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# Citizenship Federalism

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# CITIZENSHIP FEDERALISM

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*Immigration federalism has attracted overwhelming attention from scholars and advocates in recent years. Despite this, the scholarship has not fully explored the outer limits of states' power to regulate noncitizens. This Article attempts to provide one account of these outer limits. To do so, it uses as a case study an important group of noncitizens with a complex relationship to state (and national) community. It is the first systematic analysis of the effects of state law on former immigrants to the United States, a group that has grown into the millions with increased deportations and voluntary out-migration. It is also the first treatment in legal scholarship of two substantive state-law legal issues that are harming these millions of former immigrants.*

*Building on these descriptive observations, this Article offers a theoretical framework to guide state immigration law and policymaking that emphasizes states' powers to define community differently than the federal government. This framework, which the Article names "citizenship federalism" to highlight its linkages to and divergences from the antecedent concept of "immigration federalism," focuses attention on states' power to adopt different underlying values and criteria than the federal system does when deciding which noncitizens to place within the boundaries of community. This Article focuses on states' power to challenge federal law's reliance on territoriality, which federal law treats as the key boundary determining which noncitizens are within our national community. Citizenship federalism opens up significant possibilities for academics and practitioners alike, both for understanding the states' role in constructing political and social membership and for moving towards a new generation of state-level immigration policy and advocacy.*



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## INTRODUCTION

The recent election of Joseph R. Biden has eased, at least to some degree, the pressure the past four years placed on immigrants and the U.S. immigration system. However, the roiling political conflict over immigration, identity, national membership, and belonging that helped drive the 2016 election victory of Donald J. Trump remains unresolved. This fissure is only deepening as parts of the Republican and Democratic parties appear to converge on some economic policies, increasing the likelihood that identity and membership issues will become the primary axis of dispute between the parties in future elections.[1] The central question that structures all of immigration law—who is within community, within democracy, and worthy of the protections of our laws and our society's safety net—is as vexed and as essential as it ever has been in our history.

But by what process can we hope to devise answers to the age-old question of what we as a national community owe, and to whom?[2] Over the past four years, immigration advocates have largely focused their attention

1. *See infra* Section II.B.1.
2. *See infra* Section II.A.

on the states, and how they make immigration-related laws that set the bounds of community.[3] Though many advocates—and scholars—have turned their attention, for now, to the federal stage and the power it affords to make high-level policy, what happens at the state level continues to be essential to the deep forms of change national immigration advocates seek. Even after four years of intense focus on immigration federalism, we are only beginning to appreciate how much power states possess to bring noncitizens within what I call the "circle of concern."[4]

This Article identifies an important capacity of states to contest and challenge our assumptions about the boundaries of community, a practice I call "citizenship federalism." In service of explaining citizenship federalism, the Article first clarifies the power that the states exercise over millions of people outside our borders. It is the first piece of legal scholarship to identify the systemic effects of state law on the several million people who have been deported from the United States in the past two decades alone,[5] a group that

3. *See* Julia Preston, *How the Dreamers Learned to Play Politics*, POLITICO MAG. (Sept. 9, 2017), https://www.politico.com/magazine/story/2017/09/09/dreamers-daca-learned-to-play-politics-215588 (recounting pivot by major national immigration organization United We Dream to state-level advocacy during second Obama Administration term and Trump Administration).

4. The "circle of concern" is the group of people whose substantive outcomes our political community considers relevant and that our public policy therefore seeks to protect or improve. In other words, the circle of concern is the group of all members of a polity's community. Critically, people can be members of a political community without possessing full political rights in that community—for example, children. Since noncitizen immigrants do not possess full political rights in our national community (nor do they necessarily seek these rights) regardless of what policies states might choose to make, I have found it necessary to rely on another term. When a society treats someone as being within the circle of concern, very often it does so by either offering that person rights directly, or by helping effectuate their rights within another society. For instance, this Article talks about how states can help former immigrants access and update identity and biographical documents. By doing so, states would help protect the rights of these former immigrants not in their state or in the United States, but in their country of return (e.g., by making it possible to enroll in school there).

5. The precise size of this group is difficult to estimate. Over the past two decades, there have been well over 6.2 million deportations from the United States (the real figure is significantly higher because the estimate does not include deportations in 2020 or 2021). *Table 39. Aliens Removed or Returned: Fiscal Years 1892 to 2019*, DEP'T OF HOMELAND SEC. (Oct. 28, 2020), https://www.dhs.gov/immigration-statistics/yearbook/2019/table39. However, since some immigrants reenter and are deported multiple times, the actual number of deported people is likely somewhat lower, though still in the multiple millions. *See, e.g.*, U.S. SENT'G COMM'N, ILLEGAL REENTRY OFFENSES (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf (documenting charges of illegal reentry, which cannot be charged without a previous deportation, in nearly 18,500 cases in the fiscal year 2013, representing a subset of all people in that year who returned to the United States after a prior deportation). Notably, this figure does not include any of the people who left the United States under pressure from the government but without a final order of removal, a group of millions of people in itself.

is only growing in size as deportations have dramatically increased over that time and U.S. interior enforcement has become increasingly harsh.[6]

When it comes to this group, determining "what we owe" as a national community is particularly complicated. Even once outside our borders, former immigrants retain ties of the kind we often associate with membership in a polity: family, property, culture, and even loyalty. States do not control whether these people can return to our country, but they exercise power over many aspects of deported peoples' lives: for instance, whether they can reunite with their children, derive value from their property, and integrate into their country of origin or deportation.[7] Because states have failed to act to protect this group, they have undercut these former immigrants and their ties here with tragic consequences. Based partly on conversations with advocates working in the countries of origin,[8] this Article proposes interventions at three levels—property ownership, proof of identity, and parental rights—by which states can begin to assume their responsibilities towards individuals who are still in important ways members of the community, regardless of their geographical location. Legal scholars have noted the parental rights issue,[9] but this Article is the first piece of legal scholarship analyzing the property and proof of identity issues described within.

