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STATES OF CONFUSION: THE RISE OF STATE AND LOCAL POWER OVER IMMIGRATION*

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Federal immigration law has evolved from a stepchild of foreign policy into a national legislative and regulatory scheme that intersects with the triumvirate of state power: criminal law, employment law, and welfare. Shifting the locus of immigration law out of the category of foreign affairs and into these domestic spheres casts immigration law into a world infused already with state and local regulation. This Article traces that evolution and predicts that reimagining immigration law as a domestic affair will expand judicial acceptance of subnational control over immigration.

Connecting immigration law with these domestic areas of law opens the way for state and local governments to seek to regulate it concurrently with the federal government. Domesticating immigration law will also inevitably impact the judges and legislators who pass upon the lawfulness of that subnational involvement. When courts perceive the sub-national rule as a regulation of foreign policy, the space permitted for local regulation narrows. When courts view the sub-national government as acting within its traditional spheres of power, the local rule stands a much greater chance of surviving.

The domestication of immigration law is especially apparent in state and local efforts to address the criminalization of immigration law, or "crimmigration law." The rise of

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crimmigration law has transformed immigration law from something the federal government is uniquely competent to control – foreign policy – to something states are experts in – law enforcement. This Article employs history, law, and policy to critique the growing trend toward sub-national reliance on criminal law to control immigration. It advocates a searching evaluation of the costs of subnational laws that single out noncitizens for criminal sanctions.

INTRODUCTION

More than 100 years ago, the Supreme Court sidelined state and local government from any major role in the arena of immigration law. In a series of cases beginning in 1875, the Supreme Court

declared that the entry of noncitizens into the United States and the conditions under which they may remain were matters of foreign policy over which the federal government had exclusive power.[1] Rigid judicial barriers impeded state legislation seeking to regulate the movement of noncitizens.[2] So matters stood for a century and a half.

Today, there is a veritable deluge of state and local legislation seeking to regulate noncitizens. In 2006, immigration was the subject of at least 540 bills in twenty-seven states.[3] The next year saw a threefold increase in legislative activity, with more than 1,500 bills introduced in state legislatures, and close to 250 becoming law.[4] This has become a national phenomenon. In 2007, forty-six states enacted immigration laws,[5] and forty-four states considered immigration bills in the first quarter of 2008.[6] Immigration appeared as Number Two

1. *See* Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (striking down a California statute regulating Chinese immigration and establishing that the immigration power belongs exclusively to the federal government); Henderson v. Mayor of New York, 92 U.S. 259, 274 (1875) (voiding a New York law which required vessel owners to post a bond for each landing foreign passenger); Smith v. Turner (*The Passenger Cases*), 48 U.S. (7 How.) 283, 294 (1849) (holding unconstitutional New York and Massachusetts laws which imposed head taxes on landing foreign persons likely to become public charges because such statutes regulated foreign commerce, an area exclusively controlled by federal power); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) (extending the foreign policy rationale to the deportation of Chinese resident aliens); Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 604 (1889) (grounding the power to regulate immigration in the law of nations and the sovereign power to conduct foreign policy).

2. *See* Graham v. Richardson, 403 U.S. 365, 373 (1971) (voiding an Arizona law which restricted aliens' eligibility for welfare benefits); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (declaring unconstitutional a California law which barred Japanese alien residents from obtaining commercial fishing licenses); Hines v. Davidowitz, 312 U.S. 52, 74 (1941) (invalidating a Pennsylvania law which required aliens to register annually with the state); *see also* Plyler v. Doe, 457 U.S. 202, 225 (1982) (striking down Texas statute which barred undocumented children from enrollment in public schools).

3. DORIS MEISSNER ET AL., IMMIGRATION AND AMERICA'S FUTURE: A NEW CHAPTER 24 (2006).

4. Nat'l Conference of State Legislatures, *2007 Enacted State Legislation Related to Immigrants and Immigration* (2007), http://www.ncsl.org/programs/immig/2007ImmigrationUpdate.htm (last visited Aug. 4, 2008); s*ee also* Cristina Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 593–94 (2008) (discussing the reasons for state and local interest in regulating immigration law).

5. Nat'l Conference of State Legislatures, *supra* note 4.

6. Nat'l Conference of State Legislatures, *Overview of State Legislation Related to Immigrants and Immigration: January—March 2008* (2008), http://www.ncsl.org/print/immig/immigreportapril2008.pdf.

on the National Conference of State Legislatures "Top 10 Policy Issues" forecast for 2008.[7]

North Carolina is on the leading edge of this trend largely due to the fact that the state has the fastest growing foreign-born population in the country, with an increase of 273.7% between 1990 and 2000.[8] North Carolina has responded at both state and local levels with laws and resolutions that seek to regulate immigration through employment restrictions, limits on government benefits, and criminal law.[9] For instance, Gaston and Lincoln Counties in North Carolina have instructed law enforcement agencies to "diligently battle the ever increasing criminal element which is growing daily with the influx of the illegal population and to consistently check the immigration status of each undocumented resident upon his/her arrest."[10]

One might ask what all the fuss is about. The state and federal governments often enforce laws concurrently, especially criminal laws.[11] The reason this flood of state and local actions in the

7. Nat'l Conference of State Legislatures, *NCSL's Top 10 Policy Issues: Predicting a Mix Bag for State Legislatures*, http://www.ncsl.org/programs/ press/2007/pr121407.htm (last visited Aug. 4, 2008) (listing "state budget concerns" as number one).

8. NOLAN MALONE ET AL., U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION: 2000, at 3 (2003), http://www.census.gov/prod/2003pubs/c2kbr-34.pdf.

9. *See, e.g.*, H.R. Res. 2692, 2005–2006 Sess. (N.C. 2006) (entitled "A House Resolution Expressing Support for the Establishment of an Immigration Court in North Carolina, Urging Congress to Make Conviction of Driving While Impaired a Deportable Offense, and Supporting the Expansion of the Department of Homeland Security's Program Permitting Local Officers to Identify Persons Not Legally Present in the United States and Have Been Previously Deported or Who Are Wanted on Outstanding Felony Charges"); Gaston County, N.C., Resolution to Adopt Policies and Apply Staff Direction Relating to Illegal Residents in Gaston County, 2006-414 (Nov. 9, 2006); Lincoln County, N.C., Resolution to Adopt Policies and Provide Staff Direction Relating to Illegal Residents in Lincoln County (Jun. 18, 2007), *available at* http://www.lincolncounty.org/PdfFiles/Ordinances/illegalResidents.pdf.

10. Gaston County, N.C., Resolution to Adopt Policies and Apply Staff Direction Relating to Illegal Residents in Gaston County, 2006-414 (Nov. 9, 2006); Lincoln County, N.C., Resolution to Adopt Policies and Provide Staff Direction Relating to Illegal Residents in Lincoln County (Jun. 18, 2007), *available at* http://www.lincolncounty.org/PdfFiles/Ordinances/ illegalResidents.pdf.

11. United States v. Vasquez-Alvarez, 176 F.3d 1294, 1296 (10th Cir. 1999) (noting that "state and local law enforcement officers are empowered to arrest for violations of federal law, as long as such arrest is authorized by state law"); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 968 (2004) (explaining that federal immigration policy, traditionally based in foreign policy, is now shifting enforcement power to local police); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 394 (2006) (contrasting federal control of immigration with state responsibility for criminal law).

immigration arena is so novel is that for more than a century states were all but excluded from the immigration arena.[12]

The recent deluge of state and local legislation regulating noncitizens, at the same time that the United States is experiencing one of the largest influxes of immigrants in its history,[13] has generated considerable attention from the media[14] and scholars.[15] The usual explanation for the intense state and local interest in immigration law is that the federal government is stymied in enforcing immigration laws.[16] In the face of federal legislative deadlock[17] and agency

12. *See infra* notes 57–71 and accompanying text.

13. *See* Rodriguez, *supra* note 4, at 569 n.1 (reporting studies showing that since 1990 more immigrants have entered the United States than at any other point in history (citing Mary C. Waters & Tomás R. Jiménez, *Assessing Immigrant Assimilation: New Empirical and Theoretical Challenges*, 31 ANN. REV. SOC. 105 (2005) and RICHARD ALBA & VICTOR NEE, REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION (2003))).

14. *See, e.g.*, Jill P. Capuzzo, *Connecticut City Plans to Team Its Police With Federal Immigration Agents*, N.Y. TIMES, Feb. 6, 2008, at B1; Jennifer Delson, *Costa Mesa's Policy Results in 360 Deportations*, L.A. TIMES, Dec. 27, 2007, at B1; Nicole Gaouette, *U.S. Sues Illinois Over Immigration*, L.A. TIMES, Sep. 25, 2007, at A14; Erika Hayasaki, *Pennsylvania City Immigration Law is in Judge's Hands*, L.A. TIMES, Mar. 23, 2007, at A24; Deborah Horan, *Probes of Legal Status a No-No? Immigration Would Become Non-Issue Under Evanston Law*, CHI. TRIB., Jan. 11, 2008, § 2, at 1; P.J. Huffstutter, *Missouri City Tests Immigration Laws*, L.A. TIMES, Mar. 1, 2007, at A18; Editorial, *Immigration Ground Zero: In Arizona, the Fruit of Congress's Failure*, WASH. POST, Dec. 26, 2007, at A20; John Keilman, *To Serve Protect, Perhaps Deport: Suburb Cops Could Act as Immigration Agents*, CHI. TRIB., Jan. 15, 2007, § 1, at 1; Charles L. Lindner, Opinion, *No Job for the LAPD: Police Shouldn't Be Required to Enforce Immigration Laws*, L.A. TIMES, May 6, 2007, at M6; Nick Miroff, *Residency Rules May Tighten in Pr. William*, WASH. POST, July 6, 2007, at A1; Julia Preston, *Judge Voids Ordinances on Illegal Immigrants*, N.Y. TIMES, July 27, 2007, at A14; Ann M. Simmons, *Immigration Traffic Law Criticized in Louisiana*, L.A. TIMES, Feb. 2, 2007, at A16; Katie Zezima, *Massachusetts Rescinds Deal on Policing Immigration*, N.Y. TIMES, Jan. 12, 2007, at A17.

15. *See infra* note 23.

16. *See, e.g.*, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 798 (2008) (crediting, *inter alia*, failure of federal immigration enforcement); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 34 (2007) ("This extraordinary rise in such legislative interests is undoubtedly due to overburdened locales [and] well publicized and highly polarized federal failures in immigration enforcement . . . ."); Rodriguez, *supra* note 4, at 570 (crediting legislative inaction).

17. *See* Secure Borders, Economic Opportunity and Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007) (introduced in the Senate in May 2007 but never voted on); Security Through Regularized Immigration and a Vibrant Economy Act of 2007, H.R. 1645, 110th Cong. (2007) (introduced in House in March 2007 but never voted on); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006) (passed in the Senate in May 2006 but failed in the House); Border Protection, Anti-terrorism, and Illegal Control Act of 2005, H.R. 4437, 109th Cong. (2005) (passed by the House in December 2005 but not by the Senate); Comprehensive Enforcement and Immigration

inaction,[18] the states have stepped in to fill the vacuum. Yet this is not the first time that the United States has experienced a major influx of immigrants, and the current wave is not necessarily the largest.[19] Nor is this the first time Congress has been deadlocked on an issue. Moreover, this is not an area bereft of regulation; the volume and complexity of immigration laws is comparable to the tax code,[20] and federal immigration enforcement has increased substantially over the past few decades.[21] Something else must be going on.

Deeper historical and policy-based reasons explain the seemingly sudden awakening of state and local interest in immigration, and

Reform Act of 2005, S. 1438, 109th Cong. (2005) (introduced in the Senate in July 2005 but never voted on); Secure America and Orderly Immigration Act, S. 1033, 108th Cong. (2005) (introduced in the Senate in May 2005 but never voted on).

18. Linda Kaiser Conley & Ilan Rosenberg, *The Eye of the Storm*, PA. LAW., Nov.–Dec. 2007, at 35 (reporting that "[s]ensing public frustration with the federal government's failure to enforce border control and to enact immigration reform legislation, state and local governments have attempted to fill the void by regulating immigration within their borders"); Fred Lucas, *Feds Have Dropped Ball on Illegal Immigration*, *Say Local Governments*, CYBERCAST NEWS SERVICES, Mar. 1, 2007, at 1, http://www.cnsnews.com/ViewPolitics.asp?Page=/Politics/archive/200703/POL2007030la.html (last visited Aug. 10, 2008) (stating "[w]hen the federal government drops the ball on enforcing immigration laws, it's up to the local governments to protect the taxpayers" (quoting Starletta Hairston, former council member of Beaufort County, South Carolina, on her reasons for county policies that deny licenses to businesses who employ unauthorized aliens and deny business licenses to unauthorized immigrants)); s*ee also* Huntington, *supra* note 16, at 798 & n.42 (citing cases brought by states seeking to compel federal enforcement of immigration laws).

19. *See* Rodriguez, *supra* note 4, at 574 n.18 (explaining that although the numbers of immigrants in the U.S. is at an all-time high, at the beginning of the twentieth century immigrants made up a larger percentage of the total U.S. population than they do today (citing RICHARD ALBA & VICTOR NEE, REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION (2003)); U.S. CENSUS BUREAU, COMING TO AMERICA: A PROFILE OF THE NATION'S FOREIGN BORN 1 (2000), http://www.census.gov/prod/2000pubs/cenbr002.pdf (noting that in 1910 the foreign-born made up fifteen percent of the total U.S. population whereas in 1997 they were just ten percent of the total U.S. population). Nor have estimates of the population of undocumented immigrants changed much. In 1975, the Supreme Court cited an INS estimate of 10 to 12 million undocumented immigrants living in the United States. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 878 & n. 4 (citing *Hearings on Illegal Aliens before Subcommittee No. 1 of the H. Comm. on the Judiciary*, 92d Cong., 1323–25 (1972) and INS ANN. REP. iii (1974)). This figure is similar to current estimates of 11.6 million. *See* MICHAEL HOEFER, NANCY RYTINA & CHRISTOPHER CAMPBELL, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2005, at 1 (Aug. 2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/ publications/ ILL_PE_2005.pdf.

20. *See, e.g.*, Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

21. *See, e.g.*, *infra* notes 148–64 and accompanying text.

forecast its future. Courts[22] and scholars[23] have fiercely debated

22. *See, e.g.*, Ariz. Contractors Ass'n, Inc. v. Candelaria, 534 F. Supp. 2d 1036, 1051–59 (D. Ariz. 2008) (upholding against preemption and due process challenges state law suspending or revoking business licenses of employers who intentionally or knowingly hire noncitizens without work authorization); Gray v. City of Valley Park, No. 4:07CV00881 ERW, 2008 WL 294294, at *19, *24 (E.D. Mo. Jan. 31, 2008) (upholding against preemption and equal protection challenges a local ordinance suspending business licenses of employers who hire noncitizens without work authorization); Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 554–55 (M.D. Pa. 2007) (invalidating on preemption and due process grounds a city ordinance that regulated employment of undocumented aliens and required tenants to provide proof of citizenship to landlords); Villas at Parkside v. City of Farmers Branch, 496 F. Supp. 2d 757, 772 (N.D. Tex. 2007) (granting on preemption grounds a restraining order against enforcement of a city ordinance that required tenants to prove lawful presence in the United States); Doe v. Village of Mamaroneck, 462 F. Supp. 2d 520, 560 (S.D.N.Y. 2006) (invalidating on equal protection grounds law enforcement campaign which aggressively issued traffic citations to contractors seeking day laborers); League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 771 (C.D. Cal. 1995) (invalidating on preemption and equal protection grounds most civil provisions of a state law discriminating against unauthorized immigrants while upholding provisions establishing criminal sanctions for using false citizenship or permanent resident documents); Cent. Am. Refugee Ctr.-Carecen (N.Y.) v. City of Glen Cove, 753 F. Supp. 437, 439–42 (E.D. N.Y. 1990) (upholding against equal protection and First Amendment challenges local anti-solicitation ordinances which prevented day laborers from congregating); Aliessa *ex. rel.* Fayad v. Novello, 96 N.Y.2d 418, 435–36 (N.Y. 2001) (striking down on equal protection grounds New York law that terminated Medicaid benefits for certain noncitizens).

23. *See generally* Raquel Aldana, *On Rights*, *Federal Citizenship*, *and the "Alien*," 46 WASHBURN L.J. 263 (2007) (describing the devolution of federal plenary power to states and critiquing the strategic use of the preemption doctrine to challenge state anti-alienage measures); Huntington, *supra* note 16 (arguing that both the text and structure of the Constitution permit shared authority in the realm of immigration law); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law*," 29 N.C. J. INT'L L. & COM. REG. 639 (2004) (examining federal proposals to authorize local law enforcement to enforce immigration laws); Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005) (arguing that local police are integral to enforcing immigration laws); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007) (arguing that the criminalization of immigration laws has incorporated normative values of the criminal justice system, but rejected its procedural safeguards); Hiroshi Motomura, *Federalism*, *International Human Rights*, *and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361 (1999) (arguing that greater state involvement in foreign affairs should not lead to greater state involvement in immigration enforcement and policy making); Olivas, *supra* note 16 (arguing that preemption is not guided by normative arguments based on the effectiveness or ineffectiveness of a particular enforcement regime); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006) (arguing that federal laws requiring cooperation in enforcing immigration laws from state and local governments should be subject to intermediate scrutiny by the courts); Rodriguez, *supra* note 4 (advocating that federal and state lawmakers refrain from preempting sub-national immigration legislation and exploring the benefits of cooperative ventures in immigration regulation); Victor C. Romero, *Devolution and Discrimination*, 58 N.Y.U. ANN. SURV. AM. L. 377, 381–85 (2002) (countering arguments that devolution of authority to set immigration policy to the

whether federal control over immigration law should preempt state and local regulation of noncitizens, and whether individual constitutional rights prohibit subnational governments from treating noncitizens less favorably than citizens. Underlying this debate is the larger question of whether the movement and conduct of noncitizens is a proper subject for state and local regulation. Subnational action may enhance federal enforcement of immigration law,[24] but it may also usurp federal control over foreign policy and national membership and undermine individual protections for noncitizens.[25]

These debates, however, have neglected a major impetus for concurrent control over immigration law that this Article seeks to excavate. Whether state and local governments may lawfully insert themselves into the immigration arena depends on whether courts and policymakers perceive immigration law as a matter of foreign policy and national identity, or as falling within the domain of traditional state powers.[26] This inquiry has become a moving target—moving toward acceptance in the public and judicial minds of a subnational role in the regulation of noncitizens.

states would serve as a check against federal discrimination); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (2007) (arguing that state immigration policies should be found valid by courts if they serve a legitimate state interest and do not interfere with the goals of federal immigration policy); Peter Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997) (arguing that devolution of authority over immigration to states will lessen demands for stricter federal immigration policies); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws* 6 U. PA. J. CONST. L. 1084 (2004) (arguing that using local law enforcement to enforce federal immigration laws will have adverse effects on civil rights).

24. *Compare* Kobach, *supra* note 23, at 181 (arguing that the assistance of state and local law enforcement is critical to the success of enforcement of federal immigration law), *with* Schuck, *supra* note 23, at 7 (stating that the goals of federal immigration policy might be enhanced by acknowledging state authority in areas such as employment and crime control).

