States of Desire: How Immigration Law Allows States to Attract Desired Immigrants

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INTRODUCTION

> "The authority to control immigration . . . is vested solely in the Federal Government."[1]

On October 5, 2017, the governor of California signed a collection of statutes that had the stated effect of making California a sanctuary state in opposition to the Trump administration's immigration policies and practices. News reports described this move as California's refusal to accede to federal policy determinations, despite the federal government's plenary authority over immigration.[2] The plenary power doctrine is assumed to foreclose states playing a direct role in immigration regulation under our federal constitutional structure. This assumption is seemingly confirmed by *Arizona v. United States*, in which the Supreme Court held that the federal immigration system preempted state law and that Arizona could not seek to frustrate the Obama administration's policy determinations about immigration enforcement. The Trump administration is also counting on the strength of the plenary power doctrine, and it sued California claiming its authority preempted California's legislation.[3] When reading the news accounts of California's creation of a sanctuary state and the Trump lawsuit, many might assume that the statutes will not survive court scrutiny, because the states cannot frustrate the Trump administration's exercise of plenary federal authority. However, in this case the many would be wrong.

The plenary power doctrine might foreclose much state action, but it does not foreclose Congress from granting some authority to the states. In fact, over the past thirty years, Congress increasingly has devolved considerable authority to states over decisions that affect immigration regulation. Congress has done so to effectuate public policy in the immigration area and also to acknowledge the structuralist concerns for regulation that occur at the intersection of state police powers and immigration law. I argue that these grants of

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[1] Truax v. Raich, 239 U.S. 33, 42 (1915) (citation omitted); *see also* Galvan v. Press, 347 U.S. 522, 531 (1954); League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 786 (C.D. Cal. 1995) ("The State is powerless to enact its own scheme to regulate immigration or to devise immigration regulations which run parallel to or purport to supplement the federal immigration laws.").

[2] *See* Press Release, Office of Governor Edmund G. Brown Jr., Governor Brown Signs Legislation to Protect California's Hard-Working Immigrants (Oct. 5, 2017), https://www.gov.ca.gov/news.php?id=19986 [hereinafter Legislation to Protect California Immigrants].

[3] Complaint at 2, United States v. California, No. 2:18-cv-00490 JAM-KJN (E.D. Cal. Mar. 6, 2018).

power have occurred in two principal areas. First, Congress has granted power to the states to define and identify key terms of the immigration statute in areas where the states traditionally hold such powers (licensing, criminal law, and family regulation, for example). Second, Congress has ceded power to the states as an incentive for state cooperation in federal enforcement goals (such as with the section 287(g) program), or in federal integration goals (such as with naturalization education and refugee resettlement). These two categories permit states to wield a great degree of power in immigration law. In particular, my thesis is that states have been granted substantial power to define their "desired immigrants" under state law.

Although Congress has devolved power to the states in more than fifty provisions of the immigration statute, three areas of law — employment, family, and criminal — demonstrate vividly how Congress has allowed states to actualize their differing preferences for immigrants. In each of these areas, Congress has left key definitions and terms under the immigration statute to the states. This is not due to inattention or unwillingness to prescribe federal standards. There are, after all, plenty of examples in the immigration statute demonstrating that Congress has exercised its federal prerogative.[4] The plain effect is that Congress has invited states to create a body of regulation in consciously defined negative spaces of federal immigration law.

The states have been successful at implementing policy at the intersection of immigration law and traditional state police power when the provision of the immigration statute specifically relies on state decision-making or on state action to define the scope of the

[4] Examples include Congress's decision to count marijuana possession as a federal crime (which prevents admissibility), even though many states do not, or Congress's different treatment of unmarried mothers and fathers to transmit citizenship to their children. *See, e.g.*, Controlled Substances Act, 21 U.S.C. §§ 802(16), 841(b)(1)(A)(vii) (2018) (defining marijuana possession as a prohibited act); Immigration and Nationality Act §§ 212(a)(2)(A)(i)(II)), 301, 309, 8 U.S.C. §§ 1182(a)(2)(A)(2), 1401, 1409 (2018) [hereinafter INA] (stating aliens convicted of violations involving controlled substances are inadmissible and laying out the citizenship requirements for children of a citizen mother and a citizen father, respectively). Some might argue that this form of federal regulation might be outside the scope of congressional authority. Kerry Abrams, for example, argues that to the extent Congress regulates the lives of citizens through its immigration law provisions, it may be overstepping its plenary power authority. Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1646-47 (2007) [hereinafter *Regulation of Marriage*]; s*ee also* Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 VA. L. REV. 629, 687 (2014).

federal rule. For example, if the federal statute confers certain rights or benefits to a "spouse" as determined under state law, a state that recognizes common law marriage will more broadly confer benefits[5] to the "desirable immigrant."

In this environment, states increasingly are being very deliberate about how they operationalize this congressionally-delegated authority. In particular, this shared authority empowers states to define, and thereby to attract and keep, their own versions of desirable immigrants. Over the past decade, states that disagreed with what they saw as weak federal enforcement sought to counter the federal policy with restrictive immigration regimes under state law.[6] These efforts ran aground on the shoals of plenary power and preemption arguments. However, states can more productively exploit the powers granted to them by Congress to shape the effect of immigration law within their borders, including efforts to protect immigrants within their jurisdictions from federal action. This use of the power was certainly not anticipated by Congress and is best regarded as an unanticipated effect[7] of seeking to incorporate state values, prejudices, and biases into the immigration statute.[8] Nevertheless, the power exists, and it is precisely this power that the state of California has wielded to create a sanctuary state.

My argument has four parts. Part I analyzes traditional accounts of the plenary power doctrine and preemption, and the growing trend among scholars to recognize that an emerging immigration federalism is superseding the accounts. Part II analyzes provisions of the Immigration and Nationality Act ("INA") dealing with employment, family, and criminal law issues, demonstrating how the statute invites

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[5] *See Policy Manual Volume 12, Part G, Chapter 2B*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartG-Chapter2.html (last updated Aug. 25, 2018).

[6] *See* Jennifer Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL OF RTS J. 577, 582-85 (2012) [hereinafter *Immigration Federalism*] (describing state trends challenging federal immigration power).

[7] In a previous article, I characterize the unanticipated effect as an "ethical surplus." Francis J. Mootz III & Leticia M. Saucedo, *The "Ethical" Surplus of the War on Illegal Immigration*, 15 J. GENDER RACE & JUST. 257, 259-60 (2012).

[8] *See generally* Rick Su, *The Role of States in the National Conversation on Immigration*, *in* STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY 198 (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014) [hereinafter *The Role of States*] (arguing that states attempt to regulate immigration at the margins to influence national policy); Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1342 (2013) [hereinafter *States of Immigration*] (arguing that states act in the immigration arena, even if outside their scope of authority, to influence federal policy).

or even requires state decision-making. Some scholars have explored the emerging immigration federalism, but this section explores in detail how Congress devolves its own federal authority back to the states through the immigration statute's provisions. Part III provides a normative framework for understanding and interpreting state power in the immigration realm, and the unanticipated effects of the congressional devolution of power to the states. Much of new immigration federalism scholarship centers on efforts by states to restrict immigration by countering federal priorities, but this section focuses on how states can use congressional delegation of immigration authority to achieve integrationist goals by broadly defining the desirable immigrant. I conclude that this shift in power to the states will provide space for progressive state legislatures to substantially affect immigration law.

I. THE SHIFT FROM PLENARY POWER TO "NEW FEDERALISM" THEORIES OF IMMIGRATION LAW

A. The Doctrinal Baseline: Plenary Power

Immigration law has long been characterized as exclusively within the federal domain.[9] Courts and scholars have debated the degree to which the plenary power doctrine explains federal government control over immigration,[10] but the widespread and long-held view is that federal power over immigration regulation is virtually absolute.[11] As

[9] *See* Toll v. Moreno, 458 U.S. 1, 10, 17 (1982) (striking the state denial of in-state tuition status to certain visa holders); Graham v. Richardson, 403 U.S. 365, 376-78 (1971) (striking distinctions based on immigration status in state welfare laws); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418-19 (1948) (striking alienage restriction on state commercial fishing licenses); Hines v. Davidowitz, 312 U.S. 52, 68 (1941) (striking state alien registration scheme); Truax v. Raich, 239 U.S. 33, 42 (1915) (striking state law prohibiting hiring of noncitizens); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 822-23 (2008) (noting that "states and localities have not enacted pure immigration laws since the end of the nineteenth century").

[10] *See, e.g.*, *Regulation of Marriage*, *supra* note 4, at 1645-47; 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); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256-60 (1984); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549-50 (1990); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 57-58 (1984); Peter J. Spiro, *Explaining the End of the Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 340-41 (2002).

[11] *See, e.g.*, Arizona v. United States, 567 U.S. 387, 416 (2012); Chae Chan Ping v.

early as 1889, the Supreme Court held in *Chae Chan Ping v. United States*, that for reasons both constitutional and extra-constitutional, the federal government held the exclusive authority to regulate immigration.[12] The rationales upholding federal authority were grounded then, as they are today, in notions of sovereignty, in the need to speak with one voice on matters of foreign affairs, and in the need for uniformity in the development of naturalization rules. In the modern era, maintaining the safety and security of the nation has supplemented these rationales in providing a basis for recognizing the plenary power of the federal government to control immigration and maintain the rules governing immigration to the United States.[13]

As recently as the 2012 decision in *Arizona v. United States*, the Court reiterated that "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."[14] Arizona enacted legislation that amounted to immigration regulation to supplement what it regarded as federal underenforcement. The law required immigrants to register with the state, criminalized unauthorized work, authorized law enforcement officials to make warrantless arrests of people suspected of unauthorized presence, and authorized law enforcement officials to stop people and ask them about their immigration status.[15] The Court held all but one of the challenged statutory provisions violated federalism principles and the Supremacy Clause, finding that the state law attempted to usurp power that did not belong to it.[16] *Arizona* perpetuates the narrative that the United States government continues to have plenary power over immigration regulation and the states have little to say about how the federal government executes its authority.[17]

United States, 130 U.S. 581, 609-11 (1889); Legomsky, *supra* note 10, at 255-57; David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 31-32 (2015).

[12] *Chae Chan Ping*, 130 U.S. at 603-10 (noting both sovereignty and supremacy as reasons the federal government has exclusive immigration authority).

[13] *See Arizona*, 567 U.S. at 395-97.

[14] *Id.* at 394 (citations omitted).

[15] ARIZ. REV. STAT. ANN. §11-1051 (2012); Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

[16] *Arizona*, 567 U.S. at 399, 416. The Court found that the provision allowing law enforcement to ask people about their immigration status was not violative on its face, although might be in practice. *Id.* at 411, 415-16.

[17] There is yet another shift in the plenary power doctrine — the decline of power shared between Congress and the executive branch — in cases in which the Supreme Court has declined to exercise its traditional deferential role in reviewing federal immigration action. The notion of immigration exceptionalism has eroded over the past twenty years, which means that the Court has begun to use the same measures of

The Court acknowledged Arizona's frustration with underenforcement, but emphasized the federal government's "inherent power as sovereign to control and conduct relations with foreign nations."[18] It concluded that the "federal power to determine immigration policy is well-settled,"[19] and that "foreign countries . . . must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States."[20]

Preemption has been a major driver in analyzing whether state action in the immigration arena is proper.[21] The Court analyzed Arizona's attempts at immigration enforcement through the preemption lens, holding that the state overstepped its authority. Although the states and the federal government share sovereignty, the federal government can trump any state law that works at cross-purposes to federal legislation, especially when Congress exercises plenary power.[22] Normative rationales such as uniformity, efficiency, and foreign affairs considerations punctuate the narrative that the federal government should drive immigration regulation.[23] The narrative perpetuates the perception that the federal government and the states operate in separate spheres and that immigration is one example of how these spheres really are separate. The *Arizona* case seemingly leaves little room for state involvement in immigration regulation and enforcement.

However, this traditional analysis fails to take account of the extent to which Congress has devolved authority to the states generally, but also in the realm of immigration regulation and enforcement. In

scrutiny to immigration decisions that it uses in general. The Court has begun to treat immigration law as unexceptional when applying doctrinal and statutory interpretation theories to agency action. *See, e.g.*, Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2203-08 (2014) (applying standard *Chevron* deference to agency interpretation of statute); Moncrieffe v. Holder, 569 U.S. 184, 200-02 (2013) (prohibiting a solution contrary to the INA's text); Judulang v. Holder, 565 U.S. 42, 52-53 (2011) (reviewing the Board of Immigration Appeals' policies under the same narrow standard applied to other agencies); *see also* Kevin R. Johnson, *Immigration in the Supreme Court 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 61-64 (2015) (arguing immigration unexceptionalism in the Supreme Court's treatment of immigration regulation).