Because states exert control over former immigrants' rights and freedoms even after they leave this country, states have the potential to

6. A critical exception, besides Caldwell's book, is the work of Daniel Kanstroom, who has long focused on the problems facing immigrants after deportation, with particular attention to challenging wrongful deportations in a system where very few immigrants are able to continue pursuing their legal case after deportation. *See, e.g.*, Daniel Kanstroom & Jessica Chicco, *The Forgotten Deported: A Declaration on the Rights of Expelled and Deported Persons*, 47 N.Y.U. J. INT'L L. & POL'Y 537 (2015); DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA (2012). More recently, the scholar Beth Caldwell has offered a detailed account of the lives of former immigrants reintegrating in Mexico. BETH C. CALDWELL, DEPORTED AMERICANS: LIFE AFTER DEPORTATION TO MEXICO (2019). Journalists have also periodically reported on this group. *See, e.g.*, Brooke Jarvis, *The Deported Americans*, CAL. SUNDAY MAG. (Jan. 31, 2019), https://story.californiasunday.com/deported-americans (noting over "600,000 U.S.-born children of undocumented parents live in Mexico").

7. For clarity, this Article will use "country of origin" throughout to refer to the countries where former immigrants have been deported. However, it is worth noting that in some cases, the United States has deported immigrants not to their country of birth or origin, but to a third country, a practice that became institutionalized as a policy during the presidency of Donald Trump. *See, e.g.*, Aaron Reichlin-Melnick, *Biden Administration Ends 'Safe Third Country' Agreements*, IMMIGR. IMPACT (Feb. 8, 2021), https://immigrationimpact.com/2021/02/08/safe-third-country-agreement-biden/.

8. I am deeply indebted to a number of advocates whose patient explanations of the on-the-ground problems they have seen were critical to the early development of this Article back in 2018, particularly Cathleen Caron of Justice in Motion and Molly Goss of Instituto para las Mujeres en la Migración ("IMUMI"). These organizations are among the few that consistently work with post-deportation immigrants to resolve their ongoing U.S. legal issues.

9. *See infra* Section I.C.

engage in "citizenship federalism"[10]—the practice of setting different boundaries for *who is within the community* than the federal government does. The main normative contribution of this Article, elaborated in Part II, is to separate the immigration federalism[11] states already practice from the distinct, more foundationally probing strategy of citizenship federalism. Where immigration federalism addresses which rights or benefits should be extended to immigrants already on the territory and thus within the federal government's circle of concern, citizenship federalism expressly seeks to modify the boundaries of the community by extending the circle of concern to others not yet included, in this case, by going beyond the territorial paradigm to include former immigrants.[12] The power to vary from the federal

10. This Article relies on established theorizations of the relationship between states and the federal government for its models. Domestic legal scholarship on federalism in the United States has developed a broad range of models for conceptualizing the interaction between different levels of government. *See* Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1552–61 (2012). This Article relies on one of the older concepts in federalism, and one that has at times fallen out of favor or been attacked: the idea that states are "laboratories of democracy." *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *see also* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 430–31 (1998). In this model (as the concept has developed over decades), the small size and diversity of the states make them uniquely suited to test innovations in government and policymaking. Where testing shows these changes are successful and desirable, they may spread to other states or the federal government. The laboratories of democracy concept can help to explain, for instance, the spread of marriage equality from a few early-adopting states to the federal government and most states in the Union. Indeed, this concept played into the movement's strategy. *See* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1327 (2005).

11. This term, where defined in the literature, has been given an expansive meaning, but as I demonstrate in Section II.A, the range of actual policymaking that falls under this category is relatively narrow, primarily addressing itself to cooperation or noncooperation with immigration enforcement and to benefits or entitlements. Numerous scholars have written influentially about immigration federalism. *See, e.g.*, Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 706 (2013) (arguing for expanding the definition of "immigration federalism" to "encompass all multi-governmental rulemaking pertaining to immigrants and immigration—including rulemaking intended to foster immigrant inclusion"); *see also* Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 906–11 (2015) (arguing for expanded state citizenship as a means to help immigrants access benefits and civil rights protections as well as expressive inclusion within the political community); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1361 (1999) (defining immigration federalism as "states and localities play[ing a role] in making and implementing law and policy relating to immigration and immigrants"); PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM 6–7 (2015) (assessing gradual expansion of immigration federalism and differentiation of pro-immigrant and anti-immigrant variants).

12. The vast existing literature on immigration federalism talks about or at least implies that state immigration regulation articulates certain values, but rarely does this literature explicitly ask the further question of whether states can and should exercise a broader power to re-define the

government on whose substantive outcomes we care about, and who should be the subject of rights, is what I mean by "citizenship federalism."[13]

Part I of this Article details a set of actions on property, parental rights, and proof of identity that are within state control and not preempted by federal law.[14] Yet despite their interest in legislating on immigration, state lawmakers have not made policy in these areas. Part II advances a theory of *why* this is the case. States continue to underplay their powers to define the American community, I argue, because states' conception of who is entitled to the protection of our laws matches up too closely with the federal conception. In general, the federal government treats two groups of people as within the circle of concern: citizens, and noncitizens on the territory of the state.[15] People who fall outside of these groups enjoy limited protection

rights-holder. The exception, a significant intellectual antecedent of this Article, is the existing literature on noncitizen voting by immigrants, which more explicitly addresses how states and localities draw the boundaries of the political community. *See* Markowitz, *supra* note 11, at 906–11; Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1452 (1993) (addressing relationship between extension of noncitizen voting and perceptions and reality of political membership, and noting connection of these questions to democratic theory); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1111–15 (1977) (questioning why noncitizens should be excluded from political community of the state via deprivation of the right to vote); Tara Kini, Comment, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 CALIF. L. REV. 271, 299–316 (2005) (suggesting political tactics for persuading standing voters to expand the political community to noncitizen voters in local elections). Recently, New York City appears increasingly likely to authorize noncitizen voting in local elections, though the expansion will be limited to lawful permanent residents and immigrants with work authorization. *See* Jeffery C. Mays & Annie Correal, *New York Moves to Allow 800,000 Noncitizens to Vote in Local Elections*, N.Y. TIMES (Nov. 23, 2021), https://www.nytimes.com/2021/11/23/nyregion/noncitizen-voting-rights-nyc.html.

13. This concept draws on Cristina Rodríguez's influential earlier work framing immigration federalism as the states' mechanism to regulate immigrant inclusion and integration. *See generally* Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008). This Article asks how the integrative capacities Rodríguez identifies can extend across borders and beyond the group of noncitizens the Federal Constitution defines as potentially worthy of concern. When states extend these capacities across borders, they are answering a somewhat different question—not whether and how we should integrate immigrants already here in the United States, but what our relationship should be to immigrants who are no longer (or not yet) in this country.