25. *See* Plyler v. Doe, 457 U.S. 202, 225 (1982) (explaining that the states have no power to classify aliens because Congress's foreign relations power includes exclusive regulation of immigrants); Toll v. Moreno, 458 U.S. 1, 10 (1982) (explaining that Congress's broad authority over foreign affairs places substantial limitations on states in classifying aliens); *see also* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 203 (2006) [hereinafter MOTOMURA, AMERICANS IN WAITING] (arguing that enforcement of immigration law should remain an exclusively federal responsibility because state and local enforcement may be overzealous or inconsistent); Hiroshi Motomura, *Whose Immigration Law?: Citizens*, *Aliens*, *and the Constitution*, 97 COLUM. L. REV. 1567, 1596 (1997) [hereinafter Motomura, *Whose Immigration Law?*] (explaining that the federal government should have exclusive power over national self-definition because citizenship is defined nationally); Pham, *supra* note 11, at 987 (arguing that the Constitution and foreign policy require the federal government to exclusively and uniformly exercise the immigration power).

26. *See* Motomura, *Whose Immigration Law?*, *supra* note 25, at 1596–1601.

Beginning in the mid-1980s, federal immigration law has evolved from a stepchild of foreign policy to a comprehensive legislative and regulatory scheme that intersects the triumvirate of state power: criminal law, employment law, and welfare.[27] Shifting immigration law from international foreign policy to a more domestic connection with crime, employment, and welfare casts immigration law into a world infused already with state regulation. This is especially true for state and local efforts to address the criminalization of immigration law, or "crimmigration law."[28] Crimmigration law has acted as a crucible for state and local attempts to curb unwanted immigration. The rise of crimmigration law has transformed immigration law from something the federal government is uniquely competent to control—foreign policy—to something states are experts in—law enforcement.

Connecting immigration law with these domestic areas of law seems to invite states to regulate immigration concurrently with the federal government. This domestication of immigration law will inevitably affect the imaginations of judges and legislators who pass upon the lawfulness of that subnational involvement in immigration regulation. Reimagining immigration law as a domestic affair linked with employment, welfare, and crime is bound to expand judicial acceptance of state and local participation in immigration control. When courts perceive the subnational effort as a regulation of foreign policy, the space for local regulation narrows. When, however, courts view the sub-national government as merely acting within its traditional spheres of power in ways that happen to impact noncitizens, the local rule stands a much greater chance of surviving.

Part I of this Article describes the primacy of state regulation of immigration law during the country's infancy. It narrates the story of the judiciary's wresting of control over immigration regulation from the states and passing that control to the federal political branches. Part II depicts the recent expansion of federal immigration law into areas peculiarly of state and local concern: criminal law, employment, and welfare. Focusing on the recent phenomenon of the criminalization of immigration law, Part II explains how sub-

27. *See* Pham, *supra* note 23, at 1378 (detailing how 1996 immigration laws encroach upon traditional state police powers to protect public safety, health, and welfare); *see also infra* Part II. Family law, another stronghold of state sovereignty, is also pervasively regulated through federal immigration law, but I do not include it in this taxonomy because the federal role in family law has a much longer pedigree, and the current sub-national interest in immigration law seems to have largely passed over family law. *See* Kerry Abrams, *Immigration Law & the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1629–32 (2007).

28. *See* Stumpf, *supra* note 11, at 402.

national governments have responded to the domestic evolution of immigration law by extending their traditional powers in those three areas to regulate noncitizens. Part III looks ahead, predicting that the domestication of immigration law will encourage legislatures and courts to tolerate a wider sphere of such state and local involvement in immigration. Part IV details the costs of subnational use of criminal law to target noncitizens. It advocates that courts and policymakers vigilantly scrutinize subnational crimmigration.

I. STATE PRIMACY AND FEDERAL SUPREMACY OVER IMMIGRATION

A. Early State Control Over Immigrants

At the inception of this country's existence, the colonies and states governed immigration law. Apart from a constitutionally-dubious pair of federal statutes passed in 1798,[29] state and local laws were the only form of immigration regulation during the nation's first century.[30] In 1637, Massachusetts was among the first colonies to craft a classic immigration law when its General Court ordered that no town should receive any stranger who intended to reside there without official permission.[31] Controlling the movement of people across their borders, often without distinguishing between U.S.

29. Alien Enemy Act of 1798, ch. 66, 1 Stat. 577 (codified as amended at 50 U.S.C. §§ 21-24 (2000)) (providing for removal of aliens from countries at war with the United States when the President deems such an alien to be a danger to the United States); Aliens Act of 1798, ch. 58, 1 Stat. 570 (granting the President the exclusive power to expel even friendly aliens). The Aliens Act expired in 1800. *See also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians*, *Aliens*, *Territories*, *and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 87–98 (2002) (recounting the doubts about the existence of a government power that would validate the Aliens Act's authorization to expel admitted, non-enemy aliens); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 15–16 (2003) (recognizing the dangers of broad Executive authority in the Alien Enemy Act to restrict the liberty of persons identified as "enemy aliens" without individualized hearings or trials, which was used to justify the internment of tens of thousands of Japanese Americans during World War II). Beyond the Alien Acts, Congress limited itself to passing laws that fell directly within its power under the Naturalization Clause of the Constitution. *See* U.S. CONST. art. 1, § 8, cl. 4. Three naturalization acts were passed between 1790 and 1798. *See* Act of March 26, 1790, 1 Stat. 103 (repealed 1795); Act of January 29, 1795, 1 Stat. 414 (repealed 1802); Naturalization Act of 1798, 1 Stat. 566 (repealed 1802).

30. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 19–20 (1996).

31. JOSIAH HENRY BENTON, WARNING OUT IN NEW ENGLAND 46 (1911); DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 29 (2007).

citizens and noncitizens,[32] was one of the first opportunities for the fledgling states to flex their newfound sovereign powers.

For the states, these early laws were an opportunity to implement newly gained powers to regulate health, welfare, and crime. State and local government primarily used immigration laws to erect barriers to entry based on indigence, health, race, national origin, religion, and slave status.[33]

Unsurprisingly, convicts were among the immigrants that the states and colonies desired to exclude. A patchwork of civil and criminal laws sought to limit the movement of those convicted of crime. State and colonial attempts to control crime through immigration took two forms: laws excluding previously convicted criminals,[34] and laws expelling those convicted of crimes after entry

32. KANSTROOM, *supra* note 31, at 34 (citing EDMUND S. MORGAN, THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP 136 (2d ed. 1988)) (explaining that early colonial laws regulating movement and settlement of paupers did not distinguish between citizens and foreigners); NEUMAN, *supra* note 30, at 20 (noting that state regulation of migration prior to 1875, including regulation of the movement of the poor and convicts and public health regulation, often applied to U.S. citizens and aliens alike).

33. *See* EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 388–96 (1981); KANSTROOM, *supra* note 31, at 30 (describing 1743 Connecticut law that excluded Moravian immigrants (citing Conn. Col. Recs., V, 405–406; VII, 521)); *id*. (describing 1643 Virginia law ordering Catholic priests to be deported within five days of arrival (citing Act LI, 1643, in 1 STATUTES AT LARGE OF VIRGINIA: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 268–269 (William Waller Hening, ed., Richmond, Pleasants 1809))); NEUMAN, *supra* note 30, at 30 (describing 1738 South Carolina law barring entry for persons likely to become a public charge unless security was given (citing S.C. Act of Mar. 25, 1738, No. 671, § 5)); *id*. at 32 (describing a 1794 New York law permitting exclusion of a non-state citizen who came from an infected place if there was reasonable suspicion the person was infected (citing Act of Mar. 27, 1794, ch. 53, § 2, 1794 N.Y. Laws 525)); *id.* at 40 (describing Illinois law that barred black persons from entering the state (citing Act of Feb. 12, 1853, 1853 Ill. Laws 57)); *id.* at 40 n.237 (noting that some states, including Maryland, passed laws to ban the importation of slaves (citing Act of Dec. 31, 1796, ch. 67, 1796 Md. Laws)); *see also* Peter Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 Harv. C.R.-C.L. L. Rev. 289, 324–25 (2008) (noting that "[s]ome exclusion laws erected bars to admission based on religion, indigence, national origin, criminal status, or race").

34. These early laws addressed the problem of foreign countries seeking to export convicts to the United States. *See* Act of Oct. 1788, 1788 Conn. Acts & Laws 368 (prohibiting importation of convicts sentenced to transportation to the United States by a foreign country); Act of Feb. 14, 1789, ch. 61, § 7, 1789 Mass. Acts 98, 100–01 (prohibiting transportation of anyone convicted of a crime); Act of Nov. 13, 1788, ch. 12, 1788 Va. Acts 9 (same); Act of Mar. 27, 1789, ch. 463, 1788–89 Pa. Acts 692 (mandating that whoever introduced a convict into the state be responsible for removing the convict from the United States)); NEUMAN, *supra* note 30, at 21–22 (citing as examples Act of Feb. 10, 1787, 1787 Ga. Acts 40 (calling for felons banished from another state or foreign country to be arrested and removed)); *see also* Act of Feb. 24, 1821, ch. 22, § 6, 1821 Me. Laws 90,

into the state.[35] The federal government made no real move to prohibit foreign countries from exporting convicts to the United States until 1875.[36]

The early state laws reveal a significant divide between civil and criminal law. Laws of exclusion were primarily civil, even when the basis for exclusion was a crime. In contrast, expulsion from the state was a criminal matter requiring a criminal trial. Once an individual had crossed the colonial or state border, only a criminal trial and resulting conviction could empower the state to expel that individual.[37] Even then, expulsion was not imposed as a matter of course, but rather as punishment for a particularly egregious crime. Expulsion took the form of a sentence of banishment[38] or a gubernatorial pardon on the condition that the offender leave the state or the country.[39] The alternative to acceptance of such a conditional pardon was reinstatement of the original criminal sentence, which in those times was often capital punishment.[40]

While banishment and conditional pardons were not confined to noncitizens, they were precursors to our modern deportation laws.[41] Perhaps the most notorious example of this early form of criminal deportation was the Massachusetts conviction of Anne Hutchinson

91–92 (prohibiting the knowing importation of convicts and imposing a fine for violation); Act of Apr. 25, 1833, ch. 230, 1833 N.Y. Laws 313 (making it a misdemeanor for the commander of a ship to knowingly bring a foreign convict into the state).

35. *See infra* notes 37–39.

36. *See* NEUMAN, *supra* note 30, at 22 (citing Act of Mar. 3, 1875, § 5, 18 Stat. 477).

37. *See* Daniel Kanstroom, *Deportation*, *Social Control*, *and Punishment: Some Thoughts About Why Hard Laws Make Bad* Cases, 113 HARV. L. REV. 1889, 1908 (2000) (noting that colonial and state laws "seem never to have focused on the deportation of noncitizens for post-entry criminal conduct"); Markowitz, *supra* note 33, at 325 (explaining that, "[i]n sharp contrast to the well-established civil administrative power to exclude undesirable immigrants, American colonial history is devoid of any civil laws used to expel noncitizens after admission").

38. *See* NEUMAN, *supra* note 30, at 22; Kanstroom, *supra* note 37, at 1908–09 (explaining that deportation for post-entry conduct for long-term legal residents is similar to the criminal punishment of banishment used by the Colonies); Markowitz, *supra* note 33, at 329–41 (advocating a bifurcated approach to expulsion that would extend criminal procedural protections to lawful permanent residents in post-entry deportation cases). Nor was banishment restricted to noncitizens. *See* NEUMAN, *supra* note 30, at 22 ("To the best of my knowledge, no state statute singled out aliens for expulsion from the state or the United States as punishment for serious crime, but aliens were subject to these generally applicable sanctions.").

39. *See* NEUMAN, *supra* note 30, at 23 & n.33 (listing statutes).

40. *See id.* at 23 (citing LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 280–84 (2d ed. 1985)).

41. *See id.* at 22–23; Markowitz, *supra* note 33, at 324–27 (emphasizing that banishment and conditional pardons were criminal punishments, not civil sanctions).

for sedition and her sentence to banishment.[42] Less well-known was the practice of singling out slaves and free blacks, then of disputed citizenship, for the punishment of banishment, "transportation" to another jurisdiction, and conditional pardons.[43] Later, laws appeared that more explicitly restricted these punishments to noncitizens.[44]

The emphasis of these early colonial and state immigration laws was not on foreign affairs in the sense of the state's relations with foreign countries, but rather on controlling the entrance of undesirables who might settle in the community. Arising from the states' traditional powers over health, welfare, and crime, these laws sought to affect the population inside the borders of the state. Together, these early colonial and state laws constituted a network of border control regulation,[45] reflecting choices about who may join the community and who should be excluded. They served to control the membership of the community by screening out those who were of an undesirable status, race, color, religion, or class.

B. Foreign Policy and Federal Supremacy over Immigration

1. Concurrent Regulation of Immigration Law

In contrast to the colonies and states, the federal government's first forays into immigration control arose from foreign policy concerned with relations with foreign nations and the migration of noncitizens across international borders.[46] Some of the earliest immigration laws took the form of treaties, such as the 1794 Jay Treaty permitting British citizens and Native Americans to freely enter the United States at the Canadian border.[47] Later, federal

42. *See* KANSTROOM, *supra* note 31, at 29–30.

43. *See id.* at 43, 77–90.

44. *See* NEUMAN, *supra* note 30, at 23 (citing Ala. Const. of 1819, art. I § 27, and Miss. Const. of 1817, art. I, § 27).

45. *See* Kanstroom, *supra* note 37, at 1907 (defining "border control" laws to include laws that (1) "prescribe the deportation of persons who have evaded border controls," (2) "permit the deportation of persons who violate an affirmative condition on which they were permitted to enter," or (3) "seek to address the violation of an express prohibition of which a noncitizen was informed at the time of admission into the United States").

46. *See* STEPHEN LEGOMSKY, IMMIGRATION AND THE JUDICIARY 179–92 (1987) (identifying three stages of the history of federal exclusivity over immigration law).

47. *See* Treaty of Amity, Commerce and Navigation, U.S.-U.K., Nov. 19, 1794, 8 Stat. 116 ("Jay Treaty"); *see also* Treaty of Commerce and Navigation, U.S.-Prussia, May 1, 1828, 8 Stat. 378 ("Treaty of 1828") (permitting Prussian citizens to freely enter and reside in the U.S.); Treaty of Peace, Friendship, Limits and Settlement, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 ("Treaty of Guadalupe Hidalgo") (allowing Mexicans in conquered territories to remain in the territories and to become U.S. citizens). *See generally* Kevin R. Johnson, *An Essay on Immigration, Citizenship, and U.S./Mexico Relations: The Tale of Two*

legislation began to play a role, such as the 1819 law restricting the number of passengers on ships coming to the United States[48] and the numerous laws governing Chinese migration to the United States.[49]

The early 1800s was an era marked by the joint exercise of federal and state power over immigration.[50] In 1837, in *City of New York v. Miln*,[51] the Supreme Court appeared to endorse the state authority to enact immigration laws concurrently with the federal government.[52] In 1882, Congress included states in immigration regulation when it established a system of central control of immigration under the federal Secretary of the Treasury using state immigration inspectors.[53] This sharing of power was not, however, without its tempests.[54]

The focus on foreign policy as a basis for federal immigration laws of this period is not surprising since the contemporary understanding was that federal power over immigration arose from

Treaties, 5 SW. J. L. & TRADE AM. 121, 124 (1998) (hypothesizing that the omission of any reference to migration in the Treaty of Guadalupe Hidalgo was probably due to the contemporaneous absence of comprehensive immigration laws); Joshua J. Tonra, Note, *The Threat of Border Security on Indigenous Free Passage Rights in North America*, 34 SYRACUSE J. INT'L. L. & COM. 221 (2006) (discussing impact of Jay Treaty).

48. Act of Mar. 2, 1819, ch. 46, 3 Stat. 488, 488; s*ee* MOTOMURA, AMERICANS IN WAITING, *supra* note 25, at 22.

49. *See* Coolie Trade Law, Act of Feb. 19, 1862, ch. 27, 12 Stat. 340, 340 (prohibiting transporting "the inhabitants or subjects of China, known as 'coolies' . . . as servants or apprentices, or to be held to service or labor"); Immigration Act of July 4, 1864, ch. 246, 13 Stat. 385 (repealed 1868) (specifying a legal process for Chinese immigration and authorizing immigrant labor contracts in which immigrants pledged their wages to pay for transportation); Treaty of Trade, Consuls and Emigration between China and the United States, U.S.-China, July 28, 1868, Art. V, 16 Stat. 739 ("Burlingame-Seward Treaty") (providing for "the mutual advantage of free migration and emigration" of both American and Chinese citizens, including for permanent residence).

50. *See* KANSTROOM, *supra* note 31, at 92–93; MOTOMURA, AMERICANS IN WAITING, *supra* note 25, at 21–22.

51. 36 U.S. (11 Pet.) 102 (1837).

52. *Id.* at 132, 141 (upholding state law requiring shipmasters to report all passengers to the state government or risk a fine); *see* MOTOMURA, AMERICANS IN WAITING, *supra* note 25, at 21–22. Even after the federal government began to regulate immigration in 1875, states still had power to pass immigration-related quarantine laws. This power continued until 1921 when New York became the last state to surrender its international quarantine role. *Id.* at 24.

53. Immigration Fund Act, ch. 376, § 2, 22 Stat. 214, 214.

54. *See* Chy Lung v. Freeman, 92 U.S. 275, 280–81 (1875) (holding that a California statute requiring bond for certain classes of criminal immigrants was an unconstitutional regulation of commerce); Henderson v. Mayor of New York, 92 U.S. 259, 274–75 (1875) (invalidating New York law which required vessel owners to pay a bond or tax for every landing immigrant); Smith v. Turner (*The Passenger Cases*), 48 U.S. (7 How.) 283, 463–64 (1849) (voiding New York and Massachusetts statutes which imposed taxes on aliens who landed at ports); MOTOMURA, AMERICANS IN WAITING, *supra* note 25, at 22–23.

the foreign and domestic Commerce Clauses.[55] The federal foreign policy approach, however, contrasts with the states' reliance on domestic powers such as crime control, in line with *Miln's* understanding that state immigration authority arose from an inherent state "police power."[56] Thus, although both the state and federal governments regulated immigration, the approaches that each took were very different.

2. The Rise of Federal Supremacy over Immigration

Not long before the turn of the century, this concurrent state and federal immigration jurisdiction came to an abrupt end. In 1875, in *Chy Lung v. Freeman*,[57] the Court struck down a California statute regulating Chinese immigration, holding that the federal government's power over immigration was supreme.[58] The Court was overtly concerned about foreign policy, stating, "[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States," because "otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations."[59]

55. *See, e.g.*, Edye v. Robertson, 112 U.S. 580, 594–95 (1884); *Chy Lung*, 92 U.S. at 280; *Henderson*, 92 U.S. at 274; *The Passenger Cases*, 48 U.S. (7 How.) at 394; *see also* Cleveland, *supra* note 29, at 106–07 (noting that at around the time the first major federal immigration statute was adopted in 1875 the federal courts were recognizing immigration as an exclusive federal power under the Foreign Commerce Clause); *id.* at 103 (explaining that the majority in the *Passenger Cases* recognized that federal immigration power derived from either the Commerce, Taxation, Naturalization, or Migration Clauses); Markowitz, *supra* note 33, at 298 & n. 46 (noting that in these early cases, "the Court located the federal power over immigration as derived principally from the Foreign Commerce Clause").

