Nov. 27, 1979), https://lapdonlinestrgeacc.blob.core.usgovcloudapi.net/lapdonline-media/2021/12/SO_40.pdf [https://perma.cc/7MZW-DLLG] (prohibiting LAPD officers from inquiring about immigration status during routine policing); Chacón, *supra* note 3, at 1352-55 (discussing efforts to prevent state officials from cooperating with federal immigration enforcement, notably with the passage of the California TRUST Act).

7. Chacón, *supra* note 3, at 1361, 1366-67, 1373-74. On the restrictionist tendencies of sheriff's departments across the country, see generally DORIS MARIE PROVINE, MONICA W. VARSANYI, PAUL G. LEWIS & SCOTT H. DECKER, POLICING IMMIGRANTS: LOCAL LAW ENFORCEMENT ON THE FRONT LINES (2016). For a detailed discussion of how some law-enforcement agents in California worked to limit the scope of the California Values Act and continued to subvert it after passage, see generally Christopher A. Galeano, *Senate Bill 54 (2017): California Versus the Law Enforcement Lobby*, 68 UCLA L. REV. 1446 (2022).

coverage for undocumented residents.[8] Still, the state as a whole has implemented numerous policies and practices that facilitate the integration of immigrant residents regardless of legal status,[9] and California state officials have expressed their vocal opposition to the current Trump Administration's approach to immigration enforcement in public statements and in the courtroom.[10] Such conflicts between federal and state officials (and between federal officials and federal elected officials from certain states) are not limited to California.[11]

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8. Taryn Luna, *Newsom Calls for Walking Back Free Healthcare for Eligible Undocumented Immigrants*, L.A. TIMES (May 14, 2025, 6:00 AM PT), https://www.latimes.com/california/story/2025-05-14/newsom-walks-back-free-healthcare-for-undocumented-immigrants [https://perma.cc/PZ9H-W5QN].

9. *See, e.g.*, Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L. REV. 12, 25-35 (2017) (describing state-level initiatives to mitigate the immigration consequences of criminal convictions); S. Karthick Ramakrishnan & Allan Colbern, *The "California Package" of Immigrant Integration and the Evolving Nature of State Citizenship*, UCLA: INST. FOR RSCH. ON LAB. & EMP. 2 (July 8, 2015), https://irle.ucla.edu/old/publications/documents/IRLEReport_Full.pdf [https://perma.cc/3DEA-GVXE].

10. Billal Rahman, *Gavin Newsom Responds to Donald Trump's ICE Threat*, NEWSWEEK (June 16, 2025, 10:07 AM), https://www.newsweek.com/gavin-newsom-responds-donald-trump-ice-threat-sanctuary-cities-los-angeles-2086087 [https://perma.cc/86DD-LWUW]; Eric He, *California AG Pushes Back on Trump Threat to Prosecute Officials Who Don't Comply with ICE*, POLITICO (Jan. 22, 2025, 7:35 PM), https://www.politico.com/news/2025/01/22/ag-blasts-trump-threat-prosecute-officials-immigration-00200112 [https://perma.cc/H9GE-CQVE]; Press Release, Rob Bonta, Cal. Att'y Gen., Attorney General Bonta Sues U.S. Departments of Transportation and Homeland Security over Illegal Immigration Enforcement Conditions on Grant Funding (May 13, 2025), https://oag.ca.gov/news/press-releases/attorney-general-bonta-sues-us-departments-transportation-and-homeland-security [https://perma.cc/4FVJ-VL2K]. In June, to quell protests over immigration enforcement, the President mobilized the California National Guard over the objection of California Governor Gavin Newsom, prompting a lawsuit by California Attorney General Rob Bonta. Press Release, Rob Bonta, Cal. Att'y Gen., Attorney General Bonta, Governor Newsom Challenge Trump Order Seeking to Federalize California National Guard (June 9, 2025), https://oag.ca.gov/news/press-releases/attorney-general-bonta-governor-newsom-challenge-trump-order-seeking-federalize [https://perma.cc/ST4Y-2HT9].

11. Among other incidents, a Wisconsin state-court judge was arrested and eventually convicted for interfering with the efforts of federal agents to arrest a noncitizen who had come to a hearing in her courtroom. Devlin Barrett, *Wisconsin Judge Arrested, Accused of Shielding Immigrant from Federal Agents*, N.Y. TIMES (Apr. 25, 2025), https://www.nytimes.com/2025/04/25/us/politics/fbi-arrest-judge.html [https://perma.cc/CP48-HEAH]; Julie Bosman, *Judge Convicted of Obstructing Agents as They Sought Undocumented Immigrant*, N.Y. TIMES (Dec. 18, 2025), https://www.nytimes.com/2025/12/18/us/judge-hannah-dugan-trial-verdict.html [https://perma.cc/W8ZD-S7C8]. Tom Homan, the White House "border czar," later threatened to arrest Wisconsin's governor for reminding state officials about the proper way to respond to federal immigration-enforcement investigations. Graham Kilmer, *Trump's Border Czar Warns Gov. Evers He Could Be Arrested*, URB. MILWAUKEE (May 2, 2025, 2:20 PM), https://urbanmilwaukee.com/2025/05/02/trumps-border-czar-warns-gov-evers-he-could-be-arrested [https://perma.cc/X2A6-MXHV]. The mayor of Newark, Ras Baraka

In the United States, immigration law and policy are the domain of the federal government, not the states.[12] As the Supreme Court explained in *Arizona v. United States*, "The federal power to determine immigration policy is well settled."[13] While the Court has acknowledged the "importance" of immigration regulation to the states,[14] state laws must give way to federal laws whenever Congress explicitly preempts state law, when federal laws and regulations fully occupy the legal field, or when state laws conflict with federal laws.[15]

At the same time, however, states have broad authority over the conditions of immigrant residents within their boundaries.[16] They set policies in traditional areas of state authority, such as education, employment, healthcare, and policing.[17] So long as these policies do not impermissibly discriminate on the basis of alienage,[18] are not preempted by federal immigration law, and stop short of

was arrested, and one of New Jersey's Democratic representatives in Congress LaMonica McIver, was criminally charged when they confronted federal agents while investigating conditions at an immigration detention facility in Newark. Luis Ferré-Sadurní, *Rep. McIver Charged with Assault Over Clash Outside Newark ICE Center*, N.Y. TIMES (May 19, 2025), https://www.nytimes.com/2025/05/19/nyregion/new-jersey-congress-ice-charges.html [https://perma.cc/SLC5-345M]. In New York City, city comptroller and mayoral candidate Brad Lander was arrested following an altercation with ICE agents while he was escorting a noncitizen to ensure his safe appearance in immigration court. Luis Ferré-Sadurní, *Brad Lander Is Arrested by ICE Agents at Immigration Courthouse*, N.Y. TIMES (June 17, 2025), https://www.nytimes.com/2025/06/17/nyregion/brad-lander-immigration-ice.html [https://perma.cc/Z7ES-TG2J].

12. Arizona v. United States, 567 U.S. 387, 394 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.").

13. *Id.* at 395.

14. *Id.* at 397.

15. *Id.* at 399-400.

16. *See* De Canas v. Bica, 424 U.S. 351, 354-55 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power. But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration . . . ." (citations omitted)); *see also* Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187,* 35 VA. J. INT'L L. 201, 202-03 (1994) (discussing the distinction between "immigration" law and "alienage" law, and observing that "as state lawmaking moves away from the 'immigration' end of the spectrum and toward 'alienage,' it touches more on areas that states routinely regulate: for example, land ownership, education, and welfare benefits").

17. *See* Motomura, *supra* note 16, at 202-03; Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985).

18. State laws that privilege citizens over lawful permanent residents are generally subject to strict scrutiny, see Graham v. Richardson, 403 U.S. 365, 375-76 (1971), unless those distinctions relate to the political functions of the state, see, for example, Ambach v. Norwick, 441 U.S. 68, 73-75 (1979).

irrational discrimination,[19] states can wield their legislative authority in ways that intentionally target immigrant residents, even if doing so effectively amounts to indirect immigration regulation.[20] Furthermore, each state has its own criminal code and systems for enforcing it. Because federal immigration law defines wide categories of criminal offenses as removable offenses, state criminal law and local law-enforcement decisions in many cases directly determine which immigrants are subject to deportation or inadmissibility on crime-related grounds. State family courts apply state law to determine whether a child has been neglected, abused, or abandoned—determinations that are required for a young person to receive federal Special Immigrant Juvenile status.[21] And because the Department of Homeland Security (DHS) receives the digital fingerprints of anyone arrested within the country, state and local law-enforcement agents often determine which immigrants are priorities for federal removal.[22] In meaningful ways, then, subfederal laws and policies that affect the rights of immigrant residents operate as a second-order form of immigration regulation—one that can both complement and limit the reach of federal immigration policies.

The rise of state power in the sphere of immigration regulation has occurred alongside the decline of congressional activity in this area. Congress has not always lacked ambition when it comes to immigration regulation. The nation's immigration laws are detailed and far-reaching, despite being the products of

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19. *See* Plyler v. Doe, 457 U.S. 202, 230 (1982) (striking down a Texas law that denied undocumented children free public education in K-12 schools, finding that the law lacked a rational basis).

20. *See, e.g.*, Chamber of Com. v. Whiting, 563 U.S. 582, 611 (2011) (affirming an Arizona law that stripped business licenses from employers who did not use the federal E-Verify system to check whether their workers were federally authorized to work); *De Canas*, 424 U.S. at 355-56 (upholding a California law prohibiting the hiring of unauthorized immigrant workers where no federal law regulated the employment of such workers). For additional discussion of this point, see *infra* Section II.A.

21. *See Special Immigrant Juveniles*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 6, 2025), https://www.uscis.gov/working-in-US/eb4/SIJ [https://perma.cc/6KMQ-RC3K] (discussing the Special Immigrant Juvenile status (SIJ) eligibility requirements); *see also* David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1204 (2006) (noting that "the statute creating special immigrant juvenile status goes to great lengths to create a hybrid procedure ensuring that this assessment of family reunification possibilities and children's interests is made in state family courts rather than by immigration adjudicators"). *See generally* Shani M. King & Nicole Silvestri Hall, *Cooperative Federalism and SIJS*, 61 B.C. L. REV. 2869, 2870 (2020) (discussing SIJ as the site of an interdependent relationships between the federal government and the states).

22. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826-33 (2016) (discussing the immigration consequences of arrests by state and local law-enforcement agents); Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1822 (2011); Eagly, *supra* note 9, at 24; Chacón, *supra* note 3, at 1351.

significant political compromises. They include both inclusionary and restrictive policies, reflecting the federal electorate's broad diversity of views on immigration. These laws are full of intentional and necessary gaps that echo the absence of legislative consensus on many of the details of immigration law, including the precise bounds of humanitarian protections available to noncitizens and the scope of executive power in immigration enforcement. The resulting system of federal immigration laws enacted by Congress is prolix and often ambiguous. State and local policies fill in some of these gaps; many others are filled by executive policies and practices.

In the past, the Court has interpreted federal immigration statutes in ways that were reasonably consistent with the pluralistic views toward immigration regulation represented in federal immigration legislation.[23] In the era of the Cold War and McCarthyism, the Court took a restrictive approach to immigrants' rights[24] — one that mirrored the racist, eugenic,[25] and illiberal[26] immigration laws of the era. But it also leavened its decisions with implicit acknowledgements of the constitutional protections afforded to all people.[27] In the post-Civil Rights Era, the Court continued to defer heavily to the political branches in construing immigration statutes, but it also evinced a more egalitarian and rights-protective approach to immigration law.[28]

More recently, however, and over the past seven years in particular, the Court has moved away from modulating readings of immigration-enforcement power, even where such readings are readily supported by precedent and statutory text.[29] This is quite evident in the cases in which the Court has spoken on the scope of presidential authority in immigration law. The immigration policy preferences of the President are of significant and ever-growing importance in shaping national immigration policy.[30] So it is notable that over the past decade, when asked to resolve questions about the scope of presidential power to admit or bar noncitizens outside the country, the Supreme Court has generally concluded that Congress has empowered the President significantly — even in cases

23. *See infra* Section I.A.

24. *See* Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 YALE L.J. 329, 417-24 (2024).

25. Kenneth M. Ludmerer, *Genetics, Eugenics, and the Immigration Restriction Act of 1924*, 46 BULL. HIST. MED. 59, 60-61 (1972).

26. 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, 173-79, 194 (2016).

27. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 567-73 (1990).

28. *Id.* at 578-87; *see infra* Section I.B.

29. *See infra* Section II.A.

30. ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 3 (2020).

when presidential power negatively impacts the rights not only of immigrants, but also citizens.[31] And yet, when cases raise questions about the President's power to enact inclusionary or humanitarian enforcement policies *within* the United States, the Court has often found executive power to be more limited.[32]

The same asymmetry is present in the Court's interpretation of immigration laws more generally. In recent years, the Court has eschewed rights-protective readings of immigration statutes—sometimes in spite of statutory text—while embracing the government's arguments favoring broad enforcement power.[33] The Court's conclusions are not always the best reading of the statutory framework governing immigration law, and generally fail to account for the rights-protective strand of legislative efforts.

Given congressional quiescence and the asymmetries in the Court's interpretations of existing immigration law, there may be only one significant space left for a rebalancing: federalism. Several cities and states have enacted laws and adopted

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31. *See*, *e.g.*, Trump v. Hawaii, 585 U.S. 667, 684 (2018) (concluding that Immigration and National Act (INA) § 212(f) "exudes deference" to the President when deciding whether or not to admit noncitizens from abroad, and allowing a multicountry entry ban to go into effect despite the evidence that the ban was motivated by and intended to further anti-Muslim animus). Other examples of deference to presidential power in immigration have involved protection of the President's prerogative to enforce immigration law in more migrant-protective ways, free from state interference. *See*, *e.g.*, Biden v. Texas, 597 U.S. 785, 805-07 (2022) (holding that 8 U.S.C. § 1225 did not preclude the termination of the Trump-era "Migration Protection Protocol" governing the admission of asylum seekers at the U.S.-Mexico border, and that the statute provides the executive branch with broad discretion to detain or parole arriving asylum seekers); United States v. Texas, 599 U.S. 670, 674 (2023) (denying state standing to challenge border-enforcement detention policies).