[18] *Arizona*, 567 U.S. at 395, 397-98.

[19] *Id.* at 395.

[20] *Id.*

[21] *See* Johnson, *supra* note 17, at 395.

[22] *See Arizona*, 567 U.S. at 400 ("[C]ourts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress.") (internal quotation marks omitted).

[23] *See id.* at 395, 401-03, 406, 409-10.

Arizona, the Supreme Court rebuffed a state's attempt to assume federal authority. This is a very different matter than a state exploiting an express devolution of power by Congress. In contrast to states working within congressionally devolved authority, the state of Arizona exceeded its scope of authority by attempting to take over immigration functions that Congress expressly devolved to the executive branch. The distinction is important because it differentiates the implied authority that Arizona sought to appropriate from the actual authority that Congress has delegated to the states expressly in the immigration statute.

B. The "New Federalism" in Immigration Law

The plenary power doctrine and preemption analysis is no longer able to explain contemporary immigration law. The uniformity and efficiency rationales for exclusive federal authority in immigration, as in other areas of law, have eroded, resulting in Congress sharing authority with states. Adding complexity, the new federalism is reaching far beyond immigration law. Writing about the larger trend, scholars have begun to elaborate concepts and doctrines that can make sense of this emerging landscape. Heather Gerken, founder of the nationalist school of federalism, describes how states can wield their power in this new environment to influence, interpret, and implement federal law in a manner that augments state power.[24] Abbe Gluck, also a proponent of "nationalist federalism," explains that Congress legislates shared sovereignty either by giving states policy-making and implementation roles they would not have under a traditional federalism framework or by incorporating state law into federal legislation.[25] This form of federalism differs from the traditional

[24] *See, e.g.*, Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 44-73 (2010); Heather K. Gerken, *The Federalis(m) Society*, 36 HARV. J.L. & PUB. POL'Y 941, 944-45 (2013); *see also* Heather K. Gerken, *A New Progressive Federalism*, 24 DEM. J. 37 (2012), https://democracyjournal.org/magazine/24/a-new-progressive-federalism/ [hereinafter *A New Progressive Federalism*] (observing the extent to which state and local governments are becoming sites of political empowerment).

[25] *See* Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1996-97 (2014) [hereinafter *[National] Federalism*]. Her example of such shared sovereignty is the Affordable Care Act, through which Congress legislated great policy-making authority to the states. *See id.* at 2000-01. Gluck notes, "State implementation of federal statutory law and the incorporation of state law within federal statutory schemes are allocation-of-power strategies used by Congress to make federal legislation more effective; but they also restrain the breadth of national control and make legislation more politically palatable." *Id.* at 1997; *see also* Abbe R. Gluck,

framework because Congress initiates it and because Congress sets conditions for its operation.[26]

Nowhere is this form of federalism more evident than in immigration regulation, where, despite widespread perception that the plenary power doctrine renders federal authority exclusive, states define important terms for immigration law. The fact that Congress has devolved authority to the states to define the processes for licensing, marriage, the family, and criminal sanctions in the immigration statute demonstrates Congress's intent to share immigration authority. It also demonstrates how Congress seeks to manage shared authority at the boundaries of traditional state powers and to incentivize states to consider the project of immigration regulation a shared endeavor.

Immigration federalism scholars argue that states and the federal government share authority mainly in areas of enforcement.[27] The relevant issue in these discussions is the extent to which the states can encroach on federal authority to enforce immigration law. Immigration federalism scholars posit that the states have a role in immigration enforcement, whether formal or informal, and they debate how that role might be mediated.[28] Immigration federalism scholarship falls into one of several categories: identifying the trend toward state-federal cooperation and its effects; naming state-federal cooperation in immigration regulation as a new form of federalism; or calling for a re-examination of federal immigration regulation to

Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 YALE L.J. 534, 595-609 (2011) [hereinafter *Intrastatutory Federalism*] (arguing for statutory interpretation doctrines that protect the forms of federalism now arising out of federal statutes).

[26] *See Intrastatutory Federalism*, *supra* note 25, at 542-43.

[27] *See, e.g.*, Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, l06 MICH. L. REV. 567, 609-10, 617 (2008) [hereinafter *The Significance of the Local*] ("Recognizing immigration as a state and local concern would not displace federal authority to regulate in the area, nor would it be mutually exclusive with the recognition that the federal government should either occupy significant stretches of the immigration field or exert strong leadership in certain areas.").

[28] *See, e.g.*, PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM 3 (2015); Stella Burch Elias, *The Perils and Possibilities of Refugee Federalism*, 66 AM. U. L. REV. 353, 407-12 (2016) [hereinafter *Refugee Federalism*]; Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 703, 721-48 (2013) [hereinafter *The New Immigration Federalism*] (analyzing state and local immigration-related measures); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1364-65 (1999) (stating that states' roles in immigration "should [be] limited"); *The Significance of the Local*, *supra* note 27, at 609-10.

examine whether its foundations are still relevant today. These works demonstrate that states have larger degrees of control over immigration decisions than the plenary power narrative might let on.

Jennifer Chacón's historical account of the ways in which Congress expanded the role of the states in immigration enforcement is useful for its demonstration of the ways in which states have used the expansion to drive immigrants away.[29] She notes:

> First, with the passage of the Anti-Terrorism and Effective Death Penalty Act of 1998 (AEDPA), Congress authorized state officers to arrest and detain noncitizens [with felony convictions]. Second, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) added a provision to the immigration law allowing the Attorney General to empower local officials to enforce civil immigration laws in instances involving "an actual or imminent mass influx of aliens . . . ." Third, IIRIRA added Section 287(g) to the Immigration and Nationality Act (INA), which allowed the Attorney General to delegate immigration enforcement authority to state and local police pursuant to a formal agreement between the state or local agency and the Department of Justice. Fourth, Congress prohibited states and localities from barring their employees from reporting immigration status information to the federal government and required the federal government to respond to sub-federal agency inquiries concerning citizenship or immigration status "for any purpose authorized by law."[30]

Scholars like Professor Chacón, who focus on the enforcement aspect of immigration federalism, continue to argue for the primacy of federal exclusivity principles. States, they argue, involve themselves in immigration regulation to influence, even if indirectly, federal policy to the detriment of the normative values that uphold federal exclusivity.[31] Immigration federalism scholars contribute to the field by developing theories for mediating state and federal immigration authority, describing the nature of state-federal immigration enforcement cooperation, or pointing out the weaknesses in theories that envision a clear separation between federal and state authority in federalism literature. Cristina Rodríguez theorizes how the federal

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[29] *See Immigration Federalism*, *supra* note 6 at 598-606.

[30] *Id.* at 599.

[31] *See, e.g.*, *The Role of States*, *supra* note 8, at 199.

government might use federalism as a way to manage its immigration regulation goals through a diversity of methods and objectives.[32] She sees her role in the project of developing the narrative of immigration federalism as an attempt to understand the motivations of state and local governments interested in immigration regulation while at the same time "challenging broad conceptual assumptions of federal exclusivity with an appreciation of how deeply integrated the regulatory regime has become across levels of government."[33]

While early immigration federalism scholars focused on normative reasons for state involvement in immigration enforcement,[34] Pratheepan Gulasekaram and Karthick Ramakrishnan have debunked some of those rationales. Gulasekaram and Ramakrishnan embarked on an extensive and comprehensive review of sub-federal immigration initiatives, concluding that partisanship and politics played a much larger role in state efforts to enter the immigration field than normative arguments such as efficiency or experimentation.[35] They argue that "the current immigration federalism is less about the virtues of decentralized and region-specific lawmaking,"[36] as the previous generation of legal scholars suggested, and more about "providing

[32] Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2100-01 (2014) [hereinafter *Negotiating Conflict*].

[33] *Id.* at 2099-2100; *see also The Significance of the Local*, *supra* note 27, at 567, 616-18 (arguing that the debates over which level of government best protects immigrants ignore the reality of state and local involvement in immigration regulation, and conceptualizing a theory that describes this reality).

[34] *See, e.g.*, Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 84-91 (2007) (arguing states should be able to enact laws that mirror federal objectives); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1635-36 (1997) [hereinafter *Learning to Live*] (articulating a "steam-valve" theory for state immigration regulation, by which states could more easily impose restrictive immigration laws without affecting states that desire more progressive immigration laws); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 122-23 (1994) (arguing that because the states are involved in foreign relations, they should be more involved in immigration regulation); *cf.* Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 36-54 (2007) (comparing contemporary state and local laws to racially discriminatory laws in history); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 553-54, 558 (2001) (arguing that devolution to the states would result in equal protection violations against immigrants).

[35] GULASEKARAM & RAMAKRISHNAN, *supra* note 28, at 154.

[36] *Id.*

alternate forums for large-scale immigration policy debates,"[37] especially at a time when Congress is divided on the direction of immigration reform. Their research debunks the various rationales for a federalist system. They found that the main predictor of state and local involvement in immigration-related matters was whether conditions were politically ripe for such policy initiatives.[38] They posit that grassroots, on-the-ground partisan-based activity drives sub-federal immigration policies, contrary to the traditional narrative that state and federal policy makers occupy separate spheres of authority.[39] Private actors, moreover, including individuals and non-governmental organizations, push measures in politically receptive jurisdictions.[40]

Stella Burch Elias argues that immigration federalism should "encompass all multi-governmental rulemaking pertaining to immigrants and immigration-including rulemaking intended to foster immigrant inclusion-undertaken by various government entities acting in cooperation with or in opposition to one another."[41] In this sense, her scholarship gives normative weight to a call for states to be deliberate about their intentions to integrate or drive away immigrants. The statute actually gives states the space for such deliberation. Too often, however, states fail to act with deliberation in the spaces that Congress has offered.

All of this scholarship arises in the context of general legal scholarship examining the extent to which Congress has delegated its federal authority to states in an era of calls for states' rights.[42] In addition to naming the trend of state-federal cooperation through federal statutes, as Abbe Gluck has done,[43] these scholars are interested in how the emerging picture of statutory federalism fits within jurisprudential doctrines that fail to recognize the existence of this form of shared authority. Heather Gerken goes even further, calling for states to use their power to pursue the progressive goals their constituencies demand.[44] Cristina Rodríguez argues that this form of federalism is both a reality and under negotiation at all times. She argues that "having many institutions with lawmaking power

[37] *Id.*

[38] *See id.* at 158.

[39] *See id.* at 160.

[40] *See id.* at 161.

[41] *The New Immigration Federalism*, *supra* note 28, at 706; *cf. Refugee Federalism*, *supra* note 28, at 358-59 (defining refugee federalism to include state law making).

[42] *See, e.g.*, *[National] Federalism*, *supra* note 25, at 1997.

[43] *Intrastatutory Federalism*, *supra* note 25, at 538.

[44] *A New Progressive Federalism*, *supra* note 24.

enables overlapping political communities to work toward national integration, while preserving governing spaces for meaningful disagreement when consensus fractures or proves elusive."[45] Congressional devolution to the states in immigration enforcement, especially in areas of traditional state police power, in areas Congress has no interest in regulating, and in areas that Congress seeks to incentivize state action leaves open the possibility of state entrepreneurial approaches to attract the desired immigrant. The next section will discuss some of these in the areas of employment, family, and criminal law.

II. RECOGNIZING AREAS OF STATE AUTHORITY WITHIN THE IMMIGRATION STATUTE

Since the Immigration and Nationality Act was enacted in 1952, Congress has incorporated state decision-making throughout the immigration statute.[46] The trend toward shared authority has only increased since the 1980s. In 1980, Congress enacted legislation to incentivize state participation in refugee integration.[47] The mechanism for distributing refugees among the states relies heavily on state input and coordination.[48] In 1986, Congress introduced employer sanctions into the statute, opening up the possibility for cooperation between states and the federal government over employment regulation, traditionally a state power.[49] After passage of the Immigration Reform and Control Act ("IRCA"), Congress allowed states to certify the immigration status of immigrants referred to employers through state employment agencies.[50] In 1996, Congress added provisions expanding crime-based removal categories and decreased the minimum term of imprisonment to one year from five for aggravated

[45] *Negotiating Conflict*, *supra* note 32, at 2094.

