

IMMIGRATION ENFORCEMENT AND FEDERALISM AFTER SEPTEMBER 11, 2001

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Introduction

Since 2001, the federal government and members of Congress have proposed and, in some cases, adopted a number of policy initiatives that aggressively seek to involve state and local government institutions more extensively and directly in the day-to-day regulation of immigration status and the so-called “interior enforcement” of federal immigration laws. Traditionally, federal immigration enforcement efforts in the United States have tended to prioritize enforcement activities at the border itself, rather than interior enforcement. While interior enforcement has increased since the enactment of the Immigration Reform and Control Act of 1986, which instituted civil and criminal sanctions against employers who employ non-U.S. citizens without authorization to work in the United States, these efforts have remained relatively limited when compared with the vast resources devoted to border enforcement.¹

Interior enforcement efforts also have been implemented almost exclusively by federal immigration agents — the role of state and local governments, by contrast, has been highly constrained. While the states played an active role in the regulation of immigration to the United States prior to the enactment of the first federal immigration statutes in the late 19th century, scholars, advocates and government officials have largely agreed until recently that under the legal regime in place since then, state and local governments lack any general legal authority to engage in activities to enforce federal immigration statutes.

However, since the mid-1990s, and to an even greater extent since 2001, the federal government and members of Congress have increasingly sought to involve state and local government institutions more extensively and directly in the federal government’s immigration enforcement initiatives. Some of these initiatives have attempted to facilitate direct enforcement of the immigration laws by state and local law enforcement officials, such as police, highway patrol, or corrections officials, in cooperation with federal immigration agents. Other initiatives

have sought to operate less directly, employing a range of means to induce officials from a variety of state and local institutions — including welfare agencies, educational institutions, public hospitals and health agencies, motor vehicle licensing agencies, and others — to restrict access of non-U.S. citizens to various state and local benefits and public services, collect immigration status information, and report suspected civil immigration violators to federal officials. Still others impose federal standards, in circumstances where state and local institutions might otherwise apply their own, in order to advance federal immigration policy objectives. The strategies relied upon to induce states and localities to participate in these efforts have varied, including simple attempts to persuade state and local officials to act voluntarily, devolution of discretionary authority to states and localities, imposition of conditions on federal funding, promulgation of federal standards that states and localities may avoid only with great difficulty, and even, in some proposals, direct imposition of federal mandates upon state and local governments.

In this Chapter, I discuss two sets of recent federal initiatives — the efforts to involve state and local law enforcement officials in routine, civil immigration enforcement and the development of mandatory federal issuance and eligibility standards for state driver’s licenses — and the resistance to those initiatives by some states and localities in order to explore the ways in which these developments challenge conventional assumptions about the relationships between state and local governments and their non-U.S. citizen residents. While some states and localities have welcomed these federal initiatives, and in some instances have even gone further by attempting to regulate and enforce federal immigration status entirely on their own,² others have actively resisted these federal efforts to enlist their involvement in immigration-related matters.³

The extent and potential implications of these more protective impulses by states and localities remain under explored.

Part two considers the traditional assumptions of U.S. immigration law, which has long been understood to constrain state and local involvement in the regulation of immigration status — whether through laws involving “immigration” policy, which directly purport to regulate and enforce immigration status and the right to entry and presence itself, or laws involving “alienage” or “immigrant” policy, which regulate the day-to-day rights and obligations of non-U.S. citizens who already are present in the United States, and in many cases have been enacted as an indirect form of immigration regulation.⁴ These limitations on state and local authority have been explained as resting, at least in part, on the premise that non-U.S. citizens are more likely to face hostility, discrimination, or disadvantage at the hands of state or local institutions than at the hands of the federal government — a premise that is consistent with conventional understandings about federalism and the role of state and local governments in the United States more generally.

Part three discusses the recent federal initiatives to involve states and localities in immigration enforcement matters and the debate over their legality and wisdom as a matter of policy. While supporters of these initiatives have argued that security imperatives demand greater involvement by state and local officials in the regulation of immigration status, critics have raised concerns that such initiatives will increase the likelihood of racial profiling and other rights violations, and have questioned the extent to which these initiatives meaningfully improve security in any event. Notably, among these critics are many state and local officials themselves, who have emphasized concerns that such aggressive efforts to enlist state and local government agencies in routine federal immigration enforcement activities threaten to distort those

institutions' priorities and undermine their autonomy. To the extent the federal government can impose immigration enforcement responsibilities upon them, these critics have warned, state and local institutions may become increasingly obliged to shift their priorities by devoting scarce resources to pursue federal policy objectives that have little to do with their own central, non-immigration-related purposes under state and local law.

Part four considers the broader implications of these post-2001 developments for the conventional assumptions concerning immigration and federalism. Certainly, it remains the case that non-U.S. citizens may often be vulnerable to hostility or discrimination by state and local government actors, as even a number of recent examples make clear. However, as the federal government itself becomes more aggressive in its regulation of immigration status, placing greater emphasis on security than on other values that also traditionally have been at stake in federal immigration and alien policies, non-U.S. citizens are seeking — and in some instances are finding greater receptiveness for — the protection of rights and liberties in state capitals and local city halls, rather than in Washington. In this context, the traditional assumptions concerning immigration, citizenship, and federalism may be incomplete.

Background

Traditional doctrinal assumptions about immigration law place significant limits on the authority of states and localities to regulate immigration and federal citizenship status. While immigration was regulated almost exclusively by the states during the nation's first century,⁵ it has generally been presumed — especially since the end of the 19th century, when the first major federal immigration statutes were enacted and the first major Supreme Court immigration-related decisions were decided — that authority to regulate immigration in the United States is exclusively the province of the federal government.⁶ Under this paradigm, Congress has been

recognized by the courts to have “plenary power” to enact laws governing the admission and removal of non-U.S. citizens and the conditions under which they may remain in the United States. While the specific source of this authority is not altogether clear, the Supreme Court has recognized this power over immigration as arising from the inherent sovereignty of the national government as well as several specific textual sources within the Constitution which confer the federal government with power over foreign commerce, foreign affairs, and naturalization. Under the plenary power doctrine, the power of Congress over immigration has been subject to relatively few constitutional limits and only limited judicial scrutiny.⁷ The breadth of this power has been recognized both when Congress has directly regulated immigration — at its core, the “determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain”⁸ — and when it has enacted other, alienage-based laws governing the day-to-day rights and obligations of non-U.S. citizens.⁹

By contrast, state and local efforts to directly regulate immigration or to formulate other policies on the basis of alienage-based classifications have been found unlawful (or at minimum, scrutinized closely). Although it is not entirely clear the extent to which the Constitution limits the authority of the states to directly regulate matters involving immigration, some cases have invalidated state and local laws on the basis of structural, federalism-based principles. In the 19th century, before Congress had enacted its first major immigration laws, the Supreme Court invalidated several immigration-related state laws as unconstitutional, suggesting that they infringed upon the federal government’s power to regulate foreign commerce or to conduct of foreign relations.¹⁰ Since the enactment of comprehensive federal immigration legislation at the end of the 19th century, courts have been able to avoid developing these constitutional principles further by instead invalidating state laws as preempted by those broad federal statutes.¹¹

With respect to alienage-based classifications, while states and localities have been permitted to formulate and implement policies that discriminate against non-U.S. citizens when the discrimination excludes non-U.S. citizens from involvement in the state’s “political functions,” courts have otherwise exercised heightened scrutiny over such classifications, invalidating on equal protection grounds laws that discriminate on the basis of alienage unless they are sufficiently tailored to advance a legitimate and compelling state interest.¹² On this basis, for example, the Supreme Court has applied strict scrutiny to invalidate state laws denying legal immigrants eligibility for state welfare programs¹³ and commercial fishing licenses.¹⁴ While undocumented immigrants have not been extended the same degree of equal protection, the Supreme Court nevertheless did apply an intermediate standard of heightened scrutiny to invalidate a state law authorizing local school districts to deny educational access to children who were not lawfully admitted to the United States.¹⁵ Moreover, like U.S. citizens, non-U.S. citizens, whether lawfully present or not, are protected in their day-to-day lives by other provisions of the U.S. Constitution that guarantee the fundamental rights of all “persons,” such as the Due Process Clause and the prohibition against cruel and unusual punishment.¹⁶

The principles underlying these decisions to some extent presume that non-U.S. citizens are more likely to face hostility, discrimination, or disadvantage at the hands of state or local institutions than at the hands of the federal government. Premises of this sort are by no means limited to the area of immigration alone. Indeed, the dominant, modern view of American federalism has conceived of the national government as a “bulwark” against violations of individual rights by the states, which are regarded on this view as probable “constitutional wrongdoers” in a broad range of contexts.¹⁷ With respect to non-U.S. citizens, there is certainly much historical support for this interpretation. As Gerald Neuman has noted, the Supreme Court

“began denying powers of immigration regulation to the states” during the late 19th century “in part because they were visibly abusing those powers.”¹⁸ Since then, non-U.S. citizens have periodically experienced a variety of similar abuses at the hands of state and local governments.¹⁹

Doctrinally, this notion is reflected most clearly in the equal protection context, where the Supreme Court has self-consciously justified strict scrutiny of alienage-based classifications on the ground that non-U.S. citizens “as a class are a prime example of a ‘discrete and insular’ minority” vulnerable to invidious discrimination, and for whom “heightened judicial solicitude” under the federal constitution is appropriate.²⁰ However, echoes of this rationale also may be found in cases invalidating state laws as inconsistent with the federal powers over foreign commerce and foreign relations. For example, in *Chy Lung v. Freeman*, the Supreme Court expressed concern that mistreatment of non-U.S. citizens by state officials might antagonize foreign governments and render the federal government liable for claims arising from such mistreatment.²¹

As observers have noted, the equal protection and structural limits on state and local authority sit together somewhat uneasily.²² While the equal protection cases place limits on the ability of states and localities to discriminate on the basis of alienage, the Supreme Court has left open the possibility of sustaining state and local involvement in the direct regulation of immigration status to the extent harmonious with federal law.²³ More complicated questions may arise, therefore, from situations in which the federal government exercises its broad plenary power over immigration in a way that might contemplate state and local involvement. Depending upon the nature of those federal initiatives, the assumption that non-U.S. citizens will be more vulnerable to mistreatment by states and localities may or may not remain the case.