32. *See*, *e.g.*, United States v. Texas, 579 U.S. 547, 548 (2016) (affirming without opinion a lower court's injunction of a humanitarian parole program for longtime undocumented residents). Department of Homeland Security v. Regents of the University of California, 591 U.S. 1, 8 (2020), might be offered as an exception to this trend, since the Court concluded that the Trump Administration's attempted recission of the Obama-era Deferred Action for Childhood Arrivals (DACA) program without notice and comment violated the Administrative Procedure Act. While this temporarily froze the DACA program in place, the Court made clear that the President could eliminate the program by clearing statutory procedural hurdles, and also did not resolve challenges to the underlying legality of the DACA program itself. In 2022, the Biden Administration issued a final rule that replaced the initial DACA memorandum. Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53152, 53156-57 (Aug. 30, 2022). Texas and nine other states continued to challenge the legality of DACA. Those challenges are ongoing and have prevented new applicants from applying for deferred action under DACA for several years. *See* Texas v. United States, 126 F.4th 392, 402 (5th Cir. 2025) (concluding that final rule's benefit-conferring provisions were contrary to the INA but finding that provision severable from the rule's enforcement-forbearance provisions, narrowing the scope of injunctive relief to Texas, maintaining the stay keeping the program in place pending resolution of the litigation, and remanding for further proceedings).

33. *See infra* Section II.A.

policies designed to effectuate some of the inclusionary elements of federal immigration law the Court has recently tried to suppress. Through these measures, states and localities have undertaken important work to rebalance immigration policy, aligning it more closely in practice with the policy compromises made by Congress in enacting these laws, as required by the competing preferences of the people Congress represents.[34] The Court's immigration-federalism jurisprudence, which shows increasing tolerance for state and local policies that operate in the interstices of federal immigration law,[35] could be read to create space for states and localities to operationalize rights-protective and integrationist approaches to immigration policy.

To be clear, federalism is not the ideal way to rebalance immigration law. A unified national approach to immigration law — including nationwide protection of the fundamental rights of immigrant residents — would best effectuate both national foreign-policy interests and domestic constitutional guarantees. A national approach is also preferable from an efficiency standpoint — state-level immigration regulation creates externalities states themselves do not internalize.[36] Moreover, subfederal immigration regulation is not uniformly rights-protective. In our pluralistic system, it is hardly surprising that while some jurisdictions have enacted rights-protective legislation, others have used their state powers to increase immigration restrictions and maximize immigration-enforcement cooperation. Resorting to federalism to rebalance immigration law inevitably means that in some places, immigrants' rights are substantially unprotected, and state power is being exercised in ways that exacerbate, rather than mitigate, the Court's overreading of the restrictionist elements of federal immigration law. When the federal government fails to enforce a legal floor of rights protections, both constitutional and human-rights violations are exacerbated by restrictionist state policies. But, in this political moment, subfederal regulation is the only countervailing force available against maximally restrictive interpretations of federal immigration policy, and is therefore worthy of exploration.

Part I of this Essay describes the pluralistic approach Congress and the Court have taken in defining the parameters of immigration law over the sixty-year

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34. On the problem of systemic misalignment between popular policy preferences and representative processes and the possibilities for judicial and other officials to remedy the problem, see generally NICHOLAS O. STEPHANOPOULOS, ALIGNING ELECTION LAW (2024).

35. *See infra* Section II.B.

36. *See, e.g.*, Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1677-78 (2011) (describing economic externalities of immigration federalism, such as immigrants choosing to resettle in less restrictionist states and the funneling of federal funds to more restrictionist states for enforcement purposes, as well as social externalities, such as the potential to undermine a common national identity expressed through a "shared belief in certain values such as egalitarianism, nationalism, and tolerance for diversity").

period beginning with the passage of the Immigration and Nationality Act of 1965. The Part begins with an overview of the changes Congress made to immigration law during this period, describing the competing impulses—to both facilitate and restrict immigration and immigrant integration—manifested in these legislative efforts. The Part then describes how the Court has interpreted these laws. By and large, the Court's interpretive approach has been faithful to the nation's immigration pluralism, as reflected in congressional legislation. From the mid-twentieth century until quite recently, federal courts have played an important role in effectuating not only the restrictionist, enforcement-oriented goals of immigration law, but also in realizing the competing integrationist and rights-protective elements of those laws, and of the Constitution.

Part II turns to recent developments in immigration law. Section II.A describes how, in recent years, and particularly over the past seven years, the Supreme Court has largely failed to acknowledge the humanitarian, due-process-protective, and inclusionary motivations that, along with restrictionist and enforcement-oriented goals, *also* undergird contemporary federal immigration law. The Court's purportedly textual interpretations of immigration statutes have moved in a decidedly restrictive direction that cannot be explained by the text of these statutes alone. Section II.B describes how, at the same time, the Court has also demonstrated an increasing openness to subfederal participation in immigration-restrictive efforts. Focusing on the three immigration-federalism cases the Court has decided in the twenty-first century, this Section highlights the growing latitude that these cases have given to states and localities to enact subfederal regulations that amplify the restrictionist elements of federal immigration law.

Part III considers how federalism can be, and has been, a hedge against the restrictionist drift in the Court's interpretations of federal immigration law.[37] The Part discusses the efforts of some states and localities to counterbalance the Court's overreading of congressional restrictionism and presidential power

37. Jessica Bulman-Pozen describes how states can "check the exercise of federal executive power" by "casting themselves as Congress's faithful agents." Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 503-04 (2012). States and localities acting to protect immigrant residents do not claim the same mantle. Some actually position themselves as operating in opposition to the federal government, broadly defined. When California legislatures call their efforts the "California Values Act," that suggests a legislative body defining itself and its values in contradistinction to federal values. But another reason may be that states and localities are not understood as "Congress's agents" in that they are explicitly prohibited from engaging directly in immigration legislation. *See supra* notes 12-15 and accompanying text. State and local regulation of immigration-related matters are limited to indirect regulatory efforts that fall under the auspices of states' traditional police powers. Nevertheless, I argue here that it is important to understand these state and local efforts as performing the same type of safeguard function that Bulman-Pozen describes, even if this not how such efforts are characterized as a practical or doctrinal matter.

through their own laws and policies. To illustrate state-level efforts to offset the shift toward restrictionism, I offer the examples of state and local laws that limit information sharing with federal immigration-enforcement agents in Section III.A and state laws that grant in-state tuition to longtime residents who are undocumented in Section III.B. Both examples reflect state-law choices consistent with (though not required by) congressional choices as embodied in federal immigration legislation. Both allow states and localities to make decisions about how to manage immigration where it has the most direct effects. This Part concludes by making the case that the Court must leave the same space for integrationist state and local efforts that it has created for restrictionist efforts. This rising site of competitive immigration federalism can be understood as an imperfect but important source of rights protections for noncitizens. States and localities are a lonely — but vital — bulwark against some judicially sanctioned abuses of executive power in this time of congressional quiescence.[38]

I. IMMIGRATION PLURALISM

The immigration laws of the United States reflect the diverse political views of its citizens. These laws have been praised for their openness and critiqued for their severity because they are both, by turns, relatively open and absolutely severe. Section I.A describes the legislative compromises embodied in the nation's immigration statutes. Section I.B illustrates how the Court, historically, has interpreted immigration laws in ways that have given effect to the legislature's pluralistic approach to immigration law.

A. Writing the INA: Pluralism in Immigration Legislation

Immigration law in the United States has been the site of monumental shifts over the last sixty years. This era saw the elimination of racist national-origin

38. Peter J. Spiro explored the viability and promoted the desirability of competitive immigration federalism immediately following the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1639-46 (1997). Although many authors (including this one) disagreed with Spiro's optimism concerning the value of state-level immigration interventions, the Court's later loosening of constitutional restrictions on state-level immigration laws made clear that immigration federalism is here to stay, and the question shifted to how it might be leveraged in inclusionary and rights-protective ways, since it was already being used for restrictionist ends. For analyses of such efforts, see, for example, Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571-72 (2008); Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1389-98 (2013); and Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 1, 48-50 (2013).

quotas,[39] the enactment of statutory protections bringing the United States into loose compliance with the Refugee Convention,[40] the creation of temporary protective status for immigrants from countries to which they cannot immediately return,[41] the abolition of some of the harshest political and ideological exclusion categories of earlier eras,[42] and the creation of legislative protections for undocumented immigrants who are the victims of crime and human trafficking.[43] These protective laws all remain on the books and have elaborate regulatory counterparts.[44]

In the same period of time, Congress also enacted policies favoring more restrictive approaches to immigration law. While the Immigration and Nationality Act of 1965 (INA) ended the racist national-origin quotas of previous iterations of the law (including the near-total ban on Asian migration and tight restrictions on visas for Southern and Eastern European migrants), the law also included per-country visa caps that have, over time, had a disproportionate negative effect on prospective immigrants from Mexico and several Asian countries.[45] After scaling

39. Act of October 3, 1965, Pub. L. No. 89-236, §§ 201-202, 79 Stat. 911, 911-12 (codified as amended in scattered sections of 8 U.S.C.).

40. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; *see infra* note 59 and accompanying text.

41. Immigration Act of 1990, Pub. L. No. 101-649, § 302, 104 Stat. 4978, 5030-36.

42. Immigration Act of 1990 § 601, 104 Stat. at 5067-77.

43. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 107, 114 Stat. 1464, 1474-80. The Victims of Trafficking and Violence Protection Act has been reauthorized and expanded repeatedly since its enactment, most recently in 2022. Abolish Trafficking Reauthorization Act of 2022, Pub. L. No. 117-347, 136 Stat. 6199. For a complete summary of the Act's numerous reauthorizations up to that point, see *Key Legislation*, U.S. DEP'T JUST. (Aug. 23, 2023), https://www.justice.gov/humantrafficking/key-legislation [https://perma.cc/H677-NDXF].

44. The Code of Federal Regulations interpreting the INA spans hundreds of pages. 8 C.F.R. §§ 1-1337 (2025). Regulatory change has been a key mechanism by which successive presidential administrations have reshaped immigration policy.

45. Immigration Act of 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 912-15 (replacing unequal national-origin quotas with facially neutral per-country caps); Immigration and Nationality Act Amendments of 1976, Pub L. No. 94-571, § 2, 90 Stat. 2703, 2703 (extending these per-country caps to countries in the Western Hemisphere). Though these caps are facially neutral, they wind up having a disproportionate effect on particular groups of prospective immigrants because of unequal demand for visas. *See* Rose Cuison Villazor, *The 1965 Immigration Act: Family Unification and Nondiscrimination Fifty Years Later*, *in* THE IMMIGRATION AND NATIONALITY ACT OF 1965: LEGISLATING A NEW AMERICA 197, 223-25 (Gabriel J. Chin & Rose Cuison Villazor eds., 2015).

back some statutory grounds for deportation[46] and exclusion[47] in 1990, Congress turned around in 1996 and expanded crime, national-security, and foreign-policy removal grounds,[48] increased the scope of immigration detention,[49] and reduced some procedural protections and federal judicial review in immigration proceedings.[50] Congress enacted the restrictionist 1996 immigration measures in the wake of, and purportedly in response to, a deadly attack by a white nationalist U.S. citizen on a federal building in Oklahoma, although there was no connection between immigration and the attack.[51] Five years later, in response to the terrorist attack on the World Trade Center and the Pentagon on September 11, 2001, Congress doubled down on these restrictionist tendencies. It created DHS[52] and continued to authorize robust and ever-increasing funding for federal immigration enforcement in the years after 9/11.[53] Most recently, Congress enacted a massive infusion of enforcement funding in a 2025 budget reconciliation bill that added over $140 billion to the budgets of Customs and Border

46. "Deportation" referred at that time to the formal removal of a noncitizen who had entered the country. BILL O. HING, JENNIFER M. CHACÓN & KEVIN R. JOHNSON, IMMIGRATION LAW AND SOCIAL JUSTICE 523-24 (2d ed. 2022). In 1996, Congress amended the law such that deportation now refers to the formal removal of noncitizens who have been "admitted" to the country, as defined in statute. *Id.*

47. "Exclusion" referred at that time to the denial of admission to noncitizens who had not yet entered the country (and could be applied to individuals who were physically within the country but who had been apprehended at the time of an attempted entry). *Id.* at 523-24. In 1996, Congress amended the law such that exclusion grounds apply not only to individuals seeking entry or apprehended while seeking entry, but also to anyone who has never been formally admitted, no matter how long they may have been present in the United States. *Id.* The grounds of exclusion are also known as inadmissibility grounds. *Id.* at 445.

48. IIRIRA, Pub. L. No. 104-208, §§ 341-353, 110 Stat. 3009-546, 3009-635- to -641 (1996). I use "removal grounds" here to refer to both deportation and inadmissibility grounds since the current statute refers to noncitizens subject to either set of grounds collectively as "removable," 8 U.S.C. § 1229a(e)(2) (2024), and the proceedings for both are "removal proceedings," 8 U.S.C. § 1229a (2024).

49. IIRIRA §§ 321-334, 110 Stat. at 3009-627 to -635.

50. IIRIRA §§ 301-309, 110 Stat. at 3009-575 to -627; Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, §§ 431-443, 110 Stat. 1214, 1273-81.

51. *See* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1441 n.154 (1997).

52. Homeland Security Act of 2002, Pub. L. 107-296, § 101, 116 Stat. 2135, 2142.

53. *See The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL 9 (Aug. 14, 2024), https://www.americanimmigrationcouncil.org/fact-sheet/the-cost-of-immigration-enforcement-and-border-security [https://perma.cc/Q769-CZVZ] (explaining based on government budget documents that spending on immigration and border enforcement has increased from $263 million in 1990 to $4.869 billion in 2021).