14. Preemption generally does not bar states from regulating immigrants in areas historically wholly reserved to their control, and though it sometimes sets an antidiscrimination floor, it has not stopped some states and localities from enacting a variety of restrictionist measures in property and zoning laws. *See* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 509–11 (2001) (detailing relevance of preemption for local anti-immigrant lawmaking and noting "leeway" for states to regulate undocumented immigrants).

15. The Supreme Court has expressly noted that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." Zadvydas v. Davis, 533 U.S. 678, 693 (2001); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). The constitutional law of alienage discrimination represents one major set of protections

from nearly any action the U.S. government or its agents might decide to take against them.[16]

I conclude that though states have taken critically important steps to protect some immigrants, at a conceptual level, state laws do not draw the circle of concern differently than federal law. Like federal law, state law offers noncitizens significant rights protections so long as they remain on the state's territory, and very few if they travel (or are deported) outside of it—a state of affairs that stems from the reactive nature of state immigration legislation.[17] States have accepted this territorial paradigm and other aspects of the federal view as a given, and thus do not yet see as part of their responsibility many noncitizens with profound ties to both individual states and the United States. In closing, this Article explains why citizenship federalism holds promise both for domestic immigration advocates seeking a practical path to change in the immigration system and for immigration scholars wondering what is next after years of rearguard action against the federal government.[18]

Part I of this Article lays out three areas where state inaction directly harms deported immigrants. Part II is divided into two sections. The first explores the gap between how states perform immigration federalism now and the reforms proposed in Part I. It concludes that states, like the federal government, conform to a territorial model when deciding which noncitizens are within their circle of concern. This model, I explain, is pervasive both in U.S. constitutional law and across world legal systems. However, in the United States, and perhaps in other federal systems as well, states may challenge and contest this model by using citizenship federalism as a

for noncitizens on the territory of the state, under the aegis of the Fourteenth Amendment. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 223 (1982) (protecting right of noncitizen children to attend public school); Graham v. Richardson, 403 U.S. 365, 376 (1971) (forbidding state from discriminating based on alienage in social safety net benefits). Noncitizens on the territory of the state also receive heightened due process protections in removal proceedings, whereas noncitizens off of U.S. territory have long had virtually no recourse if they are denied admission. *Compare* Landon v. Plasencia, 459 U.S. 21, 32–33 (1982), *with* Kleindienst v. Mandel, 408 U.S. 753, 766–67 (1972). In addition, noncitizens on state territory are entitled to a variety of other constitutional rights. *See infra* Section II.A.

16. In recent years, the Supreme Court has expressly held that noncitizens not on U.S. territory possess a narrow right to seek judicial review of their indefinite detention by the United States via the writ of habeas corpus. *See* Boumediene v. Bush, 553 U.S. 723, 771 (2008) ("Petitioners . . . are entitled to the privilege of habeas corpus to challenge the legality of their detention."). For practical purposes, however, the federal government's power over noncitizens not on U.S. territory is broad. For instance, under U.S. constitutional law, setting aside for a moment any obligations that may be imposed by international law, an official acting under color of law may kill a noncitizen who is not on U.S. territory, even without a valid justification. *See* Hernandez v. Mesa, 140 S. Ct. 735, 741 (2020) (finding no *Bivens* remedy for Mexican teenager killed by Border Patrol agent who shot across U.S.-Mexico border).

17. *See infra* Section II.A.

18. *See infra* Section II.B.

framework. The second section of Part II adopts a broader lens to examine the role that citizenship federalism could play both for domestic immigration advocacy and for scholars of immigration, global migration, and federalism.

## I. SUDDENLY "STATELESS": DEPORTATION, STATE LAWS, AND THE DEPRIVATION OF RIGHTS

In 2004, an immigrant named Calvin James was deported from Jersey City, New Jersey, to his native country of Jamaica, where he had not lived since age twelve.[19] After a rocky youth that saw him spend eighteen months in prison for dealing marijuana, Calvin had grown into a devoted family man, with a job as a bicycle messenger in New York, where he was his boss's star employee.[20] Together with his partner Kathy, he was raising a six-year-old son, Josh, and was by all accounts a great dad.[21] But because of his prior conviction, a court had issued a deportation order for Calvin in 1996 or 1997.[22] About eight years later—well after he had established a life with his partner and son—ICE agents came looking for him at his house one evening.[23]

For most immigration lawyers and judges, an immigrant's story ends when they are placed on a plane or a bus back to their country of origin.[24] Few immigrants have the resources to continue fighting an immigration case after deportation. But as the reporting of two journalists who interviewed Calvin for an article on families' reunification struggles makes clear, deportation was not the end of the story for Calvin, Kathy, or Josh.[25]

When Calvin landed in Kingston he was homeless.[26] Unlike many deportees, who may remain indigent for weeks, months, or even permanently, he soon found work as a security guard and a truck driver.[27] Despite working sixteen-hour days, however, Calvin's take-home pay on Jamaican wages was

19. Seth Freed Wessler & Julianne Hing, *Torn Apart: Struggling to Stay Together After Deportation*, *in* BEYOND WALLS AND CAGES: PRISONS, BORDERS, AND GLOBAL CRISIS 152, 157 (Jenna M. Loyd, Matt Mitchelson & Andrew Burridge eds., 2012). For those interested in learning more about the human stories behind every deportation, Beth Caldwell's book, *Deported Americans*, also contains a broad and disturbing set of anecdotes, running through the entire text, about the effects of a family member's deportation on both the former immigrant and their family in the United States. CALDWELL, *supra* note 6.

20. Wessler & Hing, *supra* note 19, at 158–59.

21. *Id.*

22. *Id.* at 158.

23. *Id.* at 152.

24. This blind spot has a parallel in the criminal system: Many lawyers and judges see conviction as the end of the story, but law continues to structure the condemned person's life for many years after, in prison and later reentry.

25. *See* Wessler & Hing, *supra* note 19.

26. *Id.* at 152–53.

27. *Id.* at 156.

about $75 a week—not enough to bring Kathy and Josh to join him, as he had hoped.[28] Three years after Calvin's deportation, Kathy and Josh were evicted from their apartment after Kathy lost her job and, without a second household income, the family wound up at a homeless shelter.[29] Citing the family's housing instability, a case worker told Kathy that the New York City Administration for Children's Services might initiate proceedings in the child welfare system to take Josh away—which, at the same time, would strip Calvin of his right to see Josh ever again.[30] At the time the story ended, Kathy and Calvin were both on a path to having their parental rights terminated[31]—a sad chain of events rooted in Calvin's deportation, and potentially ending with him losing his right to ever see his child again.