Recent Efforts to Induce State and Local Immigration Enforcement

Like other immigration-related initiatives since 2001,²⁴ the recent efforts by the federal government to involve states and localities in federal immigration enforcement have not purely been a product of the aftermath of the terrorist attacks of September 11, 2001, but rather have roots in the immigration policy debates of the 1980s and 1990s. During the 1980s, amidst intense public debate over illegal immigration, at least twenty-four local governments and one state adopted policies, either by ordinance or executive order, prohibiting their officials from reporting immigration status information to or cooperating with federal immigration authorities.²⁵ Other political forces — first in the states, and then eventually in Washington — soon pushed in the opposite direction, seeking to involve state and local officials more directly in federal immigration enforcement activities.²⁶ Most prominently, in 1994 California voters approved Proposition 187, a ballot initiative which in effect attempted to create a comprehensive, state-level immigration enforcement system by restricting access of undocumented non-U.S. citizens to a variety of public services, including education and non-emergency health care, and requiring state and local officials to collect immigration status information from members of the public and to inform federal immigration officials about anyone they suspected to be within the country unlawfully.²⁷

In 1996, Congress itself acted to encourage or mandate various forms of state and local involvement in immigration enforcement activities. Provisions in the immigration legislation enacted that year banned states and localities from adopting policies restricting the disclosure of immigration status information to federal immigration officials, thereby purporting to preempt the policies adopted by states and localities during the 1980s.²⁸ Other legislative provisions authorized (but did not require) states to deny social service benefits from non-U.S. citizens,²⁹ to

restrict driver's license eligibility for non-U.S. citizens,³⁰ and to involve their law enforcement officials on a structured and limited basis in federal immigration enforcement activities.³¹

These efforts by Congress and the federal government have gained momentum since 2001. National security has explicitly served as the principal justification for many of the post-2001 incarnations of these initiatives, part of the broader trend in which security considerations have come to dominate the formulation of policies concerning immigration and alienage.³² Two examples — the efforts to induce state and local law enforcement officials to enforce civil violations of the federal immigration laws, and the promulgation of mandatory federal issuance and eligibility standards for state driver's licenses — illustrate the post-2001 trend of seeking to enlist states and localities more aggressively in immigration enforcement efforts at least in part in the name of national security.³³

State and Local Law Enforcement

Prior to 2001, the extent to which state and local law enforcement officials were involved in day-to-day enforcement of the civil provisions of federal immigration laws (as opposed to their criminal provisions) was highly limited.³⁴ While individual police departments had on occasion engaged in some immigration-related enforcement activities, these activities were relatively isolated. To the extent that Congress explicitly authorized some state and local participation in civil immigration enforcement activities, these programs were carefully structured and relatively constrained. For example, Congress authorized emergency deputization of state and local police officials as federal immigration enforcement officers in the event of a “mass influx” of non-U.S. citizens at the border.³⁵ When Congress expanded these provisions to apply in non-emergency situations, it explicitly set forth a structured set of conditions under which state and local jurisdictions may voluntarily enter written, cooperative agreements with

the federal government to permit their officers to participate in certain designated immigration enforcement activities under federal supervision.³⁶ As the 1980s and 1990s proceeded, the federal government also sought greater cooperation from state and local officials to identify potentially deportable non-U.S. citizens in state or local criminal custody.³⁷ With the dramatic expansion of immigration detention in the mid-1990s, federal immigration officials, faced with tremendous constraints on their own available detention space, also increasingly entered into voluntary agreements with state and local governments to house federal immigration detainees in their jails.³⁸

Beyond these limited, highly structured modes of state and local participation in immigration enforcement activities, state and local law enforcement officials have played little sustained role in civil immigration enforcement matters. In fact, whether states and localities have any broader, general legal authority to enforce federal immigration laws remains a matter of considerable doubt. The longstanding view of the U.S. Department of Justice was that state and local police lacked any general “recognized legal authority to arrest or detain aliens solely for purposes of civil immigration proceedings as opposed to criminal prosecution,”³⁹ and commentators reached similar conclusions.⁴⁰ Some state and local officials themselves concluded that their law enforcement officials lacked authority under state law to enforce the civil provisions of the federal immigration laws.⁴¹

Courts still have not resolved the question definitively. While one court suggested early on, in dicta, that state and local police may indeed have authority to enforce civil immigration laws, at least one other court assumed that any state or local authority was preempted by the comprehensive federal immigration enforcement scheme enacted by Congress.⁴² In the years since the 1996 immigration legislation, some courts have continued to characterize the existence

of any broader, more general state and local immigration arrest authority as “doubtful,” “questionable, and “uncertain,” in part based on the likely preemption of such authority by Congress’s comprehensive approach to immigration enforcement.⁴³

Since the terrorist attacks of September 11, 2001, however, the federal government has taken a series of steps aimed at reshaping the role of state and local law enforcement officials in ordinary federal immigration enforcement matters. Effectively recasting these day-to-day, *civil* immigration enforcement efforts as security-related, *criminal* enforcement priorities, the federal government has, in effect, sought to resituate its civil immigration enforcement activities within the longstanding, extensive set of federal-state-local partnerships designed to combat shared federal and state criminal law enforcement priorities such as violent crime, organized crime, drugs, and terrorism.⁴⁴

First, the executive branch, on its own initiative, has sought to encourage the voluntary cooperation of state and local police in federal immigration enforcement efforts. In 2002, the Department of Justice withdrew the portions of the 1996 legal opinion stating its longstanding position on state and local immigration arrest authority. Instead, DOJ announced that it had now reached the opposite conclusion — that state and local police have “inherent authority” to enforce and make arrests for civil violations of the immigration laws — and proceeded to encourage sub-federal jurisdictions to take it upon themselves to take on such enforcement responsibilities.⁴⁵ The government also issued regulations implementing the 1996 statutory provision authorizing cooperative deputization agreements, which had not yet been implemented, and since then DOJ has entered into several agreements with particular jurisdictions to authorize some of their law enforcement officers to perform certain specified federal immigration enforcement functions.⁴⁶

Second, the Department of Justice has attempted to induce state and local police officers to engage in immigration enforcement activities in a more indirect, *de facto* fashion, by entering hundreds of thousands of civil immigration records into the FBI's main criminal database, the National Crime Information Center ("NCIC"). The NCIC database is a nationwide clearinghouse of largely crime-related records that is maintained by the FBI, but accessed for the very most part by state and local officials. The purpose behind the creation of this clearinghouse, which Congress originally authorized to be maintained in 1930, was to facilitate (1) an efficient means for police in one jurisdiction to learn a person's criminal history in another jurisdiction, and (2) the ability of law enforcement agencies to respond to similar inquiries from police in other countries. The clearinghouse has existed in the form of a computerized database since 1967, and currently offers approximately 94,000 law enforcement agencies in the United States and Canada the ability to access records on approximately 52 million individuals. State and local police query the NCIC database millions of times each day in the course of encountering members of the public during their normal policing duties.⁴⁷ While Congress has on occasion authorized specific categories of non-criminal information to be included in the database — including certain specific categories of immigration-related information — the database continues to consist primarily of crime-related records, in accordance with Congress's statutory mandate.⁴⁸

Since 2001, however, the Justice Department has dramatically expanded the categories of individuals whose records are being entered into the NCIC. In particular, the government has begun to enter and disseminate to local police nationwide through the NCIC information concerning (1) so-called "absconders," who are individuals with outstanding orders of deportation, exclusion, or removal who the government believes have remained in the United States (a category that totals approximately 400,000 individuals), and (2) individuals who the

government believes have failed to register with the government under the National Security Entry-Exit Registration System (“NSEERS”), the “special registration” program announced by Attorney General John Ashcroft in June 2002 for certain nationals of a few dozen predominantly-Muslim countries and North Korea.⁴⁹ While the federal government also announced its intention to enter information on suspected foreign student visa violators and individuals previously deported with misdemeanor convictions, it has deferred ultimate decision on those categories for the time being. Proposals in Congress would go much further by specifically requiring the entry and dissemination through the NCIC of these and several other categories of immigration records.⁵⁰

Given that the vast majority of NCIC queries come from state and local officials, the government’s apparent purpose in using the NCIC in this manner seems to be to induce individual police officers — without regard to the scope of their immigration arrest authority as a matter of federal, state, or local law — to arrest and detain suspected civil immigration violators whose names appear in the database upon making routine queries of the database. The initiative to use the NCIC is currently the subject of litigation challenging the government’s authority to use the database for civil immigration enforcement purposes not authorized by Congress.⁵¹ In the interim, however, the government has apparently continued to enter these immigration records into the NCIC, and in the time since it commenced doing so, thousands of non-U.S. citizens have been arrested by state and local police for suspected civil violations of the immigration laws.⁵²

As a result of these initiatives, state and local police have increasingly found themselves enmeshed in civil immigration enforcement activities under circumstances in which they previously would not have been.⁵³ Even more aggressive proposals to involve state and local police enforcement have come from members of Congress, over a hundred of whom cosponsored

legislation in 2003 that not only purported to provide express authorization for state and local participation in immigration enforcement and inclusion of immigration records in the NCIC, but also would have cut off certain federal funding streams from states that fail to enact legislation of their own specifically authorizing their police to enforce federal immigration laws, criminalized a number of immigration law violations that currently are only subject to deportation and civil penalties, and required states and localities to develop and implement policies to provide federal authorities identifying information about non-U.S. citizens who are suspected of violating the immigration laws. The proposed legislation also would have conferred immunity upon state and local agencies from suit for any non-criminal wrongdoing that allegedly arises from federal immigration enforcement activities.⁵⁴

Variants on these proposals have periodically been reintroduced and incorporated into other proposed immigration legislation in the course of the debates over comprehensive immigration reform in 2005 and 2006. The most extreme of these proposals would have gone further to criminalize unlawful presence in the United States altogether, largely eliminating the traditional distinction between civil and criminal violations of the immigration laws.⁵⁵ Such proposals would thereby facilitate immigration enforcement by state and local law enforcement, since state and local police do have recognized authority in many jurisdictions to make arrests for criminal violations of the immigration laws.⁵⁶ To date, none of these proposals have been enacted into law.