56. *Miln*, 36 U.S. (11 Pet.) at 148.

57. 92 U.S. 275 (1875).

58. *Id.* at 280; *see also* Kerry Abrams, *Polygamy*, *Prostitution*, *and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 643–44 (2005) (comparing the California law at issue in *Chy Lung* with the federal Page Act, repealed in 1974, and arguing that these early laws heralded the emergence of federal immigration law).

59. *Chy Lung*, 92 U.S. at 279–80. The Court declined to

> decide for or against the right of a State, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity.

Id. at 280; *see* Huntington, *supra* note 16, at 821–22 (positing that this language challenges the traditional reading of *Chy Lung* as completely foreclosing state regulation of pure immigration law).

Almost fifteen years later, in two cases infamously laced with anti-Chinese rhetoric, the Supreme Court held that the federal government had plenary power—profound discretion unrestrained by constitutional limitations—in the areas of national security, foreign affairs, and immigration. In the *Chinese Exclusion Case*,[60] the Court proclaimed that the political branches had nearly unlimited power to exclude noncitizens seeking entry into the United States.[61] Four years later, *Fong Yue Ting v. United States*[62] extended the plenary power doctrine to removal of noncitizens who were within U.S. territory.[63] Departing from earlier cases, the Court made no attempt to ground this federal power in the Constitution. Instead, it identified an ancient and freestanding power derived from the inherent sovereignty of nations, and therefore independent from the Constitution.[64]

Together, these cases established two corollaries to the plenary power doctrine. The first was that courts would defer almost completely to the decisions of the federal legislature and the executive branch.[65] The effect was that substantive constitutional protections, such as the First Amendment or the Equal Protection Clause, were all but void in the immigration arena.[66] The only constitutional check on the government's power was due process, and even that protected only noncitizens who had entered the United States, not those at or outside the border.[67] Unbridled by the Constitution or the courts and restrained only by the frail Due Process Clause, the reach of this plenary power over noncitizens seemed boundless.

60. Chae Chan Ping v. United States, 130 U.S. 581 (1889).

61. *Id.* at 604.

62. 149 U.S. 698 (1893).

63. *Id.* at 705.

64. Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) (stating that "[t]he right to exclude or to expel all aliens, or any class of aliens . . . [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare"); *see also* Cleveland, *supra* note 29, at 142–43 (emphasizing the Court's assertion that nations have inherent authority to exclude or expel aliens and noting that the Court "made no attempt to locate the immigration power in any specific clause of the Constitution, or even the Constitution generally); Markowitz, *supra* note 33, at 309 ("According to the Court, the civil label and the inapplicability of constitutional criminal procedure protections flowed naturally from the understanding of immigration powers as inherent extra-constitutional powers.").

65. *Fong Yue Ting*, 149 U.S. at 713; *Chae Chan Ping*, 130 U.S. at 602.

66. *Fong Yue Ting*, 149 U.S. at 707; *Chae Chan Ping*, 130 U.S. at 603–04.

67. Yamataya v. Fisher, 189 U.S. 86, 103 (1903); *Fong Yue Ting*, 149 U.S. at 730.

Second, these cases ousted the states from their original role as the primary regulators of the movement of noncitizens.[68] In the *Chinese Exclusion Case*, the Court explained, "[f]or local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."[69] The comings and goings of noncitizens and the length and conditions of their stay constituted foreign policy matters that only the federal government could regulate.[70] In sum, the wide scope of federal power preempted state action in the immigration arena.[71]

3. Reconciling the Immigration and Criminal Powers

Having conceived this apparently awesome power and sketched its limitations on the states, courts, and the Constitution, the Court

68. *See* Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (striking down a California statute regulating Chinese immigration because immigration power is federal); Henderson v. Mayor of New York, 92 U.S. 259, 274 (1875) (striking down New York law requiring vessel owners to give a bond for each foreign passenger); Smith v. Turner (*The Passenger Cases*), 48 U.S. (7 How.) 283, 394 (1849) (holding unconstitutional New York and Massachusetts laws imposing head taxes on landing foreign persons likely to become public charges because they regulated foreign commerce, which is exclusively a federal power).

69. *Chae Chan Ping*, 130 U.S. at 606. The Court grounded this federal exclusivity in "powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." *Id.* at 604.

70. *See id.*, 130 U.S. at 605–06; *Chy Lung*, 92 U.S. at 280; *Henderson*, 92 U.S. at 274–75; *The Passenger Cases*, 48 U.S. at 408–09; *see also* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 262–63 (1985) (questioning the assumption of a close connection between foreign policy and immigration law and critiquing the principle of judicial deference that flows from that connection); LEGOMSKY, *supra* note 46, at 180–86 (tracing the exclusion of the states from the declaration in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196–97 (1824) that the constitutional commerce power as it relates to aliens is exclusive to the federal government, through the *Chinese Exclusion Case*'s grounding of the immigration power in international sovereignty).

71. *See Chae Chan Ping*, 130 U.S. at 605–06; *Chy Lung*, 92 U.S. at 280; *Henderson*, 92 U.S. at 274–75; *The Passenger Cases*, 48 U.S. at 408–09; *see also* Huntington, *supra* note 16, at 813–14 (discussing the argument that immigration is "analogous to the foreign affairs power, over which the federal government traditionally is understood to enjoy exclusive authority as a matter of structural preemption"); Pham, *supra* note 11, at 988 & n.114 (noting that the "widely accepted principle" of federal authority over immigration stems from both "specific constitutional provisions and the nation's status as a sovereign entity"); Rodriguez, *supra* note 4, at 612–13 (discussing the "foundation of the current federal exclusivity principle"); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 510 (2001) ("Since the late nineteenth century, when federal regulation of immigration intensified, the Court has been even more likely to conclude that state or local measures singling out immigrants are preempted.").

proceeded to rein in the breathtaking scope of the doctrine's power over noncitizens. The strongest way the Court offered to cabin the potentially extraordinary reach of the plenary power doctrine was to divide it from the power to control crime.

First, just three years after *Fong Yue Ting*, *Wong Wing v. United States*[72] drew a line in the sand between laws governing immigration and laws that imposed criminal punishment. The Court held that the government could not punish noncitizens for violating immigration law by imprisoning them at hard labor unless it provided the criminal law protections of the Fifth and Sixth Amendments.[73] The federal government could deploy its extraconstitutional sovereign power to govern entry, exclusion, and deportation, but when the law imposed criminal punishment outside of that context, the Constitution held sway.[74]

Second, by excluding the states from a primary role in regulating the movement of noncitizens, the Court confined plenary power to the federal government. That move drastically narrowed the role that criminal law played in governing immigration. Given the states' role as the primary creators and enforcers of criminal law, restricting them from acting in the immigration arena was a major step toward separating criminal law from immigration law. Since the states used both criminal and immigration law as a way to police the boundaries of membership in their communities, excluding the states made it still easier to conceptualize immigration law as an outward-looking component of foreign policy.

Third, the Court stepped in to prevent states from using criminal law (as well as civil law) to discriminate between citizens and noncitizens outside of the entry and removal context. In *Yick Wo v. Hopkins*,[75] a Chinese citizen and about 150 of his countrymen residing in San Francisco were arrested and imprisoned for violating a fire ordinance relating to operating a laundry—a misdemeanor.[76] The Court held that the discriminatory application of the misdemeanor ordinance to Chinese residents violated the Equal Protection

72. 163 U.S. 228 (1896).

73. *Id*. at 237.

74. *See* Linda Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1097–98 (1994) ("[I]n *Wong Wing*, the Supreme Court concluded that although the immigration power is extraordinarily broad, it must nevertheless be exercised within its own domain. That domain governs matters of admission, exclusion, and deportation; beyond it, the alien inhabits the domain of territorially present persons where different and more protective rules against government power apply.").

75. 118 U.S. 356 (1886).

76. *Id.* at 358–59.

Clause.[77] Invalidating the criminal ordinance as applied, the decision barred municipalities from discriminating against noncitizens on the basis of alienage.[78]

Yick Wo is usually cited for the proposition that the Equal Protection Clause applies to aliens and that laws that are neutral on their face may violate the Equal Protection Clause if motivated by discriminatory intent.[79] Yet the criminal nature of the ordinance was at the forefront of Justice Matthews' mind when he declared that "in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."[80]

77. *Id.* at 373–74. The traditional interpretation of *Yick Wo* as a landmark decision prohibiting discriminatory prosecution of the immigration laws has recently been challenged as inconsistent with the contemporaneous acceptance of discriminatory laws. *See generally* Gabriel Chin, *Unexplainable on Grounds of Race: Doubts about Yick Wo*, 2008 U. ILL. L. REV. 1359 (forthcoming Oct. 2008) (arguing that the Court based its decision in *Yick Wo* on the violation of a constitutionally protected property right rather than on the Equal Protection Clause as traditionally understood) (on file with the North Carolina Law Review). Chin argues that at the time the case was decided, the holding was based merely on business concerns, not grand conceptions of Equal Protection. *Id.* at 6–7. In contrast, Hiroshi Motomura views *Yick Wo* as "a reaction to the reluctance of the early plenary power decisions to recognize that noncitizens have rights under the U.S. Constitution." Hiroshi Motomura, *Immigration Policy*, *Immigration*, *and We the People After September 11*, 66 ALB. L. REV. 413, 425 (2003); *see also* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1691 (1992) (stating that the *Yick Wo* Court's "approach to aliens' rights in nonimmigration contexts contrasts sharply with the plenary power doctrine's begrudging and even cavalier treatment of aliens' constitutional claims regarding immigration").

78. *Yick Wo*, 118 U.S. at 373–74.

79. *See, e.g.*, PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1021 (5th ed. 2006); DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 190 (3d ed. 2003); RONALD ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 652 (8th ed. 2007); *see* Bosniak, *supra* note 74, at 1098; Kevin R. Johnson, *Race*, *the Immigration Laws*, *and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1124 n.81 (1988) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16–17, at 1483 (2d ed. 1988)); *see also* Chin, *supra* note 77, at 102 (describing *Yick Wo* as a staple of constitutional law casebooks and noting that the case is usually understood to hold that selective enforcement of a facially neutral statute violates the Equal Protection Clause).

80. *Yick Wo*, 118 U.S. at 367–68 (quoting Barbier v. Connelly, 113 U.S. 27, 31 (1884)); *see* Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (reasoning that permanent resident aliens are a " 'discrete and insular minority' " (quoting United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938))); DAVID COLE, NO EQUAL JUSTICE 159 (1999) (declaring that "[t]he principle established in *Yick Wo* is straightforward: where the government discriminates based on race in its enforcement of the criminal law, it denies equal protection of the laws"); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1536 (1988) (stating that *Yick Wo* "invalidated a facially neutral municipal ordinance that was applied discriminatorily against Chinese laundry operators.

Fong Yue Ting's categorization of deportation as civil, *Yick Wo*'s expansion of constitutional equal protection to include noncitizens within the United States, and the division that *Wong Wing* drew between civil immigration laws and criminal punishment appeared to create limits on the plenary power doctrine. The plenary power doctrine and the power to punish criminal violations are akin in their association "with sovereignty and the state's monopoly on the legitimate means of violence."[81] Although deportation alone was not criminal punishment,[82] *Wong Wing* prohibited the government from calling upon its sovereign power to justify punishment as an adjunct to removal from the country.[83] In other words, the federal government could not bring to bear on the noncitizen both of these awesome powers without some constitutional safeguards.

So, hemmed in on three sides by the plenary power doctrine, the Equal Protection Clause, and the line drawn between deportation and criminal punishment, the Court largely shut the states out of the business of regulating noncitizens separately from citizens, particularly through criminal law. The Court's holdings stripped the states of the power to act where they had previously reigned almost alone, and enthroned the federal government as the exclusive sovereign over immigration.

This turn of events is incongruous in light of the constitutional silence about exclusive federal jurisdiction over immigration law[84] and the many other areas in which state and federal governments exercised concurrent jurisdiction, including over commerce.[85] One way to explain these turn-of-the-century cases flows from historical understandings about when and how noncitizens could be excluded

In invalidating the ordinance, the Court laid the equal protection foundation for the selective prosecution defense"); *cf.* Chin, *supra* note 77, at 2, 4 (arguing that "*Yick Wo* has never been applied to invalidate a conviction based on racially selective prosecution because it did not hold that it violated the Equal Protection Clause of the Fourteenth Amendment to prosecute an individual because of his race").

81. *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 21 (2007).

82. Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893).

83. Wong Wing v. United States, 163 U.S. 228, 237 (1896).

84. *See* KANSTROOM, *supra* note 31, at 15; Huntington, *supra* note 16, at 812–13 (setting out alternative explanations for this constitutional silence); Schuck, *supra* note 23, at 57; Rodriguez, *supra* note 4, at 572.

85. *See* New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 64 (1980) (noting concurrent jurisdiction over employment discrimination); Ohio v. Wyandotte Chem. Corp., 401 U.S. 493, 509–10 (1971) (noting concurrent jurisdiction over environmental protection); Smith v. Turner, 48 U.S. (7 How.) 283, 320 (1849) (discussing concurrent jurisdiction over commerce); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 71 (1824) (same).

from membership in the national or local community. At the turn of the century, there was no national system of border inspection and alien registration comparable to what exists today.[86] Immigration laws provided for deportation only when it was based on conduct occurring prior to entry or closely related to entry.[87] Postentry conduct did not truly become grounds for removal until 1910.[88] Until then, the immigration laws retained some connection with border control, limiting grounds for deportation based on a noncitizen's conduct within the United States to a particular time period after crossing the border.[89]

Thus, in the late 1800s, outside of those "extended border-control laws,"[90] federal immigration law made no provision to expel noncitizen residents who had entered lawfully, even for acts that were grounds for forbidding entry. Alien residents who entered lawfully enjoyed the same personal and property protections as citizens.[91] Aside from border control laws, the state criminal laws governing banishment, conditional pardons, and transportation were the only means of expelling a noncitizen resident.[92]

At some level, then, resident noncitizens were members of the community in which they settled. The benefits of membership included criminal procedural protections against state power to physically remove them. *Chy Lung*'s holding restricting the states in the immigration realm,[93] and *Yick Wo*'s holding that the Equal Protection Clause prohibits applying state criminal law in a way that discriminates based on alienage,[94] together constituted a declaration

86. *See* NEUMAN, *supra* note 30, at 45 & n.9 (noting that in the late 1800s there were only a handful of federal laws focused on immigration). *See generally* Mae Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States*, *1921–1965*, 21 LAW & HIST. REV. 69 (2003) (discussing the evolution of federal border control in the early 20th Century, including the development of quota systems, Border Patrol, and criminalization of unlawful entry).

87. *See* KANSTROOM, *supra* note 31, at 124–25; Kanstroom, *supra* note 37, at 1910.

88. *See* Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 900, *amended by* Act of Mar. 26, 1910, ch. 128, § 2, 36 Stat. 263, 265 (to remove any time limit based on date of entry) (repealed 1917); KANSTROOM, *supra* note 31, at 125; Kanstroom, *supra* note 37, at 1911.

89. *See* KANSTROOM, *supra* note 31, at 124–25; Kanstroom, *supra* note 37, at 1910.

90. Kanstroom, *supra* note 37, at 1907–08.

91. KANSTROOM, *supra* note 31, at 97 (citing JAMES REDDIE, INQUIRIES INTO INTERNATIONAL LAW 208 (1842)).

92. *See* Markowitz, *supra* note 33, at 327. *See generally* Gerald Neuman, *The Lost Century of American Immigration Law* (1776–1875), 93 COLUM. L. REV. 1833 (1993) (discussing these early state means of expulsion).

93. *See* Chy Lung v. Freeman, 92 U.S. 275, 280 (1875).

94. *See* Yick Wo v. Hopkins, 118 U.S. 356, 358–89 (1886).

that a state could not use the criminal power to exclude its residents from membership based on alienage alone.[95]

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Thus, when the Court first articulated the plenary power doctrine, it would have applied only to immigration laws that governed the external borders of the United States. By making clear that the states could not claim a parallel sovereign power over their own borders, the Court may have imagined that it had granted the federal government a mere sliver of omnipotence. The plenary power doctrine would operate only at the edges of the country, wielded only by a federal sovereign that, to date, had not shown a lively interest in immigration legislation.

C. Unleashing Plenary Power

The seeds of destruction of these restrictions on the plenary power doctrine were sown in their creation. The late nineteenth century cases raised difficult questions of interpretation and categorization. *Yick Wo* left unclear when states could enact or enforce criminal laws in ways that distinguished noncitizens from citizens.[96] *Wong Wing* raised a difficult line-drawing question of when a law imposed criminal punishment and therefore triggered criminal procedural protections, rather than using imprisonment as an adjunct to deportation and therefore requiring only civil due process.[97] Did a

95. *See* Truax v. Raich, 239 U.S. 33, 41 (1915) (holding that noncitizens have "the right to work for a living in the common occupations of the community," and state laws maintaining the opposite would be in "hostility with exclusive federal power . . . to control immigration"). State laws nevertheless discriminated based on alienage plus race by borrowing the federal immigration rule that Asians could not naturalize. By barring from land ownership "aliens ineligible to citizenship," some states prohibited Asians from owning land because federal law made only Asians ineligible for citizenship. Chin, *supra* note 77, at 30 (citing Dudley O. McGoveney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7, 7 n.1 (1947)); *see also* Fumiko Mitsuuchi v. Security-First Nat. Bank of Los Angeles, 229 P.2d 376, 378 (Cal. App. 1951) (noting that "it was the public policy of the State to prevent title to agricultural lands to vest directly or indirectly in persons of Japanese ancestry who were not American citizens").

96. This question was soon answered by cases holding *Yick Wo* inapplicable to criminal cases unrelated to civil violations even when the decision to prosecute was based on race. *See* Chin, *supra* note 77, at 7–17. After *Brown v. Board of Education*, 347 U.S. 483 (1954), *Yick Wo* was reinterpreted to provide a claim for selective prosecution based on race. Chin, *supra* note 77, at 4.

97. Wong Wing v. United States, 163 U.S. 228, 236 (1896); *see also* KANSTROOM, *supra* note 31, at 122–23 (noting that "the Supreme Court has never seriously reconsidered" this "basic analytical question"); MOTOMURA, AMERICANS IN WAITING, *supra* note 25, at 65–66; Kanstroom, *supra* note 37, at 1903–04 (noting that this line-drawing question "has yet to be fully resolved").

law that imposed deportation for conduct that was also punishable as a crime trigger criminal procedural protections when adjudicating whether the noncitizen had committed the conduct?

An early statute became the fulcrum on which several of these issues turned. Spurred by perceptions that perpetrators of crime were disproportionately of foreign birth,[98] in 1907 Congress prescribed deportation for "any alien woman or girl" found to be a prostitute after entry.[99] The statute marked the rise of legislation mandating deportation for postentry conduct.[100] Its significance lies in undermining the notion that the plenary power doctrine applied only at the border.