[46] For example, Congress allowed the states to develop naturalization education programs in their schools, designed to support the path toward citizenship for immigrants. INA § 332(b); 8 U.S.C. § 1443(b). States, have in turn, passed laws to implement citizenship education and other immigrant assistance programs. *See, e.g.*, CAL. WELF. & INST. CODE §§ 13303-06 (2018).

[47] *See* Act of Mar. 17, 1980, Pub. L. No. 96-212, § 412(a), 94 Stat. 111-12.

[48] *See* INA § 412, 8 U.S.C. § 1522 (2018).

[49] *See* Immigration Reform Control Act of 1986, Pub. L. No. 99-603, § 101(a), 100 Stat. 3360.

[50] INA § 274A(a)(5), 8 U.S.C. § 1324a(a)(5) (2018) (specifying that employers who cooperated with state employment agencies have a safe harbor against federal employer sanctions). IRCA also created a space for the states to keep their sanctioning power in licensing decisions related to immigration regulation. *Id.* § 274A(h)(2).

felonies.[51] The provision left open the possibility for states to change their own definitions of enumerated crimes to have maximum terms less than the minimum terms in the statute. Congress also created a program for state-federal cooperation in immigration enforcement, which, while highly regulated, allows states and localities to make decisions about immigration enforcement.[52] The federal government's 287(g) program[53] incentivized local authorities to make explicit decisions about their involvement in what has traditionally been considered an exclusively federal power.

The forms of congressionally-mandated state involvement in immigration regulation fall into two categories. Congressional devolution occurs (1) because Congress is acting at the intersection of immigration regulation and traditional state powers, or (2) because Congress seeks to incentivize state participation.

A. Congress Sharing Authority at the Intersection of Immigration Regulation and State Police Power

Traditionally, states exercise police power over health, safety, morals, and general welfare.[54] These areas include regulation over family relations and criminal law.[55] As immigration regulation increasingly touches on each of these areas, the boundaries between federal and state authority become muddled. This section will discuss congressionally delegated authority to the states at the intersection of employment, family, and criminal law.

1. Shared Authority over Employment-Based Immigration Categories

There are several areas in the INA that rely on state judgments over the admission of legal immigrants and over their employment. Because these state judgments vary, there may be fifty different outcomes on whether an applicant may be granted an employment-based visa.

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[51] *See* INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (2018).

[52] *See* INA § 287(g).

[53] *Id.*

[54] *See, e.g.*, Barnes v. Glen Theatre, 501 U.S. 560, 567-71 (1991); Jacobson v. Massachusetts, 197 U.S. 11, 24-27 (1905).

[55] See e.g., United States v. Morrison, 529 U.S. 598, 617-18 (2000); United States v. Lopez, 514 U.S. 549, 564 (1995).

a. The Power to Define Licensing Requirements

Arguably, the states' most influential role in the development of immigration regulation lies in state power over licensing decisions that may affect immigration law. In several places throughout the immigration statute, both in the regulation of employment-based categories of immigration and in the regulation of unauthorized immigration, Congress steers clear of setting standards for licensing requirements.[56] This deference to the states is likely in recognition of the states' traditional, historical role in establishing the rules for doing business within their boundaries. While Congress might concern itself with the immigration consequences of the employment relationship — on issues such as the number and categories of employment-based visas available, the hiring of undocumented workers, and the protection of certain workers from discrimination — it has declined from exercising any authority over the conditions under which professionals and business can operate in a state. The states, therefore, have tremendous amounts of leeway in setting the parameters for the licensing of professionals and businesses and for their continued operation. This means licensing issues belong to the states even if they have immigration consequences.

Legal scholar Michael Olivas has tracked state rules for issuing licenses and has found a dizzying array of rules regarding the immigration status of licensees. For professional licenses, state requirements regarding immigration status range from citizenship to a showing of social security numbers to no requirements, for example.[57] The key is that the statute allows this dizzying array of requirements, and it seems that Congress intended this form of state autonomy.

b. State Licensing Requirements and the Professions

With respect to specific occupations, the immigration statute provides states complete autonomy to set licensing requirements. For example, INA section 212(m) allows those seeking to enter as nurses to qualify for admission if they meet the state licensing requirements of the state they seek to enter.[58] The statute does not place any

[56] *See, e.g.*, INA § 212(m), 8 U.S.C. § 1182(m) (2018) (providing that Congress defers to state decision on licensing nurses); *id.* § 214 (i)(2) (2018) (state licensure required for some forms of H1B status).

[57] *E.g.*, Michael A. Olivas, *Within You Without You: Undocumented Lawyers, DACA, and Occupational Licensing*, 52 VAL. U. L. REV. 65 app. I at 108-53 (2017) [hereinafter *Within You*].

[58] INA § 212(m).

limitations on states with respect to their licensing requirements.[59] The result is that states can signal from their licensing laws the type of immigrant they seek. They are free to make their licensing rules as permissive or as restrictive as they see fit for their needs. The licensing requirements for nurses range from no requirements to social security numbers to citizenship or lawful permanent resident status.[60]

Other parts of the statute invoke state licensing powers in final decisions about the admissibility of certain workers. Section 214(i)(2) of the INA, for example, regulates the admission of H1B, or professional workers. The H1B category includes those in specialty occupations requiring "theoretical and practical application of a body of highly specialized knowledge, and . . . a bachelor's or higher degree."[61] The statute accepts state licensure as proof that an applicant qualifies for H1B status.[62] The statute defers to state licensing requirements to determine whether an applicant is licensed.[63] As a result, states can and have set up alternative licensing schemes to integrate desired immigrants with foreign degrees into their economies. California, for example, has established a pilot program[64] to attract Spanish-speaking noncitizens with foreign medical degrees who can help service the growing Latino population throughout the state while at the same time addressing the shortage of Latino doctors in the state. The goal of the program is to prepare foreign doctors for residency programs and medical licensure. The graduates of the pilot program spend two or more years in underserved communities throughout the state.[65] California has the ability to offer such a program because the immigration statute allows the state to establish its licensure requirements in a manner that meets the needs of the state.

c. Licensing and Undocumented Workers

In addition to creating the rules for licensing, states also have authority over the level of sanction they may impose on licensees that hire undocumented workers. When Congress enacted IRCA and its

[59] *Id.*

[60] *Within You*, *supra* note 57, at app. I at 120-28.

[61] INA § 214(i)(1), 8 U.S.C. § 1184(i)(1) (2018).

[62] *Id.* § 214(i)(2)(a).

[63] *See id.*

[64] *See* CAL. BUS. & PROF. CODE § 2066.5 (2018).

[65] *A Contractual Commitment to Serve*, UCLA HEALTH, https://www.uclahealth.org/family-medicine/img-program/a-contractual-commitment-to-serve (last visited July 10, 2018).

employer sanctions provisions, it left to the states the regulation of licenses with respect to the employment of unauthorized noncitizens, while maintaining federal authority over sanctions for the unlawful employment of unauthorized noncitizens. The relevant provision states "the [employer sanctions] provisions . . . preempt 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."[66]

This provision allows the states to determine how much or how little to sanction businesses, professions, or other licensed entities for hiring undocumented workers. This *congressional* limitation on federal authority could be the tool for either expansive or restrictive state activity. Arizona tested its state authority when it enacted a law punishing businesses with the loss of their licenses for knowingly hiring undocumented workers. The Supreme Court upheld Arizona's form of licensing regulation in *Chamber of Commerce of U.S. v. Whiting*.[67]

In *Whiting*, the Arizona Chamber of Commerce challenged the Legal Arizona Workers Act provision that suspended or revoked the business licenses of state employers that knowingly or intentionally employed unauthorized workers.[68] The INA contains employer sanctions provisions that govern the regulation, oversight, and sanctioning of employers who hire undocumented workers. The Arizona Chamber of Commerce claimed that the INA's employer sanctions provisions preempted the Legal Arizona Workers Act provisions, either expressly or because Congress occupied the field. The Court held that the INA did not expressly preempt the provision because Congress explicitly included a savings clause exempting state licensing laws from preemption.[69] Nor did the employer sanctions provisions occupy the field of employer sanctions, according to the Court. Justice Roberts, writing for the Court, identified the shared allocation of power between the state and federal governments in this particular sub-arena at the intersection of immigration and business licensing:

> As with any piece of legislation, Congress did indeed seek to strike a balance among a variety of interests when it enacted

[66] INA § 274(h)(2) (2018) (emphasis added).

[67] Chamber of Commerce of U.S. v. Whiting, 563 U.S. 582, 587 (2011).

[68] *Id.* at 587, 593.

[69] The savings clause is found in the preemption section of the Act. INA § 274(h)(2).

> IRCA. Part of that balance, however, involved allocating authority between the Federal Government and the States. The principle that Congress adopted in doing so was not that the Federal Government can impose large sanctions, and the States only small ones. IRCA instead preserved state authority over a particular category of sanctions — those imposed "through licensing and similar laws."[70]

Importantly, *Whiting* is an example of the forms of shared governance that Congress has contemplated in the statute. Here, Congress intended to shape the contours of its power over immigration by explicitly excluding areas traditionally left to the states, namely licensing decisions.

Other states, however, have chosen not to use their sanctioning power to punish licensees that knowingly hire undocumented workers. The result is, again, an array of jurisdictions that vary in their treatment of undocumented workers at the intersection of immigration law and licensing regimes.

Because the provisions governing employment-based visas leave licensing requirements to the states, they have great latitude in determining whether immigration status is necessary for licensure.[71] Corollary provisions in the immigration statute govern state authority to take affirmative steps to provide state or local benefits to undocumented noncitizens.[72] The provision prohibiting undocumented noncitizens from receiving federal benefits contains a savings clause for state decisions, declaring that:

> A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible . . . only through enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.[73]

The term "State or local benefit" includes professional and commercial licenses provided by a state agency or through state-appropriated funds.[74] Because the federal provision leaves it up to

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[70] *Whiting*, 563 U.S. at 606-07.

[71] *See, e.g.*, INA § 214(i)(2)(A) (2018).

[72] *See, e.g.*, 8 U.S.C. § 1621(d) (2018).

[73] *Id.*

[74] *Id.* § 1621(c)(1). The term "State or local benefit" also includes "any grant, contract, loan . . . retirement, welfare, health, disability, . . . housing, postsecondary education, food assistance, unemployment benefit" provided by a state or local government. *Id.*

states to determine eligibility for licensure, states diverge in their approaches to such requirements. With respect to immigration status, professional and commercial licensing statutes run the gamut from requiring citizenship[75] to offering professional licenses without regard to immigration status.[76] Take California's recent efforts to offer law licenses without regard to immigration status to attorneys who pass the California bar.[77] In 2014, after an undocumented law graduate successfully petitioned the California State Bar for admission to the Bar after first being rejected because of his status,[78] the state legislature passed a law authorizing the state supreme court to grant law licenses regardless of immigration status.[79]

d. The States' Role in Labor Certification of Employment-Based Immigration

When an employer seeks to sponsor a noncitizen for an employment-based visa, the Department of Labor ("DOL") must certify that there are no American workers willing, able, and available to fill the position and that the proffered wage "does not adversely affect the wages and working conditions" of American workers.[80] This requirement has existed in the statute since the 1965 Immigration and Nationality Act, at the behest of local groups, unions, and states seeking to protect jobs for Americans.[81]

[75] *See Within You*, *supra* note 57, at 69. The Supreme Court has struck down several state licensing statutes requiring citizenship for professional licenses. *See e.g.*, Bernal v. Fainter, 467 U.S. 216, 218-19 (1984) (striking down a Texas notaries public statute); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 576, 579, 606 (1976) (striking down a Puerto Rico civil engineer licensing statute); In Re Griffiths, 413 U.S. 717, 718 (1973) (striking down a Connecticut statute requiring citizenship for law practice). *See generally* Jennesa Calvo-Friedman, Note, *The Uncertain Terrain of State Occupational Licensing Laws for Noncitizens: A Preemption Analysis*, 102 GEO. L.J. 1597 (2014).

[76] *Within You*, *supra* note 57, at app. I at 108-53.

[77] CAL. BUS. & PROF. CODE § 6064(b) (2014).

[78] *In re* Garcia, 315 P.3d 117, 120-21, 123 (Cal. 2014).

[79] BUS. & PROF. § 6064(b).

[80] INA § 212(a)(5)(A)(i), 8 U.S.C. § 1182(a)(5)(A)(i) (2018).