Driver's License Issuance and Eligibility Standards

In the United States, given the lack of a uniform national identification document, state driver's licenses and, to a lesser extent, other state identification documents have become the default means of establishing one's identity in a broad range of contexts — banking, check

cashing, boarding airplanes, establishing eligibility for employment, and many others. Traditionally, states have set their own requirements and eligibility criteria for their residents to obtain driver's licenses and identification cards and, in many cases, have not explicitly restricted eligibility on the basis of immigration status. While state governments typically recognize valid driver's licenses issued by other states or, indeed, other countries, states typically require individuals to obtain state licenses within a certain period after becoming a state resident if they wish to remain eligible to drive within the state. For example, in New York, individuals must obtain a New York driver's license within 30 days of becoming New York resident in order to be authorized to operate motor vehicles within the state.⁵⁷

In 1996, as part of a comprehensive package of changes to the immigration laws, Congress authorized the states to conduct pilot programs for a period of three years to deny driver's licenses from non-U.S. citizens who are not lawfully present in the United States. While the Attorney General was required to submit a report on those pilot programs within three years, no report was submitted, and it is not clear that any pilot programs were in fact conducted under these provisions.⁵⁸ As part of the same legislation, Congress also attempted to set forth substantive standards for state driver's licenses as prerequisites for their use for federal purposes, requiring states either to include the licensee's Social Security number on the document itself or to verify each license applicant's Social Security number with the federal government. This second provision proved unpopular, however, and as a result Congress blocked funding to implement these provisions and ultimately repealed the provision itself.⁵⁹

At the same time, prior to 2001 active movements sought to expand non-citizen access to driver's licenses in at least 15 states. Advocates variously sought to modify requirements that served barriers to access for non-U.S. citizens, such as lawful presence, Social Security number,

and other documentation requirements; to expand the categories of non-U.S. citizens eligible for driver's licenses; and to expand the categories of documents that could be used to obtain driver's licenses.⁶⁰ These efforts stalled somewhat after the terrorist attacks of September 11, 2001, as state legislators and administrators introduced new proposals to limit eligibility for non-U.S. citizens. However, only a few of these proposals succeeded and became law, and a number of states even sought to *expand* eligibility to undocumented non-U.S. citizens. As of May 2002, one leading immigrants' rights organization could claim that the pre-2001 campaigns to expand eligibility for driver's licenses had made "surprising progress" even after the September 11, 2001 terrorist attacks.⁶¹

The legislative catalyst for action by Congress was the final report of the independent September 11 Commission, which recommended that the federal government "set standards for the issuance of birth certificates, and sources of identification, such as driver's licenses."⁶² Accordingly, the intelligence reform bill that Congress enacted in December 2004 to implement the commission's recommendations did precisely that, providing that in order for a driver's license or state identification card to be accepted for any official purpose by a federal agency, the state had to satisfy certain minimum standards for application procedures, documentation of an applicant's identity, and verification of that documentation. The September 11 Commission itself did not recommend any restrictions on non-citizen eligibility for driver's licenses, and the intelligence reform act accordingly did not include any — to the contrary, the statute explicitly provided that the implementing regulations, which were to be established through a negotiated rulemaking process,⁶³ could not infringe upon any state's authority to set and enforce its own criteria for the categories of individuals eligible for driver's licenses or identification cards.⁶⁴

However, only six months later, Congress repealed these provisions and enacted the REAL ID Act (“RIDA”).⁶⁵ RIDA thereby terminated the intelligence reform act’s negotiated rulemaking process midstream — and, indeed, banned the use of negotiated rulemaking to develop implementing regulations for RIDA. In addition to the kinds of criteria required under the intelligence reform act — with which states now must comply within three years, at tremendous expense to their treasuries — RIDA also set forth certain alienage-based eligibility requirements. Under RIDA, within three years driver’s licenses only may be issued to U.S. citizens and non-U.S. citizens with certain categories of immigrant visas.⁶⁶ Lawfully present non-U.S. citizens with nonimmigrant visas or certain pending or approved applications may only obtain “temporary” licenses or identification cards, which must expire on the same date as the individual’s visa (or, for visas of indefinite length, must expire one year from the date of issue). Temporary licenses and identification documents must visibly indicate that they are temporary, and must clearly display the expiration date, in order to facilitate the ability of law enforcement personnel to inspect and verify the document.⁶⁷ States may issue “driver’s certificates” to undocumented non-U.S. citizens, but these documents must indicate clearly that they may not be accepted for federal purposes.⁶⁸ RIDA requires state motor vehicle officials to adhere to minimum federal standards for issuance and identity verification for driver’s license and identification card applicants, including the eventual use of a federal immigration database to determine whether applicants are lawfully present in the United States.⁶⁹

The enactment of RIDA by Congress has led to a flurry of legislative activity in the states on the subject of driver’s licenses. Many states must enact new legislation and appropriate significant amounts of money to comply with RIDA’s stringent issuance and verification standards; it has been estimated that implementation of RIDA will cost the states as much as \$11

billion.⁷⁰ As of March 2006, at least 66 bills were pending in 24 different states that would have some effect on the ability of non-U.S. citizens to obtain driver's licenses.⁷¹

A. Policy Considerations

The debates over the federal government's role in enlisting state and local law enforcement to enforce immigration law and in mandating federal eligibility and issuance criteria for state-issued driver's licenses have involved related, if not identical issues. In both instances, the purpose and effect of these initiatives — like their precursors in the early 1990s — would be to make immigration status more salient on a day-to-day basis, and thereby to increase the likelihood that individuals other than federal immigration enforcement agents will directly engage in, or at minimum cooperate with, federal enforcement activities. In both instances, an unusual constellation of voices — including conservatives, libertarians, immigrant community and civil rights advocates, law enforcement organizations, and some state and local government officials themselves — has coalesced to criticize these initiatives for distorting and potentially undermining important state and local policy priorities, and with little, if any, corresponding gain in national security.

Proponents of these initiatives have emphasized the importance of supplementing the federal government's limited immigration enforcement resources with the considerably more extensive resources of state and local governments. For example, while there are only a few thousand federal immigration enforcement agents, there are well over 700,000 state and local police officers nationwide, and proponents characterize this much larger pool of enforcement officials as a potential "force multiplier" whose use would result in more effective immigration enforcement and, they argue, therefore greater security. They also argue that state and local police are in a better position to enforce the immigration laws given their knowledge of local

communities.⁷² Similarly, with respect to driver's licenses, proponents of restricting eligibility for non-U.S. citizens go well beyond the concerns expressed by the independent September 11 Commission, which emphasized the need to standardize and safeguard the integrity of state driver's license and identification cards given their tremendous importance as the default means of establishing identity across a broad range of social contexts. Rather, RIDA supporters argue further that non-U.S. citizens who are unlawfully present should legitimately be hindered in their ability to engage in the full range of day-to-day activities that driver's licenses facilitate — including, for that matter, driving.⁷³ As with the use of state and local police, the implicit goal and apparent result would be to make immigration status — and unlawful presence — more salient on a day-to-day basis in situations in which it currently is not. Through the use of such policies, proponents hope not only to increase the number of undocumented immigrants who may be detected and deported, but also to induce others to depart the country on their own — what immigration restrictionists refer to as “self-deportation” — and to deter new arrivals from entering and remaining in the United States illegally.⁷⁴

Opponents have criticized these initiatives from a variety of perspectives.⁷⁵ In the spring of 2006, hundreds of thousands of people — including U.S. citizens and both documented and undocumented non-U.S. citizens, from many different racial and ethnic backgrounds — took to the streets in massive demonstrations in favor of legalization and against the enforcement-driven approaches to immigration reform advocated by many in Congress.⁷⁶ With respect to the use of state and local police, in particular, immigrant community advocates and community leaders have raised rights-based concerns about the potential for racial profiling and violations of due process. Given how complicated immigration law can be, these advocates argue, state and local police whose primary responsibilities involve completely different objectives will likely find it

difficult to properly ascertain the immigration status of individuals who they encounter. For example, as Gerald Neuman has noted:

“Illegal alien” gestures toward a concept of noncompliance with law, but [immigration] law is more complex than most politicians and voters realize. There are different manners in which an alien’s presence could be said to violate the law, and there are different forms of curative government action that may impart degrees of legality to the alien’s presence.⁷⁷

Some states and localities that have implemented immigration-related laws on their own already are wrestling with these sorts of complexities.⁷⁸ Unschooled in these complexities, state and local law officials may also resort all too quickly, whether consciously or unconsciously, to racial and national origin profiling rooted in stereotypes, in some cases, in direct violation of state law.⁷⁹ Indeed, evidence suggests that even federal immigration officials themselves — who are trained to understand the immigration laws, and whose sole responsibility is immigration enforcement — have engaged in racial profiling of this sort.⁸⁰

Even if the conduct of state and local officials were no worse than their federal counterparts, the negative consequences would be more significant, given the broader set of responsibilities of state and local governments within immigrant communities. Advocates and community leaders have noted with concern, for example, that members of immigrant communities may be discouraged from cooperating with police (for example, if they are crime victims or witnesses) and other local institutions if they perceive those institutions to be in the business of federal immigration enforcement. Preliminary research suggests that this concern may be well-founded.⁸¹ In other instances, it has been reported that individual officers have used the threat of deportation as a means of intimidating non-U.S. citizens.⁸²

State and local government officials have themselves echoed these same concerns. While police have emphasized in recent years the importance, when seeking to protect public safety, of building and maintaining trust and cooperation with immigrant communities, police face a number of barriers in creating that sense of trust — not least of which being the fear within immigrant communities that cooperating with the police might lead to deportation.⁸³ The baseline level of trust of the police in some immigrant communities is frequently quite low to begin with, owing to the experiences of those individuals with the police in their home countries and language and cultural barriers. Some evidence suggests that in jurisdictions where local police have become involved in immigration enforcement, police-community relationships have suffered even further as a result.⁸⁴ The recent federal initiatives to enlist state and local law enforcement in immigration enforcement matters also have come at a time when local and state governments have been forced to bear significant costs associated with other federal homeland security initiatives and when federal funding that previously had been granted to localities to fund the hiring of new police officers and to fight violent crime has been shrinking dramatically.⁸⁵ In this context, some state and local officials have acutely sensed that the imposition of federal immigration enforcement responsibilities upon them would constitute an unfunded mandate and would have the potential to improperly “commandeer” state and local institutions for federal policy purposes that are unrelated to — and indeed, may undermine — the core criminal justice and public safety objectives that state and local law enforcement agencies are charged to advance.⁸⁶

And all of these critics have also questioned the extent to which involving state and local police in routine immigration enforcement represents an effective means of protecting national security at all, noting that above and beyond the potential distortion of state and local law

enforcement priorities, the devotion of scarce law enforcement resources to blanket, large-scale immigration enforcement efforts simply expands the “haystacks” in which police must search for those who pose the most serious national security threats. Instead, these critics argue, state and local police cooperation should be tailored to focus more narrowly on those particular individuals and groups who pose the greatest threats to public safety — and that immigration status, standing alone, is neither a necessary nor a sufficient proxy for that purpose.⁸⁷ Moreover, as Dan Richman and others have noted, by transforming local police into “a potential source of personal ruin” in the eyes of many within immigrant communities, the federal government’s efforts to delegate ordinary immigration enforcement responsibilities would “in all likelihood result in a net intelligence loss” of information relevant to potential terrorism and other serious crimes.⁸⁸

With respect to the limitation of eligibility for driver’s licenses, critics have sounded similar notes of concern. Critics have emphasized that the principal purpose for states in issuing driver’s licenses is not to create a document to be used as a form of federal identification, but rather to ensure that state residents are qualified to drive, tested on their awareness of the traffic laws and their driving ability, and insured. By rendering millions of non-U.S. citizens ineligible for driver’s licenses, critics argue, RIDA may make roads less safe and increase insurance rates, since many non-U.S. citizens may well drive anyway because they need to do so to work. At the same time, individuals in immigrant communities who are legitimately eligible for driver’s licenses may be discouraged from applying for them.⁸⁹ Moreover, like state and local police, state motor vehicles officials have no particular immigration expertise and will invariably find it difficult to make proper eligibility determinations. And as discussed earlier, the implementation

of RIDA will require state governments to expend tremendous sums of money to fulfill federal immigration policy objectives that have nothing to do with their own policy purposes.⁹⁰