The 1907 statute also played a role in toppling a second potential barrier constraining the plenary power doctrine. In a terse opinion in *Bugajewitz v. Adams*,[101] Justice Oliver Wendell Holmes upheld the statute against a constitutional challenge.[102] *Bugajewitz* confronted the dilemma inherent in *Wong Wing*'s holding: when a deportation ground is based on conduct that is also a crime under state or local law, how is the deportation distinguishable from criminal punishment? Requiring criminal procedural protections in deportation proceedings in that circumstance would allow state criminal law to dictate whether civil due process or criminal procedures applied in federal deportation proceedings. Similarly, a rule that prohibited deportation based on conduct that was also a crime would allow state criminal law to control the federal plenary power over immigration.

Justice Holmes' solution was to completely divorce the local criminal law from the deportation ground, permitting the state and federal governments to use both independently. Holmes rejected Bugajewitz's argument that she was being deported for what was in essence a crime, and was therefore entitled to a trial complete with criminal process.[103] He reasoned that Congress's decision to base

98. *See* KANSTROOM, *supra* note 31, at 125 (quoting an 1891 House Report declaring that "at least 50 percent of the criminals, insane and paupers of our largest cities . . . are of foreign birth" (citing HUTCHINSON, *supra* note 33, at 101).

99. Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 900 (amended by Act of Mar. 26, 1910, ch. 128, 2, 36 Stat. 263, 265 to remove any time limit based on date of entry) (repealed 1917); *see* KANSTROOM, *supra* note 31, at 125–26.

100. *See* KANSTROOM, *supra* note 31, at 124–26; Kanstroom, *supra* note 37, at 1909–11.

101. 228 U.S. 585 (1913).

102. *Id.* at 592.

103. *Id.* ("The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want. The coincidence of the local penal law with the policy of Congress is an accident.").

deportation on conduct that also had local criminal consequences was a mere coincidence, and had no bearing on the deportation proceeding.[104] In sum, the deportation was not punishment despite the fact that the underlying conduct was grounds for criminal sanctions by the state.[105]

By divorcing deportation from the subfederal criminal justice system, *Bugajewitz* made deportation a uniquely federal proceeding.[106] The end result was to permit the federal government to place Bugajewitz in deportation proceedings without regard to whether the state or local government could also criminally prosecute her. The case permits the federal government to deport a noncitizen under civil standards of proof based on charges that in the criminal justice system would require proof beyond a reasonable doubt.[107]

It is not unusual for the same conduct to trigger both criminal and civil sanctions.[108] The deportation context, however, is unique. Based on the plenary power doctrine, the federal government has broad power, almost unlimited by the Constitution, to establish substantive deportability grounds. Unlike most civil contexts, the deprivation of liberty that deportation exacts is often just as great as criminal punishment, and sometimes greater.[109] At bottom, *Bugajewitz* permits the two greatest powers of the government to be brought to bear on the noncitizen for the same conduct—the immigration power by the federal government, and the criminal law by the state or local government.

A significant shard of *Wong Wing* survives *Bugajewitz*. While the federal government wields great power over substantive

104. *Id*.
105. *Id.*
106. *Id.*
107. *See In re* Winship, 397 U.S. 358, 368 n.6 (1970).
108. *See, e.g.*, Carrie C. Boyd, *Expanding the Arsenal for Sentencing Enviromental Crimes: Would Therapeutic Jurisprudence and Restorative Justice Work?*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 483, 511–512 (2008) (discussing the use of administrative, civil, and criminal sanctions to address environmental misconduct); Alison McMorran Sulentic, *Now I Lay Me Down to Sleep: Work-Related Sleep Deficits and the Theology of Leisure*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 749, 782 (2006) (noting that courts often impose criminal or civil sanctions for negligent drivers).
109. *See* KANSTROOM, *supra* note 31, at 5 (describing how deportation results in ostracism, family and community separation, and banishment); Kanstroom, *supra* note 37, at 1914 (discussing how the consequences of deportation are similar to those of conviction of a crime); Markowitz, *supra* note 33, at 294–95 (describing how a deported lawful permanent resident may suffer a greater deprivation of liberty than he would have for a criminal conviction because deportation may mean permanent exile from his family, home, and livelihood).

immigration law with few constitutional restrictions,[110] it may not make an end run around constitutional criminal procedural protections by incorporating criminal punishment in civil deportation proceedings. Neither case, however, answered the question of whether state and local governments can single out noncitizens when employing their traditional power to control crime.

II. THE DOMESTICATION OF IMMIGRATION LAW

The exclusion of the states from immigration law held sway for more than 100 years, policed by both the preemption and equal protection doctrines and essentially unchallenged until the recent domestication of immigration law.[111] Federal exclusivity manifested itself as constitutional (or structural) preemption, under which states do not have the power to enact pure immigration laws: laws that control "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[112]

Beginning in the 1970s, robust equal protection jurisprudence imposed greater limits on state power over noncitizens outside of pure immigration law.[113] Alienage law is the name given to the untidy body of laws that fall outside of pure immigration law but that define the rights and obligations of noncitizens within the United States.[114]

110. *See, e.g.*, KANSTROOM, *supra* note 31, at 16–17; MOTOMURA, AMERICANS IN WAITING, *supra* note 25, at 35–36; Cleveland, *supra* note 29, at 158–63.

111. *See infra* note 120 and accompanying text.

112. De Canas v. Bica, 424 U.S. 351, 355 (1976). The federal Immigration and Nationality Act voluminously regulates these matters. *See* Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

113. *See* Mathews v. Diaz, 426 U.S. 67, 84–85 (1976) (declaring that "state statutes that deny welfare benefits to resident aliens . . . encroach upon the exclusive federal power over the entrance and residence of aliens . . . . [I]t is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens." (citing Graham v. Richardson, 403 U.S. 365, 376–80 (1971))); *Graham*, 403 U.S. at 376–80 (striking down state welfare laws containing a citizenship requirement as a violation of the Equal Protection Clause, and holding that the states did not have the power to distinguish citizens from noncitizens).

114. *See* Huntington, *supra* note 16, at 796; Rodriguez, *supra* note 4, at 618. The distinction between pure immigration law and alienage law is famously slippery, because immigration laws often govern the rights and obligations of noncitizens inside the United States, and alienage laws may provide noncitizens incentives to enter or leave. *See* Linda Bosniak, *Varieties of Citizenship*, 75 FORDHAM L. REV. 2449, 2451–52 (2007) (arguing that both immigration and alienage law are often ultimately about border regulation); Huntington, *supra* note 16, at 798 ("[A]lienage laws barring non-citizens from certain public benefits likely affect immigration by discouraging some non-citizens from coming to the United States and encouraging others to leave . . . [and c]onversely, immigration laws

Equal protection challenges to federal alienage laws received rational basis review.[115] Equal protection challenges to most state alienage laws, however, triggered strict scrutiny by the courts.[116] State alienage laws that targeted undocumented aliens or related to political membership in the community engendered less rigorous constitutional review.[117] These divergent levels of scrutiny between federal and state action relating to noncitizens flowed from the historical understanding that immigration law is a federal concern.[118]

Under the weight of the plenary power and equal protection doctrines, state and local attempts to directly regulate the movement of noncitizens were sparse during the nineteenth and twentieth centuries.[119] It is only recently that states have begun to demand a substantial role in governing the comings and goings of noncitizens across their borders and the conditions under which immigrants remain.[120] Recent state forays into governance of noncitizens have followed naturally from the domestication of immigration law: the expansion of federal immigration law into areas peculiarly of state and local concern, namely, criminal law, employment, and welfare.

making the conviction of certain crimes the basis for removal likely affect non-citizens' behavior while they are in the country"); Hiroshi Motomura, *Immigration and Alienage*, *Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 203 (1994).

115. *See Mathews*, 426 U.S. at 79–80 (stating that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens"); *id*. at 85 ("[A] division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business"); Bosniak, *supra* note 74, at 1064; Huntington, *supra* note 16, at 796.

116. *See, e.g.*, *Graham*, 403 U.S. at 371–72, 376 (holding alienage to be a suspect class and applying strict scrutiny to state law restricting welfare benefits to aliens); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419–20 (1948) (holding that state law barring Japanese permanent residents from obtaining commercial fishing licenses violated Equal Protection Clause); Truax v. Raich, 239 U.S. 33, 43 (1915) (holding that state employment restrictions on immigrants violate Equal Protection); Yick Wo v. Hopkins, 118 U.S. 356, 369, 374 (1886) (striking down municipal ordinance as applied to noncitizens as violative of the Equal Protection Clause).

117. *See, e.g.*, Cabell v. Chavez-Salido, 454 U.S. 432, 438–39 (1982) (upholding California law requiring U.S. citizenship for public officers); Plyler v. Doe, 457 U.S. 202, 219 n.19, 223 (1982); Bosniak, *supra* note 74, at 1064.

118. *See* Bosniak, *supra* note 74, at 1110 (stating "*federal* discrimination on the basis of alienage is a form of regulation of immigration—or regulation of the nation's membership sphere") (comparing Mathews v. Diaz, 426 U.S. 67 (1976), with Graham v. Richardson, 403 U.S. 365 (1971)).

119. *See* Rodriguez, *supra* note 4, at 569–70.

120. *Id.* Rodriguez notes, "among the most notable regulatory trends of recent years is the rise of state and local efforts designed to control immigrant movement, define immigrant access to government, and regulate the practices of those with whom immigrants associate in the private sphere." *Id.* at 569.

These developments in turn have triggered a new look at the established notions of exclusive federal power over immigration law and the role of the Equal Protection Clause as a bulwark against state and local alienage laws.

A. Employment and Welfare

1. Immigration Law and Employment

The transformation in the federal approach to immigration law from a border-focused foreign policy matter to a more internal focus began with employment law. In 1974, Congress amended the Farm Labor Contractor Registration Act (FLCRA) to prohibit farm labor contractors from employing aliens without work authorization.[121] Then, in 1986, in the Immigration Reform and Control Act (IRCA), Congress sought to curb unauthorized immigration by sanctioning employers who hired undocumented immigrants.[122] IRCA also included a provision prohibiting employment discrimination on the basis of citizenship status.[123] In doing so, federal immigration law turned away from border enforcement toward the interior, putting pressure on employment regulation to deter unauthorized migrants from crossing the border.

This shift toward controlling immigration by focusing on the interior was the first major step toward reclassifying immigration law as a domestic issue, rather than as pure foreign policy. IRCA was the first expansion of federal immigration enforcement into employment, an area of traditional state concern.[124] IRCA placed burdens on all employers to reject noncitizens without work authorization, regardless of whether those employers had played any direct part in how the job applicant had entered the country.[125] Having divorced immigration law from its historically close connection to border

121. Farm Labor Contractor Registration Act of 1963, Pub. L. No. 93-518, § 11(a)(3), 88 Stat. 1652, 1655 (1974), *repealed by* Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470, § 523, 96 Stat. 2583, 2600 (1983).

122. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3359, 3365–68 (codified at 8 U.S.C. § 1324a(e), (f) (2000)).

123. *Id.* at § 102(a), 100 Stat. at 3374–80 (codified at 8 U.S.C. § 1324b (2000)).

124. *See* De Canas v. Bica, 424 U.S. 351, 356 (1976) (noting that "[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State"); Ariz. Contractors Ass'n, Inc. v. Candelaria, 534 F. Supp. 2d 1036, 1050 (D. Ariz. 2008) ("When Congress enacted employer sanctions in IRCA, it acted 'within the mainstream of [state] police power regulation.' " (quoting *De Canas*, 424 U.S. at 356)).

125. *See* Immigration Reform and Control Act of 1986 § 101(a)(1), 100 Stat. 3359, 3360 (codified at 8 U.S.C. § 1324a(a) (2000)).

control,[126] IRCA more closely resembled classic state employment law[127] in regulating hiring and termination, which are arguably the two most important employment decisions.

2. Immigration Law and Welfare

Similarly, welfare law was a major situs for the domestication of immigration law. In 1971, the Supreme Court established that the equal protection and preemption doctrines prohibited states from distinguishing between citizens and noncitizens in distributing welfare benefits.[128] *Graham v. Richardson*[129] struck down two state laws conditioning welfare on U.S. citizenship and residency in the United States.[130] Five years later in *Mathews v. Diaz*,[131] the Court held that federal authority made all the difference: the Equal Protection and Due Process Clauses did not bar the federal government from discriminating against aliens in determining Medicare eligibility.[132] Even in this seemingly domestic arena, the Court relied on the federal power over foreign policy and immigration law in upholding the federal law.[133]

126. *See supra* notes 87–100 and accompanying text.

127. State employment laws regulate, among other things, compensation, collective bargaining, hours, and conditions of work. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-286(A) (2008) (stating that trucker drivers or bus drivers may not be on duty for more than ten consecutive hours); CAL. LAB. CODE § 204(b)(1) (2007) (requiring that workers be compensated for all hours worked in excess of normal pay period no later than the next regular payday); MASS. GEN. LAWS ch. 150C, § 1 (2008) (stating that a written collective bargaining agreement to arbitrate conflicts between a labor organization and an employer is valid and enforceable); OHIO REV. CODE ANN. § 4101.11 (LexisNexis 2007) (requiring that all employers furnish safe working conditions); *see also De Canas*, 424 U.S. at 356 (listing examples of state laws regulating employment, including "[c]hild labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws"). Like IRCA, state laws place limits on who an employer may hire, *e.g.*, N.C. GEN. STAT. § 95-25.5 (2007) (limiting employment of youths), and to what extent employers may discriminate in hiring, *e.g.*, N.C. GEN. STAT. § 95-151 (2007) (making employment discrimination unlawful based on enumerated grounds).

128. Graham v. Richardson, 403 U.S. 365, 376–80 (1971).

129. 403 U.S. 365 (1971).

130. *Id.* at 376–80. While *Graham* took a strong stance against the states unilaterally discriminating on the basis of alienage, it did not decide whether the federal government could discriminate on the basis of alienage or permit such classification by states. *See id.* at 382 n.14 (stating "[w]e have no occasion to decide whether Congress, in the exercise of the immigration and naturalization power, could itself enact a statute imposing on aliens a uniform nationwide residency requirement as a condition of federally funded welfare benefits").

131. 426 U.S. 67 (1976).

132. *Id.* at 82–83 (applying rational basis review in an equal protection challenge to federal welfare rules distinguishing between citizens and legal permanent residents).

133. *Id.* at 81 (declaring "[s]ince decisions in these matters may implicate our relations with foreign powers . . . such decisions are frequently of a character more appropriate to

In 1996, Congress took a major step toward transforming immigration law from foreign policy to a domestic affair in the welfare context. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) sought to deter legal immigrants from relying on social services by permitting states to deny a range of public benefits to noncitizens, including permanent residents.[134] Here too, immigration law entered an area traditionally dominated by the states. Although the federal government now plays a major role in welfare policy, social welfare has historically been a major concern of the states, beginning with the pivotal role they played in shaping the structure of the nation's welfare system.[135]

The PRWORA drew immigration into the welfare arena in two ways.[136] First, it connected the state welfare laws with the conditions under which noncitizens are admitted to the United States. The Act sought to enforce the requirements that an admitted alien have sufficient financial resources to prevent becoming a "public charge."[137]

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either the Legislature or the Executive than to the Judiciary"). The Court also cautioned against inhibiting "the flexibility of the political branches of government to respond to changing world conditions." *Id.*

134. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 400–51, 110 Stat. 2105, 2260–76 (codified in scattered sections of 8 U.S.C., 42 U.S.C.).

135. *See*, MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE MOVEMENT, 1960–1973, at 6 (1993) (explaining that the states' adoption of over 400 public welfare laws between 1917 and 1920 created the modern welfare system); *see also* City of New York v. Miln, 36 U.S. (11 Pet.) 102, 148 (1837) (Thompson, J., dissenting) ("Can any thing fall more directly within the police power and internal regulation of a state, than that which concerns the care and management of paupers or convicts, or any other class or description of persons that may be thrown into the country, and likely to endanger its safety, or become chargeable for their maintenance?"); Pham, *supra* note 23, at 1377 (listing health as one of the traditional state police powers); Rodriguez, *supra* note 4, at 571 (same); Wishnie, *supra* note 71, at 497 (same).

136. Like IRCA, the 1996 Act followed a state statute with a similar purpose. Spiro, *supra* note 23, at 1630–36 (narrating the story of California's enactment of Proposition 187, which broadly denied public services to undocumented immigrants, its defeat in the court system, and the enactment of the PRWORA the following year).

137. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 400, 110 Stat. at 2260 (codified at 8 U.S.C. § 1601(2) (2000)) (declaring "it continues to be the immigration policy of the United States that—(A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and (B) the availability of public benefits not constitute an incentive for immigration to the United States"). The Immigration and Nationality Act prohibits the entry of aliens into the United States if they are "likely at any time to become a public charge." Immigration and Nationality Act § 212(a)(15), 8 U.S.C. § 1182(a)(4)(A) (2005); *see also* Stephen H. Legomsky, *Immigration*, *Federalism*, *and the Welfare State*, 42 UCLA L. REV. 1425, 1459–

Second, to meet the same goal, the Act devolved federal power to the states to deny benefits to immigrants.[138] Prior to the PRWORA, Congress had placed the burden on the federal government alone to enforce the "public charge" prohibition.[139] The PRWORA allows states to decide independently whether to bestow benefits on lawfully admitted noncitizens or undocumented immigrants.[140] The Act also imposed a requirement that states receiving federal block grants report to the federal immigration agency all individuals they know to be undocumented,[141] and prohibited states from restricting the exchange of citizenship status information between state agencies and the federal immigration agency.[142]

This devolution of power to the states takes a significant step beyond IRCA in reframing immigration law as a domestic affair in which states may play a role. By empowering the states to decide on which classes of noncitizens each would bestow benefits, Congress reformulated immigration law to embrace state regulation related to welfare. By placing an affirmative obligation on state administrators to report undocumented immigrants to the federal immigration authorities, the Act revived a form of concurrent regulation of immigration law that had been in abeyance since the nineteenth century.[143] Ultimately, Congress's decision to enforce federal immigration law through the traditionally state-centered contexts of employment and social welfare relocated the locus of immigration law enforcement from the border to the interior.

61 (1995) (describing "public charge" legislation and the provisions of PRWORA legislation that seek to enforce it).

138. *See* Wishnie, *supra* note 71, at 494–95.

139. *See* Immigration and Nationality Act § 212(a)(15), 8 U.S.C. § 1182(a)(4)(A) (2005). Congress sought to give teeth to that prohibition by requiring immigrants to provide "affidavits of support" by sponsors promising financial support to the immigrant. 8 U.S.C. § 1183a (2000) (later amended to render the affidavit an enforceable contract).

140. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, §§ 412, 431, 110 Stat. 2105, 2269, 2274 (codified in scattered sections of 8 U.S.C.).

141. *Id.* § 404, 110 Stat. at 2267 (codified at 42 U.S.C. § 611(a) (2000)) (requiring certain federal and state entities to notify the federal immigration authorities at least four times annually of any alien the entity "knows" is not lawfully present in the United States).