[81] *See* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION AND THE I.N.S. 47-48 (2010). The requirement existed before 1965, but the DOL maintained the onus and the responsibility to declare the availability of American workers and to deny the issuance of employment-based visas. Employers could sponsor noncitizens for an employment-based visa unless the DOL declared that American workers were available. In practice, the DOL rarely used its authority. After 1965, to insert the DOL more directly in the decisions about whether to grant employment-based visas, Congress required the DOL to affirmatively issue a labor

The DOL's labor certifications are based on analyses that include the employer documentation of search activities and prevailing wage determinations.[82] The DOL must determine that "there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa"[83] and "at the place where the alien is to perform such skilled or unskilled labor."[84] The DOL must also determine that "the employment of such alien will not adversely affect the wages and working conditions"[85] of American workers in similarly situated jobs.

The DOL has issued regulations directing employers to demonstrate that a proffered wage is at or above the prevailing wage in the relevant geographic location. State minimum wages and state prevailing wage determinations are relevant proof of the prevailing wage in an area. It is state calculations, therefore, that influence the DOL's decisions about whether a proffered wage is sufficient to not adversely affect wages and working conditions of local workers. Because the DOL's determination includes state workforce agency information, state determinations have an effect on final DOL decisions.[86]

e. State Laws Regulating the Treatment of Certain Guest Workers

The immigration statute recognizes that states historically play a role in the regulation of the workplace as well as in the regulation of contracts. Congress was careful to avoid encroaching on these traditional state powers. With respect to the federal guest worker program, the statute prohibits employers from penalizing certain guest workers who cease employment.[87] Because states govern the rules of the employment relationship, however, Congress ensured through a statutory provision that each state could determine whether a fee to end an H1B contract is considered a penalty or liquidated damages.

certification before the immigration agency could grant an employment-based visa. *Id.* at 123.

[82] Ben A. Rissing & Emilio J. Castilla, *Testing Attestations: U.S. Employment and Immigrant Work Authorizations,* 69 INDUS. & LAB. REL. REV. 1081, 1083, 1088-89 (2016) [hereinafter *Testing Attestations*] (noting the unintended consequences of attestation-based regulatory models of regulation in immigrant worker programs); Ben A. Rissing & Emilio J. Castilla, *House of Green Cards: Statistical or Preference-Based Inequality in the Employment of Foreign Nationals*, 79 AM. SOC. REV. 1226, 1235 (2014).

[83] INA § 212(a)(5)(A)(i), 8 U.S.C. § 1182(a)(5)(A)(i)(I) (2018).

[84] *Id.*

[85] *Id.* § 212(a)(5)(A)(i)(II).

[86] *See Testing Attestations*, *supra* note 82, at 1089.

[87] *See* INA § 212 (n)(2)(C)(vi)(I); *id.* § 1182(t)(3)(C)(vi)(I).

The states, therefore, exert great discretion in influencing the type of leverage certain guest workers wield with their employers. If a state agrees that a fee to end the employment relationship is a penalty because no other employee must make such a payment, the employer will violate the federal statute. If a state decides that the fee to end the relationship is akin to liquidated damages in a general contract, no federal violation will be deemed to have occurred. The states, therefore, control the nature of the employment relationship as well as the extent to which certain guest workers will be protected within their boundaries.

f. State Decisions to Investigate and Prosecute Workplace Crimes and Human Trafficking

In the early 2000s, Congress, at the behest of state and local law enforcement agencies, enacted provisions in the immigration statute protecting noncitizens who cooperated in the investigation or prosecution of a serious crime or of severe human trafficking.[88] The provision allows cooperating crime victims to apply for nonimmigrant status,[89] otherwise known as a U visa, and eventually, lawful permanent residence. The federal statute involves the states in the process of granting these visas by requiring that crime victims who cooperate with state and local authorities obtain certification from the relevant agency of their cooperation.[90] The visa process cannot start at the federal level until the crime victim receives state/local certification.[91] States have full discretion in making such determinations.[92]

Legal scholars have critiqued the structure of the provision because it leaves too much discretion in the hands of the state or local authority.[93] Such latitude means that a state or local authority could

[88] *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1468.

[89] INA § 101(a)(15)(U)(i), 8 U.S.C. § 1101(a)(15)(U)(i) (2018).

[90] *See* 8 C.F.R. § 214.14(b)(2)-(3), (c)(2)(i) (2018).

[91] *See id.* § 214.14(c)(2)(i).

[92] *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., OMB NO. 1615-0104, INSTRUCTIONS FOR SUPPLEMENT B, U NONIMMIGRANT STATUS CERTIFICATION 1-3 (Feb. 7, 2017), https://www.uscis.gov/sites/default/files/files/form/i-918supbinstr.pdf (describing a state agency responsible for the investigation or prosecution of a crime as a qualifying agency, and requiring the agency to submit a certification form as a necessary part of the U visa application process).

[93] *E.g.*, Rachel Gonzalez Settlage, *Uniquely Unhelpful: The U Visa's Disparate Treatment of Immigrant Victims of Domestic Violence*, 68 RUTGERS U. L. REV. 1747, 1772 (2016).

essentially deny a visa to a crime victim who would otherwise qualify for one. Some state and local authorities have used their discretion to deny certification as a matter of policy.[94] On the other hand, state and local law enforcement agencies have full authority to certify that victims of serious crimes[95] have cooperated in the investigation or prosecution of the crime as a first step in securing a visa. Certification, therefore, becomes a mechanism available to states that desire to protect the immigrants already within their borders. That is not to say that the states can require the federal government to issue visas. Instead, the states can use this mechanism to signal to the federal government their desire to incorporate their noncitizen crime victims. This is especially important in the workplace context, where the state can signal the value of immigrant workers coming forward to vindicate and enforce employment laws meant to protect all workers.

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The provisions in the immigration statute that govern regulation of employment-based visas as well as worksite immigration enforcement recognize that states play an important role in the implementation of the federal immigration scheme. Importantly, Congress has ceded authority that historically belonged to it under plenary power principles. Instead of completely usurping the power that the courts ceded to it, Congress has worked around the edges of employment and licensing regulation that traditionally belong to the states to create a dual sovereignty regime at the intersection of employment and immigration law.

The states have an opportunity at this intersection. Some states have already seized on it to enact restrictive and punitive laws aimed at making immigrants feel unwelcome, or worse, incentivizing them to self-deport.[96] But states can also use their congressionally-delegated power at the intersections to attract the type of immigrants most seek to integrate. It is this dual sovereignty that reflects the true, on-the-ground reality of immigration regulation today.

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[94] JEAN ABREU ET AL., THE POLITICAL GEOGRAPHY OF THE U VISA: ELIGIBILITY AS A MATTER OF LOCALE 3, http://www.law.unc.edu/documents/clinicalprograms/uvisa/fullreport.pdf (last visited Sept. 4, 2018).

[95] The statute enumerates a list of qualifying crimes for U visa eligibility. INA § 101(a)(15)(U)(i)(I), (U)(iii), 8 U.S.C. § 1101(a)(15)(U)(i)(I), (U)(iii) (2018).

[96] *See* Leticia M. Saucedo, *The Making of the "Wrongfully" Documented Worker*, 93 N.C. L. REV. 1505, 1529-40 (2015) (summarizing state laws criminalizing the use of false social security numbers for employment).

2. State Authority over Defining the Family and Its Composition

While it is indisputable that "federal immigration law has a lot to say about marriage,"[97] and the family, the states remain important players within the congressionally-mandated rules covering family-based immigration, as well as in determining immigration outcomes. State authority to define terms such as "child," "legitimation," "adoption," and "marriage," as well as state determinations in child neglect and abandonment cases, affect agency decisions in the immigration realm.[98] It turns out that Congress constructed the statute to allow state family law to drive many immigration law decisions about the family. Legal scholar Kerri Abrams argues that by stepping into a field traditionally held by the states, Congress may be encroaching on traditional state powers.[99] I argue, instead, the congressional invitation for states to participate in ultimate decisions that have immigration consequences exemplifies a form of dual sovereignty at the edges of immigration and family laws. In other words, while Congress has broad power in immigration regulation, it has ceded some of that power back to the states, so that their values and priorities get reflected in what would otherwise be a broad federal mandate. The following examples demonstrate how Congress has allowed the states to operate at the intersections of immigration and family law.

a. Citizenship, Immigration Preferences, and Children

The immigration statute defines a "child" for citizenship and immigration preference purposes as including legitimated and adopted children.[100] State processes, in turn, determine how children are legitimated or adopted within their jurisdictions.

The INA recognizes that children born in and outside a marriage can acquire the U.S. citizenship of one or both parents.[101] If a U.S. citizen father wants to pass his citizenship to a child born out of wedlock, the statute requires a showing that the child has been

[97] *Regulation of Marriage*, *supra* note 4, at 1629.

[98] *See, e.g.*, INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2018) (requiring a state court to declare a child dependent on a juvenile court to designate the child as a special immigrant juvenile eligible for immigration benefits); *id.* § 101(b)(1)(C) (referring to legitimation laws "of the child's residence" to define "legitimation").

[99] *Regulation of Marriage*, *supra* note 4, at 1632.

[100] INA § 101 (b)(1)(C), (b)(1)(E), (c).

[101] INA § 309, 8 U.S.C. § 1409 (2018) (applying INA § 301(c)-(e), (g) to children born outside marriage); *see id.* § 301.

legitimated or that the father acknowledges paternity. When Congress first passed the provision in 1952, it deferred to state requirements for legitimation before the child could acquire citizenship.[102] Although Congress amended the provision to add paternity acknowledgement or paternity adjudication as methods for proving the filial bond, it maintained legitimation — as well as deference to the different state processes for legitimation and paternity adjudication — as acceptable methods of proof.

Similarly, congressional references to adoption throughout the statute signify deference to state-enacted processes for adoption. Congress did not define the term "adoption" in the immigration statute, leaving it to the states to determine the predicate conditions for effecting adoptions before they have any meaning within the federal scheme.[103]

b. The Definition of Marriage

Marriage determines the rights of spouses and children in the immigration statute. For example, the rights of children depend, in part, on the marriage status of their parents.[104] The states, in turn, define the requirements for marriage.[105] Although the immigration statute does not define the term, the Board of Immigration Appeals ("BIA") has repeatedly acknowledged that the validity of a marriage is determined by the law of the state where the marriage took place.[106] This is especially true after the Supreme Court overturned congressional attempts to create a federal definition of marriage.[107]

[102] Immigration and Nationality Act, Pub. L. No. 82-414, § 309, 66 Stat. 163, 238-39 (1952); *see also 8 FAM 301.7-4(E)(3) Birth Out of Wedlock to a U.S. Citizen Parent and an Alien Parent*, U.S. DEP'T OF STATE (2018), https://fam.state.gov/fam/08fam/08fam030107.html#M301_7_4_E_3 (comparing requirements for derivative citizenship in "new" and "old" section 309(a) of the immigration statute, and noting that the "old" section provided only for legitimation as a means of establishing a legal relationship between parent and nonmarital child).

[103] *See, e.g.*, INA § 101(b)(1)(E); 8 U.S.C. § 1101(b)(1)(E) (2018).

[104] *Id.* §§ 101(b)(1)(A), (D), 301, 309.

[105] *See* U.S. CONST. amend. X.

[106] *See, e.g.*, Lovo-Lara, 23 I. & N. Dec. 746, 753 (BIA 2005) ("We have long held that the validity of a marriage is determined by the law of the State where the marriage was celebrated."); Da Silva, 15 I. & N. Dec. 778, 779 (BIA 1976) ("The legal validity of a marriage is generally determined by the law of the place of the celebration."). *But see* H—, 9 I. & N. Dec. 640, 642 (BIA 1962) (citing the general rule that a marriage is valid if legal in the place of celebration, unless it violates public policy, such as with a polygamous marriage).

[107] United States v. Windsor, 570 U.S. 744, 751, 775 (2013).

The Court held in *United States v. Windsor* that the Defense of Marriage Act ("DOMA") violated the Due Process Clause of the Fifth Amendment[108] when it defined "marriage" under federal law as "a legal union between one man and one woman as husband and wife."[109] The Supreme Court in *Windsor* recognized the states' authority to define and regulate marriage and family relations. The Court observed, however, that, "it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges."[110] At the intersection of family and immigration law, for example, "Congress determined that marriages 'entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant' will not qualify the noncitizen for that status, even if the noncitizen's marriage is valid and proper for state-law purposes."[111] In other ways, Congress regulates the authenticity of marriage beyond state-imposed strictures.[112]

Congress monitors certain marriages, imposes restrictions on courtship, and interrogates the termination of marriage in the course of exercising its immigration authority.[113] This recognized power of Congress to exercise full authority over definitions relevant to family relations makes it all the more important to acknowledge whenever Congress cedes that authority back to the states. Congress has done

[108] *Id.* at 774.