Critics also have questioned whether denying non-U.S. citizen's driver's licenses represent sound security policy. Taking millions of undocumented non-U.S. citizens out of state motor vehicle databases dramatically increases the numbers of people living "in the shadows," without any government agencies having any information about their presence — which may make the tasks of law enforcement and identification of individuals who may be security threats more difficult, not easier.⁹¹ Critics point out that it is not necessary to restrict non-citizen eligibility to ensure the integrity and reliability of the identification documents that states issue. At the same time, committed terrorists scarcely need driver's licenses to board aircraft, since any number of other identification documents can suffice, including U.S. or foreign passports.⁹²

Immigration and the Liberty-Enhancing Potential of Federalism

The post-September 11 efforts to involve state and local officials in federal immigration enforcement activities — and the responses to these initiatives by those officials and by immigrant community advocates — raise questions about the appropriate model of federalism upon which U.S. immigration law should rest and the continued strength of traditional doctrinal assumptions concerning the appropriate role for state and localities in the regulation of immigration. Given the persistence of non-U.S. citizens' vulnerability to hostility and abuse at the hands of state and local governments, the traditional presumption in favor of exclusive federal regulation and enforcement of immigration status retains tremendous force.⁹³

Still, this perspective may be incomplete. As scholars of U.S. federalism have discussed, the importance of federalism is not simply in its role in advancing and facilitating values

associated with any decentralized system of administration — such as the promotion of public participation, citizen choice, efficiency, and experimentation⁹⁴ — but rather, the establishment of multiple centers of power with the capacity to exert independent checks upon the power of the national government.⁹⁵ Sub-federal institutions accordingly can play significant roles in the protection of liberty — as focal points for the expression of political opposition to national policies, as “seedbeds for political change” at the national level, as sources of alternative and potentially broader conceptions of federal rights, and as potentially moderating influences on the federal actors who seek their cooperation.⁹⁶

This liberty-enhancing potential may be particularly important when a strong national government itself needs to be checked or fails to protect liberties sufficiently.⁹⁷ With legislative and judicial developments during the past fifteen years enhancing the power of state governments — for example, by placing substantive and procedural limits on Congress’s legislative authority,⁹⁸ fashioning limits on the ability to subject state governments to suit in federal court,⁹⁹ restricting the ability of the federal government to “commandeer” state government institutions for federal policy objectives,¹⁰⁰ and devolving decision-making to the states in certain policy areas¹⁰¹ — the capacity of state and local governments to play this counterbalancing role may be greater than it previously had been, at least with respect to some policy areas.¹⁰²

Discussions of immigration and federalism have inadequately accounted for these potentially liberty-enhancing dimensions of federalism and (to a somewhat lesser extent) localism.¹⁰³ A number of scholars in recent years have explored the potential roles that state and local governments might play in immigration regulation and enforcement, either on their own or pursuant to delegations of power by the federal government.¹⁰⁴ Others have discussed the ways

in which federalism can facilitate the recognition of multiple identities and affiliations through overlapping conceptions of citizenship in both federal and sub-federal political communities.¹⁰⁵ By contrast, comparatively less emphasis has been given to the myriad ways in which state and local governments might actively play a role in protecting the rights and liberties of non-U.S. citizens — and more specifically, in *resisting* potential abuses by the federal government against their non-U.S. citizen residents.¹⁰⁶

And yet, the increasing aggressiveness of the federal government in its regulation and enforcement of immigration and citizenship makes the liberty-enhancing role of state and local governments — including the status of non-U.S. citizens as “citizens” of those state and local communities — potentially more salient.¹⁰⁷ Though often discussed as if it were a unitary concept, citizenship encompasses a range of discrete institutions and practices, both formal and informal.¹⁰⁸ As Linda Bosniak has noted, non-U.S. citizens are not “entirely outside the scope of those institutions and practices and experience we call citizenship.”¹⁰⁹ To the contrary, non-U.S. citizens can and often do engage in a broad range of citizenship-like practices at the state and local levels. To varying extents within many state and local communities — and at least to some minimal extent within *all* state and local communities — non-U.S. citizens bear the same rights, exercise the same responsibilities, and engage in the same participatory practices within state and local communities as any other state or local residents, without regard to their formal immigration or citizenship status under federal law.

In some instances, this citizenship-like status at the state or local level may even be *formally* recognized as a matter of state or local law. While some recent discussions of subfederal citizenship have emphasized dimensions of citizenship other than its formal legal status,¹¹⁰ the divided nature of sovereignty in the United States means that the formal, legal

dimension of state citizenship — formal membership in the political community of a particular state — remains a potentially significant category within which to understand the rights and privileges available to non-U.S. citizens.¹¹¹ State citizenship for non-U.S. citizens could not lawfully justify state efforts to block or interfere directly with the enforcement of federal immigration law, given the supremacy of federal law under the U.S. Constitution. And under the Citizenship Clause of the Fourteenth Amendment, state governments are not constitutionally permitted to *deny* state citizenship from individuals who are U.S. citizens.¹¹² However, in particular policy areas, states may retain some ability to affirmatively *grant* state citizenship to non-U.S. citizen residents or, less formally, to define affirmatively the nature of their relationships with all state residents without regard to U.S. citizenship or immigration status — for example, when implementing laws of general applicability that have been adopted in the exercise of their traditional police powers to protect the health and safety of their communities.¹¹³

The extent to which states and localities might be able or willing to incorporate non-U.S. citizens into their political communities in any meaningful way as “citizens,” or to play the role of resisting potential abuses by the federal government, at this point remains difficult to assess and may depend upon the context: in some states and localities non-U.S. citizens may fare better, while in others they may fare worse. However, some states and localities manifestly are doing so already — and in some cases through policies of general applicability, while in others through policies designed specifically to incorporate non-U.S. citizens as members of state and local communities. As Peter Schuck has observed, it already is the case that some states and localities “embrace legal aliens at least as warmly as the federal government does.”¹¹⁴ Even immigration

restrictionists at times have complained that “it is the states and local governments that are rolling out the welcome mat for illegal aliens once they are here.”¹¹⁵

For example, as Rebecca Smith, Amy Sugimori, and Luna Yasui have observed, states often have “latitude to act in areas that are as yet subject only to state regulation, and to offer benefits and protections beyond what the federal government has made available.”¹¹⁶ Accordingly, some states and localities have acted to protect the rights of their non-U.S. citizen residents to an extent greater than the federal government in a number of policy areas, including equal employment and labor rights, language access and confidentiality protections for non-U.S. citizens seeking government benefits and services, and eligibility for workers’ compensation benefits.¹¹⁷ Similarly, in the aftermath of Congress’s devolution to the states of authority to determine non-U.S. citizen eligibility for certain categories of welfare benefits, some states — particularly (though not exclusively) those with large non-U.S. citizen populations — have continued to provide immigrants with these benefits to a considerable extent.¹¹⁸ At least ten states have extended eligibility for in-state colleges and university tuition rates to undocumented, non-U.S. citizens.¹¹⁹ In December 2006, Illinois announced plans to implement a comprehensive set of initiatives — spanning across a range of different policy areas — designed to improve integration of immigrants within the state by improving language access to state agencies, increasing resources for English education programs, providing job training, and ensuring access to health care, education, and other state services without regard to immigration status.¹²⁰ Some states and localities even have extended political rights to non-U.S. citizens.¹²¹

The political and legal skirmishes discussed here over the burgeoning efforts by the federal government to involve state and local governments in federal immigration enforcement activities provide a vivid illustration of these dynamics. On the one hand, as discussed above,

non-U.S. citizens who have advocated against these initiatives, in partnership with U.S. citizens and community organizations, have engaged in citizen-like political action and have been recognized in some contexts as legitimate, citizen-like political actors.¹²² In turn, states and localities that have opposed these initiatives in effect have asserted the right to implement their traditional police powers to protect the health and safety of their communities through laws of general applicability, without regard to the U.S. citizenship or immigration status of the residents within their communities. Notably, such opposition by states and localities has not always or necessarily been driven by an explicit goal of protecting the rights of non-U.S. citizens as such, but rather has been animated in many cases by concern that the incorporation of federal immigration policy objectives would grossly interfere with their ability to advance the welfare of their citizenries as a whole.¹²³

On the other hand, by aggressively pushing state and local governments to incorporate federal immigration enforcement activities into their day-to-day work, the federal initiatives discussed here challenge the potential salience of state citizenship altogether, insofar as they seek to extend and impose the institutions and standards for federal citizenship upon state and local communities seeking to protect and advance the welfare of their own citizenries. By asserting the predominance of federal over state and local policy objectives, these enforcement initiatives in effect seek to diminish any independent significance that state and local citizenship-like institutions might have.

Conclusion: “Denationalized” Citizenship and the Changing State-Federal Equilibrium

The contestations over the role of state and local governments in the regulation and enforcement of federal immigration status illustrate what Saskia Sassen has termed the partial “denationalization” of formal national citizenship in the wake of globalization. By

“denationalization,” Sassen refers not to the supplanting of national citizenship altogether by new forms of “postnational” citizenship existing “outside the confines of the national,” but rather to a transformation of national citizenship itself in a manner that “remains deeply connected to the national, as constructed historically, and is indeed profoundly imbricated with it but is so on historically new terms of engagement.”¹²⁴ As the role of the national state changes, notes Sassen, the possibility has emerged for “new forms of power [to be exercised] at the subnational level.”¹²⁵ In resisting federal efforts to enlist subfederal institutions in immigration enforcement activities, non-U.S. citizens and state and local governments are seeking to exercise the “new forms of power” that Sassen identifies.