142. *Id.* § 434, 110 Stat. at 2275 (codified at 8 U.S.C. § 1644 (2000)).

143. *See supra* notes 46–71 and accompanying text.

B. Crimmigration Law

Although the transfer of power in immigration law began in the employment and welfare spheres, the most significant way in which federal immigration law has transformed itself into domestic law, accessible to the states, is through its expanding intersection with criminal law. States have always been the primary enactors and enforcers of criminal law, with the federal government only recently taking a major role in crime control.[144] Because crime control is a centerpiece of state power, closer ties between immigration and criminal law have a particularly strong impact on the domestication of immigration law.[145] Perhaps for these reasons, criminal law has been a central locus for state and local attempts to curb unwanted immigration.[146]

144. *See generally* John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 702 (1999) (describing "the expansion of federal criminal law into matters that have traditionally been governed by state criminal law"); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1135–36 (1995) (introducing symposium on federalization of local crime and arguing that expanding federal criminal law cannot be reconciled with federalism principles); Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?,"* 50 SYRACUSE L. REV. 1317, 1319–29 (2000) (narrating the history of federal regulation of crime); Dru Stevenson, *Entrapment And Terrorism*, 49 B.C. L. REV. 125, 153 (2008) (describing consequences of increased federalization of criminal law). Immigration law spearheaded the federal government's entrance into criminal law. Brickey, *supra* at 1139 (explaining that in the mid- to late-nineteenth century, "[n]arrowly drawn federal crimes were tailored to provide protections in matters of direct federal interest or matters that the states were powerless to address," including "immigration and customs offenses" (citing LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 71, 262 (1994))).

145. *See* Heath v. Alabama, 474 U.S. 82, 93 (1985) (declaring that "[f]oremost among the prerogatives of sovereignty is the power to create and enforce a criminal code"); *see also* Baker, *supra* note 144, at 702 (asserting that the most important of the states' powers is "the power to define and punish crimes").

146. *See, e.g.*, Paula D. McClain, *North Carolina's Response to Latino Immigrants and Immigration*, *in* IMMIGRATION'S NEW FRONTIERS 7, 29–30 (Greg Anrig, Jr. & Tova Andrea Wang eds., 2006) (describing Mecklenburg County, North Carolina's agreement under 8 U.S.C. § 287(g) to enforce federal immigration law under federal supervision); State v. Barros-Batistele, No. 05-CR-1474 (D.N.H. Aug. 12, 2005), http://www.nh.gov/judiciary/district/criminal_trespass_decision.pdf (last visited Aug. 10, 2008) (order barring New Hampshire's use of trespass law to enforce immigration law); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption*, *Prejudice*, *and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 33 & n.19 (2007) (describing an Arizona county's attempt to prosecute undocumented immigrants for conspiring to smuggle themselves in violation of a state anti-smuggling statute).

1. The Development of Crimmigration Law

The importation of criminal law norms into immigration law has transformed immigration law over the past twenty years.[147] Since the mid-1980s, a wide array of both grave and minor state and federal crimes have come to trigger deportation,[148] including theft,[149] trafficking in fraudulent documents,[150] tax evasion,[151] forgery,[152] certain gambling offenses,[153] perjury,[154] bribery of a witness,[155] and offenses related to skipping bail.[156]

147. *See* Stumpf, *supra* note 11, at 381–92. The "criminalization of immigration law," one of the most rapidly developing areas in both immigration and criminal law, has generated intense scholarly interest. *See, e.g.*, Raquel E. Aldana, *Of* Katz *and Aliens: Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. __ (forthcoming 2008); Jennifer M. Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1827 (2007); Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059, 1063 (2002); David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 18 (2006); Legomsky, *supra* note 23, at 1453; Markowitz, *supra* note 33, at 327–41; Teresa A. Miller, *Blurring The Boundaries Between Immigration And Crime Control After September 11th*, 25 B.C. THIRD WORLD L. J. 81, 83 (2005); Wishnie, *supra* note 23, at 1087.

148. Anti-Drug Abuse Act of 1988 (Drug Kingpin Act), Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70 (codified as amended at 8 U.S.C. § 1101(a)(43) (2000)) (defining "aggravated felony" deportation grounds to include crimes of murder, drug trafficking, and firearms trafficking); Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048 (codified as amended at 8 U.S.C. § 1101(a)(43) (2000)) (amending definition of "aggravated felony" to include a "crime of violence"); 18 U.S.C. § 16 (2000) (defining "crime of violence" to include any crime in which the use of some physical force is used against the person or property of another or, for felonies, the "substantial risk" of such force); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320–22 (codified as amended at 8 U.S.C. § 1101(a)(43) (2000)) (expanding "aggravated felony" definition to include certain lesser crimes); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277–78 (codified as amended at 8 U.S.C. § 1101(a)(43) (2000)) (expanding "aggravated felony" to include certain non-violent crimes). *See* Demleitner, *supra* note 147, at 1059–60; Kanstroom, *supra* note 37, at 1890–91; Legomsky, *supra* note 23, at 482; Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L. J. 611, 614 (2003); Miller, *supra* note 147, at 82; Stumpf, *supra* note 11, at 382.

149. Immigration and Nationality Technical Corrections Act of 1994, § 222(a), 108 Stat. at 4321 (codified as amended at 8 U.S.C. 1101(a)(43)).

150. *Id.*

151. *Id.*

152. Antiterrorism and Effective Death Penalty Act of 1996, § 440(e), 110 Stat. at 1277.

153. *Id.*

154. *Id.*, 110 Stat. at 1278.

155. *Id.*

156. *Id.*

New violations of federal immigration-related laws now constitute crimes,[157] including voting in a federal election,[158] falsely claiming U.S. citizenship to obtain a benefit or employment,[159] marrying for the purpose of evading immigration laws,[160] driving above the speed limit while fleeing an immigration checkpoint,[161] and failing to cooperate in the execution of one's removal order.[162] At the same time, the government has increased enforcement. The Immigration and Customs Enforcement Agency is now the largest investigative arm of the Department of Homeland Security ("DHS"),[163] and immigration matters constitute 32% of federal prosecutions, outnumbering all other types of federal criminal prosecutions.[164] Immigration law has become so deeply imbued with the character of criminal law that it has come to constitute its own area of law: crimmigration law.[165]

State involvement in immigration control has deeply influenced the criminalization of immigration law. IRCA, imposing civil and criminal penalties on undocumented employees and employers who knowingly hire them, owes its existence to state attempts to control immigration.[166]

In 1952, Congress had insulated employers from criminal sanctions when it created the crime of "harboring" unauthorized immigrants.[167] Undocumented workers faced deportation for

157. *See* Legomsky, *supra* note 23, at 477; Stumpf, *supra* note 11, at 384.

158. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, §§ 215, 216, 110 Stat. 3009-546, 3009-572 (codified at 18 U.S.C. §§ 611, 1015 (2000)).

159. Immigration Reform and Control Act, Pub. L. No. 99-603, § 121(a)(1)(c), 100 Stat. 3359, 3385 (codified at 42 U.S.C. § 1320b-7(d)(1)(A) (2000)).

160. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2(d), 100 Stat. 3537, 3542 (codified at 8 U.S.C. § 1325(c) (2000)).

161. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 108(b), 110 Stat. 3009-546, 3009-557 (1996) (codified as amended at 18 U.S.C. § 758 (2000)).

162. *Id.* § 307(a), 110 Stat. at 3009-613 (codified as amended at 8 U.S.C. § 1253 (2000)).

163. ICE Operations: About Us, http://www.ice.gov/about/operations.htm (last visited Aug. 27, 2008).

164. *See* TRAC REPORTS, TRAC/DHS, IMMIGRATION ENFORCEMENT, NEW FINDINGS, http://trac.syr.edu/tracins/latest/current (last visited Aug. 27, 2008) (contrasting drug and weapons prosecutions).

165. *See* Stumpf, *supra* note 11, at 376.

166. *See* Immigration and Nationality Act § 274(a), 8 U.S.C. § 1324(a), (b) (2005) (instituting civil and criminal penalties for employers who knowingly hire undocumented employees); § 275, 8 U.S.C. § 1325 (a), (b) (2005) (setting out civil and criminal penalties for working without authorization).

167. Immigration and Nationality Act § 274, 66 Stat. at 229 (1952) (repealed 1986) ("for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring"). *See* Michael

unlawful presence, but no further sanction resulted from the fact of employment.[168] In 1971, a California statute criminalized employers who hired undocumented employees.[169] That law survived a Supreme Court challenge claiming unlawful usurpation of the federal government's exclusive power over immigration.[170]

IRCA and the 1974 Farm Labor Contractor Registration Act (FLCRA) followed, criminalizing employers and employees for similar conduct. Both federal statutes relied on criminal law, traditionally a state enforcement tool, to enforce their new provisions. The FLCRA imposed criminal penalties for hiring undocumented farm laborers.[171] Similar to the California statute that served as its model, IRCA imposes criminal penalties, namely fines and imprisonment, on employers with a pattern or practice of violating its provisions.[172] It was the first statute to so broadly criminalize immigration-related conduct.[173]

In IRCA, Congress recognized that there was subfederal interest in regulating immigration through state power over employment, and it took steps to curtail state and local governments from acting on that interest. IRCA partially preempts state or local laws that impose civil or criminal penalties on employers for employing unauthorized aliens, but permits some subnational regulation through "licensing and similar laws."[174] Presumably, the effect of this preemption provision is to permit limited state or local regulation through civil licensing laws, while foreclosing the use of state criminal law in that area.

California was also instrumental in the next phase of crimmigration law's development. After the courts enjoined

Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 198 (2007).

168. *See* Wishnie, *supra* note 167, at 198–99.

169. Act to Add Section 2805 to the Labor Code, ch. 1442, 1971 Cal. Stat. 2847 (repealed 1988) (prohibiting employers from "knowingly employ[ing] an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers"); *see also* De Canas v. Bica, 424 U.S. 351, 355 (1976) (identifying the state law as a criminal statute).

170. *See De Canas*, 424 U.S. at 365.

171. Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, § 13, 88 Stat. 1652, 1656 (repealed 1983).

172. 8 U.S.C. § 1324a(f) (2000).

173. Miller, *supra* note 148, at 629–30. It was not, however, the first statute to impose criminal penalties on employers in the immigration context. That honor may go to the Act of Mar. 3, 1875, 18 Stat. 477, which declared contracting to supply "coolie" labor a felony. *See* Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 680 n.53 (1997).

174. 8 U.S.C. § 1324a(h)(2) (2000).

California's Proposition 187, the state turned to Congress to push for similar federal legislation.[175] The result was the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),[176] passed six months after the PRWORA. IIRIRA shared Proposition 187's strong restrictionist direction and mirrored its use of criminal law to implement immigration policy.[177] For the first time, it defined certain immigration-related conduct as criminal or increased existing criminal penalties,[178] increased resources for enforcement,[179] and expanded the grounds for exclusion and deportation.[180] In line with IRCA, it criminalized the knowing employment of at least ten individuals within a year.[181]

The criminalization of immigration law has only accelerated with the increased attention to national security since the events of September 11, 2001. After the attacks, the government turned to

175. *See* Spiro, *supra* note 23, at 1633–34 & n.21 (explaining that the IIRIRA "was spurred and sustained by Californian interests" (citing Faye Fiore, *Congressman's Proposal Mirrors Prop. 187*, L.A. TIMES, July 19, 1995, at A3 (reporting sponsorship of legislation by California representative Frank Riggs))).

176. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C.).

177. California has achieved enormous success in turning its preferences into federal legislation, but it is not alone in trying. After a death caused by an undocumented immigrant drunk driver in North Carolina, U.S. Representative Sue Myrick of North Carolina successfully amended the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 to mandate deportation for a drunk driving conviction. *See* H.R. 4437, 109th Cong. (2005), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.04437; McClain, *supra* note 146, at 27. The bill passed the House but never became law.

178. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 215, 110 Stat. 3009-546, 3009-572 (codified at 18 U.S.C. § 1015(e) (2000)) (defining as a criminal act falsely claiming citizenship to obtain a benefit or employment); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 §§ 215-216, 110 Stat. 3009-546, 3009-572 (codified at 18 U.S.C. § 611 (2000)) (making it a crime to vote in a federal election as a noncitizen); Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat 3537 (codified at 8 U.S.C. § 1186a(b)(1)(A) (2000)) (defining criminal sanction for entering a marriage to evade immigration laws).

179. Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, § 101, 110 Stat. 3009-553 (increasing size of border patrol).

180. *Id.* § 301, 110 Stat. at 3009-575 (codified at 8 U.S.C. § 1101(a)(13)) (expanding excludability grounds); *id.* § 321, 110 Stat. at 3009-627 (codified at 8 U.S.C. § 1101(a)(43)) (expanding "aggravated felony" definition by reducing to one year the sentence length required to constitute a "crime of violence" or a deportable theft offense).

181. *Id.* § 203(b)(4), 110 Stat. 3009-546, 3009-565 (codified as amended at 8 U.S.C. § 1324(a)) (imposing a fine and a maximum of five years imprisonment). *See* Medina, *supra* note 173, at 691 & n.102.

both immigration and criminal law as tools for addressing terrorism.[182] The USA PATRIOT Act, passed shortly after September 11, 2001, more broadly defined the grounds for deportation related to terrorism, required mandatory detention of noncitizens who were terrorism suspects, and granted DHS access to the Federal Bureau of Investigation's files to check the criminal records of noncitizens seeking immigration benefits.[183] The National Security Entry-Exit Registration System ("NSEERS"), instituted around the same time, required male citizens of particular Muslim and Arab countries to register with the INS.[184] The 2006 Secure Fence Act conflated crime, national security, and immigration by mandating that DHS prevent entry of "terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband."[185]

For the most part, however, efforts to address terrorism relied on the immigration and criminal laws that existed prior to September 11, 2001. In 2002, the U.S. Justice Department instituted the Absconder Apprehension Initiative, with the goal of detaining and deporting noncitizen Muslim and Arab men with outstanding orders of removal that were based on ordinary deportability grounds.[186] Also in 2002, DHS instituted Operation Tarmac, which set out to prosecute and then deport airport screeners for working with forged employment documents, conduct which became an immigration-related crime as early as 1986.[187] Like immigration law, national security has

182. *See* Chacon, *supra* note 147, at 1835–50 (critiquing the conflation of immigration control, crime control, and national security issues); Miller, *supra* note 147, at 112–22.

183. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, §§ 403, 411–12, Pub. L. No. 107-56, 115 Stat. 272, 343–52 (codified at 8 U.S.C. §§ 1105, 1182, 1189, 1226(a)).

184. 8 C.F.R. § 264.1(f) (2006); *see also* Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77, 642 (Dec. 18, 2002) (modifying and clarifying registration requirements and specifying which countries are "designated countries").

185. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638, § 2(b) (2006).

186. U.S. Dep't of Justice, Memorandum from the Deputy Attorney General, *Guidance for Absconder Apprehension Initiative* (Jan. 25, 2002), *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/doj/abscndr012502mem.pdf; *see* Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. BULL. 550, 561 (2004) (describing the Initiative).

187. *See* DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, A REVIEW OF BACKGROUND CHECKS FOR FEDERAL PASSENGER AND BAGGAGE SCREENERS AT AIRPORTS 3–4 (Jan. 2004), http://www.dhs.gov/xoig/assets/OIG-04-08_ReviewofScreenerBackgroundChecks.pdf (last visited Aug. 27, 2008) (describing DHS investigation of airport screeners and extensive background checks for U.S. citizenship); Selected Issues in Operation Tarmac Cases, http://www.nationalimmigrationproject.org/CrimPage/tarmac_cases.doc (last visited Aug. 10, 2008) (listing criminal provisions used to

historically been categorized as a foreign policy concern.[188] The deepening ties with criminal law shifted both immigration law and national security from the foreign affairs sphere into the domestic realm.[189]

2. Crimmigration Law and the States

As the criminalization of immigration law has expanded, state criminal law has become a central focus of federal immigration law. The criminal grounds for deportation do not distinguish between federal and state crimes.[190] Because the states are the primary players in criminal law, therefore, state statutory definitions of crime play a major part in determining whether a federal deportability ground will apply to a conviction. Federal immigration law looks to the state's definition of a crime to determine whether, under the Immigration and Nationality Act, a state criminal conviction falls into one of the two major criminal grounds for deportation: either a crime involving moral turpitude[191] or an aggravated felony.[192] State legislatures and courts can often affect whether these deportability grounds apply by

prosecute arrested workers); *see also* Demleitner, *supra* note 186, at 564 (suggesting that Operation Tarmac targeted not terrorists but merely undocumented workers).

188. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 589 (1889) (noting that the federal government has inherent sovereign power to regulate foreign relations, which includes the power to declare war, make treaties, repel invasion and exclude aliens from its territory); s*ee also* Chacon, *supra* note 147, at 1851–53 (elucidating the connection between foreign policy and national security).

189. *See* Chacon, *supra* note 147, at 1850–56 (describing the roots of the conflation of criminal, immigration and national security laws); *see also id.* at 1853 (noting that "removals of non-citizens on the grounds of criminal violations can be, and frequently are, depicted as national security policy" and that "the phrase 'border security' has become a ubiquitous descriptive term for immigration reform"). This phenomenon did not begin with the September 11 attacks, but with laws passed in the 1990s linking immigration control, crime, and national security. *See id.* at 1851–53 (tracing the history of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C.).

190. *See* 8 U.S.C. § 1227(a)(2) (2005).

191. *See* 8 U.S.C. § 1227(a)(2)(A)(i) (2005) (classifying a conviction for a "crime involving moral turpitude" as grounds for deportation); Goldeshtein v. INS, 8 F.3d 645, 647 (9th Cir. 1993) (holding that courts must look to the statutory definition or the nature of the crime to determine whether a conviction was a crime of moral turpitude); *see also* Nate Carter, *Shocking the Conscience of Mankind: Using International Law to Define "Crimes Involving Moral Turpitude" in Immigration Law*, 10 LEWIS & CLARK L. REV. 955, 956–57 (2006) (critiquing the current approach to defining moral turpitude and advocating reliance on international law).

192. 8 U.S.C. § 1227(a)(2)(A)(iii) (2005) (classifying a conviction for an "aggravated felony" as a deportability ground); *see* Leocal v. Ashcroft, 543 U.S. 1, 7 (2004) (interpreting the provision).

adjusting the scope of the definition or length of the sentence.[193] At bottom, the very fabric of crimmigration law combines federal and state law: the warp is federally-defined immigration law, and the woof is state-defined criminal law.

The development of crimmigration law has ushered in a return to a form of concurrent enforcement of immigration law. Beginning at least as early as 1996, the federal government has encouraged and at times co-opted state and local participation in immigration control. In 1996, Congress empowered police to arrest felons who illegally reenter the country following deportation.[194] That same year, the Attorney General gained authority to authorize state and local law enforcement to enforce immigration law in the event of an emergency "mass influx of aliens."[195] The most attention, however, has been attracted by the 1996 grant of authority to the Attorney General to deputize state and local police to enforce federal immigration laws after training and under the Attorney General's supervision.[196] That provision remained quiescent until after the events of September 11, 2001.