Calvin James's story illustrates the particular, significant, and yet virtually unrecognized state-law harms that occur when a long-term U.S. resident is deported. To take Calvin's case as an example, the laws governing child custody and parental rights that the family's social worker threatened to invoke are almost entirely under the control of the states.[32] Sadly and ironically, state laws are more likely to complicate the lives of former immigrants who were long-term residents of the United States, a group generally thought of as most deserving by lawmakers, judges, and the public, because they have more ties and more resources tied up here.[33]

An observer might reasonably ask: "Isn't this the way the system is supposed to work?" After all, we are habituated to think about removing someone from their life, family, and property as the natural "collateral" harms of removal or deportation from the United States—an unavoidable part of what the deported person obviously stands to lose as a result of choosing to be in the United States in violation of the law.

This misunderstanding has been naturalized by our current immigration system. However, as this Part explains in more detail, these are emphatically

28. *Id.*

29. *Id.* at 160.

30. *Id.*

31. *Id.*

32. *See, e.g.*, Ankenbrandt v. Richards, 504 U.S. 689, 693–95 (1992) (affirming "domestic relations exception" to federal jurisdiction over family law cases grounded in longstanding state control in this area of law); *see also* Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL'Y 175, 180–82 (2000) (laying out contemporary justification for ongoing state preeminence in the domain of family law).

33. In Cristina M. Rodríguez's formulation, the people in this group are "functional Americans" given the depth of their various ties to this country. *See* Cristina M. Rodríguez, *Immigration, Civil Rights & the Evolution of the People*, DÆDALUS, Summer 2013, at 228, 235. State law affects long-term residents more because they are vastly more likely to have developed financial and personal ties that make it much more difficult to leave this country. *See* Clara Long, *US Deporting More Long-Term Residents*, HUM. RTS. WATCH (Apr. 21, 2018, 7:00 PM), https://www.hrw.org/news/2018/04/21/us-deporting-more-long-term-residents.

not necessary consequences. For instance, permanently losing contact with one's child after deportation is not a given. Thousands of children migrate away from the United States with a noncitizen parent every year, and thousands more stay but retain close ties to deported parents in the hopes of being reunited someday. Critically, it is states, and not the federal government, that play a major role in enforcing these collateral consequences against former immigrants, deepening the harms of deportation. States therefore also have the opportunity, and the responsibility, to reverse these harms.

Available statistics demonstrate that the problems set out in this Part of the Article potentially affect a vast group of people. For instance, nearly a third of this country's eleven million undocumented immigrants—to say nothing of lawful permanent residents—own a home in the United States, either alone or with a U.S. relative.[34] Over four million U.S. citizen children live with at least one undocumented parent;[35] and over a two-year period, approximately half a million U.S. citizen children had at least one parent deported.[36] In Mexico alone there are approximately 600,000 U.S. citizen children attending school[37]—some of whose parents voluntarily returned, and some of whose parents were deported. The United States is also increasingly deporting immigrants who have been here for many years and are therefore more likely to have the kinds of financial and personal ties governed by state law.[38] As the Trump Administration increased interior immigration policing[39] and adopted policies of indiscriminate enforcement,[40] the chance of long-term residents being placed in proceedings may have risen as well.

This Part explains how three areas of state law—laws governing property, parental rights, and proof of identity—have hampered deportees from rebuilding their lives and providing for their families. This Article is the first piece of legal scholarship to undertake a systematic review of the

34. *Profile of the Unauthorized Population: United States*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US (last visited Nov. 7, 2021) (data extracted Aug. 6, 2018).

35. *U.S. Citizen Children Impacted by Immigration Enforcement*, AM. IMMIGR. COUNCIL 1 (June 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/us_citizen_children_impacted_by_immigration_enforcement_0.pdf.

36. *Id.*

37. *See* Jarvis, *supra* note 6.

38. *See State and County Details on Deportation Proceedings in Immigration Court*, TRAC IMMIGR., http://trac.syr.edu/phptools/immigration/nta. The data for this Article was gathered using TRAC's tool on December 5 and December 6, 2019.

39. *See* Rodrigo Dominguez-Villegas, *Protection and Reintegration: Mexico Reforms Migration Agenda in an Increasingly Complex Era*, MIGRATION POL'Y INST. (Mar. 7, 2019), https://www.migrationpolicy.org/article/protection-and-reintegration-mexico-reforms-migration-agenda.

40. *See* Long, *supra* note 33.

ways state laws impact deported immigrants. Indeed, two of the three issues this Part of the Article outlines—the harms to deported immigrants from home foreclosure and inadequate state identity documentation—are new to legal scholarship. The third issue, termination of parental rights after deportation, has received attention in family law scholarship, mainly as it relates to the legal standards governing termination and "the best interests of the child," but it has not entered discussions about immigration federalism or theoretical debates around the distribution of rights to noncitizens.

Finally, I want to emphasize that the below is not meant to be an exhaustive list of all laws states could reform to benefit former immigrants.[41] The very concept of citizenship federalism that these reforms illustrate is new, and the area would benefit from further exploration. Instead, I hope to open a conversation about the powers states have to grant or deny rights outside the more familiar forms of immigration federalism. As advocates engage with citizenship federalism at the state level, other applications may suggest themselves.

### *A. Property Ownership: Foreclosure Law and the Deprivation of Property Rights*

Property rights have an important place within the framework of individual liberties envisioned by our constitutional system, though they are primarily governed by state law.[42] Similarly, international law protects individual property rights, as do most nation-states' legal regimes.[43] Many immigrants, temporary and permanent, immigrate partly to access the ability to accumulate wealth—so-called "economic migration."[44] The ability to accrue, retain, and store value in property helps immigrants and their families to improve their material situation in the United States, as well as (eventually) at home, as in situations where older immigrants retire or otherwise return to

41. This Article does not talk about landlord-tenant law, for instance, which tends to be local, and which does not contain deportation protections for relatives of immigrants, despite anecdotal evidence (like the case of Kathy and Josh) that losing an immigrant earner to deportation can cause U.S. relatives to face eviction.

42. *See* U.S. CONST. amend. V, XIV; *see also* Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1098–99 (1981) (pointing to interplay between state property laws and federal constitutional restrictions on the taking of property, and noting that the latter mostly involve a right to process).

43. *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 17 (Dec. 10, 1948) [hereinafter UDHR]; Council of Europe, Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, art. 1, Mar. 20, 1952, E.T.S. No. 009.