As Sassen recognizes, however, national citizenship itself remains important,¹²⁶ and the extent to which these processes will in fact result in greater subnational power over immigration and citizenship remains highly uncertain. Denationalization may indeed make state and local citizenship more salient, as some scholars have tentatively suggested, and create spaces for state and local governments to exercise power on behalf of their non-U.S. citizen residents against potential encroachments by federal authorities. However, as the U.S. experience in any number of policy areas since the New Deal makes clear, Washington often has been successful in its efforts, relying upon various degrees of coercion and cooperation, to enlist state and local institutions in the implementation of federal policy objectives when political will and leverage at the federal level has been sufficiently strong.¹²⁷

It is too early to tell whether the federal government will prevail in its efforts to incorporate state and local institutions in its immigration enforcement efforts. However, even if the assertion of federal predominance over state and local prerogatives ultimately succeeds, these incipient processes of denationalization may yet play a role in shaping the ultimate form that

those federal enforcement initiatives take. Even if successfully induced to cooperate in federal immigration enforcement activities, many states and localities will continue to recognize the critical importance of fully integrating and maintaining strong relationships with their non-U.S. citizen residents, in order to implement fundamentally important policies designed to protect and promote the health and safety of *all* of their residents — whether U.S. citizens or non-U.S. citizens, documented or undocumented. In an era in which the power of the federal government may be diminishing, and the power of subfederal institutions correspondingly increasing, states and localities may retain sufficient influence to ensure that federal authorities are attentive to these imperatives. Over time, therefore, any cooperative equilibrium that ultimately emerges between federal and subfederal authorities with respect to immigration enforcement may yet incorporate these state and local concerns in some manner and to a significant extent.¹²⁸

Notes

¹ Immigration Reform and Control Act (“IRCA”), Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C.); see David Dixon & Julia Gelatt, Migration Policy Institute, Immigration Facts: Immigration Enforcement Spending Since IRCA, Task Force Fact Sheet No. 10, at 1 (Nov. 2005) (analyzing dramatic increases between 1985 and 1992 in appropriations and staffing for federal immigration enforcement activities, and noting that these resources “have been concentrated heavily on border enforcement”), at

http://www.migrationpolicy.org/ITFIAF/FactSheet_Spending.pdf. Border enforcement accounted for approximately 58 percent of all spending in 2002, compared to 9 percent for interior investigations and 33 percent for detention and removal operations.

² See, e.g., Peter Whoriskey, States, Counties Begin to Enforce Immigration Law, Wash. Post, Sep. 27, 2006, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/09/26/AR2006092601319_pf.html. Several states and localities have enacted laws and ordinances prohibiting, among other things, hiring or renting property to undocumented immigrants and denying business permits, contracts, and grants to those who assist undocumented immigrants. See, e.g., Daniel Gonzalez, States Fight Illegal Migration, Arizona Republic, Aug. 2, 2006, at <http://www.azcentral.com/arizonarepublic/news/articles/0802statelaws.html> (noting that over half of all states had passed immigration-related measures in 2006 “aimed at denying undocumented immigrants access to jobs and benefits”); see also David Migoya, New era on immigration, Denver Post, Aug. 1, 2006, at http://www.denverpost.com/search/ci_4813481 (discussing new Colorado laws requiring proof of legal residence in United States to be eligible for public benefits and professional licenses); Perdue Signs Georgia Security and Immigration Compliance Act, The Chattanooga, Apr. 17, 2006, at http://www.chattanooga.com/articles/article_83961.asp (discussing comprehensive new Georgia law requiring proof of lawful residence to be eligible for public services, requiring state contractors to verify lawful residence of new employees, and authorizing state law enforcement to enforce federal immigration laws).

These laws and ordinances are currently the subject of litigation. See, e.g., Michael Rubinkam, Federal Judge Blocks Town’s Crackdown on Illegal Immigrants, Associated Press, Nov. 1, 2006, at <http://news.findlaw.com/ap/o/51/11-01-2006/2b42000fb270c1a6.html>; Laura Parker, Court tests

await cities' laws on immigrants, USA Today, Oct. 9, 2006, at

http://www.usatoday.com/news/nation/2006-10-08-immigration_x.htm (discussing ordinances in Hazleton and other localities).

³ See *infra* section III.C.

⁴ On the distinction between “immigration” law and policy and “alienage” or “immigrant” law and policy, see Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* 37-76 (2006); Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* 46-47, 113-14 (2006).

⁵ See, e.g., Gerald Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 *Colum. L. Rev.* 1833 (1993) (discussing regulation of immigration by states before 1875).

⁶ E.g., *De Canas v. Bica*, 424 U.S. 351 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”); see Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 *U.C.L.A. L. Rev.* 1425, 1436 (1995); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 *U. Pa. J. Const. L.* 1084, 1088-90 (2004) (discussing “widely understood and accepted” conclusion that state and local governments lack power to enforce provisions of federal immigration laws); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 *Va. J. Int’l L.* 121, 134 (1994) (“It has long been assumed that control of immigration and the treatment of aliens within the United States are exclusive federal responsibilities.”).

⁷ On the plenary power doctrine, see, e.g., Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 *N.Y.U. L. Rev.* 493, 502-04, 532-33 (2001).

⁸ De Canas, 424 U.S. at 355.

⁹ E.g., *Mathews v. Diaz*, 426 U.S. 67 (1976). On the distinction between immigration law and alienage law, see *supra* note 4.

¹⁰ See, e.g., *Chy Lung v. Freeman*, 92 U.S. 275 (1875); *The Passenger Cases*, 48 U.S. 283 (1849); see *Spiro*, *supra* note 6, at 134-45; Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* 44-51 (1996).

¹¹ See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941) (invalidating Pennsylvania alien registration law on the basis of federal preemption); *Wishnie*, *supra* note 7, at 510; *supra* note 27 (discussing invalidation of main provisions of California’s Proposition 187 in part on the ground of preemption).

¹² See Harold Hongju Koh, *Equality With a Human Face: Justice Blackman and the Equal Protection of Aliens*, 8 *Hamline L. Rev* 51 (1985).

¹³ *Graham v. Richardson*, 403 U.S. 365 (1971).

¹⁴ *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410 (1948).

¹⁵ *Plyler v. Doe*, 457 U.S. 202 (1982).

¹⁶ E.g., *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896) (non-U.S. citizens may not be subjected to criminal punishment without being afforded due process of law and other constitutional protections); see Neuman, *supra* note 6, at 1441-42, 1445-46.

¹⁷ Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 *Vand. L. Rev.* 1229, 1230-31 (1994); see also Richman 2006, at 421 (“We are accustomed to the idea that the federal government is responsible for monitoring local abuses — stepping in with civil suits or civil rights prosecutions whenever the local are derelict in their attention to such matters — not local

monitoring of the feds.”); Michael W. McConnell, *Evaluating the Founders’ Design*, 54 *U. Chi. L. Rev.* 1484, 1501 (1987) (under modern assumptions underlying Fourteenth Amendment and New Deal legislation, “it is the federal government, not the states, that appears to be our system’s primary protector of individual liberties”).

¹⁸ Neuman, *supra* note 6, at 1436.

¹⁹ See, e.g., Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 71-75 (2005) (discussing state and local government initiatives during the 1930s to exclude Mexicans and Mexican Americans from state and local government services and to expel them from the United States); Joan M. Jensen, *Passage From India: Asian Indian Immigrants in North America* 42-47 (1988) (discussing inaction of local police in response to violent expulsions of South Asians and other Asian immigrants from Pacific Coast communities during late 19th and early 20th century); Wishnie, *supra* note 7, at 555 & nn.318-19 (discussing anti-immigrant movements at state and local levels).

²⁰ *Graham*, 403 U.S. at 372; see Neuman, *supra* note 6, at 1435 (arguing that “dynamics of the political process” render non-U.S. citizens “more vulnerable at the state level than the federal level”).

²¹ *Chy Lung*, 92 U.S. at 279 (noting that mistreatment of non-U.S. citizens by state officials “may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend.”). Similar principles underlie the availability of federal court jurisdiction for cases involving non-U.S. citizens. As Kevin Johnson has explained, the Founders provided for alienage jurisdiction in the federal courts “to avoid the potentially adverse foreign relations consequences caused by allowing state courts, fueled by a mixture of anti-British and anticreditor sentiment, to resolve disputes involving noncitizens.” Kevin Johnson, *Why Alienage Jurisdiction? Historical*

Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens, 21 *Yale J. Int'l L.* 1, 6 (1996).

²² See, e.g., Wishnie, *supra* note 7.

²³ For example, in *De Canas v. Bica*, the Supreme Court concluded that Congress Congress did not intend to preclude states from restricting the employment of unauthorized migrants, and on that basis left open the possibility that a California statute making it illegal to “knowingly employ” undocumented immigrants if it would have “an adverse effect on lawful resident workers” might be sustained. 424 U.S. at 351; see Bill Ong Hing, *Defining America: Through Immigration Policy* 156-57 (2004) (discussing *De Canas*).

²⁴ See, e.g., Jennifer M. Chacón, *The Security Myth: Punishing Immigrants in the Name of National Security*, manuscript at 14 (2006) (*this volume*) (arguing that in light of legal developments during 1990s, “September 11, 2001, cannot accurately be labeled as a watershed for U.S. immigration policy”); H. Richard Friman, *Migration and Security: Crime, Terror, and the Politics of Order* (2006) (*this volume*) (discussing pre-2001 trend toward “securitization” of immigration law).

²⁵ Some of these policies were adopted in direct response to the federal government’s failure to grant asylum to thousands of individuals fleeing civil wars in Guatemala and El Salvador, the overwhelming majority of whose claims were denied apparently on account of the federal government’s support of the political regimes from which they had fled. Following the lead of religious congregations which had pledged “sanctuary” to these refugees, these cities explicitly stated their opposition to the deportation of these Guatemalan and Salvadoran refugees and prohibited city officials from cooperating in their arrest or deportation. In other instances, localities acted in response to concerns within their immigrant communities about the barriers to fair and equal access to

government services that would potentially result if local officials cooperated with federal immigration enforcement activities, which many individuals perceived to involve racial discrimination and other abuses. See Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation With the INS*, 7 *La Raza L.J.* 50, 50-53 & nn.4, 10-11 (2004); Craig B. Mousin, *A Clear View From the Prairie: Harold Washington and the People of Illinois Respond to Federal Encroachment of Human Rights*, 29 *S. Ill. Univ. L.J.* 285, 293-96 (2005); Linda Reyna Yanez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 *Hispanic L.J.* 9, 33-34 (1994)

²⁶ See, e.g., Spiro, *supra* note 6, at 130-32 (noting state laws criminalizing employment of undocumented immigrants, requiring prison and mental health authorities to share immigration status information with federal officials, and preempting local “sanctuary” ordinances, and discussing state legislative proposals in early 1990s to regulate immigration status more aggressively). In the states, some of these political efforts were driven by concern that illegal immigration was imposing significant fiscal burdens upon state and local governments. While accounts differ concerning the extent of the costs and benefits to states and localities associated with illegal immigration, a number of states filed lawsuits during the early 1990s seeking compensation from the federal government for the costs they claimed to have incurred. *Id.* at 126-29.

²⁷ See Peter H. Schuck, *The Message of Proposition 187*, 26 *Pac. L.J.* 989, 990 (1995). Federal court litigation over Proposition 187 initially led to the invalidation of most of its main provisions, on the grounds that they either were preempted by the federal immigration laws or constituted an impermissible regulation of federal immigration status by the state of California, and ultimately to a settlement agreement. See *League of United Latin American Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997); *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal.

1995).

²⁸ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), § 642(b)(2), Pub. L. No. 104-208, Division C, 110 Stat. 3009-546, 8 U.S.C. § 1373; see *City of New York v. United States*, 179 F.3d 29, 37 (sustaining provision against constitutional challenge, but reserving decision as to whether a broader confidentiality policy “more integral to the operation of City government” might be constitutionally protected under the Tenth Amendment).