After September 11, 2001, the trend toward concurrent enforcement accelerated. The shift from categorizing immigration law and national security as foreign affairs to envisioning them as domestic concerns rendered state involvement imaginable, and even expected.[197] Post-September 11, 2001 terrorism-related efforts sought

193. A single "crime involving moral turpitude" will not trigger deportation if the maximum sentence is one year or less. 8 U.S.C. § 1227(a)(2)(A)(i) (2005). A "crime of violence" is an "aggravated felony" only if the sentence for the crime is at least one year. 8 U.S.C. § 1227(a)(2)(A)(iii) (2005) (defining commission of an aggravated felony as a deportability ground); 8 U.S.C. § 1101(a)(43)(F) (defining "crime of violence"); *see* Spiro, *supra* note 23, at 1634 n.28 (noting that "state and local jurisdictions may be able to undermine enforcement . . . by adjusting criminal sentences to preclude deportation in individual cases"). State and local jurisdictions could adjust sentences to assure deportation as easily as to preclude it.

194. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 439(a), 104-132, 110 Stat. 1214, 1276 (codified at 8 U.S.C. § 1252c) (providing that "State and local law enforcement officials are authorized to arrest and detain an individual who—(1) is an alien illegally present in the United States; and (2) has previously been convicted of a felony" and ordered deported).

195. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 372(3), 110 Stat. 3009-546, 3009-646 (codified as amended at 8 U.S.C. § 1103(a)(10) (2000)).

196. *Id.* § 133, 110 Stat. at 3009-563 (codified as amended at 8 U.S.C. § 1357(g)(1) (2005)).

197. Harris, *supra* note 147, at 3 (commenting that "[e]lected officials and citizens will expect not just the FBI but also . . . local police agencies to do anything necessary to stop terrorism").

to engage state and local law enforcement.[198] The U.S. Justice Department's Office of Legal Counsel issued an opinion that state and local police have inherent authority to enforce both criminal and civil immigration laws, reversing its previous position on that issue.[199] On the basis of that memo, then-Attorney General John Ashcroft urged state and local police to make immigration arrests.[200]

Several post-September 11, 2001 federal actions have had the effect of drawing state and local police into indirectly enforcing immigration law. In 2002, for the first time, DHS began to enter warrants for civil immigration violations into national law enforcement databases routinely tapped by state and local police.[201] The result was that police were essentially co-opted into a role in enforcing civil immigration law when they acted on those warrants.[202] More recently, the REAL ID Act prohibited certain federal agencies from accepting state-issued driver's licenses unless the state has verified the licensee's immigration status.[203] As a result, when police sanction undocumented immigrants for driving without a license, they will be indirectly enforcing the immigration laws.

In sum, the development of crimmigration law transformed immigration law and its enforcement. Although immigration law maintains the veneer of a civil proceeding, it has become infused with

198. *See* Kobach, *supra* note 23, at 183–88; Legomsky, *supra* note 23, at 496–98; Wishnie, *supra* note 23, at 1085.

199. *See* Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Attorney General John Ashcroft 13 (Apr. 2, 2002), *available at* http://www.aclu.org/FilesPDFs/ACF27DA.pdf; *cf.* U.S. Dep't of Justice, Office of Legal Counsel, Memorandum Opinion for the U.S. Att'y, S.D. Cal., *Assistance by State and Local Police in Apprehending Illegal Aliens* (Feb. 5, 1996), *available at* http://www.usdoj.gov/olc/immstopo1a.htm (opining that state and local police may enforce only the criminal provisions of federal immigration law). The question whether state and local law enforcement have inherent authority to enforce immigration law has generated a lively debate. *See* Huntington, *supra* note 16, at 841–44 (arguing that states and localities are neither constitutionally nor statutorily preempted from enforcing immigration law); Wishnie, *supra* note 23, at 1088–95 (arguing that the Constitution grants exclusive power over immigration to Congress and that Congress has preempted state and local enforcement of immigration law). *See generally* Kobach, *supra* note 23 (arguing that state and local law enforcement have inherent authority to arrest noncitizens for immigration violations); Pham, *supra* note 11 (arguing that the constitutional requirement of uniformity in immigration laws prohibits state and local enforcement of immigration law).

200. John Ashcroft, Attorney General, Announcement of the National Security Entry-Exit Registration System (June 6, 2002), http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm (referring to the Office of Legal Counsel opinion that state and local law police can enforce both civil and criminal immigration laws).

201. *See* Wishnie, *supra* note 23, at 1095–97.

202. *Id.*

203. Real ID Act of 2005, Pub. L. No. 109-13, § 202(c)(2)(B) (codified as amended at 49 U.S.C. § 30301 (2005)).

national security concerns and substantive criminal law norms.[204] This development has in turn invited states to occupy the space created by the linking of crimmigration law and national security, implanting in the public imagination a role for police to address terrorism concerns as part and parcel of their work.[205] When the traditional police enforcement of criminal laws intermingles with immigration law and terrorism, the delineation between foreign policy and domestic law falls away.

3. State and Local Responses to Crimmigration Law

Subnational governments have responded to the criminalization of immigration law in two main ways. Some have eschewed employing their criminal justice apparatus to enforce immigration law. Others have embraced subnational control over noncitizens. North Carolina provides examples of both approaches.

The cities of Durham, Chapel Hill, and Carrboro, North Carolina have rejected participation in immigration enforcement. In 2003, Durham passed a resolution stating that "no Durham city officer . . . shall inquire into the immigration status of any person or engage in activities designed to ascertain the immigration status of any person" except as required by duty or law.[206] Chapel Hill and Carrboro have imposed similar restrictions.[207] Other states and local governments have prohibited law enforcement officers from acting solely on the basis of citizenship status or national origin.[208] These "sanctuary"

204. *See* Stumpf, *supra* note 11, at 392–93; Legomsky, *supra* note 23, at 515–16 (explaining that immigration law continues to lack most criminal procedural protections).

205. *See* Chacon, *supra* note 147, at 1849; Harris, *supra* note 147, at 3 (asserting that "local law enforcement may have to carry the bulk of the everyday anti-terrorism work . . . [and] using police power to thwart terrorists has become a top priority for every police agency, federal, state, or local").

206. Durham, N.C., Resolution Supporting the Rights of Persons Regardless of Immigration Status, 9046 (Oct. 20, 2003), http://www.democracyinaction.org/dia/organizations/ NILC/images/Durham.pdf.

207. *See* Meiling Arounnarath, *Carrboro Rejects Role on Migrants*, THE NEWS & OBSERVER (Raleigh, N.C.), May 17, 2006, at 6B.

208. *See* NAT'L IMMIGRATION LAW CTR., LAWS, RESOLUTIONS, AND POLICIES INSTITUTED ACROSS THE U.S. LIMITING ENFORCEMENT OF IMMIGRATION LAWS BY STATE AND LOCAL AUTHORITIES (Apr. 2008), http://www.nilc.org/immlawpolicy/LocalLaw/locallaw_limiting_tbl_2008-04-15.pdf; *see, e.g.*, SAN FRANCISCO ADMIN. CODE, § 12H.1 (1989), *available at* http://www.municode.com/resources/gateway.asp?pid=14131&sid=5 (prohibiting use of city resources "to assist in the enforcement of federal immigration law or to gather or disseminate information regarding the immigration status" of individuals in San Francisco unless otherwise required by law); *id.* § 12H2.1 ("no officer, employee or law enforcement agency . . . shall stop, question, arrest or detain any individual solely because of the individual's national origin or immigration status."); *see*

policies seek to prevent police enforcement of immigration law from inhibiting victims of crimes and witnesses from reporting crimes and cooperating in investigations and prosecutions.[209]

Other state and local governments have embraced the link between immigration law and their traditional powers to control crime. These responses fall into three categories: acceptance of federal delegation of immigration authority, enforcement of immigration law without federal delegation of power, and regulation of noncitizens that reaches beyond pure immigration law.[210] Local governments in North Carolina have undertaken all three.[211]

The central means of federal delegation of immigration authority to state and local law enforcement is through a memorandum of agreement with the Immigration and Customs Enforcement agency allowing police to investigate immigration violations and arrest and detain suspected violators.[212] Although Congress created the authority for this delegation of immigration power in 1996, no state entered into such an agreement until Florida began a pilot project in April 2002.[213] Since September 11, 2001, a number of subnational governments, including three in North Carolina,[214] have accepted the federal invitation to deputize police as federal immigration agents.[215]

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also Orde F. Kittrie, *Federalism*, *Deportation*, *and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1466–75 (2006) (listing similar rules in other major cities).

209. *See* Arounnarath, *supra* note 207 (reporting Chapel Hill police chief remark that "[w]e're trying to establish a policy of relationships with Latino residents who are often victims of crime," and "any attempt to enforce federal immigration laws would hamper that relationship, negat[ing] any trust building we've had over the years"); Kittrie, *supra* note 208, at 1461 (describing effects on immigrant victims and witnesses of police involvement in immigration enforcement).

210. *See* Huntington, *supra* note 16, at 799 (setting out the taxonomy of subnational government involvement in immigration-related law).

211. *See infra* notes 215, 217–19, 221–22 and accompanying text.

212. *See* 8 U.S.C. § 1357(g)(1) (2000) (providing authority for the Attorney General to deputize state and local law enforcement officers to enforce immigration law after training and under the supervision of federal authorities).

213. *See* Memorandum of Understanding between the State of Florida and the U.S. Department of Justice (2002), http://www.immigration.com/newsletter1/mouflorida.pdf; *see* Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 124–25 (2007) (describing Florida's motivation for entering into the agreement).

214. Alamance, Gaston, and Mecklenburg counties have entered into these memoranda of agreement. *See* U.S. Immigration and Customs Enforcement, Section 287(g), Immigration and Nationality Act; Delegation of Immigration Authority, June 22, 2007, http://www.ice.gov/pi/news/factsheets/070622factsheet287gprogover.htm (last visited Aug. 10, 2008); *see also* McClain, *supra* note 146, at 29–30 (describing Mecklenburg County's agreement).

215. As of August 2008, there were sixty-two § 287(g) memoranda of agreement with ICE. *See* U.S. Immigration and Customs Enforcement, Delegation of Immigration

The second subnational response has been to enact rules that permit or require police to assist with federal immigration enforcement even without a delegation of federal authority.[216] Counties in North Carolina, as well as several other states and counties, now require police to verify the immigration status of arrested noncitizens.[217] North Carolina has charged its jail administrators with inquiring into the immigration status of its detainees,[218] and attempted to pass a broader bill that would authorize state and local police to enforce immigration law to the extent authorized by federal law.[219] Likewise, Illinois now permits its courts to hold the criminal sentence of an alien in abeyance and transfer custody to the federal government for deportation.[220]

State and local governments have also enacted immigration-related laws that parallel the new breed of federal crimmigration laws. Prohibitions against hiring employees without work authorization have surfaced, such as Forsyth County, North Carolina's resolution requiring county job applicants to provide "adequate documentation and assurance" of work authorization.[221] The sheriff of Guilford County, North Carolina has advocated detaining witnesses to crimes who are unlawfully present,[222] much like Arizona's detention of material witnesses based on the individual's

Authority Section 287(g) Immigration and Nationality Act, http://www.ice.gov/partners/287g/Section287_g.htm (last visited Aug. 27, 2008).

216. *See* Huntington, *supra* note 16, at 801–02; Rodriguez, *supra* note 4, at 591–92.

217. *See* Op-Ed, *Borderline*, THE NEWS & OBSERVER (Raleigh, N.C.), Apr. 26, 2007, at A16 (stating that "Alamance deputies, along with counterparts in Mecklenburg and Gaston counties, are . . . 'checking the immigration status of every foreign person they arrest—whether for running a stop sign or selling drugs—and starting deportation of those in the United States illegally' "). The New Jersey and Kentucky Attorneys General have ordered local law enforcement to inquire into the immigration status of criminal suspects and notify federal immigration authorities of individuals believed to be in the country unlawfully. David Chen & Kareem, *New Jersey Tells Police to Check Immigrants*, N.Y. TIMES, Aug. 23, 2007, at B1; s*ee also* Rodriguez, *supra* note 4, at 591–92 (listing four states and counties).

218. Act of Aug. 30, 2007, ch. 162, 2007 N.C. Sess. Laws 1506.

219. H.B. 1362, 2007–2008 Session (N.C. 2007); s*ee also* McClain, *supra* note 146, at 28.

220. H.B. 132, 95th Gen. Assemb. (Ill. 2007).

221. *See* Forsyth County, N.C., Resolution Outlining Compliance with the Federal Immigration Laws in County Recruitment, Hiring and Contracting Practices (Oct. 23, 2006). West Virginia has considered legislation to make it a misdemeanor for an employer to knowingly hire an employee without work authorization. *See* S.B. 70, 2008 Regular Session (W. Va. 2007).

222. *See* Eric J.S. Townsend, *Sheriff Wants to Join Immigration Effort*, NEWS & REC. (Greensboro, N.C.), Apr. 28, 2007, at A1.

immigration status.[223] Other states have enacted laws similar to the federal prohibitions on smuggling or harboring undocumented immigrants, such as Oklahoma's law making it a felony to harbor, conceal, transport, or shelter unauthorized immigrants.[224] California, Oregon, and Wyoming have criminalized the use of false proof of citizenship or permanent residence documents.[225]

Finally, subnational rules that use criminal law to indirectly affect the entry and departure of noncitizens are proliferating, including restrictions on where and how immigrants live and work. Escondido, California passed a criminal ordinance banning landlords from renting to any "illegal alien."[226] Suffolk County, New York passed a law requiring businesses that contract with the County to verify, under penalty of fines and jail time, that their employees are in the United States legally.[227] Finally, Hazleton, Pennsylvania passed a civil ordinance suspending the licenses of businesses that hired undocumented workers and fining landlords who rented to undocumented immigrants,[228] asserting a state interest in

223. ARIZ. REV. STAT. ANN. § 13-4085 (2007) (providing for detention of a material witness if it "may become impracticable to secure the presence of the person by subpoena because of the immigration status of the person"); *cf.* Stumpf, *supra* note 11, at 391–92 (describing expansion of federal detention in immigration law).

224. OKLA. STAT. ANN. tit. 21, § 1550.42 (West 2002). At least one challenge to this law has been rejected on standing grounds. *See* Nat'l Coalition of Latino Clergy, Inc. v. Henry, No. 07-CV-613-JHP, slip op. (N.D. Okla. Dec. 12, 2007). Tennessee has similarly established a misdemeanor for transporting "an individual who the person knows or should have known has illegally entered or remained in the United States." TENN. CODE ANN. § 39-17-114 (2007).

225. CAL. PENAL CODE § 114 (West 1999); OR. REV STAT. § 165.800(4)(b)(D) (2007); WYO. STAT. ANN. 1977 § 6-3-615(a) (2008); *see* League of United Latin Am. Citizens v. Wilson (*LULAC*), 908 F. Supp. 755, 775–76 (C.D. Cal. 1995) (upholding criminal provisions); People v. Salazar-Merino, 107 Cal. Rptr. 2d 313, 319–20 (Cal. Ct. App. 2001) (adopting the reasoning from LULAC to uphold the same provisions).

226. *See* Escondido, Cal., Ordinance 2006-38R (Oct. 18, 2006), *available at* http://www.ci.escondido.ca.us/immigration/Ord-2006-38R.pdf (subjecting violators to fines and imprisonment); Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1054–56 (S.D. Cal. 2006) (granting temporary restraining order against the ordinance based, in part, on the likelihood of preemption by the "harboring" provisions of 8 U.S.C. § 1324).

227. *See* Bruce Lambert, *Congressman Endorses Suffolk County Plan to Bar Contractors From Using Illegal Immigrants*, N.Y. TIMES, Aug. 17, 2006, at B3 (describing bill); *Hauppauge: New Immigration Law*, N.Y. TIMES, Oct. 5, 2006, at B7 (noting passage of bill into law).

228. Hazleton, Pa., Illegal Immigration Relief Act Ordinance, No. 2006-18 (Sept. 21, 2006), *available at* http://www.hazletoncity.org/090806/2006-18%20_Illegal%20Alien%20Immigration%20Relief%20Act.pdf (prohibiting the employment and harboring of undocumented aliens in the City of Hazleton); Hazleton, Pa., Tenant Registration Ordinance, No. 2006-13 (August 15, 2006), *available at* http://smalltowndefenders.com/090806/200613%20_Landlord%20Tenant%20Ordinance.pdf (requiring apartment dwellers to obtain an occupancy permit, and requiring proof of citizenship or lawful

"protect[ing] public safety by limiting the crimes committed by illegal immigrants in the city."[229]

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The story that states have engaged in immigration regulation because of high levels of immigration or federal inaction in immigration control is woefully incomplete. It neglects a major evolution in immigration law, one that set the stage for state action in influencing the movement of noncitizens. The transformation of immigration law from a focus on foreign affairs and national identity to a seemingly domestic issue, touching on central areas of state concern, has invited the states into the immigration arena.

III. STATE REGULATION OF IMMIGRATION AND THE POWER OF IMAGINATION

Infusing traditional areas of state concern with federal immigration law is likely to blur the constitutional line dividing the expansive power of the federal government over noncitizens from the much weaker powers of subnational governments. The domestication of immigration law unsettles foundational understandings about when federal law preempts state regulation of noncitizens and when the Equal Protection Clause forbids it. Inklings of these changes appear in recent preemption and Equal Protection challenges to state and local laws seeking to regulate the movement of noncitizens. At bottom, the domestic direction of immigration law encourages expansion of concurrent federal and subfederal regulation of noncitizens.

A. Preemption

The domestication of immigration law sets the stage for a mighty clash of sovereignty. Preemption doctrine imposes four obstacles to state and local rules affecting noncitizens. The first is constitutional preemption, also called structural preemption. It occurs when the state or local rule is a regulation of pure immigration law, which governs the entry and expulsion of noncitizens and the conditions

residence for receipt of permit). *See* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 484–85 (M.D. Pa. 2007) (describing ordinances).

229. *Lozano*, 496 F. Supp. 2d at 542 (striking down the Hazleton ordinances on preemption and due process grounds, but holding that the state interest in crime control was rational under the Equal Protection Clause).

under which they may remain.[230] Grounded in the idea that the "[p]ower to regulate immigration is unquestionably exclusively a federal power,"[231] state regulation of immigration law is "constitutionally proscribed."[232] Theoretically at least, this broad-based preemption imposes a constitutional obstacle to congressional delegation of immigration authority to state and local governments and police.[233] Domesticating immigration law, however, alienates one of the premises of this constitutional proscription: the notion that the Constitution imbues only Congress with power to conduct foreign affairs.[234]

Outside of pure immigration law, the other three bases for preemption leave to Congress the decision whether to permit states to regulate noncitizens (or solicit their assistance). The second basis for preemption is an express congressional prohibition on state and local regulation in the area. The prime example is IRCA's express

230. De Canas v. Bica, 424 U.S. 351, 354 (1976); *see, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 56, 60 (1941) (striking down as preempted state alien registration scheme).

231. *De Canas*, 424 U.S. at 354.

232. *Id*. at 356.