44. For an example relevant to the United States context, see PETER J. MEYER, CONG. RSCH. SERV., IF11151, CENTRAL AMERICAN MIGRATION: ROOT CAUSES AND U.S. POLICY 1 (2021), https://fas.org/sgp/crs/row/IF11151.pdf (placing economic issues preeminent among root causes of Central American migration).

their country of origin.[45] Noncitizens, like citizens, use property ownership as a way to build wealth.

An immigrant's property does not lose its importance just because they are deported. Indeed, to the extent they use property to store wealth, their ability to exercise their property rights may become more important. Property an immigrant has accumulated in the United States may provide a critical support if they are deported or someday decide to return to their country of origin, for instance after earning enough for a major purchase like housing for their extended family. However, for all intents and purposes, many immigrants lose their ability to exercise their property rights upon deportation.

This is exceptionally problematic in the case where the immigrant owns a home, because detained and deported immigrants routinely face, and are severely disadvantaged in, the process of home foreclosure. Empirical research by economists demonstrates a direct connection between immigration enforcement and increased foreclosure rates.[46] The authors of one 2016 paper, Jacob Rugh and Matthew Hall, used county 287(g) agreements with ICE—which are designed to facilitate immigration enforcement—as a proxy for higher enforcement rates in those counties, and asked whether they affected rates of home foreclosure.[47] The authors found that rates of foreclosures among Latinos were significantly higher in counties with 287(g) agreements than in counties without such agreements.[48] The authors even found that counties where immigrant community members were detained at high rates experienced a more pronounced increase in foreclosures.[49] The data substantiated the authors' hypothesis that "deportations exacerbate rates of foreclosure among Latinos by removing income earners from owner-occupied households."[50]

As the study authors note, this dramatic finding is consistent with prior studies that investigate causal links between immigration enforcement and foreclosure.[51] For instance, one small study followed eight families who

45. *See generally, e.g.*, Alma Vega & Karen Hirschman, *The Reasons Older Immigrants in the United States of America Report for Returning to Mexico*, 39 AGEING & SOC'Y 722 (2019).

46. Jacob S. Rugh & Matthew Hall, *Deporting the American Dream: Immigration Enforcement and Latino Foreclosures*, 3 SOCIO. SCI. 1053, 1053 (2016).

47. *Id.* at 1054–56.

48. *Id.* at 1062–65.

49. *Id.* at 1066.

50. *Id.* at 1053.

51. *See* RANDY CAPPS ET AL., URB. INST. & MIGRATION POL'Y INST., IMPLICATIONS OF IMMIGRATION ENFORCEMENT ACTIVITIES FOR THE WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES 1 (2015), https://www.urban.org/sites/default/files/alfresco/publication-exhibits/2000405/2000405-Implications-of-Immigration-Enforcement-Activities-for-the-Well-Being-of-Children-in-Immigrant-Families.pdf; HEATHER KOBALL ET AL., URB. INST. & MIGRATION POL'Y INST., HEALTH AND SOCIAL SERVICE NEEDS OF US-CITIZEN CHILDREN WITH

owned homes at the time a family member was deported.[52] All of these families had mortgages on their homes, and all of them "struggled to make mortgage payments in the aftermath of the arrest, because of the loss of the main breadwinners' income."[53] Within one year, half of the families had lost their homes.[54]

Quantitative data does not exist at the national level for the extent of these harms, but there is reason to think they are widespread. Thirty percent of undocumented immigrants, or 3.4 million people, own a home in the United States,[55] and because at least some undocumented people are legally able to access mortgages[56]—to say nothing of lawful permanent residents, who can easily take out mortgages using their social security number and green card[57]—the number of people potentially subject to foreclosure of their home if they are deported is extremely large.

For all families, regardless of citizenship, foreclosure has two severe consequences. First, it can cause a family to lose its accumulated life savings, since many families regardless of immigration status use their home as their

DETAINED OR DEPORTED IMMIGRANT PARENTS 9 (2015), https://www.urban.org/sites/default/files/publication/71131/2000405-Health-and-Social-Service-Needs-of-US-Citizen-Children-with-Detained-or-Deported-Immigrant-Parents.pdf; AJAY CHAUDRY ET AL., URB. INST., FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT 30–31 (2010), https://www.urban.org/sites/default/files/publication/28331/412020-Facing-Our-Future.PDF; Kalina Brabeck & Qingwen Xu, *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32 HISP. J. BEHAV. SCIS. 341, 353–54 (2010).

52. CHAUDRY ET AL., *supra* note 51, at 30–31.

53. *Id.* at 31.

54. *Id.*

55. Vivian Yee, Kenan Davis & Jugal K. Patel, *Here's the Reality About Illegal Immigrants in the United States*, N.Y. TIMES (Mar. 6, 2017), https://www.nytimes.com/interactive/2017/03/06/us/politics/undocumented-illegal-immigrants.html.

56. *See* Shayak Sarkar, *Financial Immigration Federalism*, 107 GEO. L.J. 1561, 1578–80 (2019) (delineating pathways to a mortgage for some undocumented home buyers); *see also* Jana Kasperkevic, *The American Dream: How Undocumented Immigrants Buy Homes in the U.S.*, MARKETPLACE (Sept. 11, 2017), https://www.marketplace.org/2017/09/11/american-dream-how-undocumented-immigrants-buy-homes-us. Furthermore, federal nondiscrimination laws may bar lenders from discriminating against mortgage-seekers on the basis of alienage. *See* Perez v. Wells Fargo & Co., No. 17-cv-00454-MMC, 2017 WL 3314797, at *6–7 (N.D. Cal. Aug. 3, 2017) (refusing to dismiss claim for alienage discrimination under federal antidiscrimination Equal Credit Opportunity Act).