[109] 1 U.S.C. § 7 (2018), *invalidated by Windsor*, 570 U.S. at 774-75.

[110] *Windsor*, 570 U.S. at 764.

[111] *Id.* at 765 (citing 8 U.S.C. § 1186a(b)(1) (2006 ed. and Supp. V)). The Court noted this as an example to "establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy." *Id.*

[112] The INA requires petitioners to prove the bona fides of a marriage to prevent immigration fraud, for example. INA § 204(a)(2)(i), 8 U.S.C. § 1154(a)(2)(i) (2018) (placing five year limitation on spousal petitions for spousal beneficiaries); *id.* § 1154(c) (prohibiting approval of marriage petition if beneficiary previously committed marriage fraud); *id.* § 1154(g) (restricting marriage petitions while in removal proceedings).

[113] *See generally Regulation of Marriage*, *supra* note 4; Abrams & Piacenti, *supra* note 4 (noting how factors such as marriage and biology impact immigrants and their families). The INA grants lawful permanent residence conditionally to noncitizen spouses who enter into marriage within two years of admission. INA § 216(h)(1)(B), 8 U.S.C. § 1186a(h)(1)(B) (2018). The immigration agency has the right to investigate the bona fides of a marriage during the two years of conditional residence. *See id.* § 216(b)(1). The agency can grant waivers for marriages that have ended before the conditional residence period. *Id.* § 216(c)(4). The statute also regulates the entry of fiancés and requires they marry within ninety days of entry. *Id.* § 214(d)(1). If certain marriages terminate, the statute prohibits the noncitizen from seeking a spousal visa for another noncitizen for five years. *Id.* § 204(a)(2).

just that in several areas. As a result, state-level norms and values have entered the implementation of family-based immigration law.

c. Special Immigrant Juveniles

Congress added provisions in the immigration statute for protection of children who had been abused, neglected, or abandoned by their parents. Section 101(a)(27)(J) of the statute defines a special immigrant juvenile by referring to state definitions of dependency and juvenile status.[114] While some states might define a child under twenty-one as dependent on the court, others cut off the date of dependency at eighteen.[115] These state determinations, therefore, make a difference in whether a child can ultimately obtain immigration benefits. The statute provides that a special immigrant juvenile is one who "has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State."[116] The state agency or court must determine that "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law."[117]

Just as with U visas, Congress has deferred to state action to decide on a predicate condition before the federal government can act. Here, the state must determine whether a child was abused, neglected, or abandoned before the feds can make decisions about that child's immigration status. The immigration agency will not act on a special immigrant juvenile application until the state has made a decision about reunification in a juvenile or child welfare court.[118] States, therefore, have great power and influence in the ways that they process cases for children who might be eligible for special immigrant juvenile status. States can set up roadblocks to status just by making it more difficult or time-consuming to navigate state child dependency or juvenile court hearings. On the other hand, states can streamline

[114] INA § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J).

[115] Laila L. Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266, 321-24 (2014) (describing how state family laws and child welfare policies affect access decisions about special immigrant juvenile status).

[116] INA § 101(a)(27)(J)(i).

[117] *Id.*

[118] *See id.* § 101(a)(27)(J); 8 C.F.R. § 204.11(a) ("Eligible for long-term foster care means that a determination has been made by the juvenile court that family reunification is no longer a viable option.").

processes for children who they determine might ultimately become special immigrant juveniles.

3. State Authority over Criminal Sanctions

The immigration statute imposes sanctions, including deportation and exclusion, on noncitizens convicted of crimes, including state convictions.[119] While Congress determines the immigration consequences of state convictions, the states have the authority to determine sanctions for criminal violations. Congress also leaves to the states the authority to decide whether certain violations are convictions or infractions, which have different consequences under immigration law.[120]

Several scholars have addressed how states use their police powers to enact and enforce criminal law to the detriment of immigrants.[121] More importantly, however, states have the authority to define their criminal sanctions in ways that ameliorate the negative effects of restrictive federal sanctions.[122] Two examples include redefining the maximum possible sentence for a misdemeanor and defining offenses as infractions rather than convictions, both of which have the effect of helping immigrants avoid the immigration consequences of convictions.

a. Redefining the Maximum Penalty for Misdemeanors in California

Recently, California enacted a law making the maximum penalty for all state misdemeanors 364 days.[123] The law helps immigrants who are convicted of minor offenses avoid deportation. It also helps noncitizens who seek relief from removal, and it shields immigrants from immigration consequences for crimes that require a conviction of one year or more.

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[119] *See* INA § 212(a)(2)(i), 8 U.S.C. § § 1182(a)(2)(i) (2018); 8 U.S.C. § 1227(a)(2) (2018).

[120] *See id.* § 1101(a)(48).

[121] *E.g.*, Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1616-18 (2010); HANNAH GLADSTEIN ET AL., BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002-2004, at 29 (2005), http://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.pdf.

[122] *See, e.g.*, Eslamizar, 23 I. & N. Dec. 684, 687-88 (BIA 2004) (describing Oregon's criminal statute as distinguishing between offenses that are crimes and violations).

[123] CAL. PENAL CODE § 18.5(a) (2018).

First, noncitizens convicted of a crime involving moral turpitude with a potential sentence of one year or more risk deportation if the crime is committed within five years of admission.[124] By limiting potential sentences for misdemeanors to 364 days, the state has removed misdemeanors from the realm of offenses that can result in deportation. Second, noncitizens face a bar to relief from removal if they commit a crime of moral turpitude with a potential sentence of one year or more.[125] California's new law ensures that a misdemeanor conviction will not bar relief, because a misdemeanor now carries a maximum possible sentence of 364 days. Third, under the INA, certain offenses — including crimes of violence, theft, receipt of stolen property, obstruction of justice, forgery, and RICO offenses — become aggravated felonies only if a sentence of a year or more is imposed.[126] California misdemeanors that involve these crimes will not have the potential to become aggravated felonies because a sentence of a year cannot be legally imposed.

b. Defining Punishment for Minor Offenses as Infractions or Violations

The immigration statute requires a conviction for most criminal grounds of removal.[127] It defines a conviction as "a formal judgment of guilt . . . entered by a court" with a finding of "sufficient facts to warrant . . . guilt," in which a judge has ordered the imposition of "some form of punishment, penalty, or restraint on [a noncitizen's] liberty."[128] This definition requires some level of adjudication with constitutional protections such as access to counsel and right to jury trial.[129] Convictions of noncriminal offenses, sometimes called infractions or violations, do not typically meet theses constitutional requirements. The BIA has held that these types of dispositions are not

[124] 8 U.S.C. § 1227(a)(2)(A)(i) (2018).

[125] Cortez, 25 I. & N. Dec. 301, 307-08 (BIA 2010); Pedroza, 25 I. & N. Dec. 312, 314 (BIA 2010) (discussing INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1) (2018)).

[126] *E.g.*, INA § 101(a)(43)(F), (G), (J), (P), (R), (S). 8 U.S.C. § 1101(a)(43)(F), (G), (J), (P), (R), (S).

[127] *Id.* § 1227(a)(2) (requiring a conviction for deportability for various crimes including crimes of moral turpitude, multiple crimes, aggravated felonies, high speed flight, sex offenses, controlled substance offenses, firearm offenses, crimes of domestic violence, and human trafficking).

[128] *Id.* § 1101(a)(48)(A).

[129] *See* Eslamizar, 23 I & N Dec. 684, 687 (BIA 2004) (requiring proof beyond a reasonable doubt to find a conviction under the INA).

considered convictions for immigration purposes.[130] Nor are dispositions that in a given state would not count as prior convictions in sentencing enhancements for a subsequent misdemeanor or felony offense.

States, of course, have the authority to indicate the seriousness of a criminal offense by defining its punishment as something less than a conviction. States have created categories of offenses, such as infractions or violations, that are less serious in their degree of gravity than crimes that require convictions.[131] The federal statute defers to the states' great authority to define these offenses and to require less constitutional protection for less serious criminal activity.[132] The sanctions for these offenses — typically fines — tend to be less onerous than those for misdemeanors. By allowing states to determine the types of offenses that result in infractions or violations, the statute by its terms, along with the agency's interpretation, has allowed the states to determine the types of crimes that result in conviction.

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These examples for the immigration statute demonstrate the extent to which states exercise great discretion within the confines of the statute. Importantly, states can use their discretion in restrictive or integrationist ways.

B. Congressional Incentives that Produce Shared State Authority

This section considers the second category through which Congress effectuates shared authority through the statute. Just as in general statutes, Congress can incentivize state activity. Here, the states can influence the director of federal initiatives through their participation and through the power of influence.

1. State Authority over the Integration of Immigrants and Refugees

There are two examples of congressional incentives to states to achieve Congress's integration goals. First, Congress enacted a refugee resettlement program in 1980 to "provide comprehensive and uniform

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130 *Id.*at 687-88.

131 *E.g.*, CAL. PENAL CODE §§ 17(d), 19.8 (2018) (defining infraction); N.Y. PENAL LAW § 70.15 (2018) (describing violation sentences and distinguishing from other offenses); WASH. REV. CODE § 7.84.020 (2018) (defining infraction).

132 *See, e.g.*, Eslamizar, 23 I. & N. Dec. 684, 686-88 (BIA 2004) (distinguishing infraction from a conviction, required under immigration law for certain offenses).

provisions for the effective resettlement"[133] of refugees throughout the country. Second, Congress established a scheme for state involvement in civics education for immigrants seeking naturalization, the final step in the integration process.

The INA contains a detailed plan for refugee assistance that includes the states in decisions surrounding the integration of refugees into local communities.[134] The states play a large role in resettlement because the federal government hopes to successfully integrate refugees into their new lives. To accomplish this, it funds state programs, provides support, and disburses refugees to states based on their backgrounds and where they would be most likely to find a community in which they can thrive. To that end, Congress directed the federal agency administering the refugee resettlement program to consult regularly with states and local nonprofit agencies regarding "the sponsorship process and the intended distribution of refugees among the States and localities before their placement in those States and localities."[135] Congress directed the federal agency to work with states to devise strategies and create mechanisms for the orderly placement and distribution of resources to refugees.[136] Statutory provisions direct funds to states to encourage efficient resettlement, to promote self-sufficiency among refugees, to provide language training, to take responsibility for unaccompanied refugee children, and to provide medical care. All of this activity is performed under contract with the federal government, just as in other areas of law in which the federal government seeks to incentivize the states to participate in federal programs.[137] The states in this case have great latitude to develop plans that direct services and promote self-sufficiency within their jurisdictions.[138] Congress also allows federal agencies to reimburse states for provision of services, medical assistance,[139] and education to refugees and their children.[140]

Stella Burch Elias has analyzed the limits of state power to exclude refugees, even under the current congressional incentive scheme, as

[133] Refugee Act of 1980, Pub. L. No. 96-212, tit.1, § 101(b), 94 Stat. 102 (1980).

[134] *See* INA § 412(a)(1)(B), 8 U.S.C. § 1522(a)(1)(B) (2018).

[135] *Id.* § 1522(a)(2)(A).

[136] *See id.* § 1522(a)(2)(B)-(C).

[137] *See id.* § 1522(a)(6).

[138] *Refugee Federalism*, *supra* note 28, at 403, 408-12 (analyzing state options for playing a larger role in refugee resettlement); *see* 8 U.S.C. § 1522(a)(6)(A).

[139] *Id.* § 1522(e)(1).

[140] *Id.* § 1522(a)(4)(A), (d)(1).

well as the possibilities for "inclusionary lawmaking."[141] She terms these state options "refugee federalism."[142] In its progressive form, refugee federalism would manifest in states determining how best to integrate refugees in ways that promote their own economic, health, and welfare interests.[143]

Second, Congress authorizes the Attorney General to incentivize states and public school participation in civics education for naturalization applicants.[144] The immigration statute directs the AG to coordinate with public schools, vocational education schools, and state entities to ensure proper instruction to immigrants preparing for the citizenship test. This provision allows states to encourage integration of their immigrant populations and to coordinate with the federal government in the dissemination of resources to ensure public education about the naturalization process.[145] It also gives states the ability to influence the creation of resources for citizenship education.