²⁹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”), Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 8 U.S.C. & 42 U.S.C.); see Wishnie, *supra* note 7, at 513-16.

³⁰ IIRIRA § 502, 8 U.S.C. § 1621 note (authorizing pilot programs to limit issuance of drivers licenses to undocumented non-U.S. citizens).

³¹ IIRIRA § 133 (codified at 8 U.S.C. § 1357(g)).

³² See Muzaffar Chishti, et al., Migration Policy Institute, *America’s Challenge: Domestic Security, Civil Liberties, and National Unity After September 11 (2003)*; see also Chacón, *supra* note 24, manuscript at 14-23.

³³ See generally Wishnie, *supra* note 6; Michael J. Wishnie & Doris Meissner, *Policing Immigrants Post-September 11* (unpublished manuscript, 2005); Appleseed, *Forcing Our Blues into Gray Areas: Local Police and Federal Immigration Enforcement, A Legal Guide for Advocates* (2006); Kevin R. Johnson, *Driver’s Licenses and Undocumented Immigrants: The Future of Civil Rights Law?* 5 Nev. L.J. 213 (2004); Maria Pabon Lopez, *More Than a License to Drive: State Restrictions on the Use of Driver’s Licenses By Noncitizens*, 29 S. Ill. U. L.J. 91, 95 & n.11 (2004).

³⁴ Federal immigration law consists of both *civil* provisions, which authorize deportation, fines, and

other civil penalties for violations, and *criminal* provisions, which authorize criminal punishment for a subset of immigration violations deemed to be more serious. See Wishnie, *supra* note 6, at 1089-90. Congress has authorized state and local law enforcement officials to make arrests for violations of the *criminal* provisions of the immigration laws. See 8 U.S.C. § 1324(c) (authorizing criminal arrests for harboring, smuggling, or transporting unauthorized immigrants); 8 U.S.C. § 1252c(a) (authorizing criminal arrests for illegal reentry by previously deported felon).

³⁵ See 8 U.S.C. § 1103(a)(8) (conferring Attorney General with emergency powers to certify the existence of “an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border,” and on that basis to authorize state and local law enforcement officials to enforce federal immigration laws).

³⁶ IIRIRA §§ 133 (codified at 8 U.S.C. § 1357(g); IIRIRA § 373 (codified at 8 U.S.C. § 1103); see also 8 U.S.C. § 1103(a)(8) (authorizing Attorney General, in event of “mass influx of aliens” into the United States, “to authorize any State or local law enforcement officer,” with the consent of the head of the state or local agency, “to perform or exercise any of the powers, privileges or duties conferred or imposed [upon]” federal immigration officers).

³⁷ See Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 Harv. J.L. & Pub. Pol’y 367, 427-31, 434, 448-49 (1999).

³⁸ See Mark Dow, *American Gulag: Inside U.S. Immigration Prisons* 9-10, 207-11 (2004) (discussing use of state and local jails for federal immigration detention); Human Rights Watch, *Locked Away: Immigration Detainees in Jails in the United States* 16-17 (1998), available at . As of August 2006, 57 percent of all federal immigration detainees, or approximately 130,000 individuals per year, were housed in county jails, which received between \$50 and \$90 per day for each detainee.

Meredith Kolodner, *County Jails Boost Their Income*, News 21, Aug. 30, 2006, at

http://news.yahoo.com/s/news21/20060831/ts_news21/county_jails_boost_their_income.

³⁹ Theresa Wynn Roseborough, Deputy Assistant Attorney General, Office of Legal Counsel, *Assistance by State and Local Police in Apprehending Illegal Aliens* (Feb. 5, 1996); Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Handling of INS Warrants of Deportation in relation to NCIC Wanted Person File*, at 4 & n. 11 (Apr. 11, 1989); see generally *Bronx Defenders v. U.S. Dep't of Homeland Sec.*, No. 04 Civ. 8576(HB), 2005 WL 3462725, *2-*3 (Dec. 19, 2005) (discussing series of legal opinions by federal government officials between 1974 and 1996 concluding that “state and local officers could not ‘arrest’ a person against whom an administrative (civil) warrant of deportation had been issued” by federal immigration authorities).

⁴⁰ See, e.g., Wishnie, *supra* note 6, at 1090; Jeff Lewis, et al., *Migration Policy Institute, Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Federal Immigration Law*, 7 *Bender's Immigr. Bull.* 944 (2003).

⁴¹ See, e.g., Office of the Attorney General, State of New York, *Informal Op. No. 2000-1*, 2000 N.Y. Op. Atty. Gen. (Inf.) 1001, 2000 WL 420372 (N.Y.A.G. Mar. 21, 2000) (concluding that state and local law enforcement officers in New York lack authority to make arrests for civil violations of federal immigration laws, but do have authority to make arrests for criminal violations); Chishti et al. 2003, at 85 (discussing legal conclusions by officials in other states, including California, Texas, and Oklahoma).

⁴² Compare *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1296 (10th Cir. 1999) (state and local police have authority to enforce civil violations of federal immigration laws), with *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983) (states and localities do not have such authority).

⁴³ E.g., *Mena v. City of Simi Valley*, 332 F.3d 1255, 1265 n.15 (9th Cir. 2003), vac'd on other grounds, 544 U.S. 93 (2005); *Carrasca v. Pomeroy*, 313 F.3d 828, 836-37 (3d Cir. 2002).

⁴⁴ See Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 *Crime & Just.* 377 (2006); see also William A. Geller & Norval Morris, *Relations Between Federal and Local Police*, 15 *Crime & Just.* 231 (1992); Malcolm L. Russell-Einhorn, U.S. Dep't of Justice, Nat'l Inst. of Justice, *Fighting Urban Crime: The Evolution of Federal-Local Collaboration* (Dec. 2003), at <http://www.ncjrs.gov/pdffiles1/nij/197040.pdf>.

⁴⁵ See Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations* (Apr. 3, 2002); see *Bronx Defenders*, 2005 WL 3462725, *3 (stating that DOJ “flip-flopped” by opining in 2002 that “state and local law enforcement could, in fact, lawfully enforce the civil provisions of the immigration law”). While the government initially attempted to withhold the 2002 DOJ legal opinion from the public, it was ordered to release the document in the course of litigation under the Freedom of Information Act. See *National Council of La Raza v. Department of Justice*, 411 F.3d 350 (2d Cir. 2005).

⁴⁶ Agreements with the federal government were initially concluded by Florida and Alabama, each of which has designated a small number of state troopers to participate in certain immigration enforcement activities. Wishnie & Meissner, *supra* note 33, manuscript at 18-19, 23-24. Since then, several other jurisdictions have entered or considered entering similar agreements involving specific categories of state officials. E.g., Peggy Lowe, *Deal guts O.C. sheriff's immigration enforcement plan*, *Orange County Register*, Oct. 6, 2006 (officials in Orange County jails), available at http://www.ocregister.com/ocregister/homepage/abox/article_1299610.php; Heather MacDonald, *ICE, ICE, Baby*, *Nat'l Review Online*, Aug. 7, 2006, at

<http://article.nationalreview.com/?q=YjRiYzRIYTM4ZjlhOThjYmRINDUzNjQ3NjRmY2RIZGY=> (jail officials in Arizona and Los Angeles, San Bernardino, and Riverside Counties in California); see also Bill Turque, Herndon Police May Join Immigration Enforcement, Wash. Post, Sep. 22, 2006, at B1, at http://www.washingtonpost.com/wp-dyn/content/article/2006/09/21/AR2006092101562_pf.html (noting consideration of deputization agreement by town of Herndon, Virginia). Recently, upon election of Deval Patrick as its new governor, Massachusetts rescinded the decision of its previous governor, Mitt Romney, to assign 30 state police troopers to participate. See Jonathan Saltzman, Governor Rescinds Immigration Order, Boston Globe, Jan. 12, 2007, at http://www.boston.com/news/local/massachusetts/articles/2007/01/12/governor_rescinds_immigration_order.

⁴⁷ In recent years, the NCIC has processed over 4 million queries per day — most from state and local police — with an average response time of approximately 0.06 seconds. See Federal Bureau of Investigation, Press Release, An NCIC Milestone, Aug. 9, 2006, at <http://www.fbi.gov/pressrel/pressrel06/ncic080906.htm>.

⁴⁸ See Wishnie & Meissner, *supra* note 33, manuscript at 19-20; Wishnie, *supra* note 6, at 1095-1101.

⁴⁹ On the Absconder Apprehension Initiative and NSEERS, see Chishti et al. 2003, at 40-45.

⁵⁰ See Seghetti et al., *supra* note 55, at 23.

⁵¹ National Council of La Raza v. Ashcroft, No. 03 Civ. 6324 (E.D.N.Y.), motion to dismiss pending. I serve as co-counsel for the plaintiffs in that lawsuit.

⁵² Wishnie & Meissner, *supra* note 33, manuscript at 19.

⁵³ See, e.g., *id.*; Whoriskey, *supra* note 2. Other initiatives implemented after the 2001 terrorist

attacks have induced state and local officials to enforce federal immigration policy objectives at the expense of state laws of general applicability which have been enacted in the exercise of state police powers. For example, an emergency administrative order by the INS — which was hastily issued, without an opportunity for notice and comment under the Administrative Procedures Act, 5 U.S.C. § 553, in the midst of litigation in New Jersey state courts seeking to learn the identities of non-U.S. citizens detained after September 11, 2001, in New Jersey county jails — prohibited all non-federal facilities housing federal immigration detainees, including state and local jails, from disclosing the identities of any detainees in their custody. Interim Rule, Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 67 Fed. Reg. 19, 508 (Apr. 22, 2002), as confirmed at 68 Fed. Reg. 4365 (Jan. 29, 2003) (codified at 8 C.F.R. § 236.6). The regulation thereby purported to preempt a set of state laws in New Jersey requiring county jails to record and publicly disclose the identities of all individuals committed to their care — thereby displacing state policies concerning county jail operations and open government in the name of federal immigration policy objectives. See Ronald K. Chen, *State Incarceration of Federal Prisoners After September 11: Whose Jail Is It Anyway?*, 69 *Brook. L. Rev.* 1335 (2004).

⁵⁴ Clear Law Enforcement for Criminal Alien Removal Act of 2003, H.R. 2671; Homeland Security Enhancement Act of 2003, S. 1906.

⁵⁵ Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437; see Lisa M. Seghetti et al., *Congr. Res. Serv., Enforcing Immigration Law: The Role of State and Local Law Enforcement* 20-24 (Jan. 27, 2006).

⁵⁶ See *supra* notes 34, 41.

⁵⁷ See, e.g., N.Y. Veh. & Traf. L. § 250(2).

⁵⁸ IIRIRA § 502; see Lopez, *supra* note 33, at 95 & n.11 (2004).