Protection (CBP) and Immigration and Customs Enforcement (ICE) over a four-year period, essentially tripling those agencies' budgets.[54]

The Immigration Reform and Control Act of 1986 (IRCA) is a self-contained embodiment of the kinds of legislative compromises that have characterized the past sixty years of federal immigration lawmaking and given shape to current immigration laws.[55] IRCA ushered in new federal restrictions on the employment of unauthorized workers, for the first time criminalizing the employment of unauthorized noncitizen workers at the federal level.[56] But IRCA did not just increase federal restrictions on unauthorized work. It also provided a pathway to citizenship for more than three million unauthorized residents in the United States, and it created a federal office charged with ensuring that the work-authorization provisions would be enforced in a nondiscriminatory way.[57] For these reasons, IRCA is often cited as an example of political compromise in immigration lawmaking.[58]

But IRCA is not the only immigration legislation that reflects compromises between legislators who favor greater immigration restrictions and those who prefer more liberal immigration and integration policies. This sort of compromise is woven throughout the fabric of contemporary immigration law. The Refugee Act of 1980, for example, codified in domestic law many of the immigrant-

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54. *See* The One Big Beautiful Bill Act, Pub. Law No. 119-21, §§ 90001-90004, 100052, 139 Stat. 72, 357-59, 387-89 (2025); Margy O'Herron, *Big Budget Act Creates a "Deportation-Industrial Complex,"* BRENNAN CTR. FOR JUST. (Aug. 13, 2025), https://www.brennancenter.org/our-work/analysis-opinion/big-budget-act-creates-deportation-industrial-complex [https://perma.cc/7Q43-HURE].

55. Kitty Calavita, *The Contradictions of Immigration Lawmaking: The Immigration Reform and Control Act of 1986*, 11 LAW & POL'Y 17, 23-24 (1989).

56. Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 681 (1997) ("It was not until 1986 that Congress passed the Immigration Reform and Control Act (IRCA). . . . The central mechanism to deter unauthorized immigration was the employer sanctions provisions.").

57. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, 3375-76 (codified as enacted in scattered sections of 8 U.S.C.).

58. Nat'l Ctr. for Immigrants' Rts., Inc. v. INS, 913 F.2d 1350, 1366 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991) (describing IRCA as a "carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected"); Bill Ong Hing, *The Immigration and Naturalization Service, Community-Based Organizations, and the Legalization Experience: Lessons for the Self-Help Immigration Phenomenon*, 6 GEO. IMMIGR. L.J. 413 app. B (1992) (discussing the many compromises undergirding IRCA's passage); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails,* 2007 U. CHI. LEGAL F. 193, 196 n.13 (noting that the Chamber of Commerce initially opposed IRCA, but "by 1985, eventually offered 'qualified support' for the grand compromise in IRCA: legalization in exchange for sanctions" (quoting NANCY HUMEL MONTWIELER, THE IMMIGRATION REFORM LAW OF 1986: ANALYSIS, TEXT, AND LEGISLATIVE HISTORY 7, 10 (1987))).

protective features of the 1951 United Nations Convention Relating to the Status of Refugees.[59] But Congress has also imposed limitations and restrictions on those protections that are inconsistent with the requirements of international law.[60]

Similarly, although often viewed as the apotheosis of restrictionist immigration policies, the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) also embodies legislative compromise. It expanded removal grounds and the authorization of detention during immigration proceedings, and it eliminated a number of procedural protections in removal proceedings.[61] But the law did not attempt to eliminate federal habeas review of immigration cases.[62] Moreover, it steered clear of including some of the most regressive exclusion and deportation grounds of the mid-twentieth century, while expanding

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59. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150. The United States acceded to the Convention when it signed the 1967 United Nations Protocol Relating to the Status of Refugees. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. The 1980 Refugee Act sought to implement that obligation through domestic law. S. REP. NO. 96-256, at 1 (1979); H.R. REP. NO. 96-608, at 17-18 (1979); INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, . . . to which the United States acceded in 1968."); *see also* Negusie v. Holder, 555 U.S. 511, 535-36 (2009) (Stevens, J., concurring) (explaining that "Congress passed the Refugee Act to implement the United Nations Convention Relating to the Status of Refugees," which is why the "Refugee Act's withholding of removal provision specifically tracks" the treaty language); E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640, 672 (9th Cir. 2021) ("To streamline the United States's refugee procedures and implement the country's new treaty commitments, Congress passed the Refugee Act of 1980, which amended the INA and created the country's first codified rules governing asylum."). Despite the clear intent of Congress in this regard, the Supreme Court sometimes has approved executive policies that violate the Refugee Convention. *See, e.g.*, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 187-88 (1993). For a discussion of the inconsistent Supreme Court approaches in interpreting the Refugee Act, see Note, *American Courts and the U.N. High Commissioner for Refugees: A Need for Harmony in the Face of a Refugee Crisis*, 131 HARV. L. REV. 1399, 1402-12 (2018).

60. Eleanor Acer & Olga Byrne, *How the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Has Undermined US Refugee Protection Obligations and Wasted Government Resources*, 5 J. ON MIGRATION & HUM. SEC. 356, 357 (2017) (citing the one-year asylum filing deadline, the creation of summary deportation procedures applicable to asylum seekers, and the use of mandatory detention on asylum seekers as violative of international refugee protections).

61. *See, e.g.*, Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1943 (2000) (describing the changes and noting that they "dramatically reshape the rights" of affected noncitizens).

62. *See* INS v. St. Cyr, 533 U.S. 289, 310 (2001).

asylum pathways for Chinese nationals subjected to the one-child policy.[63] And several years later, Congress created new pathways and protections for victims of crime and trafficking and for migrant children.[64]

In short, immigration laws enacted by Congress over the last sixty years have reflected the legislative body's mixed views on migration. Congress has expanded and formalized some forms of protection while eliminating or limiting others, and has guaranteed a certain degree of process while streamlining or eliminating other procedural protections. The statutes reflect, albeit imperfectly, the nation's pluralistic views regarding the desirability of immigration and the appropriate means of enforcing immigration law.

B. Immigration Pluralism in the Courts

Until recently, two distinct interpretive principles, which operated in some tension with one another, seemed to guide the federal judiciary in addressing challenges to immigration laws, particularly in the post-1965 era. First was an expansive view of the powers of the political branches to regulate immigration law. Second, and concurrently, was a limited view of the permissible scope of judicial review of immigration regulation and enforcement. Beginning in the mid-twentieth century, the Court developed a doctrinal notion of congressional "plenary" power to regulate immigration, which it imported and expanded from case law arising out of the racist restrictions of the late nineteenth century.[65] The Court treated immigration law as an extension of foreign policy: Congress could set the procedural floor for immigration processes, and the executive branch could in turn exercise broad discretion over the exclusion and detention of noncitizens.[66] This view persists to the present day.[67]

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63. IIRIRA, Pub. L. No. 104-208, § 601, 110 Stat. 3009-546, 3009-689 (1996) (codified as amended at 8 U.S.C. § 1101(a)(42)).

64. Rachel E. Rosenbloom, *Beyond Severity: A New View of Crimmigration*, 22 LEWIS & CLARK L. REV. 663, 684-85, 687-88 (2018); *supra* note 43 and accompanying text.

65. Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 257 (2000); Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 YALE L.J. 329, 343-44 (2024).

66. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542-43 (1950); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953); Galvan v. Press, 347 U.S. 522, 530-31 (1954); *see also* Cox, *supra* note 65, at 417-23 (analyzing the ways *Knauff* and *Mezei* fundamentally misread earlier immigration cases to create a novel and expansive notion of immigration plenary power in the mid-twentieth century).

67. *See, e.g.*, Dep't of State v. Muñoz, 602 U.S. 899, 907 (2024) ("'For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely immune from

But as the twentieth century wore on, a second, countervailing principle emerged in the jurisprudence. Without explicitly or fully discarding its notion of the plenary immigration powers of Congress and the executive, the Court obliquely extended rights protections to noncitizens in several important immigration cases. This extension of rights was oblique in the sense that the opinions of the time never expressly extended the full panoply of constitutional protections to noncitizens seeking immigration relief nor repudiated a robust notion of plenary power. But, as Hiroshi Motomura documented in 1990, the Court often avoided the most rights-restrictive readings of immigration laws in these cases.[68] Motomura charts the ways that the Court used a form of constitutional avoidance, reading statutes protectively "to offset the disadvantaged position of [noncitizens] in constitutional immigration law."[69] He identified the ways that "phantom" constitutional norms shaped outcomes in immigration cases, even where the midcentury notion of the political branches' plenary power over immigration might otherwise preclude the possibility of relief.[70]

The Court's sensitivity to phantom constitutional norms has shown up in more recent cases as well. The most vivid twenty-first century example of this is *Zadvydas v. Davis*.[71] There, noncitizens challenged a statute that authorized their detention after they had been ordered removed, but before that removal could

judicial control.' Congress may delegate to executive officials the discretionary authority to admit noncitizens 'immune from judicial inquiry or interference.'" (citations omitted) (first quoting Trump v. Hawaii, 585 U.S. 667, 702 (2018); then quoting *Harisiades*, 342 U.S. at 589)); Demore v. Kim, 538 U.S. 510, 521, 526 (2003) (upholding a statutory mandatory-detention provision, noting Congress's "broad power" to regulate immigration, and reiterating that "'reasonable presumptions and generic rules,' even when made by the INS rather than Congress, are not necessarily impermissible exercises of Congress' traditional power to legislate with respect to aliens" (first quoting Mathews v. Diaz, 426 U.S. 67, 79 (1976); then quoting Reno v. Flores, 507 U.S. 292, 313 (1993))).

68. Motomura, *supra* note 27, at 564-73.

69. *Id.* at 568.

70. *Id.* at 566-67. Motomura discusses a host of mid-twentieth century cases, including *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953). There, the Court read an immigration statute creatively, reaching results that functionally protected the due-process rights of noncitizens returning to the United States after a brief absence. Motomura, *supra* note 27, at 571 ("The opinion's language . . . suggests that the Court favored a constitutional norm of procedural due process for returning permanent residents like Chew, even if the statute and regulations, by applying the reentry doctrine to a temporary departure, treated them no better than first-time entrants. In 1953, however, any such constitutional norm was a phantom because, as the Court would soon confirm in *Mezei*, aliens seeking admission could not challenge immigration law on explicitly constitutional grounds. At the same time, the phantom norm had enough gravitational force to exercise a pull on the Court's interpretation of the regulation." (footnote omitted)).

71. 533 U.S. 678 (2001).

be effectuated.[72] The government took the position that such detention was valid indefinitely.[73] The Court disagreed, and effectively read into the statute a review requirement after six months of post-order detention. In the absence of such a requirement, the majority observed that the statute would raise "a serious constitutional problem."[74] Much of the Court's jurisprudence over the past quarter century reaffirming the power of federal courts to review agency detention and removal decisions after IIRIRA is also premised on reasoning that a contrary ruling would raise "serious constitutional questions."[75]

To Motomura's observation that the Court appears to treat the due-process rights of noncitizen as a guiding phantom norm that shapes judicial outcomes, it is worth adding a second observation. During this same period, the Court also recognized (at least in some contexts) that the protection of the rights of U.S. citizens and residents required respect for the procedural rights of noncitizens. So, for example, in *Kleindienst v. Mandel*, the Court recognized that the First Amendment rights of citizens were implicated when noncitizens were arbitrarily denied entry to the United States.[76] As Peter Schuck has explained, although this ruling was a technical loss for the noncitizen, the Court's articulation of the requirement that the government had to provide a legitimate and bona fide reason for a visa denial when the First Amendment rights of citizens were impacted by that decision was ultimately "a solid victory over ideological exclusion."[77]

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72. *Id.* at 684-87.

73. *Id.* at 692.

74. *Id.* at 690.

75. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 314 (2001).

76. 408 U.S. 753, 765 (1972).

77. *See* Peter H. Schuck, Kleindienst v. Mandel*: Plenary Power v. the Professors*, *in* IMMIGRATION STORIES 169, 169 (David A. Martin & Peter H. Schuck eds., 2005). I do not mean to suggest that the Court consistently protected immigrant communities at that time. In cases concerning immigration policing, in particular, the Court's rulings insufficiently accounted for the ways that racial profiling in immigration policing affects not just unauthorized immigrants, but rather, all immigrants and citizens who will be the targets of enforcement on account of the racial categorizations imposed upon them by police. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 562-64, 564 n.17 (1976) (concluding that even if stops were motivated by racial appearance, and therefore disproportionately or even entirely impacted individuals of apparent Mexican ancestry, including Mexican Americans, these brief stops would be justified by the government's law-enforcement interests). Immigration policing is not necessarily exceptional in this way, in the sense that the Court is consistently more tolerant of the use of race in policing than in other contexts. *See, e.g.*, Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1006-08 (2010); *cf.* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 231 (2023) (striking down race-based affirmative action in university admissions on equal-protection grounds and emphasizing that an applicant "must be treated based on his or her

Interestingly, this nuanced approach to immigration law—one that aligns well with the legislature and the public's complex and conflicting sentiments on immigration-law questions, and a post-Civil Rights Era understanding of basic and fundamental individual-rights protections—persisted into the twenty-first century.[78] In this way, the Court's decisions generally captured the pluralistic views that U.S. voters hold on immigration. But by 2018, as right-wing politicians led a scorched-earth rhetorical attack on immigrants and immigration, the Court jettisoned the methods it had once operationalized as a counterweight to the plenary-power doctrine. What remains is an approach to immigration law that is beginning to look even less protective of migrants than in the rights nadir of the McCarthy era.[79]

II. THE DECLINE OF FEDERAL IMMIGRATION PLURALISM AND THE RISE OF IMMIGRATION FEDERALISM

The immigration laws on the books reflect a series of compromises attempting to capture the diverse views of U.S. voters toward immigration policy. Although the legislature has added more enforcement-focused elements to federal immigration law in recent years,[80] the overall body of immigration law continues to reflect the political balancing act that immigration legislation has always required. What has changed is the Supreme Court's approach to interpreting these federal statutes. The Court's recent immigration jurisprudence is characterized by a restrictionist drift, resulting in interpretations of federal law that fail to give effect to the rights-protective and immigrant-friendly elements of these laws. At

experiences as an individual—not on the basis of race"). Justice Kavanaugh's recent concurrence in *Noem v. Vazquez-Perdomo* crystalizes this point. No. 25A169, slip op. at 5-6 (U.S. Sep. 8, 2025) (Kavanaugh, J., concurring in the grant of application for stay) (stating that "apparent ethnicity" is a "relevant factor" in the reasonable-suspicion determination and that it was therefore permissible to consider the fact that "many of those illegally in the Los Angeles area come from Mexico or Central America and do not speak much English").

78. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678 (2001).

79. *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 959 (2002) ("[W]hile we think of the McCarthy era as beginning in the 1940s, it was in fact preceded by several decades of targeting immigrants for their purportedly subversive political associations using immigration law. Joe McCarthy simply applied to citizens techniques developed in the 1910s under the leadership of a young J. Edgar Hoover, head of the Justice Department's 'Alien Radical' division. Measures initially targeted at noncitizens may well come back to haunt us all."); Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CALIF. L. REV. 1387, 1405 (2005) ("McCarthy's methods violated the most fundamental norms and the most essential values of the American constitutional system.").

80. *See, e.g.*, Laken-Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025) (to be codified at 8 U.S.C. § 1101 note).

the same time, the Court has shown increasing tolerance for indirect state and local restrictions on immigrants' rights.

A. Reading the INA: The Court's Restrictionist Drift and the Demise of Immigration Pluralism

Between 2000 and 2024, the Court decided more than eighty cases interpreting immigration and citizenship statutes, questions of executive immigration policy, criminal immigration laws, and procedures relating to immigration enforcement.[81] The majority of immigration cases decided since 2000 have

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81. In addition to the statutory-interpretation cases discussed in this subsection, the Court decided six cases dealing with citizenship, denaturalization, and related matters. Nguyen v. INS, 533 U.S. 53, 70 (2001) (upholding a facially discriminatory citizenship law as substantially related to important governmental objectives); Flores-Villar v. United States, 564 U.S. 210, 210 (2011) (affirming by an equally divided Court the Ninth Circuit's rejection of an equal-protection challenge to sex-based citizenship-transmission requirements); Zivotofsky v. Clinton, 566 U.S. 189, 191 (2012) (holding that a statutory challenge to passport place-of-birth designations does not present a political question); Zivotofsky v. Kerry, 576 U.S. 1, 32 (2015) (holding that Congress cannot mandate passport place-of-birth entries for Jerusalem-born U.S. citizens since recognition authority rests exclusively with the President); Sessions v. Morales-Santana, 582 U.S. 47, 51-52 (2017) (striking down a facially discriminatory law with sex-based citizenship-transmission requirements as violating equal protection); Maslenjak v. United States, 582 U.S. 335, 338 (2017) (addressing denaturalization requirements). The Court decided three cases dealing with noncitizens' rights to effective counsel in criminal proceedings and remedies for ineffective assistance. Padilla v. Kentucky, 559 U.S. 356, 359-60 (2010) (holding that misadvice concerning the clear immigration consequences of a criminal plea agreement constituted Sixth Amendment ineffective assistance of counsel); Chaidez v. United States, 568 U.S. 342, 344 (2013) (declining to give retroactive effect to *Padilla*); Jae Lee v. United States, 582 U.S. 357, 369-71 (2017) (clarifying the prejudice standard for a *Padilla* violation). The Court decided five cases concerning the scope of Fourth Amendment protections as against immigration agents, and related remedies, deciding for the government in every case. United States v. Flores-Montano, 541 U.S. 149, 155-56 (2004) (requiring no reasonable suspicion for a search of an automobile at a port of entry); Muehler v. Mena, 544 U.S. 93, 102 (2005) (allowing, in relevant part, immigration agents to question someone detained about immigration status during the lawful execution of a search warrant on her premises, without independent reasonable suspicion); Hernandez v. Mesa, 582 U.S. 548, 553-54 (2017)(vacating and remanding a lower court's opinion that failed to consider whether *Bivens* applied in a case involving a cross-border shooting); Hernandez v. Mesa, 589 U.S. 93, 96 (2020) (affirming a lower court's determination that *Bivens* does not extend to cases involving a death outside of U.S. borders that resulted from a cross-border shooting); Egbert v. Boule, 596 U.S. 482, 486 (2022) (concluding that *Bivens* does not extend to an excessive-force claim against a Border Patrol agent in the border-security context). The Court decided three cases related to Obama-era deferred-action programs. United States v. Texas, 579 U.S. 547 (2016) (leaving in place, with a 4-4 vote, a lower court's injunction of President Obama's Deferred Action for Parents of U.S. Citizens and Lawful Permanent Residents); *In re* United States, 583 U.S. 29, 31-32 (2017) (vacating a lower court's discovery order in the DACA litigation); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 19-22 (2020) (holding that the Trump

involved the interpretation of provisions of the INA that had been added or modified in 1996 with the passage of IIRIRA[82] and the Antiterrorism and Effective Death Penalty Act (AEDPA).[83] Ten of those cases involved questions related to immigration detention, including questions of whether courts retained the power to review challenges to detention, and whether immigrants detained

Administration's recission of the DACA program was arbitrary and capricious). It also decided two cases related to the Trump-era entry ban focusing on several majority-Muslim countries. Trump v. Int'l Refugee Assistance Project, 582 U.S. 571, 582-83 (2017) (partially staying a lower court's injunction of Trump's proposed entry ban to the extent it covered individuals without a bona fide relationship to an American individual or entity); Trump v. Hawaii, 585 U.S. 667, 706-10 (2018) (upholding the third iteration of President Trump's entry ban focused on several predominantly Muslim countries). Two cases addressed Biden-era programmatic shifts in border and detention policy. Biden v. Texas, 597 U.S. 785, 802-14 (2022) (holding that Biden's recission of the Migrant Protection Protocol was lawful); United States v. Texas, 599 U.S. 670, 676-81 (2023) (holding that states lacked standing to challenge the Biden Administration's discretionary decisions regarding "how to prioritize and how aggressively to pursue immigration enforcement actions" (quoting TransUnion LLC v. Ramirez, 594 U.S. 413, 429 (2021))). Two addressed the immigration crime of encouraging unauthorized migration. United States v. Sineneng-Smith, 590 U.S. 371, 375-80 (2020) (vacating a lower court's invalidation of 8 U.S.C. § 1324(a)(1)(A)(iv), finding that the lower court's departure from the principle of party presentation constituted an abuse of discretion); United States v. Hansen, 599 U.S. 762, 766, 774-85 (2023) (rejecting a First Amendment challenge to 8 U.S.C. § 1324(a)(1)(A)(iv) by reading the provision's requirements of encouragement and inducement as limited by the traditional requirements of criminal solicitation and facilitation). Two dealt with the rights of a U.S. citizen to challenge the exclusion of her noncitizen spouse. Kerry v. Din, 576 U.S. 86, 102-06 (2015) (finding in a plurality opinion that the government satisfied due process by citing to 8 U.S.C. § 1182(a)(3)(B) as the sole basis for Din's husband's visa denial, without providing specific factual basis for terrorism-related exclusion); Dep't of State v. Muñoz, 602 U.S. 899, 916-17 (2024) (concluding that Muñoz had no constitutional interest in the administrative proceedings that resulted in her husband's exclusion from the U.S. based on an inadmissibility finding). And the Court also took up three preemption cases, which are discussed in the next section. *See infra* at Section II.B. It also decided three cases concerning miscellaneous substantive and procedural questions relating to asylum claims. INS v. Orlando Ventura, 537 U.S. 12, 16-17 (2002) (remanding with instruction that the Ninth Circuit was required to remand an asylum claim for a factual determination regarding a changed-circumstance argument in an asylum case); Gonzales v. Thomas, 547 U.S. 183, 185-87 (2006) (finding that the Ninth Circuit violated *Ventura* by failing to remand for consideration of the factual bases of an asylum claimants particular social group claim); Negusie v. Holder, 555 U.S. 511, 516-17, 521-23 (2009) finding that the Board of Immigration Appeals (BIA) and Fifth Circuit erred because they presumed incorrectly that coercion to persecute was immaterial when determining whether the "persecutor bar" applies). And the Court decided one case relating to a visa age provision. Scialabba v. Cuellar de Osorio, 573 U.S. 41, 57-58, 64 (2014) (holding that the BIA's interpretation of an act limiting relief for aged-out beneficiaries was entitled to *Chevron* deference because the statute was ambiguous and the agency's construction was reasonable).

82. IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

83. AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

under provisions enacted in 1996 were entitled to bond hearings or release.[84] Eight cases involved other questions of whether the 1996 amendments to federal immigration law divested the federal courts of jurisdiction to review agency action in contexts other than immigration detention.[85] Twelve cases involved the question of whether a particular state-court crime of conviction constituted a federal ground of removability.[86] Seventeen cases involve less easily groupable questions concerning the interpretation of INA provisions that were modified by the 1996 laws.[87] Among other things, they relate to the requirements for relief in the form of cancellation of removal,[88] to the statutory requirements concerning the form of notices to appear,[89] and to questions of the retroactive effects of various 1996 provisions.[90] The adversary parties in these cases were typically the government and one or more immigrants. Prior to 2018, the Court was more

84. INS v. St. Cyr, 533 U.S. 289 (2001); Calcano-Martinez v. INS, 533 U.S. 348 (2001); Zadvydas v. Davis, 533 U.S. 678 (2001); Demore v. Kim, 538 U.S. 510 (2003); Clark v. Martinez, 543 U.S. 371 (2005); Jennings v. Rodriguez, 583 U.S. 281 (2018); Nielsen v. Preap, 586 U.S. 392 (2019); Johnson v. Guzman Chavez, 594 U.S. 523 (2021); Garland v. Aleman Gonzalez, 596 U.S. 543 (2022); Johnson v. Arteaga-Martinez, 596 U.S. 573 (2022). The government has prevailed in every immigration-detention case before the Court in the last twenty years.

85. Kucana v. Holder, 558 U.S. 233 (2010); Reyes Mata v. Lynch, 576 U.S. 143 (2015); Guerrero-Lasprilla v. Barr, 589 U.S. 221 (2020); Nasrallah v. Barr, 590 U.S. 573 (2020); Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103 (2020); Patel v. Garland, 596 U.S. 328 (2022); Wilkinson v. Garland, 601 U.S. 209 (2024); Bouarfa v. Mayorkas, 604 U.S. 6 (2024). Here, noncitizen litigants have prevailed in the majority of cases, convincing the Court to retain its power to review nondiscretionary determinations.

86. Leocal v. Ashcroft, 543 U.S. 1 (2004); Lopez v. Gonzales, 549 U.S. 47 (2006); Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007); Nijhawan v. Holder, 557 U.S. 29 (2009); Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010); Kawashima v. Holder, 565 U.S. 478 (2012); Moncrieffe v. Holder, 569 U.S. 184 (2013); Mellouli v. Lynch, 575 U.S. 978 (2015); Luna Torres v. Lynch, 578 U.S. 452 (2016); Esquivel-Quintana v. Sessions, 581 U.S. 385 (2017); Sessions v. Dimaya, 584 U.S. 148 (2018); Pugin v. Garland, 599 U.S. 600 (2023). All but two of these cases predate 2018, and the case outcomes split fairly evenly in favor of the government and the noncitizen.

87. Jama v. Immigr. & Customs Enf't, 543 U.S. 335 (2005); Dada v. Mukasey, 554 U.S. 1 (2008); Nken v. Holder, 556 U.S. 418 (2009); Holder v. Gutierrez, 566 U.S. 583 (2012); Garland v. Ming Dai, 593 U.S. 357 (2021); Sanchez v. Mayorkas, 593 U.S. 409 (2021); Santos-Zacaria v. Garland, 598 U.S. 411 (2023); Velazquez v. Bondi, 604 U.S. 712 (2025); Riley v. Bondi, 606 U.S. 259 (2025). The government prevailed in five of these nine cases, with more recent cases breaking more often for the government.

88. Barton v. Barr, 590 U.S. 222 (2020); Pereida v. Wilkinson, 592 U.S. 224 (2021). The government prevailed in both cases.

89. Pereira v. Sessions, 585 U.S. 198 (2018); Niz-Chavez v. Garland, 593 U.S. 155 (2021); Campos-Chaves v. Garland, 602 U.S. 447 (2024). The noncitizen prevailed in the first two cases before the Court pivoted in the other direction. *See infra* at notes 108-112 and accompanying text.

90. Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006); Judulang v. Holder, 565 U.S. 42 (2011); Vartelas v. Holder, 566 U.S. 257 (2012). The government prevailed in one of these three cases.

likely to construe the relevant statutory provisions in ways that favored the immigrant; after that, the government was far more likely to prevail in these cases.[91]

No doubt, this shift can be most simply explained by ideological shifts accompanying changes in the Court's composition. But it is useful to understand how the reasoning in these cases changed. First, the Court's turn to "pure textualism"—a methodological approach that purports to look almost exclusively at statutory language without reference to legislative intent or a law's historical context—allows the Court to be guided by its own restrictionist preferences, without attention to the will of the people as expressed through their democratically-elected legislators.[92] The Court is increasingly reading the words of the immigration laws entirely outside of the complex and compromise-laden congressional context in which those words were chosen.[93] Second, the Court has largely cast off the constraints of the Constitution in interpreting immigration laws. At one time, the Constitution's due-process guarantee operated as a background, phantom norm that shaped the Court's reading of statutory provisions.[94] This has given way to a deference to the executive branch that undercuts both congressional limits on executive power and the individual rights of noncitizens. Each of these developments warrants elaboration.

The Court's turn toward an apparently formalist, but deeply ideological, textualism is readily apparent in the immigration cases it has decided over the past seven years. In a piece evaluating three of the Supreme Court's 2022 immigration decisions, Shalani Bhargava Ray sheds some helpful light on how the Court's new approach to statutory interpretation was affecting its reading of

91. Although a simple tally of cases is an imperfect measure, between 2000 and 2017, the Court decided twenty-four cases involving the application of the provisions of IIRIRA and AEDPA, and immigrants prevailed in fifteen of those. In the twenty-three cases decided between 2018 and 2024, immigrants won in eight cases and the government won in fifteen. The government prevailed in almost every detention case after 2005, but a progovernment shift is discernable in the Court's reading of the other provisions of immigration law as well. Across administrations, regardless of party, the government argued aggressively for restrictive interpretations of the statute.

92. *Cf.* Stanley v. City of Sanford, 606 U.S. 46, 96 n.12 (2025) (Jackson, J., dissenting) ("[P]ure textualism's refusal to try to understand the text of a statute in the larger context of what Congress sought to achieve turns the interpretive task into a potent weapon for advancing judicial policy preferences.").