233. Scholars have vigorously debated the doctrinal soundness, scope, and normative implications of structural preemption. *See, e.g.*, Huntington, *supra* note 16 (questioning the origins of the modern understanding of the doctrine as truly excluding the states and arguing that ordinary statutory preemption rules should apply to pure immigration law); Kobach, *supra* note 23, at 199–200 (arguing that state sovereignty imbues state and local police with inherent authority to make arrests for violations of pure immigration law); Olivas, *supra* note 16, at 34–35 (arguing that "state, county, and local ordinances aimed at regulating general immigration functions are unconstitutional as a function of exclusive federal preemptory powers" and providing policy reasons for this conclusion); Rodriguez, *supra* note 4, at 632–36 (advocating concurrent regulation in certain areas); Schuck, *supra* note 23, at 59 (advocating congressional delegation of responsibility to states in "employment-based admissions, immigration enforcement, and employer sanctions"); Wishnie, *supra* note 23, at 1089 (stating "[n]or may this constitutional power to regulate immigration be devolved by statute or executive decree to state or local authorities, because the federal immigration power is 'incapable of transfer' and 'cannot be granted away' " (quoting *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889))); *see also* Wishnie, *supra* note 71, at 527–58 (analyzing the exclusive nature of the federal immigration power).

234. *See supra* notes 57–95 and accompanying text (describing the focus in early immigration cases on grounding federal power over immigration in constitutional power over foreign policy); s*ee also* Legomsky, *supra* note 70, at 262–63 (critiquing the assumption that immigration matters broadly implicate foreign policy considerations). Loosening the historic connection between immigration and foreign policy also undermines a central rationale for judicial deference to federal immigration policymaking. *See id.*; American Ins. Ass'n v. Garamendi, 539 U.S. 396, 419 n.11 (2003) (suggesting that a state law affecting foreign policy may not automatically incur preemption if the state is acting within its "traditional competence," and that it "might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted").

preemption of state and local laws sanctioning employers for employing undocumented immigrant workers.[235] Third, Congress may impliedly preempt subnational enactments through field preemption, by showing a "clear and manifest purpose" to effect a "complete ouster of state power—including state power to promulgate laws not in conflict with" federal immigration laws.[236] Finally, under conflict preemption, a subnational rule may be preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," making compliance with both state and federal law impossible.[237]

Left out of this taxonomy are state laws that attempt to influence the movement of noncitizens using traditional state police powers over employment, welfare, and crime. These laws raise tensions between the outward-looking justifications for federal control over immigration law—uniformity in foreign policy and the border-centered role of the federal government in defining the national identity—and the domestic role of the states in exercising their police powers. Now that federal immigration law has invaded those traditional areas of state concern, there is friction with the constitutional preemption rule reserving governance of immigration law to the federal government.

On the one hand, the federal domestication of immigration law seems to support preempting the states from regulation of noncitizens. Federal immigration laws governing noncitizens in employment, welfare, or criminal law arguably fall within pure immigration law because their purpose is to deter entry and encourage departure of unauthorized migrants or to enforce the conditions under which noncitizens remain in this country. In that case, as a constitutional matter, the expansion of federal immigration law into the domestic sphere would seem to crowd the states out of the immigration arena. Even if the new immigration regime falls outside of pure immigration law, so that constitutional preemption arguments no longer apply, the expansion of domestic immigration-related law strengthens arguments that Congress has occupied the field or that similar sub-national laws trigger conflict preemption.

In theory, IRCA should exemplify this stronger preemption doctrine. The Act expressly preempts most state regulation of

235. *See* 8 U.S.C. § 1324a(h)(2) (2001).

236. *De Canas*, 424 U.S. at 357.

237. *Id.* at 363 (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); *see also* League of United Latin Am. Citizens v. Wilson (*LULAC*), 908 F. Supp. 755, 768 (C.D. Cal. 1995).

unauthorized employment.[238] At the same time, it expands federal regulation in the area, increasing potential conflict between state laws and the federal employer sanctions provisions. Yet case law has not borne this out.

Several states have enacted laws requiring employers to verify with the federal government that their employees are authorized to work, at the risk of losing their business licenses.[239] In imposing the loss of license as a sanction, the states rely on IRCA's exception to federal preemption when the state is regulating "licensing and similar laws."[240] Of three challenges to those statutes, two courts upheld the state statutes against preemption challenges and one court enjoined it.[241] All three decisions were heavily influenced by whether the court understood the state law as a foreign affair or a domestic issue as well as by the weight placed on the traditional role of states in employment law.

Lozano v. City of Hazleton[242] summoned up the traditional vision of immigration law as foreign policy to hold that federal law preempted the city ordinance that imposed licensing sanctions on employers for hiring undocumented workers. The court explicitly tied these sanctions to national immigration policy and foreign affairs, declaring that "[i]mmigration is a national issue"[243] and that "United States foreign relations is affected by the manner in which the [enforcement] balance is struck."[244] Because "the United States political system places the responsibility for striking this balance with

238. 8 U.S.C. § 1324a(h)(2) (2006) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit, or refer for a fee for employment, unauthorized aliens.").

239. North Carolina recently passed legislation stating that "[a]fter December 31, 2008, every employer, after hiring an employee, shall verify the employment eligibility of the employee through the federal work authorization program." North Carolina Citizen Protection Act, S. 1596, 2007 Gen. Assemb., Reg. Sess. (N.C. 2008); *see also* OKLA STAT. ANN. tit. 25, §§ 1312, 1313 (West 2007) (requiring public employers to use an electronic system operated by the federal government to verify the federal employment authorization of all new employees); South Carolina Illegal Immigration Reform Act, H.B. 4400, 117th Sess. (S.C. 2008) (requiring public employers to use the federal E-Verify Program or a similar federal program or agree to hire only employees who possess a limited set of work authorization documents).

240. 8 U.S.C. § 1324a(h)(2) (2006).

241. For a useful summary of the preemption issues in each case, see Ben Stanley, *Preemption Issues Arising from State and Local Laws Mandating Use of the Federal E-Verify Program*, PUB. SERVANT, Mar. 2008, at 1.

242. 496 F. Supp. 2d 477 (M.D. Pa. 2007).

243. *Id.* at 523.

244. *Id.* at 528.

the United States Congress and the executive branch," the purely domestic concerns of the city were insufficient to justify the intrusion into federal territory.[245]

In contrast, two contemporaneous decisions that rejected similar preemption challenges offer an opposing vision of the domestic direction of immigration law. *Ariz. Contractors Ass'n Inc. v. Candelaria*[246] and *Gray v. City of Valley Park*[247] raised the bar for preemption challenges. Both cases suggest that the evolution of federal immigration law into areas that the states have traditionally governed weakens the longstanding rule that federal immigration regulation preempts similar state laws.

Both decisions relied on a Supreme Court declaration that when Congress legislates "in a field which the States have traditionally occupied," the Court will assume "that the historic police powers of the States were not to be superseded" by federal law absent a "clear and manifest purpose of Congress."[248] *Candelaria* also unearthed a footnote in the Supreme Court case of *Plyler v. Doe*[249] suggesting that a state may have power to deter "unchecked unlawful migration" when that influx "might impair the State's economy" or its provision of an important service.[250]

Unlike *Lozano*, these cases emphasize state power, presenting a vision of concurrent regulation of immigration. Candelaria situates both IRCA and the Arizona law at the center of traditional state power, characterizing the state's desire to prohibit the employment of unauthorized aliens as a "strong local interest[]"[251] and the employer sanctions in IRCA as "within the mainstream of [state] police power regulation."[252] In *Gray*, the court similarly describes "preventing the hiring of illegal aliens" as "a goal shared by the Federal and local law."[253]

245. *Id.* at 528 (stating that the "city council and the mayor did not consider the implications of the ordinances on foreign policy . . . . Their only concern, as might be expected, was for Hazleton").

246. 534 F. Supp. 2d 1036, 1048 (D. Ariz. 2008).

247. No. 4:07CV00881(ERW), 2008 WL 294294 (E.D. Mo. Jan. 31, 2008).

248. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see Candelaria*, 534 F. Supp. 2d at 1050; *Gray*, 2008 WL 294294 at *8, *13.

249. 457 U.S. 202 (1982).

250. *Candelaria*, 534 F. Supp. 2d at 1049 (quoting *Plyler*, 457 U.S. at 228 n.23).

251. *Id.* at 1048; s*ee also Gray*, 2008 WL 294294 at *19 (emphasizing the importance of "state or local government's authority under the police powers" and noting "generally, a state has concurrent jurisdiction with the federal government to enforce federal laws").

252. *Candelaria*, 534 F. Supp. 2d at 1050 (quoting De Canas v. Bica, 424 U.S. 351, 356 (1976)).

253. *Gray*, 2008 WL 294294 at *19.

The doctrinal pedigree of the reasoning in these cases is vulnerable to critique. The vitality of the rule resisting federal preemption in areas of traditional state concern has been widely called into question.[254] The rule is even more questionable when applied to pure immigration law if the basis for federal exclusivity over immigration law is not Congress, but the Constitution. And, if the states are in fact using their police powers in nontraditional ways to break new ground in regulating noncitizens, it saps the justification for forbearance in preempting those traditional police powers. There is no thumb on the nonpreemption side of the scale "when the State regulates in an area where there has been a history of significant federal presence."[255]

Closely analyzed then, the preemption doctrine is a wash. Something else is driving the consideration of when state and local governance of noncitizens is valid: the effect of domesticating federal immigration law on the judicial imagination. Shifting federal immigration law into areas considered strongholds of state power is bound to influence whether courts will associate a challenged state action with acceptable exercises of state power or forbidden meddling in foreign affairs. *Lozano* imagined immigration law as a foreign affair within the federal government's exclusive control, far removed from the domestic concerns of Hazleton, and therefore struck down the state action. In contrast, the vision in *Candelaria* and *Gray* of IRCA as a newcomer to the state stronghold of employment law, with foreign affairs as an irrelevant backdrop, precedes the decision to uphold the state laws. *Candelaria* stated, "[u]nlike . . . foreign affairs [and] immigration, employment of unauthorized aliens is neither intrinsically nor historically an exclusive concern of the federal government."[256] This portrayal of the federal employer sanctions laws as relative newcomers in a field occupied by state regulation opens

254. *Cf.* Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 968 (2002) (declaring "[t]here is no [anti-preemption] presumption any longer, if, indeed, there ever really was one"); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 61 (2007) (explaining that "the Court's decisions have frequently honored *Rice*'s 'initial assumption' by abandoning it, finding an intent to preempt even without anything remotely like 'clear and manifest' evidence of such intent"); Calvin Massey, *"Joltin' Joe Has Left and Gone Away": The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 759, 759 (2003) (declaring that the antipreemption doctrine is "devoid of force and no longer even hortatory").

255. United States v. Locke, 529 U.S. 89, 108 (2000).

256. *Candelaria*, 534 F. Supp. 2d at 1048 (D. Ariz. 2008) (citing De Canas v. Bica, 424 U.S. 351 (1976)); *see also Gray*, 2008 WL 294294 at *8.

the door to a system of concurrent federal and subnational jurisdiction over unauthorized employment of noncitizens.

B. Equal Protection

A similar phenomenon has emerged in constitutional equal protection analysis. Domesticating immigration law muddies the existing equal protection dichotomy under which federal alienage laws receive rational basis review while state alienage laws usually trigger strict scrutiny.[257] That dichotomy is sustainable only so long as federal immigration law manifests as a facet of foreign policy and state and local legislation appears confined to domestic police powers.

Immigration law's movement into the domestic sphere creates a puzzle for courts determining which level of scrutiny to apply to subnational rules targeting noncitizens when those rules arise in areas where states have traditionally enjoyed broad power. When the two governments are making essentially the same rules in the same area of law, far from border control and foreign relations, it becomes easier to imagine concurrent regulation. When the area of common regulation is historically a state stronghold of power, courts are likely to be more indulgent of the state's desire to participate in governance of immigrants. Judges may come to consider strict scrutiny of such state regulation as too restrictive of state interests, especially when paired with a similar federal law that is accorded much laxer rational basis review.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") provides a prime example of this possibility. Prior to its enactment, the Supreme Court had ruled that the Equal Protection Clause required strict scrutiny of state welfare laws distinguishing citizens and aliens,[258] while according rational basis review to federal laws making similar alienage distinctions.[259] The PRWORA threw a wrench into this distinction. The Act devolved power to the states to decide individually whether to deny certain public benefits to noncitizens[260] rather than relying on

257. *See supra* notes 115–16. Undocumented aliens and state laws governing political membership receive less rigorous constitutional review. *See supra* note 117.

258. Graham v. Richardson, 403 U.S. 365, 376–80 (1971).

259. Mathews v. Diaz, 426 U.S. 67, 82 (1976).

260. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 8 U.S.C., 26 U.S.C., and 42 U.S.C.). *See id.* §§ 400–451, 110 Stat. at 2260–76 (codified in scattered sections of 8 U.S.C., 42 U.S.C.).

the federal government to enforce the "public charge" ground for exclusion of noncitizens.[261]

Two major challenges to this new state power resulted in opposing views of the role of states in enforcing this federal immigration policy. In *Aliessa v. Novello*,[262] New York's highest court applied strict scrutiny to strike down a law differentiating between aliens based on length of residency in the United States.[263] Because the PRWORA permitted but did not mandate that state welfare law make distinctions based on citizenship status, the court held that the state law did not qualify for the rational basis review accorded to federal alienage laws.[264] Three years later, in 2004, the Tenth Circuit in *Soskin v. Reinertson*[265] applied rational basis review to uphold a Colorado law that withdrew Medicaid coverage from noncitizen residents, holding that the PRWORA had permissibly devolved federal power to the states to distinguish between citizens and noncitizens.[266]

These conflicting holdings rest upon divergent conceptions of the limits of state involvement in immigration law. *Aliessa* grouped the PRWORA with pure immigration laws governing exclusion and deportation and emphasized the states' powerlessness in that arena.[267] The court reasoned that because "national immigration interests" were "so far removed from [the states'] normal responsibilities," the court could not presume that the state would act to further those interests.[268] Congress, then, could not devolve power to the states in a way that contravened the constitutional mandate of uniformity in national immigration policy.[269]

In contrast, *Soskin* defined the relevant interest as one shared by both state and federal governments: "When a state . . . decides against optional [welfare] coverage, it is addressing the Congressional concern (not just a parochial state concern) that 'individual aliens not

261. *See* Immigration and Nationality Act § 212(a)(4)(A), 8 U.S.C. § 1182(a)(4)(A) (setting out public charge provision); 8 U.S.C. § 1601(1)-(7) (explaining that purpose of the Act was to "assure that aliens be self-reliant in accordance with national immigration policy").

262. 754 N.E.2d 1085, 1098 (N.Y. 2001).

263. *Id.* at 1091.

264. *Id.* at 1096–97.

265. Soskin v. Reinertson, 353 F.3d 1242 (10th Cir. 2004).

266. *Id.* at 1255–57.

267. *Aliessa*, 754 N.E.2d at 1096 n.15 (explaining that "Congress has power to exclude aliens and may 'order the deportation of aliens whose presence in the country it deems hurtful' " but that the "States have no like power") (citations omitted).

268. *Id.* at 1097.

269. *Id.* at 1097–98.

burden the public benefits system.' "[270] That common interest in public benefits supported the devolution to the states of federal power to discriminate based on alienage.[271] Bereft of federal protection, New York's law faltered under strict scrutiny,[272] while the Colorado law easily withstood rational basis review.[273]

Aliessa and *Soskin* place Equal Protection doctrine at a crossroads, with the direction to be determined by whether the federal interest in uniform treatment of noncitizens will withstand the domestication of immigration law. The solicitous treatment of the common state and federal interests in public benefits in *Soskin* caused the court to turn away from strict scrutiny of state alienage laws. If *Soskin*'s view of the interests at stake prevails, courts may gradually carve out a third category of cases that apply more relaxed scrutiny when federal immigration law has entered an arena of traditional state power.

C. The Crimmigration Spectrum

The transformation in immigration law has also affected subnational rules seeking to regulate noncitizens through criminal law. The criminalization of immigration law has resulted in a spectrum of scrutiny of state criminal laws that apply only to noncitizens. On one end of the spectrum, state and local laws are most vulnerable to invalidation when courts perceive them as pure immigration laws with a criminal law veneer. On the other end, when the law strongly evokes generally-applicable criminal law, it stands a greater chance of surviving, even when the law singles out noncitizens and parallels existing immigration law.

1. Subnational Laws with a Criminal Law Veneer

When there is a strong parallel with federal immigration law and no parallel criminal law applicable regardless of citizenship, the subnational criminal law is unlikely to survive. In *Hines v. Davidowitz*,[274] the Supreme Court struck down as preempted a state alien registration scheme that used state criminal laws to punish noncitizens for failing to register with state authorities or present

270. *Soskin*, 353 F.3d at 1255 (quoting 8 U.S.C. § 1601(4) (2000)).

271. *Id.*

272. *Aliessa*, 754 N.E.2d at 1097–99.

273. *Soskin*, 353 F.3d at 1248 (noting that "[t]he parties appear to agree that [the law] would not survive strict scrutiny but would satisfy the rational-basis test" and thus its constitutionality "depends on the level of scrutiny to which the law is subject").

274. 312 U.S. 52 (1941).

registration documents to state law enforcement.[275] More recently, *New Hampshire v. Barros-Batistele* dismissed as preempted criminal charges that creatively interpreted state trespass law to prohibit the presence of undocumented immigrants in the state.[276]

The mere existence of parallel immigration laws in these cases is insufficient to explain these holdings. There are parallels in immigration law to the alien registration scheme in *Hines* and to the regulation of the movement of noncitizens across borders that the trespass charge in *Barros-Batistele* represents. Instead, the key to these cases is the absence of generally-applicable criminal law. U.S. citizens are not subject to a requirement to register with the government similar to that for aliens in *Hines* and, all else being equal, a U.S. citizen encountered in the same location as the noncitizens in *Barros-Batistele* would not violate criminal trespass laws.[277] Thus, the more tangential the relationship between the state alienage law and the core of criminal law, the more vulnerable the law is.

Garrett v. City of Escondido,[278] which held that the criminal "harboring" provision of the Immigration and Nationality Act preempted Escondido, California's landlord ordinance,[279] illustrates

275. *Id.* at 73–74; *see id.* at 68 (declaring that "the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing power of state and nation, but whatever power a state may have is subordinate to supreme national law").

276. New Hampshire v. Barros-Batistele, No. 05-CR-1474 (D.N.H. Aug. 12, 2005), (unpublished order granting motion to dismiss), *available at* http://www.nh.gov/judiciary/district/criminal_trespass_decision.pdf.

277. An exception to this pattern is a Louisiana case rejecting a preemption challenge to a law criminalizing operating a vehicle without lawful presence in the United States. *See* State v. Reyes, No. 2007 KA 1811, 2008 La. App. LEXIS 270, at *16 (La. App. Feb. 27, 2008) (upholding against preemption challenge LA. REV. STAT. ANN. § 14:11.13 (2002)) (providing for fines and imprisonment with or without hard labor, concluding that the law was a proper exercise of the state's police power to regulate its public roads and highways). The court stated that the law "does not actually forbid illegal aliens from driving; it requires that all non-resident alien drivers carry proof of legal status." *Id.* at *7–*8.

278. 465 F. Supp. 2d 1043 (S.D. Cal. 2006).