⁵⁹ IIRIRA § 656; Michael John Garcia, et al., Congressional Research Service, Immigration: Analysis of the Major Provisions of H.R. 418, the REAL ID Act of 2005, at 29 n.89 (Feb. 2, 2005).

⁶⁰ See Nat'l Immigr. Law Center, Immigrant Driver's License Proposals and Campaigns: Surprising Progress Since 9/11, Immigr. Rights Update (May 14, 2002), at <http://www.nilc.org/immspbs/DLs/DL002.htm>.

⁶¹ See *id.*; Nat'l Immigr. Law Center, Most State Proposals To Restrict Drivers' Licenses For Immigrants Have Been Unsuccessful, Immigr. Rights Update (July 15, 2002), at <http://www.nilc.org/immspbs/DLs/DL003.htm>.

⁶² National Commission on Terrorist Attacks Upon the United States, Final Report 390 (2004), at <http://www.9-11commission.gov/report/911Report.pdf>.

⁶³ Negotiated rulemaking brings administrative agency representatives together with concerned interest groups to negotiate the contents of proposed regulations. See Negotiated Rulemaking Act of 1990, P.L. 101-648, 104 Stat. 4970 (1990). In this case, the negotiated rulemaking process included state officials, law enforcement, and other experts, including privacy and immigrant community advocates.

⁶⁴ Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-408, § 7212(b), 118 Stat. 3638 (2004); see Todd B. Tatelman, Congressional Research Service, Intelligence Reform and Terrorism Prevention Act of 2004: National Standards for Drivers' Licenses, Social Security Cards, and Birth Certificates (Jan. 6, 2005).

⁶⁵ The statute was enacted as part of an emergency supplemental appropriations bill for tsunami relief and the military operations in Iraq and Afghanistan. REAL ID Act ("RIDA"), Pub. L. 109-13, Div.

B., 119 Stat. 303-23 (May 15, 2005).

⁶⁶ RIDA § 202(a)(1), (c)(2)(B).

⁶⁷ RIDA § 202(c)(2)(C). As a practical matter, these requirements also may induce state and local officials such as the police — and for that matter, private actors who may have occasion to review a driver’s license for identification purposes — to enforce federal immigration laws in much the same way as the government’s use of the NCIC database, since they make immigration status a salient and apparent fact in the eyes of those officials in the course of their day-to-day, non-immigration related duties.

⁶⁸ RIDA § 202(d)(11).

⁶⁹ RIDA § 202(c)(1) (setting forth minimum issuance standards), (c)(3) (setting forth minimum requirements for verification of documents).

⁷⁰ See Nat’l Governors Ass’n, Nat’l Conf. of State Legislatures, & Am. Ass’n of Motor Vehicle Adm’rs, *The Real ID Act: National Impact Analysis 3* (Sep. 2006), at http://www.ncsl.org/print/statefed/Real_ID_Impact_Report_FINAL_Sept19.pdf.

⁷¹ Nat’l Immigr. Law Center, *Twenty-four states introduce driver’s license bills*, Immigr. Rights Update (Mar. 23, 2006), at <http://www.nilc.org/immspbs/DLs/DL031.htm>.

⁷² See, e.g., Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 *Albany L. Rev.* 179 (2005); Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 *Stan. L. & Pol’y Rev.* 323 (2005); Kris W. Kobach, *Center for Immigration Studies, State and Local Authority to Enforce Immigration Law: A Unified Approach for Stopping Terrorists* (2004); *Federation for American Immigration Reform, State of Insecurity: How State and Local Immigration*

Policies are Undermining Homeland Security 3 (Sep. 2003) (“FAIR Report 2003”); Seghetti et al., *supra* note 55, at 28-30; Richman, *supra* note 44, at 409.

⁷³ See FAIR Report 2003, *supra* note 72, at 4.

⁷⁴ As Gerald Neuman has noted, taken to an extreme such an approach would justify the treatment of undocumented immigrants as “de facto outlaws,” individuals who are disentitled from a whole range of basic legal protections altogether, in a manner analogous to the treatment of individuals declared as “outlaws” under old English law. See Neuman, *supra* note 6, at 1440-52.

⁷⁵ See generally Michele Waslin, National Council of La Raza, Immigration Enforcement by Local Police: The Impact on the Civil Rights of Latinos, Issue Brief, Feb. 2003; Craig E. Ferrell, Jr., Immigration Enforcement: Is It a Local Issue?, Police Chief (Feb. 2005) (“Ferrell, Immigration Enforcement”); Craig E. Ferrell, Jr., The War on Terror’s ‘Absconder Initiative,’ Police Chief (Oct. 2002); Wishnie & Meissner, *supra* note 33, manuscript at 23-27; James Jay Carafano, The Heritage Foundation, No Need for the CLEAR Act: Building Capacity for Immigration Counterterrorism Investigations, Exec. Memorandum No. 925 (Apr. 21, 2004); Margaret D. Stock, Driver Licenses and National Security: Myths and Reality, 10 *Bender’s Immigr. Bull.* 422 (Mar. 1, 2005); Anita Ramasastry, Why the Real ID Act Is A Real Mess, Findlaw.com, Aug. 10, 2005, at <http://writ.news.findlaw.com/ramasastry/20050810.html>; Michele Waslin, National Council of La Raza, Safe Roads, Safe Communities: Immigrants and State Driver’s License Requirements, Issue Brief, May 2002.

⁷⁶ See, e.g., Randal C. Archibold, Immigrants Take to U.S. Streets in Show of Strength, N.Y. Times, May 2, 2006, at <http://www.nytimes.com/2006/05/02/us/02immig.html>

⁷⁷ Neuman, *supra* note 6, at 1440.

⁷⁸ See, e.g., Abigail Eagye, *Immigration Laws Lead To Unintended Housing Problems for Legal Aliens*, *Post Indep.* (Glenwood Springs, Colo.), Jan. 4, 2007, at <http://www.postindependent.com/article/20070104/VALLEYNEWS/101040031> (discussing complications caused by new Colorado law for lawfully present immigrant seasonal workers seeking housing benefits in Aspen, Colorado).

⁷⁹ See, e.g., Muzaffar A. Chishti, *The Role of States in U.S. Immigration Policy*, 58 *Ann. Surv. Am. L.* 371, 374 (2002) (“Local law enforcement officers, untrained in the complexities of immigration regulations, are more likely to use race or ethnicity as a substitute for reasonable cause.”); Wishnie, *supra* note 6, at 1102 & n.107 (citing statutes prohibiting racial profiling under California, Colorado, Rhode Island, and Texas law).

⁸⁰ Wishnie, *supra* note 6, at 1104-13.

⁸¹ See, e.g., Chishti 2002, at 373; Anita Khashu et al., *Vera Inst. of Just., Building Strong Police-Immigrant Community Relations: Lessons From a New York City Project 3* (Aug. 2005) (“Immigrant groups often cite fear of deportation (their own or that of family members or friends) as a major barrier to building trust and partnerships with police.”), at http://www.vera.org/publication_pdf/300_564.pdf; Nicole J. Henderson et al., *Vera Inst. of Just., Law Enforcement & Arab American Community Relations After September 11, 2001: Engagement in a Time of Uncertainty 7*, 15-16 (June 2006), at http://www.vera.org/publication_pdf/353_636.pdf (documenting fears within immigrant communities of immigration enforcement by police, and finding that “the threat of detentions and deportations contributed to the underreporting of crimes and exacerbated the general climate of fear and anxiety”).

⁸² See, e.g., Suleman Din, *A different tack on immigration: Edison balks on aiding the feds*, *Star-*

Ledger, Sep. 25, 2006 (quoting Latino community leader who noted reports of “individual officers us[ing] the threat of reporting individuals to immigration as a way of intimidation”).

⁸³ Khashu et al., supra note 81, at 3; Henderson et al., supra note 81, at 13-16; see also Nat’l Immigr. Forum, *Proposals to Expand the Immigration Authority Of State And Local Police: Dangerous Public Policy According to Law Enforcement, Governments, Opinion Leaders, and Communities* (Sep. 18, 2006), at <http://www.immigrationforum.org/documents/TheDebate/EnforcementLocalPolice/CLEARHSEAQnotes.pdf> (compiling statements by state and local police officials across the country opposing expansion of immigration enforcement responsibilities for state and local police); Theresa Vargas, *Wanted: Local Agencies to Enforce Immigration Law*, Wash. Post, Jan. 4, 2007, at LZ6, at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/02/AR2007010201327.html> (discussing unwillingness of local police in northern Virginia to engage in immigration enforcement).

⁸⁴ See Henderson et al., supra note 81, at 7, 15-16 (noting baseline level of mistrust of law enforcement within Arab American communities, and concluding that decision in one city to enforce immigration laws “appeared to have undermined Arab American trust”); see also Anita Khashu et al., Vera Inst. of Just., *Translating Justice: A Guide for New York City’s Justice and Public Safety Agencies to Improve Access for Residents with Limited English Proficiency* 6 (June 2005; updated Apr. 2006) (noting that language barriers interfere with the ability of immigrant victims of crime to seek police assistance).

⁸⁵ Richman, supra note 44, at 413-14; Shawn Reese, Congr. Res. Serv., *State and Local Homeland Security: Unresolved Issues for the 109th Congress* 5 (June 9, 2005).

⁸⁶ See, e.g., Ferrell, *Immigration Enforcement*, *supra* note 75 (local police should “use the communities resources to address burglaries, robberies, assaults, rapes, murders, and even traffic violations occurring in the communities rather than spend those resources addressing the massive national problem of illegal immigration”); Henderson et al. 2006, at 15-16 (documenting objections by some local police to involvement in immigration enforcement and noting refusal by some police to enforce federal immigration laws “because their time and resources were needed for responding to local crime and public safety concerns”).

⁸⁷ See Chishti et al., *supra* note 32, at 148-50.

⁸⁸ Richman, *supra* note 44, at 421; see also Khashu et al., *supra* note 81, at 3.

⁸⁹ See Stock, *supra* note 75, at 424-25.

⁹⁰ See *supra* note 70 and accompanying text.

⁹¹ Indeed, federal authorities relied upon the fact that the September 11 hijackers had driver’s license records to identify and investigate the individuals responsible for those attacks. Stock, *supra* note 75, at 424-25.

⁹² *Id.* at 424. While proponents of driver’s license restrictions frequently invoke the driver’s licenses obtained by the September 11 hijackers, they often neglect to note that all of the hijackers had foreign passports, which would have sufficed to permit them to pass through airport security. *Id.* at 425.

⁹³ See, e.g., Wishnie, *supra* note 7, at 527-58; cf. Spiro, *supra* note 6, at 159-61.

⁹⁴ See, e.g., Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. Rev.* 903, 910-26 (discussing distinctions between federalism and decentralization).