93. *See* Garland v. Aleman Gonzalez, 596 U.S. 543, 562, 568-78 (2022) (Sotomayor, J., dissenting) (reading the text of the jurisdiction-stripping provision, and its related savings clause, in light of "contextual and historical evidence" and disputing the majority's interpretation of the statute).

94. *See supra* text accompanying notes 68-75.

immigration laws at that time.[95] Drawing on the work of William N. Eskridge, Jr. and Victoria F. Nourse theorizing the Court's new form of statutory interpretation as textual gerrymandering,[96] Ray explores how the Court's readings of the INA "crack" and "pack" the language of the relevant statutory provisions to organize plainly ambiguous statutory text into a reading that *un*ambiguously supports a restrictionist interpretation of immigration law.[97] Using the example of *Garland v. Aleman Gonzalez*,[98] Ray illustrates how Justice Alito "cracked" the text of 8 U.S.C. § 1252(f) "into pieces, invoking dictionary definitions of each word, 'enjoin,' 'restrain,' and 'operation,'" then seized on words *within* those dictionary definitions, including their meanings, to interpolate the original text ("packing").[99]

This decontextualized wordplay has continued since Ray wrote about it in 2022. For example, in 2023, in *Pugin v. Garland*, the Court rejected a plausible narrowing construction of the INA.[100] The question in *Pugin* was whether a state conviction could constitute an aggravated felony offense "relating to obstruction of justice"[101] in cases where the conviction in question did not pertain to a pending investigation or proceeding.[102] The stakes were high. In immigration law, a conviction for an offense classified as an "aggravated felony" not only renders a noncitizen removable, but bars that person from virtually any form of relief from removal (no matter how strong the individual's ties to the United States or how long ago the offense was committed), and such classification imposes a lifetime

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95. Shalini Bhargava Ray, *Eroding Immigrants' Rights Through the "New" New Textualism*, *in* AMERICAN CONSTITUTION SOCIETY SUPREME COURT REVIEW (6th ed. 2023), https://www.acslaw.org/wp-content/uploads/2023/11/Ray-%E2%80%93-Eroding-Immigrants-Rights-Through-the-New-New-Textualism-1.pdf [https://perma.cc/CB55-EGT4] (analyzing Patel v. Garland, 596 U.S. 328 (2022); Aleman Gonzalez, 596 U.S. 543; and Johnson v. Arteaga-Martinez, 596 U.S. 573 (2022)).

96. William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1738 (2021). Eskridge and Nourse argue that textualist gerrymandering is deployed by the Court to achieve "populist" ends, whereby the Court lays claim to democratic legitimacy through the invocation of a search for the true will of the people. *Id.* at 1722-23.

97. Ray, *supra* note 95, at 12-13 (analyzing the cracking and packing in the majority's interpretation of 8 U.S.C. § 1252(f) as prohibiting-class action challenges to immigration detention in *Aleman Gonzalez,* 596 U.S. at 555).

98. 596 U.S. 543.

99. Ray, *supra* note 95, at 12-13.

100. 599 U.S. 600, 610 (2023).

101. 8 U.S.C. § 1101(a)(43)(S) (2024) (defining an aggravated felony to include offenses "relating to obstruction of justice").

102. 599 U.S. at 602.

bar on that person's return to the United States.[103] In deciding how to interpret what "relat[es] to obstruction of justice," the Court mulled over the meaning of individual words out of legislative context to reach a conclusion that supported their "common sense."[104] This reading may or may not have been sensible, but certainly did not evince a sense *common*ly shared either by all of the Justices,[105] or by all of the judges below.[106]

In more recent cases, the Court continues to treat statutory text as clearly and unambiguously barring the claims of noncitizens, even when the statutory language is susceptible to plausible, conflicting readings.[107] And the same cracking-and-packing moves Ray identified in *Aleman Gonzalez* are evident in later cases. One recent example is the 2024 *Campos-Chaves v. Garland* decision, in which the Court affirmed the validity of *in absentia* removal orders issued during hearings

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103. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 483-84 (2007) ("Among other things, that statute renders deportable any noncitizen who is convicted of an 'aggravated felony' after entry (now admission) into the United States. Unlike one other major category of crime-related deportability grounds, the aggravated felony ground applies regardless of either the length of the criminal sentence or the amount of time spent in the United States. Moreover, aggravated felonies eliminate almost all the major avenues of discretionary relief from removal, including even asylum; they trigger mandatory preventive detention; and they bar return to the United States for life, absent special permission from the Secretary of Homeland Security." (footnotes omitted)).

104. *Pugin*, 599 U.S. at 604, 606.

105. Justice Sotomayor authored a dissent joined in full by Justice Gorsuch and in all but one part by Justice Kagan. *Id.* at 614 (Sotomayor, J., dissenting). Justice Jackson concurred in the result, but her interpretation of the provision focused on evidence of Congress's intent, not on the text alone. *Id.* at 612-13 (Jackson, J., concurring). Jackson's concurrence makes clear that reading the statute with sensitivity to legislative intent and to historical context will not necessarily yield a more immigrant-protective reading of a statute. In some cases, the opposite is certainly true. But such readings are more likely to respond to the democratic lawmaking context out of which these statutes emerged. *See id.* at 612-13 (Jackson, J., concurring) ("In our constitutional system, the Legislature makes legal policy judgments regarding the particular circumstances that trigger the consequences that are associated with criminal convictions.").

106. *Id.* at 603 (majority opinion) ("Cordero-Garcia and Pugin petitioned for review in the relevant Courts of Appeals. In Cordero-Garcia's case, the Ninth Circuit concluded, in pertinent part, that his state conviction for dissuading a witness from reporting a crime did not constitute an offense 'relating to obstruction of justice' because the state offense did not require that an investigation or proceeding be *pending*. In Pugin's case, by contrast, the Fourth Circuit concluded that his state conviction for accessory after the fact constituted an offense 'relating to obstruction of justice' even if the state offense did not require that an investigation or proceeding be pending." (citation omitted) (first citing Cordero-Garcia v. Garland, 44 F.4th 1181, 1188-89 (9th Cir. 2022); then citing Pugin v. Garland, 19 F.4th 437, 450 (4th Cir. 2021)).

107. *See, e.g.*, Riley v. Bondi, 606 U.S. 259, 290 (2025) (Sotomayor, J. dissenting) (noting that the Court "stands alone . . . in asserting that a 'straightforward reading of the statutory text' resolves this case" because "[e]ven the courts of appeals that have attempted to defend the majority's position" recognize the textual ambiguities).

for which the noncitizens received defective notices to appear that were later corrected.[108] In reaching this conclusion, the Court not only strained to read the text in ways comporting with their own "common sense,"[109] but the Court did so in ways requiring it to disregard its own, very recent precedent. The Court declined to extend its earlier applicable rulings in *Pereira v. Sessions*[110] and *Niz-Chavez v. Garland*.[111] In both earlier cases, the Court had read the plain text of the statutory provision governing the issuance of notices to appear to require that such notices had to contain the time and date of the noticed hearing in order to be legally valid.[112] In *Campos-Chaves*, the Court adopted a textualist reading of the statute that distorts the text and ignores the Court's own prior construction of it. With its new approach to statutory interpretation, the Supreme Court's majority also ignored the negotiations and compromises of Congress, the body representing a people who are deeply divided on matters of immigration policy. Instead, the Court embraced a straightforwardly restrictionist immigration policy that aligns with its own preferences.

The Court's turn to "pure textualism" in its reading of the nation's immigration laws has been coupled with its significantly narrower understanding of the constitutional rights of noncitizens (and the citizens in community with them).[113] The phantom constitutional norms that may have once motivated the Court to engage in rights-protective constructions of immigration statutes[114] have faded away. When expressly weighing in on questions concerning the scope of constitutional protections for noncitizens, the Court now generally concludes that noncitizens, even those within the borders of the United States, have very limited (if any) constitutional protection.[115] When statutes raise the sorts of

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108. 602 U.S. 447, 457 (2024); *see id.* at 470 (Jackson, J., dissenting) (describing how the majority's opinion interprets 8 U.S.C. § 1229(a)(1)-(2) in a way that "unjustifiably cleaves the paragraph (2) notice from paragraph (1)'s NTA requirement").

109. *Id.* at 460 (majority opinion) ("This reading aligns with common sense.").

110. 585 U.S. 198 (2018); *see Campos-Chaves*, 602 U.S. at 463-64.

111. 593 U.S. 155 (2021); *see Campos-Chaves*, 602 U.S. at 464 n.1. *Niz-Chavez* made clear that *Pereira* applied even in cases where the government later sent corrected hearing information to a noncitizen who received the initial, defective notice. *Niz-Chavez*, 593 U.S. at 159-60, 169-70.

112. *Pereira*, 585 U.S. at 202; *Niz-Chavez*, 593 U.S. at 171.

113. As Ray noted her analysis of the 2022 cases, "Where a Court might once have seized on a textual ambiguity to supply protections from harsh incursions on liberty through statutory interpretation, it now finds no ambiguity at all." Ray, *supra* note 95, at 7. The implication is that these noncitizens have no constitutional liberty interests that the Supreme Court is bound to recognize.

114. *See supra* text accompanying notes 68-75.

115. *See, e.g.*, Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103, 107 (2020) (rejecting a Suspension Clause challenge to a statutory provision barring judicial review of expedited-removal proceedings).

serious constitutional questions evinced in earlier cases like *Zadvydas*,[116] the Court is no longer engaging in saving constructions through rights-protective readings.[117] Moreover, when squarely faced with constitutional questions, the Supreme Court now routinely denies constitutional protection to immigrants.[118] This trend holds true even when the litigants claiming constitutional-rights violations are U.S. citizens and residents.[119] Moreover, in place of a rights-protective phantom norm, the Court now appears to be driven by a constitutional norm favoring executive discretion over congressional constraint or individual rights—but only where that executive discretion is leveraged for restrictionist ends.[120]

In short, the Supreme Court's immigration decisions over the last seven years reflect a significant shift in its approach to statutory interpretation. This shift has moved the Court out of alignment with the goals and values that informed the immigration legislation they are interpreting.

B. Outside the INA: The Rise of Federalism in Immigration Law

This rights-restrictive shift of the Court's interpretation of immigration statutes is mirrored in the preemption cases that it has decided over the past two decades. Since 2000, the Court has decided three cases involving challenges to state laws on the grounds that those laws are preempted by federal immigration

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116. Zadvydas v. Davis, 533 U.S. 678 (2001); *see supra* notes 71-74 and accompanying text (discussing the use of constitutional avoidance in *Zadvydas*).

117. Ray, *supra* note 95, at 5-7 (describing how the Court refused to engage in a rights-protective reading in the case of Johnson v. Arteaga-Martinez, 596 U.S. 573 (2022)). For an earlier example of the same phenomenon, see *Jennings v. Rodriguez*, 583 U.S. 281, 312 (2018), where the Court found that the statute's text provided no temporal limits or bond-hearing requirements for certain statutory categories of immigration detention without ruling on whether the statute, so constructed, was constitutional.

118. *See, e.g.*, Trump v. Hawaii, 585 U.S. 667, 710 (2018) (rejecting a First Amendment challenge to Trump's entry ban despite ample evidence in the record of its racial animus); *Thuraissigiam*, 591 U.S. at 107 (rejecting due-process and Suspension Clause challenges); Dep't of State v. Muñoz, 602 U.S. 889, 902-03 (2024) (rejecting the due-process claims of a noncitizen and his citizen spouse where State Department officials denied his visa with no justification beyond a bare-boned citation to the statutory basis of the denial).

119. *See Hawaii*, 585 U.S. at 680-81; *Muñoz*, 602 U.S. at 903; *supra* note 76 and accompanying text; *see also* Jennifer M. Chacón, *The Inside-Out Constitution:* Department of Commerce v. New York, 2019 SUP. CT. REV. 231, 233 (discussing this trend in a trio of cases decided in the period from 2018-2019); Jennifer M. Chacón, Loving*'s Borders*, 115 CALIF. L. REV. 1079, 1081 (2025) (discussing how, in *Muñoz*, the Court "undermin[ed] the practical value of the right to marriage for individuals married to noncitizens").

120. *See supra* notes 31-32 and accompanying text.

law.[121] All three of these cases involved challenges to state laws that enforced immigration law indirectly through the use of the state's own criminal codes and law-enforcement agents. In all three of these cases, the Court upheld restrictionist state laws that functioned as indirect forms of immigration enforcement. By upholding all or portions of these laws, the Court was acting consistently with its overall restrictionist drift in the field of immigration law. But the conclusions reached in these cases arguably pave the way for other, more rights-protective uses of subfederal regulatory power in immigration law.

In *Chamber of Commerce v. Whiting*,[122] the Court addressed a challenge to Arizona's Legal Arizona Workers Act (LAWA). LAWA imposed on employers the obligation to verify the work-authorization status of newly hired workers through the federal work-authorization database (known as E-Verify) and punished employers' failure to comply with penalties up to and including the revocation of the employer's business license.[123] The law's challengers, including the Chamber of Commerce, argued that the law was preempted by IRCA,[124] which expressly preempts in 8 U.S.C. § 1324a(h)(2) "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[125] The Court rejected the challenge, finding that Arizona's provision fell under the parenthetical carveout for "licensing . . . laws."[126]

The decision is striking for two reasons. First, it signals far greater tolerance for state-law interventions in immigration-enforcement efforts than the twentieth-century immigration-preemption cases. In general, the Court's earlier immigration-federalism cases seemed to preclude state-law interventions in immigration regulation, prohibiting not just those that overtly conflicted with federal law, but also those that purported to "complement" federal efforts.[127] The only twentieth-century case that remotely resembles *Whiting* is *De Canas v. Bica*, in which the Court had upheld a California law prohibiting the employment of undocumented immigrant workers.[128] But at the time *De Canas* was decided,

121. Chamber of Com. v. Whiting, 563 U.S. 582, 611 (2011); Arizona v. United States, 567 U.S. 387, 416 (2012); Kansas v. Garcia, 589 U.S. 191, 210-12 (2020).