57. *See* Daniel Kurt, *Getting a Mortgage for Non-U.S. Citizens*, INVESTOPEDIA (June 20, 2021), https://www.investopedia.com/articles/personal-finance/050115/getting-mortgage-non-us-citizens.asp.

major savings vehicle.[58] Second, foreclosure can lead to housing instability and a variety of related problems, like child custody issues.[59]

Yet for deported immigrants and immigrants in removal proceedings, foreclosure is difficult to avert because their economic situation during and after deportation makes them particularly vulnerable. A bit of background is helpful to understand why. Foreclosures typically occur when an individual uses a mortgage to help them pay for a house, and then stops making monthly payments on their mortgage for whatever reason.[60] Often, sometime after the buyer stops making payments, the mortgage lender will step in and take legal possession of the property (the actual "foreclosure" process) in anticipation of selling it and "getting its money back."[61] Unless the home buyer successfully argues against the sale in court or catches up on their payment obligations beforehand, the home goes to an involuntary sale, often at a severely depressed price.[62] If the foreclosure plays out this way, as it often does, the former owner may receive none of the value they had previously stored in their home when they made a down payment and previous mortgage payments.[63]

Detained and deported immigrants are at a particular disadvantage in this process.[64] For one thing, a detained or deported immigrant will not be

58. There is both a broad public perception and some empirical evidence that owning a home is one of the best ways for low- and middle-income people to accumulate wealth, though this consensus has been challenged since the subprime mortgage crisis. *See, e.g.*, Laurie S. Goodman & Christopher Mayer, *Homeownership and the American Dream*, 32 J. ECON. PERSPS. 31, 43, 47, 50 (2018); CHRISTOPHER E. HERBERT & ERIC S. BELSKY, THE HOMEOWNERSHIP EXPERIENCE OF LOW-INCOME AND MINORITY FAMILIES: A REVIEW AND SYNTHESIS OF THE LITERATURE 4–5 (2006), https://www.huduser.gov/portal/Publications/PDF/hisp_homeown9.pdf.

59. *See* CHAUDRY ET AL., *supra* note 51, at 30–31.

60. Any number of life events that reduce a household's income—including the loss of a job or a serious illness—could lead the household to stop paying its mortgage, as could the realization that the home is worth less than the cost of the debt. *See, e.g.*, Kristopher Gerardi et al., *Can't Pay or Won't Pay? Unemployment, Negative Equity, and Strategic Default* 3, 6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 21630, 2015) (noting "strategic default[s]" among reasons to stop paying a mortgage, alongside adverse life events traditionally associated with foreclosure).

61. For a clear description of the two kinds of foreclosure processes employed in different states, see G. THOMAS KINGSLEY, ROBIN SMITH & DAVID PRICE, URB. INST., THE IMPACTS OF FORECLOSURES ON FAMILIES AND COMMUNITIES 7–8 (2009), https://www.urban.org/sites/default/files/publication/30426/411909-The-Impacts-of-Foreclosures-on-Families-and-Communities.PDF.

62. *Id.* at 8.

63. This occurs if the homeowner reaches the end of the foreclosure process without selling the home or reaching an agreement with the lender. On the other hand, it is possible and even common to sell a mortgaged home before foreclosure ends (or even begins), and even to extract some profit from the sale. *See* Daniel Bortz, *Can I Sell My Home If I'm Behind on My Mortgage?*, REALTOR.COM (Apr. 4, 2019), https://www.realtor.com/advice/sell/can-i-sell-my-home-when-behind-on-a-mortgage. However, for reasons explained below, this is significantly more difficult for a detained or deported immigrant to accomplish.

64. *See* CHAUDRY ET AL., *supra* note 51, at 31.

able to defend themself in a foreclosure proceeding that requires their physical presence in court. For another, an immigrant who is detained often cannot earn an income for many months.[65] Similarly, an immigrant who is deported will in the vast majority of cases find it very difficult to replace their dollar-denominated income and keep up with their monthly mortgage payments,[66] even if they find immediate employment, which is far from a given. This is why a family member's deportation often has a dramatic effect on a family's income: A family can lose approximately 70% of its income in the six months after a family member is deported.[67] In turn, a precipitous drop in household income is often the immediate precursor of a foreclosure, regardless of a family's immigration status. As I discuss in a moment, this economic problem has a direct link to state laws because states set many of the terms of the foreclosure process.

Despite empirical evidence that foreclosure is a clear and serious threat to immigrants and their families, states have not reformed their foreclosure laws to account for the severe impediments that deportation creates. Many protections for homeowners that are popular with policymakers, like requiring lenders and homeowners to go before a judge,[68] have little utility where the homeowner is detained or deported. Accomplishing a home sale from overseas requires specialized knowledge and access to resources, as well as trustworthy and savvy contacts in the United States. Unfortunately, many deported immigrants do not have the knowledge, contacts, and arrangements they need to accomplish this type of sale within the time state foreclosure laws permit.[69]

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65. In December 2019, the average immigrant was held in immigration detention for fifty-five days after being charged with removability by ICE. *See Immigration Detention in the United States by Agency*, AM. IMMIGR. COUNCIL 4 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf. This average of nearly two months in detention represented a significant increase over the norm earlier in 2019. *See* Isabela Dias, *ICE Is Detaining More People than Ever—And for Longer*, PAC. STANDARD (Aug. 1, 2019), https://psmag.com/news/ice-is-detaining-more-people-than-ever-and-for-longer. Yet as the American Immigration Council notes in its report, the fifty-five-day figure is significantly distorted by the large number of detained immigrants who choose not to fight their deportation cases. *See Immigration Detention in the United States by Agency*, *supra*. These also generally tend to be immigrants with fewer ties to the United States. The report notes that noncitizens who sought relief from removal in California wound up spending an average of *421 days* in immigration detention. *Id.*

66. *See* CHAUDRY ET AL., *supra* note 51, at 30–31.

67. *See id.* at 28–29.

68. *See* Brian D. Feinstein, *State Foreclosure Law: A Neglected Element of the Housing Finance Debate*, 6 PENN WHARTON PUB. POL'Y INITIATIVE 2 (2018), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1062&context=pennwhartonppi.

69. For Americans who seamlessly cross borders with just a passport and conduct meetings by laptop, the idea that leaving the United States can make it difficult to accomplish a home sale may seem implausible. However, attorneys working with detained and deported clients consistently report serious difficulties in contacting their clients after they have been removed from the United

States have the power to build in protections from foreclosure for immigrants. The states traditionally control foreclosure laws and property laws, and state laws currently govern most aspects of foreclosure.[70] A fix for this issue could take a number of forms. Indeed, there are already legislative models at the federal level that provide foreclosure carve-outs for specific groups, including veterans.[71] States might follow the example of this legislation and create a longer forbearance period for families whose primary income earner has been deported. States might also require mortgage lenders to renegotiate repayment terms until an immigrant has an opportunity for resale. A family might be able to continue making mortgage payments at the lower rate while they wait for a sale to go through.