2. State Authority over Immigration Enforcement

Just as Congress created a mechanism for incentivizing states to participate in the integration of refugees in 1980, it created a program to incentivize state participation in immigration enforcement in 1996.[146] The immigration statute provides for federal-state cooperation in the arrest, apprehension, and detention of noncitizens who are in the states in violation of immigration laws.[147] This statute differs from the refugee integration provisions in that it provides much less latitude to the states in immigration enforcement. The provision requires state and local law enforcement agencies to enter into written agreements with the federal government and to receive training and be supervised by federal officials. Numerous legal scholars have commented on the extent to which these so-called 287(g) arrangements might constitute state usurpation of federal powers.[148]

141 *Refugee Federalism*, *supra* note 28, at 403-12.

142 *Id.* at 403.

143 *Id.* at 409-10.

144 INA § 332(b), 8 U.S.C. § 1443(b) (2018).

145 *Id.* § 1443(h).

146 *See generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-563 (1996).

147 INA § 287(g)(1), 8 U.S.C. § 1357(g)(1) (2018).

148 *See, e.g.*, *Immigration Federalism*, *supra* note 6, at 605-06; Jennifer M. Chacón, *Policing Immigration after* Arizona, 3 WAKE FOREST J.L. & POL'Y 231, 239 (2013); Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV.

The Court in *Arizona v. United States* noted that the statute did not allow states to create their own enforcement mechanisms outside of federal law.[149] The statute itself sets out a detailed plan for maintaining federal control over immigration enforcement in a manner intended to circumscribe state activity.[150] The Court held that in the immigration enforcement arena, Congress preempted any state activity outside the narrowly circumscribed cooperative scheme set out in section 287(g).[151]

This form of state-federal cooperation differs from those sections in which the statute devolves power to the states at the intersection of federal immigration power and state police powers. Its devolution is, as the *Arizona* Court established, more circumscribed, and the federal government retains formal decision-making control. Yet, it is similar in some ways to the devolution of authority at the intersections in that once the states have input, they can wield great persuasive power in the development of programs, in large part because state agencies will be called upon to implement them.[152]

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The Supreme Court cases regulating authority at these intersections focus either on state action affecting immigrants or on the extent to which state actions encroach on federal authority. The Supreme Court has yet to decide on the extent to which states can use their *congressionally-conferred* authority to bolster their traditional police power in favor of immigrants. This section has reviewed congressionally delegated authority to the states at the intersection of employment, family, and criminal law. The next section will discuss the normative implications of this congressionally delegated authority.

313, 326 (2012); Huyen Pham & Pham Hoang Van, *The Economic Impact of Local Immigration Regulation: An Empirical Analysis*, 31 IMMIGR. & NAT'LITY L. REV. 687, 702-04 (2010) (characterizing the agreements as a "transfer" of federal authority); Rick Su, *Police Discretion and Local Immigration Policymaking*, 79 UMKC L. REV. 901, 918-20 (2011); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1095-96 (2004).

149 Arizona v. United States, 567 U.S. 387, 407-09 (2012).

150 *See* INA § 287(g).

151 *See Arizona*, 567 U.S. at 408-10.

152 *See [National] Federalism*, *supra* note 25, at 1996-97.

III. THE NORMATIVE IMPLICATIONS OF NAVIGATING STATE AUTHORITY IN IMMIGRATION REGULATION

The new immigration federalism scholars appreciate the power of states and localities to control the movement and integration of immigrants.[153] Their normative position that we should recognize the states' authority, formal and informal, in integration or enforcement of immigrants has been mainstreamed into immigration debates.[154] I am more concerned with the establishment of these norms in legislative decision-making. I have demonstrated the extent to which Congress itself has devolved its authority to states throughout the immigration statute.[155] This devolution, in and of itself, should be weighed heavily in considering the extent to which states have the right to protect their own residents regardless of immigration status, precisely because Congress has considered state sovereignty as it implemented its immigration laws.

While there may be trepidation about the effects of state involvement because of past restrictionist measures, there are also great benefits to the narratives of state sovereignty that we should mine. In this section, I highlight how the states can use the power Congress has devolved to attract their own versions of the desired immigrant to their communities.

The competing narratives about immigration regulation, as discussed in Part I of this Article, demonstrate two stories. In the first, the federal government has exclusive authority over immigration regulation for normative reasons such as efficiency, uniformity, sovereignty, security, and the equal protection of immigrants. In the second, the states should share authority over immigration regulation for normative reasons such as the value of experimentation, a steam-valve theory,[156] the presence of the states in foreign relations, or to support or mirror federal objectives. New immigration federalism theories, while debunking some of the normative reasons for state

153 *See, e.g.*, *The Significance of the Local*, *supra* note 27, at 571 (establishing "the simple proposition that immigration regulation should be included in the list of quintessentially state interests, such as education, crime control, and the regulation of health, safety, and welfare, not just because immigration affects each of those interests, but also because managing immigrant movement is itself a state interest.").

154 *See* STEVEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 253-56 (6th ed. 2015).

155 *See supra* Part II.

156 *See Learning to Live*, *supra* note 34, at 1635-36 ("Affording the states discretion to act on their preferences diminishes the pressure on the structure as a whole; otherwise, because you don't let off the steam, sooner or later the roof comes off.").

involvement, develop their own normative conclusions about state and local-level immigration regulation. These are based on a broad understanding that state and local-level participation is key to successful integration of immigrants, that states and localities know best how enforcement priorities affect immigrants on the ground, and that states and localities respond to political pressures more readily than the federal government might. Missing from these narratives is the extent to which states integrate immigrants in response to constituency demands, as a way of defining their own polity, and as reactions to their own economic contexts.

All of these narratives attempt to explain state involvement in immigration enforcement, even as they acknowledge that states can use their participation for progressive, integrationist purposes. A slightly different narrative emerges when we highlight Congress's part in the devolution of rights to the states. Both the traditional and the new federalism rationales for state involvement in enforcement ignore the extent to which Congress has already devolved its own power to the states. It is no longer a matter of whether the states can encroach on congressional power because Congress has given it up freely.

As demonstrated in this Article, Congress has devolved authority in areas that intersect with traditional state authority, as if recognizing that *it* may be the encroaching actor. The significance of congressional devolution, ultimately, is that once Congress gives up power to the states, it is difficult to project how that power might be used. At the margins, in the cases of congressional incentives to the states, Congress can be more directive. But in those areas where the line between congressional authority and state police powers is unclear, the fact of congressional devolution — more than the overarching theories of immigration federalism — give states latitude that does not exist in the plenary power story.

Plenty has been written about state attempts to restrict immigration.[157] Less has been written about the ability of states to use their Congress-given authority to create their own sets of integrationist measures, within the confines of the statute. This form of federalism — progressive federalism — can provide us with a possible roadmap for state creation of the desired immigrant. And, once the federal government recognizes shared authority, it cannot control how that power might be used. After all, Congress is sharing

[157] *See, e.g.*, *Immigration Federalism*, *supra* note 6, at 601-06; Saucedo, *supra* note 96, at 1556-57; *States of Immigration*, *supra* note 8, at 1341-42.

authority with sovereign states.[158] Nor can it control the deliberateness with which states approach their authority over issues that might have immigration effects.[159] This is the practical, unanticipated effect of the devolution of power. Congress may intend for it to be used in restrictionist ways, but once devolved it can also be used in progressive ways. Progressive federalism theorists like Heather Gerken advocate this type of state interaction with the federal project.[160] It is also the federalism that Professor Gluck describes in congressional devolution of power over insurance regulation and Medicaid to the states.[161] Progressive federalism in the immigration context has also taken root, making the states the catalysts for change and influential actors in immigration law's future direction. States have begun to use their authority in deliberate ways to further integrate immigrants in their communities.

A. How Congressionally-Devolved Authority Produces Deliberate State Action

While many states are still careful to limit their roles in immigration regulation, in part because of the staying power of the plenary power doctrine, others have become much more deliberate about entering the spaces that Congress has created for state involvement. States that deliberately seek to integrate their immigrant populations find much room to maneuver in the devolution of congressional authority. California is a current example. Its role is pro-active: the governor of California appointed a director of immigration integration to coordinate initiatives throughout the state.[162] The state legislature has become a leader in establishing state-level protections for its immigrant residents. Importantly, California is not alone. States are finding, and the Supreme Court is acknowledging,[163] that state trends should influence federal policy on issues such as criminal sanctions.

158 *[National] Federalism*, *supra* note 27, at 2000.

159 *See id.*

160 *See, e.g.*, *A New Progressive Federalism*, *supra* note 26.

161 *[National] Federalism*, supra note 27, at 2002-05.

162 *See* Press Release, Office of Governor, Governor Brown Announces Appointments (Mar. 11, 2016), https://www.gov.ca.gov/news.php?id=19340; CAL. GOV'T CODE § 65050 (establishing a statewide director of immigrant integration to develop a clearinghouse of immigrant services and monitor the implementation of statewide laws that serve immigrants).

163 *See* discussion *infra* Part II (describing Supreme Court decision in *Esquivel-Quintana v. Sessions,* to align the federal generic definition of "sexual abuse of a minor" with the statutory definition adopted by the majority of states).

This section analyzes two levels of power: the influence of a big state and the influence of states acting as a majority voice.

B. California's Influential Pro-Active Efforts at the Intersections to Attract (and Protect) the Desired Immigrant

In response to the Trump administration's threats to destabilize the lives of immigrants, the state of California enacted a series of laws designed to demonstrate the state's commitment to its congressionally-enacted authority at the intersection of immigration regulation and its police powers.[164] The legislature passed the California Values Act which will, as Governor Jerry Brown put it, "protect public safety and people who come to California to work hard and make this state a better place."[165] The media dubbed it a sanctuary state law.[166] Through this law, the state has claimed its authority in the very spaces that Congress has devolved to the states. The law establishes the state's position on cooperation with federal immigration authorities in areas that Congress has left to the states. For example, when Congress implemented its U visa provisions facilitating visas for victims of crime, it declared that its purpose was to ensure that victims of crime would step forward to cooperate with law enforcement authorities.[167] In enacting its California Values Act, the California legislature declared that "[a] relationship of trust between California's immigrant community and state and local agencies is central to the public safety of the people of California."[168] To ensure the protection of crime victims, the law prohibits law enforcement agencies from providing personal information, including information about a person's

[164] *See* Legislation to Protect California Immigrants, *supra* note 2.

[165] Taryn Luna, *California Sanctuary State Bill Headed for Approval After Changes to Please Jerry Brown*, SACRAMENTO BEE (Sept. 12, 2017, 9:20 AM), https://www.sacbee.com/news/politics-government/capitol-alert/article172712181.html.

[166] *See, e.g.*, Ben Adler, *California Governor Signs 'Sanctuary State' Bill*, NPR (Oct. 5, 2017, 7:44 PM), http://www.npr.org/sections/thetwo-way/2017/10/05/555920658/california-governor-signs-sanctuary-state-bill.

[167] Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(A), 114 Stat. 1533 ("The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a)(15)(u)(iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.").

[168] CAL. GOV'T CODE § 7284.2(b) (2018); S.B. 54, 2017-18 Leg., Reg. Sess. (Cal. 2017).

immigration status, to federal immigration authorities.[169] The legislature characterized its measure as necessary to prevent entanglement with federal enforcement authority.[170] The state drew upon its own police powers to ensure that immigrant community members would not "fear approaching police when they are victims of, and witnesses to, crimes, seeking basic health services, or attending school, to the detriment of public safety and the well-being of all Californians."[171] The legislature emphasized that it was acting within its power "to ensure effective policing, to protect the safety, well-being, and constitutional rights of the people of California."[172]

Specifically, the California Values Act declines the congressional invitation to participate in immigration enforcement. It does so by prohibiting state and local law enforcement agencies from using state resources or personnel to "investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes."[173] The legislation expresses choices that Congress left to the states when it enacted section 287(g) of the immigration statute. The plain language of the statute indicates that Congress envisioned voluntary cooperation from state and local law enforcement agencies, and the willing use of state funds for such purposes.[174] The California law ensures that state law governs such activity. Except in some extreme circumstances,[175] state law enforcement agencies will not provide information about an individual's address, immigration status, or release date; detain individuals based on immigration hold requests; arrest individuals based on civil immigration warrants; assist the federal government in section 287(g) activities; or perform the functions of an immigration officer.[176] The law is also careful to ensure

169 *See* GOV'T § 7284.6(a)(1)(A)-(D); Cal. S.B. 54.

170 GOV'T § 7284.2(c); Cal. S.B. 54.

171 GOV'T § 7284.2(c); Cal. S.B. 54.

172 GOV'T § 7284.2(f); Cal. S.B. 54.

173 GOV'T § 7284.6(a)(1); Cal. S.B. 54.

174 INA § 287(g); 8 U.S.C. § 1357(g) ("[T]he 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 extent consistent with State and local law.").