122. 563 U.S. 582.

123. *Id.* at 592-93.

124. *Id.* at 593-94.

125. 8 U.S.C. § 1324a(h)(2) (2024).

126. *Whiting*, 563 U.S. at 594-600 (quoting 8 U.S.C. § 1324a(h)(2) (2024)).

127. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941) ("[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . , states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.").

128. 424 U.S. 351, 365 (1976).

federal immigration law did not regulate the employment of unauthorized workers at all.[129] California's regulation of its own workforce therefore operated in a field completely outside of the scope of federal immigration regulation. That was no longer the case when the Court decided *Whiting*.

Second, the *Whiting* case began to hint at the Court's later turn toward its restrictionist-friendly textualism. The text of IRCA in 8 U.SC. § 1324a(h)(2) in fact easily could have been read to preclude state-law enforcement interventions in this area of immigration regulation. By considering the context in which Congress had chosen the words and the intended effect of the preemption provision, the dissent in *Whiting* found just that.[130] A focus on congressional intent and legislative history prompted the dissenters to read "licensing and similar laws" to cover only those state licensing systems applicable "to the licensing of firms in the business of recruiting or referring workers for employment, such as the state agricultural labor contractor licensing schemes in existence when the federal Act was created."[131] The majority opinion disregards the legislative history, including the underlying legislative concerns with racially discriminatory enforcement that had prompted Congress's efforts to link enforcement of the employer-sanctions provision with a bespoke antidiscrimination prohibition enforced by a Special Counsel within the Department of Justice.[132] In its blinkered textualism, the decision is a precursor of immigration cases to come.

Two years later, the Court decided *Arizona v. United States*.[133] At the time it was decided, this case was generally characterized by legal commentators as a return to form in the world of immigration federalism[134] because the Court rearticulated the legal principle that the federal government has broad and preclusive authority over immigration law, and applied precedent to limit state laws affecting immigration.[135] And it is true that the Court reaffirmed the notion of

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129. *Id.* at 359 ("The central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country. The comprehensiveness of the INA scheme for regulation of immigration and naturalization, without more, cannot be said to draw in the employment of illegal aliens as 'plainly within . . . [that] central aim of federal regulation.'" (alteration in original) (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959))).

130. 563 U.S. at 622-23 (Breyer, J., dissenting).

131. *Id.*

132. *See* 8 U.S.C. § 1324b(c) (2024); Bhandari v. First Nat'l Bank of Com., 829 F.2d 1343, 1351 (5th Cir. 1987).

133. 567 U.S. 387 (2012).

134. *See, e.g.*, David A. Martin, *Reading* Arizona, 98 VA. L. REV. IN BRIEF 41, 41 (2012) ("Both sides in our nation's ongoing immigration disputes are spinning the *Arizona v. United States* ruling as a victory . . . . It's the federal side, however, that has the better claim to success.").

135. 567 U.S. at 416.

federal preeminence in immigration regulation as it struck down three of four challenged provisions of Arizona's S.B. 1070.[136] But it also left standing S.B. 1070's Section 2(B),[137] an Arizona state law that mandated the participation of state and local law-enforcement agents in federal immigration-enforcement efforts. In doing so, the Court reasoned in ways that both echoed *Whiting*'s broader tolerance for subfederal immigration restrictions and foreshadowed a future in which state-law restrictions on immigration would be given more latitude.

To conclude that Arizona's S.B. 1070 Section 2(B) was not preempted, the Court first had to overlook the fact that the law had been enacted for the stated purpose of enforcing immigration law.[138] This was seemingly at odds with the Court's oft-repeated mantra that the federal government has full control over immigration law.[139] But the Court then allowed the central policing component of the law—a provision that allowed state and local officials to investigate an individual's immigration status during any police stop—to go into effect for the stated purposes of causing the "attrition" of the unauthorized immigrant population.[140] To conclude that Section 2(B) was not preempted, the Court not only had to ignore the state's motivations in enacting the provision, but also the

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136. Applying *Hines*, the Court concluded that federal law preempted the provisions of the law that criminalized an immigrant's failure to register as required by federal law. *Id.* at 400-03. The Court also found that the criminal prohibition on working without authorization was preempted by IRCA. *Id.* at 403-07. The reasoning of Justice Kennedy, the author of the majority opinion, is more sensitive to historical context and the complex legislative motivations underlying the employer-sanctions provision than Justice Roberts's opinion in *Whiting* had been. Finally, and in the most expansive application of preemption in its opinion, the Court struck down the Arizona law's attempt to expand the immigration arrest powers of its own agents beyond what federal law authorized for federal agents. *Id.* at 407-10.

137. *Id.* at 411-15.

138. S.B. 1070, 49th Leg., 2d Reg. Sess. § 1 (Ariz. 2010). The section states:

> The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.

139. *See, e.g.*, 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."); *see also* 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."); De Canas v. Bica, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103, 139 (2020) ("[T]he Constitution gives 'the political department of the government' plenary authority to decide which aliens to admit . . . ." (quoting Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892)).

140. *See Arizona*, 567 U.S. at 393, 415 (quoting S.B. 1070, § 1).

practical, factual distinctions that previous cases[141] had drawn between federal and subfederal law enforcement agents in the context of immigration enforcement. This choice was in some tension with the Court's previous approach to questions of immigration federalism, suggesting that states could play a more expansive role in the policing of immigration.[142] It also continued the pattern, initiated in *Whiting*, of deemphasizing congressional efforts to mitigate the racially discriminatory effects of immigration enforcement.

Finally, in *Kansas v. Garcia*, the Court upheld criminal convictions based on a Kansas identity-theft statute that criminalized the use of another person's social security number (SSN) on their W-4 and K-4 tax filing forms.[143] The state-court proceedings make plain, and the Kansas Supreme Court found, that prosecutors in Kansas were using the state's identity-theft laws to target immigrant workers, using the identity-theft law as an indirect form of immigration regulation.[144] The K-4 forms at issue in the case had contained the same SSN that was provided for purposes of the federal I-9 form.[145] And the Court had quite recently found in *Arizona* that Congress intended to preempt state efforts to criminalize employees for violations of the federal employer-sanctions provision.[146] But, in *Garcia*, the Court reasoned that because the prosecutions here were based on

141. Most notably, in both *United States v. Brignoni-Ponce*, 422 U.S. 873, 884-85 (1975) and *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 & n.16 (1976), the Court suggested that the training of Border Patrol agents made them uniquely capable of determining a person's immigration status simply by regarding their appearance and context clues. In *Brignoni-Ponce*, for example, the Court accepted the Government's submission that "trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut." 422 U.S. at 885.

142. The Court noted that federal law allows local police to request immigration-status information from the federal government and prohibits states from impeding information sharing about immigration status. *Arizona*, 567 U.S. at 411-13. It never explained how the Arizona investigative provisions are consistent with 8 U.S.C. § 1357(g)(2)-(3), which requires local officials to undergo federal training and supervision to engage in immigration investigations.

143. 589 U.S. 191, 208-12 (2020).

144. State v. Garcia, 401 P.3d 588, 590, 599 (Kan. 2017), *rev'd*, 589 U.S. 191 (2020) (describing Garcia's prosecution after a traffic stop on his way to work and concluding that "[p]rosecution of Garcia—an alien who committed identity theft for the purpose of establishing work eligibility—is not among the purposes allowed in IRCA. Although the State did not rely on the I-9, it does not follow that the State's use of the Social Security card information was allowed by Congress. 'A State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect'" (quoting Wos v. E.M.A. *ex rel.* Johnson, 568 U.S. 627, 636 (2013)).

145. 589 U.S. at 198 ("They also used these same false identities when they completed their W-4's and K-4's.").

146. Arizona v. United States, 567 U.S. 387, 405 (2012) (observing that Congress "made a deliberate choice not to impose criminal penalties on aliens who" merely "seek, or engage in, unauthorized employment").

information provided on state tax forms, they were untouched by IRCA's preemption provision.[147] The majority reached this conclusion even though the record revealed that prosecutors targeted for prosecution not those who were attempting to evade Kansas's tax laws, but rather, those who sought to deceive their employer about their federal work-authorization status in order to get a job.[148] The majority's approach not only required it to ignore aspects of legislative history and congressional intent surrounding the enactment of the federal employer-sanctions provisions, but also to disregard its own characterization of this legislative history and intent in its *Arizona* decision just eight years earlier.

Taken together, the three cases—*Whiting*, *Arizona*, and *Garcia*—make clear that the Court's pure textualist turn in the interpretation of federal immigration laws can be wielded in ways that limit the preemptive effects of those laws. The Court has moved away from its previously broad view of the field-preemptive effects of federal immigration law,[149] in favor of a constrained view of federal preemption tied to narrow readings of federal immigration statutes. There is ample space for state laws to "complement" federal immigration law, so long as these efforts are not *very* expressly preempted.[150] The Court's new position on immigration federalism appears to allow states to play a much more active role in shaping the enforcement of federal immigration law.

III. FEDERALISM WITHOUT PLURALISTIC UNDERSTANDINGS OF FEDERAL LAW

The Court's new approach to textualism, with its accompanying narrowing of the preemptive effects of federal law, should open up new space for integrationist and rights-protective immigration policies at the state and local level. As explained above, some states have found leeway within the bounds of federal immigration law (with varying degrees of success) to enact laws that target immigrant residents in police stops, and to enforce certain criminal prohibitions

147. 589 U.S. at 204-07.

148. *Id.* at 219-20 (Breyer, J., concurring in part and dissenting in part).

149. *Cf.* Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941) (finding a state immigrant-registration law preempted because "where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations").

150. The holdings in *Chamber of Commerce* and *Garcia* make clear that even expressly preemptive language can be read quite narrowly by a textualist court unconcerned with broader congressional objectives. Chamber of Com. v. Whiting, 563 U.S. 582, 596-600 (2011); *Garcia*, 589 U.S. at 219-20 (Breyer, J., concurring in part and dissenting in part).

selectively in immigrant neighborhoods and workplaces.[151] But states have also used the latitude left to them within the framework of federal immigration law to enact laws aimed at integrating and supporting immigrant residents.[152] Though it has yet to be tested, the Supreme Court's current approach to immigration federalism *ought* to allow for integrationist state and local policies in the same way that it allows for restrictionist ones. The Court's new, narrower reading of the preemptive effects of federal immigration statutes should provide legal space for states and localities[153] to exercise integrationist and inclusionary policies toward immigrant residents.

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151. *See, e.g.*, *Garcia*, 589 U.S. at 219 (Breyer, J., concurring in part and dissenting in part) (explaining that Kansas prosecutors deliberately use the prosecutions at issue in the case "to do what IRCA reserves to the Federal Government alone—police fraud committed to demonstrate federal work authorization"); Uriel J. García, *New State Law Increasing Sentences for Human Smuggling Takes Effect*, TEX. TRIB. (Feb. 6, 2024), https://www.texastribune.org/2024/02/06/texas-human-smuggling-law-minimum-sentence [https://perma.cc/MAY4-9Q6G] (summarizing various criminal laws and sentencing enhancements enacted by the Texas legislature with the explicit purpose of combatting unauthorized migration). In some cases, lower courts have continued to strike such laws down on federalism grounds. *See, e.g.*, Farmworker Ass'n of Fla. v. Moody, 734 F. Supp. 3d 1311, 1318, 1334-37 (S.D. Fla. 2024) (finding that federal law preempts a Florida bill imposing criminal penalties on anyone "who knowingly and willfully transports into this state an individual whom the person knows, or reasonably should know, has entered the United States in violation of law and has not been inspected by the Federal Government since his or her unlawful entry from another country" (quoting S.B. 1718 § 10, 2023 Leg., Reg. Sess. (Fla. 2023) (enacted)).

152. *See* Christopher N. Lasch et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1739-52 (2018) (describing and categorizing numerous state, county, local, and agency-level policies that aim to protect immigrant communities and limit immigration-enforcement cooperation); Eagly, *supra* note 9, at 26-35 (discussing changes to California criminal-law and sentencing practices that had ameliorative effects on immigration law).

153. The Constitution explicitly recognizes the lawmaking power of state governments. U.S. CONST. amend. X. Historically, debates around federalism, including immigration federalism, typically focus on the allocation of lawmaking authority between the federal and state governments. *See*, *e.g.*, Hiroshi Motomura, *Whose Immigration Law?: Citizens, Aliens, and the Constitution*, 97 COLUM. L. REV. 1567, 1587-1601 (1997) (reviewing GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996) and exploring how the work contributes to a new understanding of immigration federalism); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 497 (2001) ("I argue that a close examination of the sources and scope of the federal immigration power yields the conclusion that the immigration power is an exclusively federal one that Congress may not devolve by statute to the states."); *cf.* Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 22 (2010) (urging scholars to pay attention to the role not only of cities but also of "special purpose institutions (juries, school committees, zoning boards, local prosecutors' offices, state administrative agencies) that constitute states and cities"). Localities, on the other hand, are creatures of the state and have no explicitly recognized powers under federal law. *See, e.g.*, Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907); Ysursa v. Pocatello Educ. Ass'n, 555 U.S.

By permitting states and localities to legislate in immigrant-protective ways within the interstices of federal immigration law, the Court could give states space to compensate for its restrictionist drift in the interpretation of federal immigration law. The Court could also give leeway to some states to counterbalance the restrictionist state and local policies now proliferating under the Court's revised approach to immigration federalism. The recent preemption cases, collectively, indicate that states have some power to participate indirectly in shaping how federal immigration law is operationalized in their jurisdictions. So long as state policies do not directly conflict with federal immigration law, that principle *should* hold for integrationist measures as well as restrictionist ones. Whether the Court will actually demonstrate the same tolerance for subfederal integrationist measures as it did for restrictionist ones in *Whiting*, *Arizona*, and *Garcia* remains to be seen. This Part explores the potential for two different kinds of state policies to provide representational space for the many U.S. voters (and their representatives) who favor a more integrationist approach to immigration law: sanctuary (or noncooperation) laws, and laws governing access to higher education.