Changes to foreclosure statutes are one powerful option. But states could also implement affirmative programs that facilitate repayment and resale and that would not require changes to statutory foreclosure law. A state or locality could create an emergency fund to temporarily assist deported immigrants and their families through loans.[72] It could establish partnerships with local, state, and regional governments in common countries of origin to help immigrants convey power of attorney to friends and relatives

States, and even U.S. family members may lose track of deported relatives for long periods of time. For a snapshot of this phenomenon in the context of detention prior to deportation, see Masha Gessen, *The Bureaucratic Nightmare of Fighting Deportation*, NEW YORKER (Apr. 4, 2018), https://www.newyorker.com/news/news-desk/the-bureaucratic-nightmare-of-fighting-deportation. Given the difficulties inherent in accomplishing a sale after a person has been deported, immigration lawyers may advise immigrants to give a friend or relative a power of attorney ("POA") that will allow them to execute a sale on a home. Immigrants who fail to create a POA before they are detained may have no options later.

70. At least one legal scholar studying foreclosure has recommended that housing advocates focus on changes to state-level foreclosure laws—and particularly to foreclosure procedures—as the federal government increasingly deregulates the lending industry. *See* Feinstein, *supra* note 68, at 1.

71. Servicemembers Civil Relief Act, 50 U.S.C. § 3953.

72. Some states already have (or have previously had) general mortgage help programs of this nature that do not specifically target the immigrant community—for instance, programs that help the unemployed with mortgage payments. *See, e.g.*, *Homeowners' Emergency Mortgage Assistance Program/ACT 91*, PA. HOUS. FIN. AGENCY, https://www.phfa.org/counseling/hemap.aspx (last visited Sept. 19, 2021). In some cases, states have administered these general mortgage help programs using federal funds. *See, e.g.*, Marshall A. Latimore, *HomeSafe Georgia's Free Mortgage Assistance Program Closing March 2020*, ATLANTA VOICE (Jan. 7, 2020), https://www.theatlantavoice.com/articles/homesafe-georgias-free-mortgage-assistance-program-closing-march-2020. Some states and localities have also invested significant funds in other services that specifically assist immigrant families, like deportation defense. *See, e.g.*, Nicole Narea, *New York Gave Every Detained Immigrant a Lawyer. It Could Serve as a National Model*., VOX (June 9, 2021, 8:00 AM), https://www.vox.com/policy-and-politics/22463009/biden-new-york-immigrant-access-lawyer-court; Katy Murphy, *California Budget Deal Includes Deportation Defense Funds for Undocumented Immigrants*, MERCURY NEWS (June 17, 2017), https://www.mercurynews.com/2017/06/16/california-budget-deal-includes-deportation-defense-for-undocumented-immigrants/.

who can help them sell a home or access the U.S. real estate market through a reliable broker.[73]

Making these legislative and non-legislative changes would benefit states and localities. Foreclosure has a series of broader, community-wide effects, and Rugh and Hall's research demonstrates that deportations are a significant cause of foreclosure in some communities.[74] Widespread foreclosures can damage housing prices and fray community fabrics.[75] For immigrants and the places where they live, this effect may be particularly pronounced, because new immigrants tend to congregate in neighborhoods where they already have family and community ties due to network effects.[76] Certainly, from an economic and not only a moral perspective, state and local governments with large immigrant populations have a very strong interest in seeking to avoid foreclosure.

### *B. Proof of Identity: Due Process in State Identification Laws and Reintegration in the Country of Origin*

State laws and policies do not just create challenges for immigrants who still have parts of their lives in the United States. In some cases, they can even create issues for former immigrants in their country of origin as they try to reintegrate and rebuild their lives—even if they retain no significant U.S. ties.[77] Problems with state-issued identity documents, another area where

73. Though federal foreign policy preemption places some obvious constraints on the ability of states and localities to cooperate directly with foreign governments, examples of such collaboration exist—for instance, between U.S. and Mexican border states and between border mayors. *See* Naveena Sadasivam, *Despite Trump, Water Agency Fosters Cross-Border Cooperation Between U.S. and Mexico*, TEX. OBSERVER (Apr. 18, 2018), https://www.texasobserver.org/water-mexico-united-states-share; *US-Mexico Border Mayors Convene Amid High-Stakes Debates*, VOICE OF AMERICA (July 27, 2017, 6:44 PM), https://www.voanews.com/a/united-states-mexico-border-mayors-convene/3962024.html.

74. Consistent with this, Rugh and Hall found that foreclosure rates were higher for whites living in areas with low segregation between Latinos and whites, suggesting that foreclosure has broad, indirect effects. *See* Rugh & Hall, *supra* note 46, at 1065.

75. The scholarly consensus is that foreclosures hurt neighborhood property values, though economists disagree on the strength of the effect. *See, e.g.*, Zhenguo Lin, Eric Rosenblatt & Vincent W. Yao, *Spillover Effects of Foreclosures on Neighborhood Property Values*, 38 J. REAL EST. FIN. & ECON. 387, 403–05 (2009).

76. Existing immigrant communities in immigrant-receiving countries exert powerful network effects, so that new migrants are often drawn to live near expatriates from the same country by family, language, employment, and cultural ties. *See* Alejandro Portes & Steven Shafer, *Revisiting the Enclave Hypothesis: Miami Twenty-Five Years Later*, *in* THE SOCIOLOGY OF ENTREPRENEURSHIP 157, 168–69, 187–88 (Martin Ruef & Michael Lounsbury eds., 2007). For a general overview that includes the early scholarship in this area, see Maritsa Poros, *Migrant Social Networks: Vehicles for Migration, Integration, and Development*, MIGRATION POL'Y INST. (Mar. 30, 2011), https://www.migrationpolicy.org/article/migrant-social-networks-vehicles-migration-integration-and-development.