175 The law gives law enforcement agencies the discretion to cooperate with federal authorities when individuals have been convicted of particularly serious or violent felonies. CAL GOV'T CODE § 7282.5(a)(1) (2018); Cal. S.B. 54.

176 *See* GOV'T § 7284.6(a)(1); Cal. S.B. 54.

cooperation with federal authorities wherever it is required by federal statute, such as responding to requests for specific information about an individual's criminal history, sharing information necessary to certify crime victims for U or T visas, or participating in joint task forces with federal immigration agencies.[177]

In response to the Trump administration's threats to deport immigrant workers, California enacted legislation prohibiting employers from giving federal immigration agents access to the non-public parts of their business property or to employee records, without a judicial warrant.[178] In addition, the law requires business owners to give their employees notice whenever federal immigration officers seek to inspect employee records.[179] The legislature passed the section in order to "direct the state's limited resources to matters of greatest concern to state and local governments."[180] More importantly, California enacted the legislation in the space that Congress left open for states to sanction businesses when it enacted employer sanctions provisions in the immigration statute.[181] The law sanctions businesses with civil penalties for violating its provisions.[182] When Congress enacted employer sanctions, it devolved authority to the states to impose licensing requirements as well as sanctions on licensed businesses for hiring undocumented workers.[183] The California legislature had already passed laws protecting immigrants from unfair immigration-related employment practices in 2013.[184] This legislation imposes further sanctions on public and private businesses that make their nonpublic areas accessible to federal immigration authorities. Also, in keeping with its authority to sanction licensed businesses, the legislation imposes sanctions on employers that re-verify the

[177] GOV'T § 7284.6(b)(1)-(4); Cal. S.B. 54.

[178] *See* CAL GOV'T CODE §§ 7285.1(a), 7285.2(a)(1); A.B. 450, 2017-2018 Leg., Reg. Sess. (Cal. 2017); *see also* Jazmine Ulloa, *California Expands Protections for Immigrants Against ICE Workplace Raids*, L.A. TIMES (Oct. 5, 2017, 2:16 PM), http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-expands-workplace-1507236616-htmlstory.html.

[179] CAL. LAB. CODE § 90.2(a)(1) (2018); *cf.* INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2) (2018) (stating explicitly that the INA preempts most state laws).

[180] GOV'T § 7284.2(f); Cal. S.B. 54.

[181] *See supra* Part II.A.1.c.

[182] GOV'T §§ 7285.1(b), 7285.2(b); Cal. A.B. 450.

[183] *See* INA § 274A; Chamber of Commerce of U.S. v. Whiting, 563 U.S. 582, 597-600 (2011).

[184] A.B. 263, 2013 Leg., Reg. Sess. (Cal. 2013).

employment eligibility of a current employee at a time or in a manner not specified by federal law.[185]

These two pieces of legislation are only the beginning. The governor signed nine more bills protecting immigrants from enforcement efforts on October 5, 2017. Protections include laws protecting the personal information of public university students;[186] prohibiting landlords from inquiring about or disclosing a tenant's immigration status, unless required by law;[187] prohibiting localities from requiring landlords to provide information about tenants' immigration status;[188] providing in-state tuition to California's 73,000 refugee and special immigrant population;[189] prohibiting public schools from collecting information regarding students' citizenship or immigration status;[190] prohibiting public agencies from entering into contracts with the federal government to house or detain individuals in civil immigration custody;[191] providing in-state tuition to all students (except nonimmigrants), regardless of immigration status, who have attended a California high school or community college for three years;[192] providing citizenship assistance to members of the military and the California National Guard who are California residents;[193] and ensuring that students whose parents are removed from the state involuntarily, including through deportation, can maintain their residency status.[194]

When it passed this series of laws, the state was responding, not by flouting federal immigration authority, but by inhabiting the spaces that Congress devolved to the states in the immigration statute. Congress created these spaces for the states both at the intersection of immigration law and through incentives to cooperate with federal enforcement. Contrary to reports that California overstepped its state power and risks federal preemption, the state used the spaces for state shared sovereignty as its reasons for legislative actions. Importantly,

185 *See* CAL. LAB. CODE § 1019.2 (2018).

186 CAL. EDUC. CODE § 66093.3 (2018); A.B. 21, 2017 Leg., Reg. Sess. (Cal. 2017).

187 CAL. CIV. CODE § 1940.3(b) (2018); A.B. 291, 2017 Leg., Reg. Sess. (Cal. 2017).

188 CIV. § 1940.3(a); A.B. 299, 2017 Leg., Reg. Sess. (Cal. 2017).

189 CAL. EDUC. CODE § 68075.6 (2018); A.B. 343, 2017 Leg., Reg. Sess. (Cal. 2017).

190 CAL. EDUC. CODE § 234.7(a) (2018); A.B. 699, 2017 Leg., Reg. Sess. (Cal. 2017).

191 CAL. CIV. CODE § 1670.9(a) (2018); S.B. 29, 2017 Leg., Reg. Sess. (Cal. 2017).

192 *See* CAL. EDUC. CODE § 68130.5 (2018); S.B. 68, 2017 Leg., Reg. Sess. (Cal. 2017).

193 CAL. MIL. & VET. CODE §§ 90, 217 (2017); S.B. 156, 2017 Leg., Reg. Sess. (Cal. 2017).

194 *See* CAL. EDUC. CODE § 48204.4 (2018); S.B. 257, 2017 Leg., Reg. Sess. (Cal. 2017).

California has established a federalism path that states can follow to deliberately fashion a set of laws that attract (and protect) desired immigrants, even in the face of hostile federal actors.

To be sure, the California legislature has also responded to a need to protect its immigrant population from parties seeking to exploit immigrants' vulnerabilities. In the past several years, the state created prohibitions against what the legislature termed, "unfair immigration-related practices."[195] The legislature enacted several laws prohibiting employers and attorneys from retaliating against immigrant workers by disclosing their personal information to federal immigration authorities.[196] These laws were enacted pursuant to the authority Congress devolved to states to control licensing issues and to regulate employment relations. The state has also set aside funds for healthcare, educational assistance to refugees, unaccompanied minors, immigrants seeking to regularize their status, and those facing deportation, all in the name of immigrant integration.[197]

Just as progressive federalism scholars predicted,[198] states like California have pushed the boundaries of state authority in immigration regulation, and at the same time, have been influential in setting the example for other states seeking to attract desired immigrants. California's influence stems, in part, from its geographic size, the size of its immigrant population, and its economic power. California's efforts to attract desired immigrants by protecting its already existing immigrant population promises to have spillover effects into neighboring states, if not the entire country, especially if the courts agree that it has such power. More importantly, its success promises to signal to many immigrants that they are desired in some parts of the country.

C. The Power of State Majorities to Influence Federal Policy

Sometimes the direction of state trends influences federal decisions. The shared sovereignty structure of immigration law allows this development, even though perceptions of exclusive federal authority

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195 CAL. LAB. CODE § 1019(a)-(b) (2018).

196 *See* LAB. §§ 1019(a), (b)(1)(D), 1019.1(a)(4).

197 *See, e.g.*, CAL. WELF. & INSTIT. CODE §§ 13303-06 (2018); CAL. DEP'T OF SOC. SERVS., CALIFORNIA STATE PLAN FOR REFUGEE ASSISTANCE AND SERVICES 5-22 (2018), http://www.cdss.ca.gov/Portals/9/Refugee/StatePlans/CA_State_Plan_2017-18.pdf?ver=2018-02-14-104010-877.

198 *See, e.g.*, *[National] Federalism*, *supra* note 27, at 1997 (arguing that states have influence by exercising their own sovereignty as they operate within federal legislation).

persist. A recent Supreme Court decision, *Esquivel-Quintana v. Sessions,* exemplifies the power of state trends at the intersection of immigration and criminal law.[199]

Immigration law's doctrines surrounding immigration consequences of state crimes have been traditionally described as uniquely federal in that they require actors to compare state crimes to generic definitions of targeted criminal grounds of removal in the immigration statute.[200] Typically, Congress defines the generic definition in the statute, or the courts define it by referring to the elements in a majority of state criminal codes.[201] Recently, the Supreme Court reiterated that the elements of a crime's generic definition is determined by reference to how the majority of states define it.[202] The Supreme Court acknowledged the power of state trends in establishing a direction for federal policy. It is an incentive for states to learn from each other, to form majorities, and to seek through those majorities to influence federal decisions. The Supreme Court's decision in *Esquivel-Quintana v. Sessions* demonstrates that the states have persuasive power, if not authority, over the definition of crimes that have immigration consequences when they act in ways that produce a majority rule.[203] There, the Court held that state trends in the definition of a crime influences the federal definition of crimes for immigration purposes.[204] Specifically, the Court held that the federal definition of "sexual abuse of a minor" is influenced by how the states define it. Since the majority of states require the age of the victim to be younger than sixteen in cases that involve sexual abuse of a minor, the federal statute should follow suit in determining the immigration consequences of the crime.[205] In determining the generic meaning of the term "sexual abuse of a minor" the Court noted that "[a] significant majority of jurisdictions . . . set the age of consent at 16 for statutory rape offenses predicated exclusively on the age of the participants."[206] The Court sided with the consensus of the states in their own definitions of sexual abuse of a minor, finding that "[w]here sexual intercourse is abusive solely because of the ages of the

[199] Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1570-72 (2017).

[200] *See* Taylor v. U.S., 495 U.S. 575, 581 (1990); Moncrieffe v. Holder, 569 U.S. 184, 190 (2013).

[201] Taylor v. U.S., 495 U.S. at 589.

[202] *See Esquivel-Quintana*, 137 S. Ct. at 1571-72.

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.* at 1571.

participants, the victim must be younger than 16."[207] The Court's deference to state consensus signals that states can coordinate or cooperate with each other to shift the definitions of crimes in ways that the federal government must accept in the absence of congressionally-enacted definitions.

Whether Congress intended it or not, the states have great power to fashion remedies for their immigrant residents within these pockets of state authority. The practical effect of a narrative of state cooperation, deference to state police powers, and incentivization *is* state involvement in immigration law, even if it is to meet a state's own integrationist agenda.

D. The Parameters of State Action to Attract Their Own Versions of the Desired Immigrant

The examples in this section demonstrate the project of progressive and nationalist federalism proponents.[208] States have accepted their roles as implementers of congressional objectives at the same time that they assert their identities as sovereigns, all within the parameters of authority that Congress has written into the statute. The interesting development in state participation in immigration regulation is its character as a deliberate project to fulfill state needs at the same time. The two elements of this form of federalism are its deliberateness in using the authority in the spaces that Congress has created and its intent to infuse immigration law with the principles of equity and equality. California's example demonstrates the extent to which states can and should exercise both deliberation and an integrationist agenda. Deliberateness starts with states mining the spaces that Congress explicitly leaves to state decision-making in the immigration statute. These include decisions around licensing issues and contracts generally, family and employment relations, and criminal sanctions. Congress left plenty of space for states to assert their unique needs and desires. Many have used their state authority to drive out immigrants, and that may have been Congress's intent when it enacted cooperative enforcement provisions such as INA 287(g). But, despite congressional attempts to limit state activity at the intersection, the states can also use their congressionally-given power to attract and protect immigrants.

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[207] *Id.* at 1572.

[208] *See generally [National] Federalism*, *supra* note 25, at 1996-2002; *A New Progressive Federalism*, *supra* note 24.

State and local governments have historically found benefit in attracting immigrants because of their contributions to economic competitiveness and economic growth, or because they seek to reverse demographic declines, or because they are responding to federal immigration reform measures.[209]

The question remains: what should states be aiming for in constructing their own versions of, and in attracting, the desired immigrant? Three elements come to mind that should figure into a state's decision-making: first, what are the state's constituencies that require, or allow, states to want to attract immigrants; second, what are the benefits, whether economic growth, competitive advantage, or some other value, that the states perceive exist in cultivating an immigrant population; third, how broadly does the state define its constituencies or its communities.

First, the California example demonstrates how states must be responsive to their own communities and constituencies. In California, this means a political structure that is responsive to its changing populations. Demographic changes now make California a majority-minority state, with Latinos and Asians the largest ethnic populations statewide.[210] More than a quarter of the population is foreign-born.[211] Federal and state policies that target immigrants — positively or negatively — disproportionately affect the communities and geographic regions where immigrants settle because their own growth and well-being depends on the effective integration of their immigrant populations.[212] The desired immigrant in this case is the family member, the neighbor, the worker who keeps the economy moving forward. More importantly, attracting, or constructing, the desired immigrant is a function of responding to the needs of entire geographic communities and regions.[213]

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[209] *See, e.g.*, MARIE PRICE, WORLD MIGRATION REPORT, CITIES WELCOMING IMMIGRANTS: LOCAL STRATEGIES TO ATTRACT AND RETAIN IMMIGRANTS IN U.S. METROPOLITAN AREAS 3-4, 11 (2014), https://www.iom.int/sites/default/files/our_work/ICP/MPR/WMR-2015-Background-Paper-MPrice.pdf.