A. "Sanctuary" and the Possibilities of Restoring Pluralism Through Federalism

One of the clearest testing grounds for whether the Court will consistently apply its approach to immigration federalism is on the issue of state and local immigration-enforcement noncooperation policies, sometimes referred to as "sanctuary" policies. A number of states and localities have enacted laws limiting the ability of state and local law enforcement and other officials to engage in enforcement cooperation not required by federal law, or to share information with federal officials about immigrant residents beyond what is required by federal law.[154] Many of these policies long predate even the first Trump Administration, as do scattered efforts at the federal level to undercut them.[155]

353, 363 (2009); Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2008 (2018). Nevertheless, county and local governments exercise lawmaking authority in many ways that indisputably affect the rights and privileges of noncitizen residents and are therefore an important focal point for evaluations of immigration federalism. *See* Chacón, *supra* note 3, at 1333.

154. For a useful description of various forms of "sanctuary" laws, and their adherence to federal law, see generally Lasch et al., *supra* note 152. For a discussion of the evolution of California's noncooperation policies, as well as county-level implementation of these policies in the late 2010s, see generally Chacón, *supra* note 3.

155. Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 544-63 (2017) (identifying four waves of sanctuary policies dating back decades and discussing efforts by various federal officials to prevent them).

As commentators have noted, there is ample leeway within the bounds of federal law for such policies.[156] They are neither prohibited by express statutory language, nor do they directly conflict with federal immigration law. Federal laws or policies requiring state and local officials to use their own resources to engage in federal law enforcement without federal support have previously been found to violate the Tenth Amendment.[157] And though federal funding can be used to incentivize subfederal enforcement assistance, the federal government cannot coerce state cooperation through the retraction of substantial amounts of previously committed funds.[158] Moreover, courts have widely concluded that detention of noncitizens by state or local law enforcement solely on the basis of a request from federal immigration-enforcement officials, absent a judicial warrant or probable cause to detain, violates the Fourth Amendment.[159] In other words, federal immigration law does not require much in the way of immigration-enforcement cooperation, and the Constitution prohibits the federal government both from compelling it, and from undercutting protections U.S. residents have against unreasonable seizures through delegation to state and local agents.

During the first Trump term, the Department of Justice announced its intention to prevent jurisdictions that the Department identified as "sanctuary" jurisdictions from receiving block grants from the Byrne Justice Assistance Grant program, which gives funds to states for law-enforcement initiatives.[160] At the

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156. *Id.* at 545.

157. *See, e.g.*, United States v. Printz, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

158. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012). Nor can the executive branch unilaterally override congressional spending decisions without potentially violating separation-of-powers principles. *See, e.g.*, City & Cnty. of S.F. v. Trump, 897 F.3d 1225, 1233-35 (9th Cir. 2018). To be sure, the Supreme Court's recent shadow-docket rulings are beginning to cast doubt on whether there is anything the President cannot do with congressionally appropriated funds — yet another way that constitutional norms are shifting away from individual-rights protections in favor of relatively unconstrained executive power. *See, e.g.*, Dep't of State v. AIDS Vaccine Advoc. Coal., No. 25A269, slip op. at 1-2 (U.S. Sep. 26, 2025) (granting an emergency application for a stay of an order preventing rescission of $4 billion in appropriated funds). But without binding precedent on point, it is too early to conclude what the Court's decisions portend for separation-of-powers claims concerning appropriations.

159. Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1279-81 (2015) (describing policy changes following Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014) and Miranda-Olivares v. Clackamas County, No. 3:12-cv-02317, 2014 WL 1414305 (D. Or. Apr. 11, 2014)).

160. *See DOJ Grants and Sanctuary Cities*, IMMIGRANT LEGAL RES. CTR. 1 (Aug. 2018), https://www.ilrc.org/sites/default/files/resources/doj_grants_sanct_cities-20180808.pdf [https://perma.cc/5NA6-7RUS].

time, all previous congressional efforts to tie Byrne grant funds to state pledges of enforcement cooperation had failed.[161] This is perhaps unsurprising given the many conflicting views that local governments (including local law enforcement) have on the question of whether they should be involved in immigration policing efforts.[162] The Trump Administration's attempt to achieve through executive policy what Congress could not enact in law thus generated a spate of legal challenges.[163] A number of courts ruled that the threatened funding cuts were unduly coercive in violation of the Tenth Amendment, or that the Administration's efforts to revoke congressionally authorized funding violated the separation of powers.[164]

Though the issue was moot during the Biden Administration, it has come back into focus with the second Trump Administration. This time, after the President again issued vague executive orders threatening to cut a wide array of funding to jurisdictions that support noncooperation policies,[165] the Administration announced its intention to withhold transportation and other funding from states with noncooperation policies.[166] Compared to the first Trump Administration, the current threatened funding cuts are larger, and funds are less obviously related to immigration-enforcement goals,[167] making the Tenth

161. Lai & Lasch, *supra* note 155, at 552-53.

162. *See*, *e.g.*, DORIS MARIE PROVINE, MONICA W. VARSANYI, PAUL G. LEWIS & SCOTT H. DECKER, POLICING IMMIGRANTS LOCAL LAW ENFORCEMENT ON THE FRONT LINES 44-49 (2016) (finding significant opposition by some city police departments to immigration-enforcement cooperation, significant support among sheriffs' departments, and substantial regional variation on the question more generally).

163. *DOJ Grants and Sanctuary Cities*, *supra* note 160, at 1-2.

164. *Id.* One appeals court, however, did determine that the Administration could condition certain Byrne grants on specified forms of immigration-enforcement cooperation. Lisa Soronen, *Second Circuit Rules Against Cities and States in Sanctuary Jurisdictions Case*, NAT'L LEAGUE OF CITIES (Mar. 4, 2020), https://www.nlc.org/article/2020/03/04/second-circuit-rules-against-cities-and-states-in-sanctuary-jurisdictions-case [https://perma.cc/UUD8-G4T5].

165. Protecting the American People Against Invasion, Exec. Order No. 14,159 § 17, 90 Fed. Reg. 8443, 8446 (Jan. 20, 2025); Ending Taxpayer Subsidization of Open Borders, Exec. Order No. 14,218 § 2, 90 Fed. Reg. 10581, 10581 (Feb. 19, 2025).

166. Emily Badger, *Trump Raises New Threat to Sanctuary Cities: Blocking Transportation Dollars*, N.Y. TIMES (Jan. 31, 2025), https://www.nytimes.com/2025/01/31/upshot/sanctuary-cities-trump-transportation-funds.html [https://perma.cc/RVN3-UFTH].

167. *See* Enhancing Public Safety in the Interior of the United States, Exec. Order 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017). Section 9a of that order states that "the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary." *Id.* at 8801. Attorney General Sessions, acting under the authority of this executive order, placed limiting conditions on Byrne JAG grants—additional funds for personnel, equipment, training, and other criminal-justice needs. *See* Press Release,

Amendment problems even greater than during the last term.[168] Federal district courts have already enjoined these threatened cuts,[169] but the legal wrangling will undoubtedly continue.

Meanwhile, doubling down on positions in tension with the Tenth Amendment and separation-of-powers principles, in April, the Department of Justice also sued several jurisdictions for their alleged failure to enforce immigration laws and threatened other jurisdictions with similar suits.[170] These lawsuits appear to overread what federal immigration law requires of states and localities.

Off. of Pub. Affs., Dep't of Just., Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), https://www.justice.gov/archives/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial [https://perma.cc/FP5P-XYEF]. Sessions instructed that such funds would be denied to jurisdictions deemed insufficiently cooperative in immigration-enforcement efforts. Press Release, Off. of Pub. Affs., *supra*. Most courts enjoined the imposition of these conditions, finding they likely violated the Constitution. *See* City of Providence v. Barr, 954 F.3d 23, 45 (1st Cir. 2020) (holding that the DOJ was not authorized to impose the challenged conditions); City of Los Angeles v. Barr, 941 F.3d 931, 944-45 (9th Cir. 2019) (same), City of Philadelphia v. Att'y Gen., 916 F.3d 276, 279 (3d Cir. 2019) (same); City of Chicago v. Sessions, 888 F.3d 272, 293 (7th Cir. 2018) (same). *But see* New York v. U.S. Dep't of Justice, 951 F.3d 84, 90 (2d Cir. 2020) (holding that the statutes analyzed did provide such authority). While the first Trump administration threatened the withholding of law-enforcement funds from sanctuary jurisdictions, the second Trump administration has threatened the withholding of transportation funds, which are not obviously linked to immigration enforcement in a meaningful way. And the threatened cuts are also larger. *See* Badger, *supra* note 166 ("The money at stake now is potentially far larger than the law enforcement grants: The Department of Transportation sends billions of dollars annually to states and local governments to fund highways, transit systems, airports, bridges, commuter rail and ports, as well as road safety projects.").

168. The Supreme Court has held that the federal government can condition federal funds on a state's participation in certain programs or adoption of polices. South Dakota v. Dole, 483 U.S. 203, 211-12 (1987). But the Court has also noted the limits on such exercises of the spending power. Namely, this spending power must be used to promote the "general welfare," the funding conditions must be presented to the states unambiguously, and the funds at issue must be related to the program or policy the government seeks to incentivize. *Id.* at 207. More recently, the Court has reiterated that such cuts cannot be so large as to constitute undue coercions. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 580 (2012).

169. City & Cnty. of S.F. v. Trump, 779 F. Supp. 3d 1077, 1083 (N.D. Cal. 2025) (granting a preliminary injunction); California v. U.S. Dep't of Transp., 788 F. Supp. 3d 316, 324 (D.R.I. 2025) (granting a preliminary injunction).

170. Joel Rose, *Justice Department Sues Chicago and Illinois over 'Sanctuary' Laws*, NAT'L PUB. RADIO (Feb. 6, 2025, 2:49 PM ET), https://www.npr.org/2025/02/06/nx-s1-5288871/justice-department-sues-chicago-and-illinois-over-sanctuary-laws [https://perma.cc/2BA2-TV72] (describing the DOJ lawsuit against Illinois and Chicago); Dan Gooding & Gabe Whisnant, *Pam Bondi Announces Lawsuit Against New York Over Immigration—'You're Next'*, NEWSWEEK (Feb. 12, 2025, 8:19 PM ET), https://www.newsweek.com/bondi-ny-immigration-lawsuit-letitia-james-hochul-2030311 [https://perma.cc/4MTR-K8YA].

Federal law, specifically 8 U.S.C. § 1357(g), *permits*,[171] but does not require,[172] states and localities to enter into enforcement-cooperation agreements with the federal government. The text of that provision is explicit that such enforcement cooperation is optional.[173]

Federal officials have argued,[174] however, that noncooperation measures violate 8 U.S.C. § 1373, the federal law prohibiting states from limiting the exchange of information between government officials of a person's "citizenship or immigration status."[175] But as Annie Lai and Christopher N. Lasch have noted, "Section 1373 [i]s a curious weapon to wield against sanctuary jurisdictions," because it "says nothing about whether governments can limit compliance with detention requests or requests for notification of inmate release dates made via immigration detainers, both of which were central preoccupations of those seeking to defund sanctuary cities."[176] The only other relevant statutory provision is similarly circumscribed, only preventing states from limiting communications to or from federal officials "regarding the immigration status, lawful or unlawful, of an alien in the United States."[177] None of this comes close to requiring enforcement cooperation.

It remains to be seen how the legal questions over federal funding in sanctuary jurisdictions ultimately will be resolved in federal court. These cases are important tests of whether the Supreme Court's permissive approach toward state-level restrictionist immigration regulations will be applied consistently to noncooperation policies as well. Noncooperation policies operate as mechanisms for state (and local) expressions on the very local question of how to best use local

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171. "The Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law." 8 U.S.C. § 1357(g)(1) (2024).

172. "Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection." 8 U.S.C. § 1357(g)(9) (2024). The statute also permits communication between state and federal officials concerning enforcement efforts outside of the scope of such agreements, but does not require it. *Id.* § 1357(g)(10).

173. *Id.* § 1357(g).

174. *See, e.g.*, Complaint at 25-26, United States v. Minnesota, No. 0:25-cv-03798 (D. Minn. Sep. 29, 2025); Complaint at 12, United States v. City of Boston, No. 1:25-cv-12456 (D. Mass. Sep. 4, 2025).

175. 8 U.S.C. § 1373 (2024); *see also id.* § 1644 (similar prohibitions).

176. Lai & Lasch, *supra* note 155, at 551.

177. 8 U.S.C. § 1644 (2024).

resources to enhance public safety. They give voice to residents of cities like Los Angeles and Chicago, and states like California and Illinois, who have significant immigrant populations and who have consistently opposed a maximalist immigration-enforcement posture over the past decade or more. Their policies, which operate in space deliberately left by Congress in its own legislative efforts,[178] are mechanisms for effectuating the nuanced views of the people that are reflected in both federal legislation and contemporary public opinion.

B. Higher-Education Access and the Possibilities of Immigration Pluralism

A second example of what should be possible under the existing preemption paradigm concerns state policies toward undocumented residents in public colleges and universities. At the beginning of 2025, twenty-four states, led by Texas in 2001,[179] had passed laws that allowed all enrollees at state colleges and universities to pay in-state tuition if they satisfied the educational requirement of graduating from a state high school, regardless of their citizenship and immigration status.[180] No federal law clearly prohibits a state from charging in-state tuition rates for undocumented college students who meet the state's educational requirements for in-state tuition. There is only one federal statutory provision that references undocumented-immigrant students in higher education: 8 U.S.C. § 1623(a).[181] The provision states:

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.[182]

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178. Lai & Lasch, *supra* note 155, at 557-59 (describing failed congressional efforts to condition federal grants on states' compliance with 8 U.S.C. § 1373).

179. H.B. 1403, 77th Leg., Reg. Sess. (Tex. 2001); Eleanor Klibanoff, Jessica Priest & María Méndez, *What to Know About Texas Ending In-State Tuition for Undocumented Students*, TEX. TRIB. (June 24, 2025), https://www.texastribune.org/2025/06/14/texas-undocumented-students-tuition-explainer [https://perma.cc/728A-WWPL].

180. Texas was the first state to enact such a provision, but at least twenty-three other states have similar laws. *See Comparative Chart of States—Policy View*, HIGHER ED IMMIGR. PORTAL, https://www.higheredimmigrationportal.org/states/state-policy-hub/in-state-tuition-state-financial-aid/comparative-chart-of-states [https://perma.cc/54PG-UZKB].