⁹⁵ See Akhil Reed Amar, *Some New World Lessons for the Old*, 58 *U. Chi. L. Rev.* 483, (“The best argument for federalism, then, is neither experimentation, nor diversity, nor residential self-selection,

but protection against abusive government.”); see also Richard Briffault, “What About the ‘Ism’?” Normative and Formal Concerns in Contemporary Federalism, 47 Vand. L. Rev. 1303, 1348-49 & n.161 (1997).

⁹⁶ See, e.g., Ernest A. Young, Welcome to the Dark Side, 69 Brook. L. Rev. 1277, 1284–90 (2004).

⁹⁷ See, e.g., Amar 1994, at 1232; William J. Brennan, The Bill of Rights and the States: The Revival of State Constitutions As Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535 (1986); cf. Catherine Powell, Dialogic Federalism: Constitutional Possibilities For Incorporation of Human Rights Law in the United States, 150 U. Pa. L. Rev. 245 (2001) (advocating greater involvement by state and local governments in implementation of international human rights law norms in order to promote democratic deliberation over those norms at multiple levels of government and intergovernmental cooperation and dialogue in their implementation); Eliot Spitzer, Remarks for Law Day, May 1, 2000 (“As Congress and Courts have succeeded in forging a ‘New Federalism,’ they have created an opportunity to accomplish things previously thought unsuited to state initiative.”).

⁹⁸ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); see also Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat. 48 (1995) (codified as amended in scattered sections of 2 U.S.C.) (requiring cost-benefit analyses for congressional legislation imposing mandates upon state and local governments and imposing procedural hurdles for enactment of bills imposing mandates greater than \$50 million).

⁹⁹ See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Fla. Prepaid Postsecondary*

Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); see also Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. Ill. L. Rev. 183, 188-95.

¹⁰⁰ See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (holding it unconstitutional for Congress to mandate state executive officials to implement federal policy objectives); *New York v. United States*, 505 U.S. 144 (1992) (holding it unconstitutional for Congress to compel state legislatures or agencies to adopt laws or regulations to advance federal policy objectives); see also Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commandeer State Officers to Implement Federal Laws*, 95 Colum. L. Rev. 1001 (1995).

¹⁰¹ See, e.g., PRWORA, *supra* note 29 (restructuring federal welfare program as block grants to states).

¹⁰² See also Richman, *supra* note 44, at 418-21 (discussing possibility that state and local police might exercise power by “exacting a toll from federal authorities,” in the form of greater state and local influence over the substance of federal domestic intelligence policies, in exchange for their cooperation and participation in the implementation of those policies).

¹⁰³ See Briffault, *supra* note 95, at 1335-37 (while independent role of state governments is recognized and protected by federal constitution, “no comparable guarantees” exist for local governments, which are subject to plenary authority of state legislatures). This oversight may be part of a broader lack of consideration of institutional design in immigration law scholarship more generally, as recently noted by Adam Cox and Eric Posner. See Adam B. Cox and Eric A. Posner, *The Second Order Structure of Immigration Law*, 59 *Stan. L. Rev.* (forthcoming 2007), available at <http://ssrn.com/abstract=941730>.

¹⁰⁴ See, e.g., Spiro, *supra* note 6, at 172-73 (arguing that permitting some states to restrict immigration might permit them “individually to let off their steam, however scalding it may be,” so that “the nation need not visit the same sins”); Schuck & Williams, *supra* note 37, at 460 (advocating cooperative federalist model in which state and local governments would be “allowed and encouraged to play a greater role in immigration enforcement”); Howard F. Chang, Public Benefits and Federal Authorization for Alienage Discrimination by the States, 58 *Ann. Surv. Am. L.* 357 (2002) (arguing that Congress may constitutionally delegate the federal government’s broad power to discriminate against non-U.S. citizens); see also *supra* notes 72-73.

¹⁰⁵ See, e.g., Vicki C. Jackson, Citizenship and Federalism, in *Citizenship Today: Global Perspectives and Practices* 127, 127-29 (T. Alexander Aleinikoff & Douglas Klusmeyer eds. 2001).

¹⁰⁶ But see, e.g., Rebecca Smith et al., Low Pay, High Risk: State Models for Advancing Immigrant Workers’ Rights, 28 *N.Y.U. Rev. L. & Soc. Change* 597 (2003-04); Richman, *supra* note 44, at 418-21; Chen 2004.

¹⁰⁷ Cf. Peter H. Schuck, *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* 202 (1998) (“To the extent that Congress devolves more immigration policy to the states, *state* citizenship could become more salient than in the past.”); Peter J. Spiro, The Citizenship Dilemma, 51 *Stan. L. Rev.* 597, 618-21 (1999). European integration may be causing similar developments in Europe. See, e.g., Gerard Delanty, The Resurgence of the City in Europe? The Spaces of European Citizenship, in *Democracy, Citizenship and the Global City* 79 (Engin F. Isin ed. 2000) (“With the emergency of a regulatory supranational polity since the 1980s, the sub-national level is now growing in salience; regions and cities are resurfacing and becoming powerful new voices in a world in which sovereignty is shared on many levels.”).

¹⁰⁸ See, e.g., Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* 291 (2006) (“Though often talked about as a single concept and experienced as a unitary institution, citizenship actually describes a number of discrete but connected components in the relation between the individual and the polity.”); Bosniak, *supra* note 4, at 3 (“[C]itizenship is not a unitary or monolithic whole: the concept is comprised of distinct discourses designating a range of institutions and experiences and social practices that are overlapping but not always coextensive.”); Peter H. Schuck, *Citizenship in Federal Systems*, *Am. J. Comp. L.* 195, 207-08 (2000) (discussing and distinguishing among political, legal, psychological, and sociological dimensions of citizenship).

¹⁰⁹ Bosniak, *supra* note 4, at 3; see also *id.* at 81-82; Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* 237-80 (2005) (discussing citizenship-like practices of undocumented, non-U.S. citizen workers who organized and advocated for workers’ rights legislation during late 1990s in New York).

¹¹⁰ See *supra* note 108.

¹¹¹ See Spiro, *supra* note 107, at 619 n.111 (discussing potential availability of formal state citizenship to non-U.S. citizens); Gerald L. Neuman, “We Are The People”: Alien Suffrage in German and American Perspective, *13 Mich. J. Int’l L.* 259, 292-93 & n.220 (1992) (same). This may not be true to the same extent of local or regional citizenship, since local governments do not share the same constitutional status as state governments. See Briffault, *supra* note 95, at 1997, at 1335-37.

¹¹² U.S. Const. amend. XIV.

¹¹³ See *supra* note 111.

¹¹⁴ Schuck, *supra* note 107, at 201. These developments parallel experiences in other countries: for

example, some observers have suggested that in countries including Japan, South Korea, Italy, and Spain, local governments have played a more significant role in facilitating the social integration of immigrants than national governments. Tayeuki Tsuda, *Localities and the Struggle for Immigrant Rights: The Significance of Local Citizenship in Recent Countries of Immigration*, in *Local Citizenship in Recent Countries of Immigration: Japan in Comparative Perspective 6-7* (Takeyuki Tsuda ed. 2006) (characterizing immigrants in these countries as “local citizens” given the roles played by local governments in “granting . . . basic sociopolitical rights and services to immigrants as legitimate members of these local communities”).

¹¹⁵ FAIR Report 2003, *supra* note 72, at iii.

¹¹⁶ Smith et al., *supra* note 106, at 602; see also Gordon, *supra* note 109, at 237 (contrasting policies of U.S. Department of Labor, which until recently shared information with immigration authorities upon receiving reports of wage law violations, with those of New York State Department of Labor, which “maintained strict confidentiality”).

¹¹⁷ Smith et al., *supra* note 106, at 602.

¹¹⁸ Wendy Zimmerman & Karen C. Tumlin, Urban Institute, *Patchwork Policies: State Assistance for Immigrants Under Welfare Reform*, Occasional Paper No. 24, at 3-4 (1999), available at <http://www.urban.org/publications/309007.html>.

¹¹⁹ These laws typically require the students to satisfy certain minimum state residency requirements, have graduated from high schools within the state, and affirm that they are in the process of legalizing their immigration status or will do so as soon as they are able. See, e.g., Ruth Marcus, *Op-Ed, Immigration’s Scrambled Politics*, *Wash. Post*, Apr. 4, 2006, A23, at <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/03/AR2006040301618.html>,

available at Raphael Lewis, In-state tuition not a draw for many immigrants, *Boston Globe*, Nov. 9, 1995, at

http://www.boston.com/news/nation/articles/2005/11/09/in_state_tuition_not_a_draw_for_many_immigrants/; see generally Michael A. Olivas, IIRIRA, the Dream Act, and Undocumented College Student Residency, 30. *J. Coll. & Univ. L.* 435 (2004); Nat'l Immigr. Law Center, State Proposed or Enacted Legislation Regarding Immigrant Access to Higher Education, http://www.nilc.org/immlawpolicy/DREAM/DREAM_Bills.pdf (Nov. 13, 2003).

To date, efforts to challenge these laws in court have not succeeded. See *Martinez v. Regents*, No. CV 05-2064 (Cal. Super. Ct. Oct. 6, 2006) (order); *Day v. Sebelius*, 376 F. Supp. 2d 1022 (D. Kan. 2005); see also Josh Bernstein, Nat'l Immigr. Law Center, Court Upholds California In-State Tuition Law (AB 540), Oct. 10, 2006, at <http://www.nilc.org/immlawpolicy/DREAM/Dream006.htm>.

¹²⁰ See Kari Lydersen, Ill. Governor to Announce New Benefits for Immigrants, *Wash. Post*, Dec. 13, 2006, A11, at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/12/AR2006121201342.html> (discussing Illinois's "New Americans" program).

¹²¹ See generally Ron Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States* 87-194 (2006) (discussing contemporary instances of local communities granting non-U.S. citizens the right to vote and active campaigns in other states and localities to implement non-U.S. citizen voting rights); see also *Crosse v. Bd. of Supervisors of Elections*, 221 A.2d 431 (Md. 1966) (holding that non-U.S. citizen satisfies qualifications under state constitution to hold public office as sheriff).

¹²² See *supra* notes 76-81. Jennifer Gordon discusses an earlier example, in which non-U.S. citizen

workers “came to act like citizens and won recognition for their basic rights,” in the context of the successful campaign in New York to enact the Unpaid Wages Prohibition Act in the mid-1990s.

Gordon, *supra* note 106, at 268-80.

¹²³ See *supra* notes 83-88 and accompanying text.

¹²⁴ Sassen, *supra* note 108, at 305-09; see also Saskia Sassen, *Globalization and Its Discontents* 12-13, 25 (1998).

¹²⁵ Sassen, *supra* note 108, at 314; see also Sassen, *supra* note 124, at 11-12.

¹²⁶ Sassen, *supra* note 108, at 320 (“[C]itizenship can undergo significant transformations without needing to be dislodged from its national encasement.”).

¹²⁷ I am grateful to Alberta Sbragia for this observation.

¹²⁸ See Richman, *supra* note 44, at 418-21, 427.