279. *Id.* at 1056; *see* 8 U.S.C. § 1324; Escondido, Cal., Ordinance 2006-38R (Oct. 18, 2006), *available at* http://www.ci.escondido.ca.us/immigration/Ord-2006-38R.pdf (imposing fines and imprisonment for violations). Other similar ordinances have succumbed to preemption challenges. *See, e.g.* Lozano v. City of Hazelton, 496 F. Supp. 2d 477, 554 (M.D. Pa. 2007) (striking down Hazleton, Pa., Ordinance 2006-13 (Aug. 15, 2006) (requiring apartment dwellers to obtain an occupancy permit, and requiring proof of citizenship or lawful residence for receipt of permit)); Villas at Parkside Partners v. City of Farmer's Branch, 2008 WL 2201980, at *19 (N.D. Tex. May 28, 2008) (striking down as preempted ordinance criminalizing renting to tenants who failed to provide citizenship status documents).

the central role that the absence of a generally-applicable parallel criminal law plays. The argument that federal immigration law overlapped with the local ordinance is strained: it is a stretch to characterize renting an apartment to unauthorized immigrants as criminal harboring.[280] Significantly absent is a parallel with general criminal law. Merely by renting from the same landlord, a U.S. citizen would not be committing a crime.[281]

2. Subnational Laws that Evoke Generally-Applicable Criminal Law

The harder cases involve subnational criminal laws that single out noncitizens when there exists a parallel to generally-applicable criminal law. California's Proposition 187, passed in 2004, made it a felony to use false proof of citizenship or permanent residence documents,[282] conduct that only noncitizens engage in. This provision presents a puzzle of categorization. Based on the existence of federal immigration laws criminalizing the same conduct[283] and then-Governor Pete Wilson's expressed desire that Proposition 187 cause unauthorized citizens to "self-deport,"[284] the provision seems firmly planted in the immigration arena. The language of the statute, criminalizing the use of false documents to conceal one's "true citizenship or resident alien status,"[285] raises a potential conflict between federal and state understandings of "true" citizenship or resident alien status, matters frequently litigated in federal immigration courts.[286]

280. After *Garrett*, federal prosecutors filed the first criminal case under the harboring provision against a landlord in Lexington, Kentucky. *See* Brandon Ortiz, *Immigration Case Puts Focus on Landlords*, HOUSTON CHRON., May 24, 2008, at A3. A jury cleared the landlord of all charges. Brandon Ortiz, *Landlord Found Not Guilty*, LEXINGTON HERALD-LEADER, June 28, 2008, at A1.

281. *See Villas at Parkside Partner*s, 2008 WL 2201980 at *19 (striking down on preemption and vagueness grounds municipal ordinance that criminalized renting to tenants who failed to show documents complying with the ordinance's "citizenship certification requirement").

282. CAL. PENAL CODE § 114 (West 2000).

283. League of United Latin Am. Citizens v. Wilson (*LULAC*), 908 F. Supp. 755, 786 n.39 (listing federal immigration statutes: "8 U.S.C. § 1306(d) (false alien registration cards); 18 U.S.C. §§ 1424, 1425 (false papers in naturalization proceedings); 18 U.S.C. § 1028 (production, possession or use of false identification documents); 18 U.S.C. § 1426 (false naturalization, citizenship or alien registration papers); 18 U.S.C. §§ 1542–1543 (forgery or false use of passport); 18 U.S.C. § 1544 (misuse of passport); 18 U.S.C. § 1546 (fraud and misuse of visas); 18 U.S.C. § 911 (false claim to citizenship)").

284. Susan Yoachum, *Wilson Plan For ID Card: If 187 Wins It Would be Proof of Legal Residency*, SAN FRANCISCO CHRON., October 26, 1994, at A1.

285. CAL. PENAL CODE § 114 (West 2000).

286. *See* INA § 240(a)(1), 8 U.S.C. § 1229a (setting out procedures in immigration proceedings for establishing lawful immigration status and eligibility for admission or

However, in *League of United Latin American Citizens v. Wilson (LULAC)*,[287] after the court struck down as preempted almost all of the civil provisions of California's Proposition 187, the criminal provisions remained as an oasis of lawfulness.[288] The court perceived no conflict between the criminal sanctions and federal immigration law,[289] reasoning that the provisions touched "not the broad field of immigration regulation but, rather, the field of the criminal law as it relates to false documents.[290]

LULAC's characterization of traditional state powers over crime drives the result here. Despite the existence of federal immigration provisions targeting precisely the same conduct, the potential conflict between state and federal definitions of "true" citizenship or alienage status, and then-Governor Wilson's statement, the opinion situated the challenged provisions at the core of state police powers over criminal law, declaring that "criminalizing conduct that is dishonest and deceptive [is] a legitimate exercise of the police power of the state."[291] The identification of the use of false documents as parallel conduct that would be criminal if committed by U.S. citizens seems to compel the result in the case. In effect, *LULAC* constructs a sphere of pure criminal law that is completely separable from immigration law, even when enacted to deter unauthorized immigration and applicable only to noncitizens.

Crimmigration law creates the conditions that enabled the court to categorize the law as a traditional state criminal law. The criminalization of immigration law has created a body of federal criminal laws that apply only to noncitizens,[292] such that similar conduct by a U.S. citizen would not constitute a crime. This mixing of federal immigration law with criminal law deflates the foreign policy rationale for excluding states from regulating noncitizens, while at the same time bringing immigration regulation into the traditional state

removal); Murphy v. INS, 54 F.3d 605, 608–10 (9th Cir. 1995) (discussing the burden of proof in immigration removal proceedings for establishing that a respondent is not a U.S. citizen); *see also* Ali v. Ashcroft, 395 F.3d. 722, 725 (7th Cir. 2005) (reviewing an immigration judge's ruling that an individual was not a U.S. citizen under the Child Citizenship Act of 2000).

287. 908 F. Supp. 755 (C.D. Cal. 1995).

288. *Id.* at 787 (upholding CAL. PENAL CODE § 114 (West 2000)).

289. *LULAC*, 908 F. Supp. at 786.

290. *Id.* at 775; s*ee also* People v. Salazar-Merino, 107 Cal. Rptr. 2d 313, 319–20 (Cal. Ct. App. 2001) (upholding the same provisions and adopting *LULAC*'s reasoning).

291. *LULAC*, 908 F. Supp. at 775 (stating "the criminal penalties do not serve the impermissible goal of ensuring that 'illegal' aliens leave the country").

292. *See* Stumpf, *supra* note 11, at 384 (describing the proliferation of federal criminal laws relating to immigration).

domain of crime. Presented with a state criminal law that parallels those federal crimmigration laws, courts find it difficult to resist concurrent state and local regulation of immigrants.

The Equal Protection analysis reveals a similar influence from the criminalization of immigration law. In the employment context, the express preemption of state criminal sanctions for hiring undocumented workers prohibits the states from expanding their criminal powers to match the federal criminal employment sanctions in IRCA.[293] With preemption largely set aside, equal protection challenges become paramount.

Even within equal protection challenges to civil laws, criminal law seems to exert a gravitational pull. In *Gray*, upholding Valley Park's civil ordinance suspending the licenses of businesses that hired undocumented workers, undercurrents of criminal law influenced the court to reject the plaintiffs' equal protection claim. *Gray* found a rational basis for the ordinance in the City's statement that "illegal immigration leads to higher crime rates" and "endangers the security and safety of the homeland."[294] Similarly, in *Lozano*, the court rejected an equal protection challenge to provisions stripping licenses from employers of undocumented workers and fining landlords who rented to them,[295] holding that the restrictions were rationally related to the legitimate state interest of "protecting public safety by limiting the crimes committed by illegal immigrants in the city."[296]

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The domestication of immigration law has made regulating noncitizens more accessible to subnational lawmakers and has also influenced the imaginations of judges and legislators faced with the question of whether immigration is a proper subject for state or local participation. Linking immigration control to foreign policy inspired

293. 8 U.S.C. § 1324a(h)(2) (2000) (stating "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens").

294. Gray v. City of Valley Park, No. 4:07CV00881 (ERW), 2008 WL 294294 at *25 (E.D. Mo. Jan. 31, 2008) (quoting Valley Park, Mo., Ordinance 1722, § 1 (Feb. 14, 2007)).

295. Hazleton, Pa., Ordinance 2006-18 (Sept. 21, 2006) (as amended by Hazleton, Pa. Ordinance 2006-40 (Dec. 28, 2006) and Hazleton, Pa., Ordinance 2007-6 (Mar. 21, 2007) (prohibiting the employment and harboring of undocumented aliens in the City of Hazleton); Hazleton, Pa., Ordinance 2006-13 (Aug. 15, 2006) (requiring apartment dwellers to obtain an occupancy permit contingent on proof of citizenship or lawful residence); *see also* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 484–85 (M.D. Pa. 2007) (describing ordinances).

296. *Lozano*, 496 F. Supp. 2d at 542.

nineteenth-century judges to imagine a rogue California bent on disadvantaging noncitizens regardless of the international consequences for the nation.[297] Reimagining immigration law as primarily a domestic concern linked to crime, employment, and welfare primes courts to envision states as merely carrying out their traditional roles in ways that also impact noncitizens, even when those subnational choices impact federal immigration law. At bottom, the development of closer ties among criminal law, immigration law, and national security has framed immigration regulation as a space shared by federal sovereign power and the traditional police powers of the states.

IV. CABINING STATE CRIMMIGRATION LAW

The domestication of immigration law and the expansion of subnational reliance on criminal law to govern noncitizens demands careful scrutiny from courts and policymakers. The decision to categorize subnational action as either unduly intruding into the realm of foreign policy or as merely regulating within traditional subnational spheres drives the outcome of preemption and equal protection challenges. Yet, drawing lines between federal exclusivity in immigration law and subnational regulation of noncitizens is more than an exercise in categorization. The domestication of immigration law compels a nuanced approach, namely a more critical evaluation of whether permitting freer use of state and local police powers over noncitizens imposes undue cost.[298]

The danger of a greater role for subnational power becomes most acute when the state or local government is acting at the height of its powers, in criminal law. The nineteenth-century cases, especially *Wong Wing*, sought to divide federal plenary power over immigration from the power to criminally punish.[299] The plenary power over immigration and the power to exact criminal penalties are two of the greatest powers that government can deploy with respect to individuals. Federal immigration law employs plenary power when

297. *See* Chy Lung v. Freeman, 92 U.S. 275, 279–80 (1875) (exclaiming that "if citizens of our own government were treated by any foreign nation as subjects of the Emperor of China have been actually treated under [California's] law, no administration could withstand the call for a demand on such government for redress").

298. Others have raised concerns about whether allowing states and local governments to wield this power would raise issues of uniformity and undermine the federal government's role in defining the national identity. *See, e.g.*, Motomura, *Whose Immigration Law?*, *supra* note 25, at 1596–1601; Motomura, *supra* note 114, at 214–15.

299. *See supra* notes 72–83 and accompanying text.

dividing noncitizens into lawful and unlawful categories. When state or local criminal law relies on federal immigration law to determine the lawful status of a noncitizen, the criminal and plenary powers are rejoined. Combining them lowers the barriers to employing two of the greatest deprivations of liberty: incarceration and deportation.[300]

Seen in this light, courts should impose heightened barriers to subnational attempts to use criminal law to regulate noncitizens apart from U.S. citizens. Yet just the opposite has occurred. With immigration law recast as a domestic concern, when courts perceive the subnational action as merely an extension of the traditional power over criminal law, judicial vigilance relaxes, and state and local decisions enjoy greater leeway. In *LULAC*, despite the singling out of noncitizens for criminal sanctions and the absence of any guidance to state actors in determining the meaning of "true citizenship or resident alien" status, the court upheld the provision as a pure criminal law.[301] Yet it is that intermingling of plenary power to discriminate between citizens and noncitizens and the criminal power to punish that raises the specter of unchecked power wielded by fifty states.

Opening the door to this level of state governance of noncitizens through criminal law is particularly troubling when invidious purposes underlie the state or local interest in immigration law. Although measures to control crime in state and local communities are inarguably necessary and may increase deportation rates, using criminal laws and enforcement to target noncitizens is unlikely to be cost-effective. The notion that immigrants contribute disproportionately to crime[302] runs counter to studies showing lower crime rates among first generation immigrants than among the native-born population in the United States.[303] The least educated immigrant groups, Salvadorans, Guatemalans, and Mexicans, are

300. One might expect, in light of this, that greater procedural protections should apply in the context of crimmigration law. In fact, the opposite is true: the development of crimmigration law has not brought with it access in deportation proceedings to criminal procedural protections. *See* Legomsky, *supra* note 23, at 515–16.

301. *See supra* notes 286–90.

302. Rubén G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, MIGRATION INFORMATION SOURCE (June 2006), http://www.migrationinformation.org/Feature/display.cfm?id=403.

303. *See, e.g.*, *id.* (reporting that "the incarceration rate of the U.S. born (3.51 percent) was four times the rate of the foreign born (0.86 percent)").

most likely to be stereotyped as "illegal aliens," yet they have the lowest incarceration rates among Latin American immigrants.[304]

Still, when subnational governments seek to employ criminal law in the immigration arena, that illusory elision of undocumented immigrants and criminals is invariably summoned up. A prime example is Forsyth County's declaration connecting its county employment resolution to the commission of crimes by undocumented immigrants.[305] The same is true in *Gray* and *Lozano* of the crime-based motivations offered to justify increasing burdens on employers and landlords to verify the lawful status of employees and lessees.[306]

The lack of empirical support for prioritizing immigrants in criminal legislation suggests that motives other than crime control underlie at least some of the subnational criminal laws focusing on noncitizens. Several subnational actions explicitly tie the motives for such laws to the ethnicity or culture of the newcomers. As examples drawn from North Carolina, in their resolutions directing law enforcement to check the immigration status of each undocumented resident upon arrest, Gaston and Lincoln Counties connected illegal immigration with increasing the crime rate "due to lack of comprehension of the English language and inability to read and follow established laws" as well as "lack of social and personal health care standards."[307] The Alamance County sheriff, who has directed his deputies to check the immigration status of all foreign persons arrested, characterized Mexicans as having "different" morals exemplified by heavy drinking and sexual exploitation of minors.[308]

The proliferation of subnational criminal statutes affecting noncitizens and the troubling motives that may underlie them counsel against permitting states to join the plenary power of the federal government with their own criminal police powers. Crimmigration

304. *Id.* (reporting that "the lowest incarceration rates among Latin American immigrants are seen for the least educated groups: Salvadorans and Guatemalans (0.52 percent), and Mexicans (0.70 percent). These are precisely the groups most stigmatized as 'illegals' in the public perception and outcry about immigration").

305. *See* Forsyth County, N.C., Resolution Outlining Compliance with the Federal Immigration Laws in County Recruitment, Hiring and Contracting Practices (Oct. 23, 2006).

306. *See supra* notes 293, 295 and accompanying text.

307. Gaston County, N.C., Resolution to Adopt Policies and Apply Staff Direction Relating to Illegal Residents in Gaston County, 2006-414 (Nov. 9, 2006); Lincoln County, N.C., Resolution to Adopt Policies and Provide Staff Direction Relating to Illegal Residents in Lincoln County (June 18, 2007), *available at* http://www.lincolncounty.org/PdfFiles/Ordinances/illegalResidents.pdf.

308. *Borderline*, *supra* note 217, at A16.

law has exacerbated the view that citizens are members of our community, while noncitizens are not.[309] The negative connection drawn between immigrants and criminals, coupled with the domestication of immigration law, creates a danger that lawmakers and courts will fail to curb unduly harsh measures and heavier sanctions that subnational governments place on noncitizens.

When the government seeks to act at the height of its powers to curtail individual liberty interests, courts should be especially vigilant to cabin those powers. *Graham v. Richardson*[310] established that aliens are a politically disempowered group requiring judicial protection from state power. *Plyler v. Doe*[311] limits state government power even when noncitizens do not have permission to be in the United States. *Wong Wing* separated plenary power from the power to criminally punish.[312] Together, these cases counsel restraint on sub-national governments using criminal sanctions or enforcement to single out noncitizens in ways that intersect with federal immigration regulation.

The solution is to impose barriers to the concurrent use of plenary power and the power to criminally punish by looking with disfavor upon subnational actions that single out noncitizens for criminal enforcement and sanctions. When subnational governments wield the power to criminally punish, courts should scrutinize their actions to ensure that they impose equal burdens on both citizens and noncitizens. By joining the fortunes of citizens and noncitizens in this way, courts will ensure that the social and political power of citizenship protects noncitizens against undue and invidious use of sub-national power.

CONCLUSION

The recent intense state and local interest in regulating noncitizens is a symptom of a larger struggle. We are witnessing a clash of sovereignties in which the relationship between noncitizens and subnational government depends upon the survival or demise of the age-old rule of exclusive federal control of immigration. That struggle has revived a dialogue about the importance of the local versus the national identity that was stymied in the nineteenth century when *Chy Lung* and its progeny ejected the states from the

309. *See* Stumpf, *supra* note 11, at 396–402.
310. 403 U.S. 367 (1971).
311. 457 U.S. 202 (1982).
312. *See supra* notes 72–83 and accompanying text.

immigration arena. In that early contest, the creation of the federal plenary power over noncitizens trumped the states' traditional police powers. Now that the federal government has turned immigration law 180 degrees from the border to the interior of the country, it has revived this sovereign conflict.

Precedent and the history of exclusion of states from pure immigration law alone are unlikely to resolve this conflict in cases where subnational governments seek to single out noncitizens through legislation or enforcement actions. Ultimately, the lawfulness of state and local governments as major players on the immigration law stage will be determined not by the power of precedent in preemption and equal protection doctrine, but rather by the extent to which the judicial, legislative, and public imaginations link immigration law with traditional understandings about what states do. The connections between employment, welfare, and especially criminal law forged in the modern era will make it easier for courts to make inroads into the mantra that immigration law is an exclusive federal power. Prohibiting states from regulating noncitizens in the employment, welfare, and criminal arenas may create the perception that judges are disenfranchising subnational governments from exercising powers in which they have the greatest investment. Transforming immigration law into a domestic affair means that arguments about exclusive federal power and preemption will have less traction.

In the area of crimmigration law, expanding subnational power over noncitizens raises unique problems. The plenary power of the federal government over immigration places noncitizens in a lower status offering fewer rights and protections than citizens enjoy. When the stigmatization of immigrants as criminals or invidious beliefs beyond the mere control of crime motivate subnational governments to single out noncitizens, the judiciary stands as the only barrier to improper use of the traditional state and local police power over criminal punishment. Unless courts begin to place limits on subnational use of the power to single out noncitizens for criminal punishment, the pairing of plenary power and criminal law will doubly disadvantage noncitizens.

The concerns raised here do not fit neatly into preemption or equal protection analysis. They reach beyond the question that preemption analysis raises of whether state laws or enforcement actions conflict with federal immigration law and resist confinement in the neat categories that equal protection doctrine requires for

comparing the treatment of citizens and noncitizens.[313] They do, nevertheless, stoke the ageless constitutional fascination with the tug of war between the federal and state governments and highlight the necessity to limit sub-national power over the lives and fortunes of the noncitizens in our midst.

313. *See Plyler*, 457 U.S. at 216.