181. This provision was enacted into law as Section 505 of IIRIRA. IIRIRA, Pub. L. No. 104-208, § 505, 110 Stat. 3009, 3009-672 (codified at 8 U.S.C. § 1623).

182. 8 U.S.C. § 1623(a) (2024).

States (and federal courts) have interpreted and understood this provision as a nondiscrimination provision.[183] All people, regardless of citizenship or residence status, must be eligible for in-state tuition once they meet the state's educational requirements for that tuition rate.[184]

Texas's 2001 in-state tuition law (along with those of other states) provides an example of federalism at work. After all, when it comes to tuition rates for state universities, state lawmakers are regulating matters squarely within the scope of their traditional powers.[185] The text of the relevant federal law says nothing about a state's ability to provide in-state tuition for graduates of its high schools. These in-state tuition laws illustrate the ways that state regulation in the interstices of federal immigration regulation can capture nuanced political opinions on matters that impact immigrant residents within a state.

Recent events in Texas and Oklahoma, however, highlight the difficulty of maintaining pluralistic immigration policies, even when those policies align with democratically expressed preferences. The Texas legislature retained its in-state tuition law for twenty-four years.[186] The law provided a counterweight to restrictionist federal laws (and the increasingly restrictionist constructions of those laws), and ironically, did so in a state that has adopted some of the harshest restrictionist immigration policies in the nation.[187] The law was never without its opponents in Texas, and various state legislators introduced proposed repeals of this law several times in recent years, but those bills all failed, reflecting a continued democratic preference for the law.[188]

The 2025 Texas legislative session again ended without the passage of proposed legislation that would have terminated in-state tuition for undocumented residents. Then, in a twist that threatened the viability of competitive federalism, the federal government filed a lawsuit against the existing Texas law governing

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183. Martinez v. Regents of the Univ. of Cal., 241 P.3d 855, 859-60 (Cal. 2010).

184. *Id.*; *see also* Michael A. Olivas, *IIRIRA, the DREAM Act, and Undocumented College Student Residency*, 30 J. COLL. & UNIV. L. 435, 452-55 (2004) (defending the legality of these provisions under federal law). The Supreme Court has also held that the Equal Protection Clause requires states to provide K-12 education to all residents, regardless of citizenship or immigration status. Plyler v. Doe, 457 U.S. 202, 202 (1982).

185. Contrast this to Texas's attempt to regulate the actual flow of immigrants across the border—something that is plainly a federal prerogative.

186. Eleanor Klibanoff & Jessica Priest, *Texas' Undocumented College Students No Longer Qualify for In-State Tuition*, TEX. TRIB. (June 4, 2025, 10:00 PM CT), https://www.texastribune.org/2025/06/04/texas-justice-department-lawsuit-undocumented-in-state-tuition [https://perma.cc/ZQX8-8PB2].

187. *See, e.g.*, S.B. 4, 88th Leg., 4th Spec. Sess. (Tex. 2023). Enacted in 2023, S.B. 4 increases penalties for the state law crime of human smuggling and introduces new state-level offenses for illegal entry and reentry.

188. Klibanoff & Priest, *supra* note 186.

in-state tuition.[189] The lawsuit claimed that the in-state tuition provision is preempted by federal law.[190] Though it rests on one plausible reading of the text of the federal law, the claim is far from obvious and, at a minimum, is contrary to some existing precedent.[191]

Notwithstanding the plausible arguments that the Texas law does not violate the INA, as soon as the lawsuit was filed, Texas Attorney General Ken Paxton declined to defend the law the Texas legislature had only recently left untouched. Paxton agreed to settle the case brought by the federal government, eliminating in-state tuition for undocumented residents in Texas.[192] U.S. District Judge Reed O'Connor approved the settlement almost immediately, without hearing any arguments in defense of the law enacted and defended by Texas's legislature.[193] In this way, the federal judiciary acted in concert with the federal executive to override the will of the people of Texas as expressed through their

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189. Klibanoff, Priest & Méndez, *supra* note 179.

190. Complaint at 2, United States v. Texas, No. 7:25-cv-00055 (N.D. Tex. June 4, 2025).

191. *See* Martinez v. Regents of the Univ. of Cal., 241 P.3d 855, 859-60 (Cal. 2010) (dismissing a challenge to a state-residency statute); *see also* Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99, 123 (2008) ("The provisions of IIRIRA, the 1996 federal statute, do not preclude the ability of states to enact residency statutes for the undocumented."); Olivas, *supra*, at 126-29 (describing failed legal challenges to in-state tuition benefits for undocumented students); Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393, 404-07 (2002) (describing state initiatives to grant undocumented immigrants postsecondary tuition benefits); Jessica Salsbury, Comment, *Evading "Residence": Undocumented Students, Higher Education, and the States*, 53 AM. U. L. REV. 459, 465-66 (2003) (arguing that such laws do not conflict with Section 505 of IIRIRA and are not preempted under the federal power over immigration). A federal district court judge in Texas did conclude that Texas's law was preempted, but that judgment was reversed by the Fifth Circuit. Young Conservatives of Tex. Found. v. Univ. of N. Tex., 597 F. Supp. 3d 1062, 1070 (E.D. Tex. 2022), *rev'd and vacated sub nom.* Young Conservatives of Tex. Found. v. Smatresk, 73 F.4th 304 (5th Cir. 2023).

192. Steve Vladeck, *Bonus 155: The Six-Hour Settlement*, ONE FIRST (June 5, 2025), https://www.stevevladeck.com/p/bonus-155-the-six-hour-settlement [https://perma.cc/3VGU-B3TU] (explaining that the complaint by the federal government, agreement by the state Attorney General to permanently enjoin enforcement of the provision, and approval of the consent judgment by the district judge all happened in just over six hours)

193. *Id.*; Klibanoff & Priest, *supra* note 186. The docket shows that the court heard no arguments in favor of the provision before approving the consent judgment. *See United States* v. *State of Texas (7:25-cv-00055): District Court, N.D. Texas*, COURTLISTENER (Oct. 27, 2025, 1:18 PM), https://www.courtlistener.com/docket/70454897/united-states-v-state-of-texas [https://perma.cc/9KNG-RXT2]. Judge O'Connor later provided a window into his reasoning in a written opinion denying motions to intervene in the case, in which he concluded that intervention would be futile because the law was expressly preempted. United States v. Texas, 350 F.R.D. 74, 78-81 (N.D. Tex. 2025).

legislative body, and expanded the scope of federal preemption in ways that, at least arguably, go beyond what Congress intended.

In the weeks after Paxton cooperated with the federal government to override the decision of the Texas legislature on the in-state tuition question, the same sequence of events played out in Oklahoma.[194] These developments point to just how difficult it is for U.S. citizens to secure immigrant-protective policies even after winning legislative battles to enact them. If the Court has stepped back to allow space for state and local immigration enforcement, it should do the same with respect to inclusionary state and local initiatives that are not clearly preempted by federal law.

C. The Promises and Perils of Immigration Federalism

The story of recent developments in Texas concerning higher-education access highlight some of the perils of immigration federalism. But there are others. First, states and localities are just as likely (and in some places much more likely) to enact restrictionist subfederal immigration policies as they are to enact immigrant-protective policies. Florida has, in recent months, demonstrated just how much a state can do to advance its own restrictive immigration policy, particularly when the party of the President does not object to those efforts.

In 2023, Florida enacted Senate Bill 1718.[195] The law represents a sweeping effort to use state law to enforce immigration law. S.B. 1718 prohibits Florida counties and municipalities from providing funds to any person or organization "for the purpose of issuing an identification card or document" to undocumented residents.[196] It requires hospitals that accept Medicaid to collect patient immigration-status data on admission or registration forms.[197] It mandates the repayment of state economic-development incentives if the state Department of Economic Opportunity finds or is notified that an employer has knowingly employed an unauthorized immigrant worker without verifying the employment eligibility of that worker.[198] It declares out-of-state driver's licenses invalid in Florida if the issuing state issued licenses to undocumented residents.[199] And S.B. 1718 enacts state-law criminal prohibitions on the knowing transportation

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194. Sara Weissman, *Oklahoma Agrees to End In-State Tuition for Noncitizens After DOJ Sues*, INSIDE HIGHER ED (Aug. 6, 2025), https://www.insidehighered.com/news/quick-takes/2025/08/06/after-doj-sues-okla-ends-state-tuition-noncitizens [https://perma.cc/JH29-Y2TF].

195. S.B. 1718, 2023 Leg., Reg. Sess. (Fla. 2023) (enacted).

196. *Id.* §§ 1–2.

197. *Id.* § 5.

198. *Id.* § 6.

199. *Id.* § 3.

of undocumented immigrants.[200] Using a combination of state licensing laws, funding incentives, and state criminal law, the bill would put state actors in the position of enforcing immigration law far beyond the bounds of state enforcement that the Supreme Court has approved to date. Judge Roy Altman, a conservative judge appointed by President Trump, accordingly has preliminarily enjoined the knowing-transportation provision, finding it preempted by federal law.[201] Litigation is ongoing.

Far from deterred by the partial injunction of S.B. 1718, the Florida legislature doubled down on its efforts to restrict immigration. In February 2025, Florida Governor Ron DeSantis signed into law S.B. 4-C, which created sweeping state crimes that made it a felony for certain immigrants to enter Florida and mandates their jail time without bond.[202] This direct criminalization of the entry of undocumented residents goes much further than anything that was attempted by Arizona in S.B. 1070, but, unlike the Obama Administration, which brought a preemption challenge against S.B. 1070, the Trump Administration has no interest in fighting the new Florida law on preemption grounds. Immigrant advocacy organizations have obtained a temporary restraining order and preliminary injunction of the law.[203] So far, the Supreme Court has declined to enter the fray, denying an application to stay the district court's order.[204] Perhaps this signals the limits of the Court's appetite to further expand state power in this area, though that remains to be seen.

Even if the Supreme Court holds the line against aggressive new forms of subfederal immigration enforcement, that will not create a truly pluralistic approach to immigration policy. As is already evident, where states and localities opt for protective, noncooperation policies, the federal government is increasingly responding with more aggressive uses of federal force, not just in the form of immigration-enforcement agents,[205] but also the military and the National Guard.[206] Should the Supreme Court adopt the absolute deference the President

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200. *Id.* § 10.

201. Farmworker Ass'n of Fla. v. Moody, 734 F. Supp. 3d 1311, 1344 (S.D. Fla. 2024).

202. S.B. 4-C, 2025 Leg., Spec. Sess. C (Fla. 2025) (enacted).

203. Fla. Immigrant Coal. v. Uthmeier, 780 F. Supp. 3d 1235, 1277 (S.D. Fla. 2025).

204. Uthmeier v. Fla. Immigrant Coal., 145 S. Ct. 2872, 2872 (2025) (mem.).

205. Connor Greene, *The Trump Administration Escalates Its Battle with Sanctuary Cities: What to Know*, TIME (Sep, 8, 2025, 4:31 PM ET), https://time.com/7315444/trump-immigration-crackdown-ice-sanctuary-cities [https://perma.cc/ER4Z-HS2M].

206. Caitlin McTiernan, *US Cities Brace for Another Los Angeles, as Trump Deploys Troops in Expanding Immigration Crackdown*, AM. IMMIGR. COUNCIL (Sep. 11, 2025), https://www.americanimmigrationcouncil.org/blog/los-angeles-chicago-trump-deploys-troops-immigration-crackdown [https://perma.cc/HZU4-2CDW].

now seeks on matters of appropriations and foreign policy,[207] the executive branch will hold virtually all of the cards when it comes to setting immigration enforcement policy. State and local policies may be able to offer some small protections to immigrant residents, but the legal landscape will hardly mirror the pluralistic laws contained in the nation's statutes, let alone the diverse views of the nation's people.

CONCLUSION

Immigration-policy disputes are currently playing out in a dramatic and violent fashion as the President enables the National Guard, U.S. Marines, and federal ICE agents to deploy physical force against those who oppose his Administration's vision of immigration enforcement. But the immigration laws that the Administration is enforcing are more complicated, more contested, and more pluralistic than the Administration's rhetoric suggests. As the Supreme Court increasingly embraces the Administration's enforcement-maximalist version of federal immigration law and dismantles the constitutional backstops that once prevented the unmitigated exercise of executive power over the lives of immigrants in the United States, moderating state laws and policies are an increasingly important vehicle for vindicating the will of the people — all of the people — and for protecting the rights of all of the people against unchecked executive power.

The Court's increasing tolerance for subfederal regulation could create space for subfederal immigration-policy innovations to thrive. Or the Court could simply shutdown integrationist subfederal immigration regulations, importing into its reading of the preemptive scope of federal statutes the same restrictionist assumptions that increasingly motivate its interpretation of federal immigration laws. In this moment, judicial tolerance for subfederal integrationist measures consistent with federal laws is important not only for the rights of immigrants and those who live in community with them, but also for the sake of greater

207. On foreign-policy questions, see, for example, Emergency Motion for Stay Pending Appeal at 8, 13, J.G.G. v. Trump, Nos. 25-5067 & 25-5068 (D.C. Cir. Mar. 16, 2025), which argues that Alien Enemy Act (AEA) designation is a "nonjusticiable political question" implicating foreign affairs and that "[t]he determination of whether there has been an 'invasion' or 'predatory incursion,' whether an organization is sufficiently linked to a foreign nation or government, or whether national security interests have otherwise been engaged so as to implicate the AEA, is fundamentally a political question to be answered by the President." On appropriations, see, for example, Reply in Support of Application to Vacate the Order Issued by the United States District Court for the District of Columbia at 8-9, Dep't of State v. AIDS Vaccine Advoc. Coal., No. 24A831 (U.S. Mar. 3, 2025), which argues for the President's power to cancel unilaterally the spending of billions of dollars in appropriated foreign-aid funds in part because it is "in the field of foreign affairs, where the President's power is at its height."

fealty to the complicated will of the people as expressed through federal immigration law.

Jennifer M. Chacón is the Bruce Tyson Mitchell Professor of Law and Associate Dean for the J.D. Program, Stanford Law School. *The author thanks the generous community of immigration-law teachers and scholars for their ideas and support.*