[210] *See QuickFacts: California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/ca/PST045217 (last visited July 14, 2018) (noting 37.2% of people identified as White alone, not Hispanic or Latino, compared with 39.1% of people who identified as Hispanic or Latino and 15.2% of people who identified as Asian alone).

[211] *Id.*

[212] *See* MANUEL PASTOR ET AL., CALIFORNIA IMMIGRANT INTEGRATION SCORECARD (2012), https://dornsife.usc.edu/assets/sites/731/docs/California_Immigrant_Integration_Scorecard_web.pdf.

[213] *See id.*

Political commitment will also play a part in state decisions to protect immigrants within their jurisdictions. It should come as no surprise that the legislative leadership in California consists of Latinos who come from immigrant families. Kevin De León, the Senate President, and Ricardo Lara, the Chair of the Appropriations Committee, have all been leaders in the passage and implementation of S.B. 54 and similar legislation demonstrating California's commitment to its immigrant population.[214] In addition, California Attorney General Xavier Becerra and Secretary of State Alex Padilla have both expressed commitments to defend legislative efforts to protect immigrants.[215] The Attorney General sued the Trump administration for its decision to rescind Deferred Action for Childhood Arrivals ("DACA"), in part because of the massive effect it would have on California's immigrant population and on its economy.[216] The Secretary of State has responded forcefully to Trump administration allegations that immigrant and Latino communities tend to engage in voter fraud.[217]

Second, states have and should make decisions about constructing their own versions of the desired immigrant by looking to economic growth possibilities and the competitive edge that immigrants might provide to their state. Two states — California and Alabama — exemplify different approaches to constructing a desire for immigrants. California has a broad public policy agenda emphasizing economic growth and seeking a competitive edge in areas like

[214] *See, e.g.*, A.B. 4, 2017 Leg., Reg. Sess. (Cal. 2017) (calling on the federal government to develop pro-immigrant policies, in part due to their rich contributions to the state); S.B. 29, 2017 Leg., Reg. Sess. (Cal. 2017) (adding CAL. CIV. CODE § 1670.9 (2018), introduced by Senator Ricardo Lara); S.B. 54, 2017-18 Leg., Reg. Sess. (Cal. 2017) (amending CAL. GOV'T CODE §§ 7282, 7282.5; introduced by Senator Keven De Leon); S.B. 68, 2017-18 Leg., Reg. Sess. (Cal. 2017) (amending CAL. EDUC. CODE § 68130.5 (2018); introduced by Senator Ricardo Lara); S.B. 257, 2017 Leg., Reg. Sess. (Cal. 2017) (adding CAL. EDUC. CODE § 48204.4 (2018); introduced by Senator Ricardo Lara).

[215] *See* Melody Gutierrez, *California Vows to Sue U.S. to Protect Immigrants Now in Jeopardy*, S.F. GATE (Sept. 5, 2017, 10:33 PM), https://www.sfgate.com/politics/article/State-s-top-lawyer-vows-to-sue-feds-over-12175168.php (noting the commitments of Xavier Becerra and Alex Padilla to protect the state's immigrants).

[216] Complaint at 1-4, California v. U.S. Dep't of Homeland Sec., No. 3:17-cv-05235 (N.D. Cal. 2017); *see also* Patrick McGreevy, *California Sues Trump over Plan to End DACA*, L.A. TIMES (Sept. 11, 2017, 11:10 AM), http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-sues-trump-administration-1505150334-htmlstory.html.

[217] *See* John Myers, *California's Top Elections Officer to Trump's Voting Fraud Panel: No*, L.A. TIMES (June 29, 2017, 2:57 PM), http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-s-top-elections-officer-1498771356-htmlstory.html.

technology.[218] This approach tracks its broad efforts to welcome immigrants into the state. Studies show that California's economic growth is highly dependent on the well-being of immigrants in the state.[219]

Studies also show the ways in which immigrants contribute to the economy of the state. Immigrants, for example, are overrepresented in entrepreneurial activities and in the development of small businesses.[220] In California, immigrants were responsible for starting forty-five percent of all new businesses in the state during the Great Recession, between 2007 and 2011.[221] A state that wants to incentivize entrepreneurial activity would benefit by making it easier for its immigrant population to start and maintain businesses. Immigrants also contribute approximately one in every four dollars that Californians paid in state taxes. This means that the state's welfare depends on whether the state can ensure that immigrants can continue to work and be productive.[222] California is attracting immigrants who are overrepresented in the job market, and in specific sectors of the economy. While they account for about twenty-seven percent of the state's population, they make up about thirty-five percent of the state's working population.[223] They are more than half of workers in landscaping, more than seventy percent of workers in agriculture, and more than seventy-five percent of workers in garment manufacturing.[224] These economic trends point to the areas in which California seeks to attract immigrants, as well as to the policies that might continue to attract them. Future economic indicators predict that states like California will need more health care workers than it has on hand, signaling one area where the state must construct a hospitable environment for immigrants.

Alabama, on the other hand, has a public policy that attracts immigrants for temporary work, but not permanent immigration. In 2013, Alabama was among the top states to attract foreign temporary workers, when viewed as a percentage of the population.[225] Around

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[218] *See* NEW AM. ECON., THE CONTRIBUTIONS OF NEW AMERICANS IN CALIFORNIA 1 (2016), http://research.newamericaneconomy.org/wp-content/uploads/2017/02/nae-ca-report.pdf [hereinafter NAE Report]; *see also* PRICE, *supra* note 209, at 11.

[219] Pastor et al., *supra* note 212.

[220] *See* NAE Report, *supra* note 218, at 2.

[221] *Id.* at 2-3.

[222] *See id.* at 4.

[223] *Id.* at 7.

[224] *Id.*

[225] *See* Challen Stephens, *Alabama Among Top 10 for Bringing in Unskilled Foreign*

the same time, the Alabama legislature passed legislation to make it difficult for immigrants to settle in the state by imposing penalties for undocumented presence or work in the state.[226] Its policy of desiring immigrants for only limited periods of time is also reflected in laws criminalizing immigrant behavior, such as the use of false social security numbers for work.[227]

California and Alabama reflect the different approaches to the economic edge that immigrants provide. For California, capitalizing on the benefits that immigrants provide economically reflects its general approach to economic growth. For Alabama, policy makers have weighed the economic benefits of immigrant settlement and have chosen a different path.

Third, a state might develop its policies constructing their desired immigrants based on how it defines its constituencies. This construction, of course, changes and evolves over time. It is also highly dependent on demographic, political, and economic changes. California itself has transformed through demographic changes from a restrictionist state in the 1990s to a more inclusive state today.[228] During that time, the state's population has become majority-minority,[229] and Latinos and Asians have capitalized on their growing political power.[230] In addition, immigrants constitute a growing

Workers, AL.COM (May 23, 2013, 1:20 PM), http://blog.al.com/wire/2013/05/now_a_look_at_unskilled_foreig.html.

226 *See* H.B. 56, Reg. Sess. (Ala. 2011). The legislation was challenged and the state ultimately entered into a settlement agreement to refrain from implementing it. *See* Press Release, S. Poverty Law Ctr., SPLC Victorious Against Alabama Anti-Immigrant Law (Oct. 28, 2013), https://www.splcenter.org/news/2013/10/29/splc-victorious-against-alabama-anti-immigrant-law.

227 *See, e.g.*, Saucedo, *supra* note 96, at 1530-31 (documenting Alabama's passage of laws criminalizing undocumented work).

228 In 1994, California passed Prop. 187, a state anti-immigrant measure aimed at restricting benefits, including health care and education, to immigrants and making it difficult for undocumented immigrants to stay in the state. Many have argued that the measure politicized and incentivized Latino and immigrant populations to organize for change in the state and created the power shift that exists today in the state. *See, e.g.*, DAVID DAMORE & ADRIAN PANTOJA, LATINO DECISIONS, ANTI-IMMIGRANT POLITICS AND LESSONS FOR THE GOP FROM CALIFORNIA 5-12, http://www.latinodecisions.com/blog/wp-content/uploads/2016/11/Prop187Effect.pdf; Scott Schafer, *Political Effects Linger 20 Years After Prop. 187 Targeted Illegal Immigration*, KQED: CAL. REP. (Nov. 4, 2014), https://www.kqed.org/news/10346251/political-effects-linger-20-years-after-prop-187-targeted-illegal-immigration.

229 *See QuickFacts*, *supra* note 210 (showing that Latinos, Asians, and Blacks together make up 60.8 % of the estimated total population in California as of 2017).

230 *See* Agnes Constante, *In California, Asian Americans Find Growing Political Power*, NBC NEWS: ASIAN AM. (Apr. 19, 2018, 5:42 AM), https://www.nbcnews.com/news/

segment of the state's residents, accounting for one in four.[231] Nearly half of the immigrant population in California is naturalized.[232] That power is, in part, reflected in policies that reflect an understanding of mixed-status immigrant families and their barriers to integration.

To the extent that a state integrates its immigrant populations, it will want to create policies that reflect an expanded polity.[233] This might include broad civic protections for immigrant populations, or the right to vote in local elections.

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The new federalism theorists have established that the plenary power doctrine fails to reflect the extent to which states share authority over immigration regulation with the federal government. State authority, whether informal and persuasive,[234] or incremental and dangerous,[235] or as a politicized driver of policy,[236] is a reality of contemporary immigration law. The new immigration federalism theories do a better job of identifying the importance of negotiations between federal, state, and local players, and of recognizing that the spheres of authority are not so clear-cut. However, these theories underappreciate that the interplay in the immigration statute provides the space for these negotiations to occur. I have argued that states are beginning to exploit their affirmative authority to define and attract the desired immigrant. Rather than undermining a federal scheme, by focusing on the pockets of authority that Congress has granted, states have a wide ambit to determine the types of immigrants welcome within their boundaries. They should pay attention, moreover, to their constituencies, their own contextual experiences with immigrants, and their need to be responsive to demographic, political, and economic changes in making decisions about how to construct their desired

asian-america/california-asian-americans-find-growing-political-power-n866611; Adam Nagourney & Jennifer Medina, *This City is 78% Latino, and the Face of a New California*, N.Y. TIMES (Oct. 11, 2016), https://www.nytimes.com/2016/10/12/us/california-latino-voters.html?ref=nyt-es.

231 AM. IMMIGRATION COUNCIL, IMMIGRANTS IN CALIFORNIA 1 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_california.pdf; *see* DAMORE & PANTOJA, *supra* note 228, at 27.

232 AM. IMMIGRATION COUNCIL, *supra* note 231.

233 *See* PASTOR ET AL., *supra* note 212.

234 *See States of Immigration*, *supra* note 8, at 1342 (noting how even laws that are never implemented can be impactful).

235 *See Immigration Federalism*, *supra* note 6, at 580-81 (noting the "increasingly illusory" distinction between federal and state policies).

236 *See* GULASEKARAM & RAMAKRISHNAN, *supra* note 28, at 153-54.

immigrants through state law. And we can see in the numbers that states are beginning to do just that. California and six other states attracted sixty to seventy percent of immigrants arriving in the United States every year for over three decades, from the 1960s to the 1990s.[237] As one report noted, "[California] is known as a place where many immigrants build new lives and grab a piece of the American dream."[238] California serves as the prime example of a state meeting its own needs by catering to the needs of its immigrant populations and their related stakeholders.

CONCLUSION

The idea of congressional devolution to the states seems out of place in the immigration arena because the notion of federal plenary power is so entrenched. This Article has revealed the large degree to which the immigration power is offered to the states as well as the possibilities for states to be deliberate in their own uses of the power. Ultimately, each state should be able to attract the immigrants that make sense for the state given its constituencies, its definition of its polity, and its economic position. While this power can be used negatively to keep out immigrants, it holds much more promise as a policy for both constructing the conditions to attract desired immigrants and for integrating them. This strategy creates a path of growth, economically, demographically, and politically, that comports with notions of shared sovereignty and the new federalism in which our nation operates today.

237 NAE Report, *supra* note 218, at 1.

238 *Id.*