77. *See supra* notes 31–38 and accompanying text.

states have great autonomy, can create serious problems for reintegration.[78] Together with a lack of national documents from the country of origin, state laws and policies on identity documents may hinder former U.S. immigrants trying to take the most basic steps for resettlement, like registering for school and health care, in their first few weeks in their country of origin and in years to come.[79]

While some U.S. states have progressive identification laws that provide even undocumented residents with identification,[80] others have created grave hurdles for proving identity, residence, school attendance, and other important basic facts about an individual's life.[81] A lack of basic proof of

78. *See, e.g.*, United States v. Best, 573 F.2d 1095, 1103 (9th Cir. 1978) (observing historical state discretion to issue licenses to drivers). The REAL ID Act, which mandated numerous security requirements for state identification as well as demanding that ID holders be citizens, may seem to cut against this point. However, REAL ID actually orders federal agencies not to accept state identification that does not meet certain requirements and sets up a process by which the Secretary of Homeland Security can certify whether a state is in compliance. *See* REAL ID Act of 2005, Pub. L. 109–13, § 202(a)(1)–(2), 119 Stat. 302, 312. While this obviously provides incentives to states to make some form of REAL ID-compliant identification available to citizens, many states and localities continue to issue non-REAL ID compliant forms of identification, including some that are expressly intended to help undocumented people. *See, e.g.*, *AB 60 Driver's Licenses*, STATE OF CAL. DEP'T OF MOTOR VEHICLES, https://www.dmv.ca.gov/portal/driver-licenses-identification-cards/assembly-bill-ab-60-driver-licenses (last visited Aug. 4, 2020); *IDNYC*, NYC.GOV, https://www1.nyc.gov/site/idnyc/index.page (last visited Aug. 4, 2020); KATE M. MANUEL & MICHAEL JOHN GARCIA, CONG. RSCH. SERV., R43452, UNLAWFULLY PRESENT ALIENS, DRIVER'S LICENSES, AND OTHER STATE-ISSUED ID: SELECT LEGAL ISSUES 1–2 (2014), https://fas.org/sgp/crs/misc/R43452.pdf.

79. Dominguez-Villegas, *supra* note 39.

80. *See supra* note 78. As of now, at least fifteen states plus the District of Columbia allow some undocumented residents to apply for a driver's license, and a number of cities, among them Oakland and New York, issue municipal ID cards to residents regardless of their immigration status. *See States Offering Driver's Licenses to Immigrants*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 9, 2021), https://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx.

81. The most restrictive policies have faced due process and equal protection challenges in court and have been repealed, suggesting that the Federal Constitution places a floor on restrictionist citizenship federalism's ability to exclude immigrants from the circle of concern. *See, e.g.*, Erik De La Garza, *Texas Cuts a Deal with Kids of Immigrants*, COURTHOUSE NEWS SERV. (July 27, 2016), https://www.courthousenews.com/texas-cuts-a-deal-with-kids-of-immigrants/. Perhaps the most shocking recent example of this phenomenon was Texas's policy, now defunct, to refuse to issue birth certificates to the U.S.-born children of any parent presenting as documentation only a *matricula consular*—a common form of identification issued by Mexican and Central American consular authorities to their citizens living abroad without lawful status. *See* Cathy Liu, Note, *An Assault on the Fundamental Right to Parenthood and Birthright Citizenship: An Equal Protection Analysis of the Recent Ban of the* Matricula Consular *in Texas's Birth Certificate Application Policy*, 50 COLUM. J.L. & SOC. PROBS. 619, 620–22 (2017). Hundreds of families—at the least—were not able to secure proof of their U.S. citizen children's births as a result. Maya Kaufman, *Illegal Immigrants Sue Texas for Denying Birth Certificates to U.S.-Born Children*, CBS NEWS (July 24, 2015, 8:38 AM), https://www.cbsnews.com/news/illegal-immigrants-denied-birth-certificates-for-u-s-born-children. As an author to the Texas law noted, most states with large immigrant populations are less restrictive in accepting identification for birth certificates, although they still

identity and other documentation can lead to shocking problems for former immigrants, both deportees and voluntary returnees, years after they leave the United States. One young returnee to Mexico was unable to enroll in college for five years because she could not get apostilles—a type of formal seal contemplated by the Hague Convention—for her academic transcript from her Georgia high school.[82] Though the example might sound extreme, the apostille requirement was until just a few years ago a lawful reason to deny U.S.-born or -educated children admission to Mexican schools.[83] Similarly, until five years ago, the country also required apostilles and certified Spanish translations for other foreign public documents, including U.S. birth certificates, that made it difficult for former immigrant parents to register their former immigrant or U.S. citizen children for social and health services.[84] While these requirements have formally been terminated in Mexico, in some locales they are still applied and used to turn children away from education and medical care.[85]

In Mexico, which has perhaps the largest and best-organized population of former U.S. immigrants, advocacy groups mounted a sustained campaign that ultimately pushed the Mexican Congress and federal agencies to address identification-related problems.[86] Mexico's *Instituto Nacional de Migración*

differ in how flexible they are. *See* Liu, *supra*, at 657–58; *see also Arizona Bill Would Deny Citizenship to Children of Illegal Immigrants*, CNN (June 16, 2010, 12:09 PM), https://www.cnn.com/2010/US/06/15/arizona.immigration.children/index.html (chronicling earlier attempt to pass a similar birth certificate law in Arizona, which ultimately failed).

82. Caitlin Donohue, *At Poch@ House, Mexican Deportees and Returnees Find Help Starting Over*, REMEZCLA (Mar. 23, 2018), https://remezcla.com/features/culture/mexico-city-pocho-house-deportees-returnees; *see also* CARLOS A. GARRIDO DE LA CALLEJA & JILL ANDERSON, SANTUARIOS EDUCATIVOS EN MÉXICO? PROYECTOS Y PROPUESTAS ANTE LA CRIMINALIZACIÓN DE JÓVENES *DREAMERS* RETORNADOS Y DEPORTADOS 72–73 (2018) (discussing documentation problems faced by Mexican and Mexican American expatriates, deportees, and returnees as they enroll in school in Mexico).

83. *See* CALDWELL, *supra* note 6, at 87 (describing delays to one young woman's school enrollment caused by state records and apostille process); Jill Anderson, *Bilingual, Bicultural, Not Yet Binational: Undocumented Immigrant Youth in Mexico and the United States* 14, 25 (Wilson Ctr. Mex. Inst., Working Paper, 2016), https://www.wilsoncenter.org/sites/default/files/media/documents/publication/bilingual_bicultural_not_yet_binational_undocumented_immigrant_youth_in_mexico_and_the_united_states.pdf (describing apostille requirement as condition for school enrollment).

84. Pamela L. Cruz, *A Vulnerable Population: U.S. Citizen Minors Living in Mexico*, RICE UNIV.'S BAKER INST. FOR PUB. POL'Y 3 (Mar. 19, 2018), https://www.bakerinstitute.org/media/files/research-document/3869bc0a/bi-brief-031918-mex-citizenminors.pdf.

85. Anderson, *supra* note 83, at 25. The reasons for these phenomena are complex. In Calleja and Anderson's telling, discrimination against returned migrants – especially bicultural young migrants with a deep affinity for the United States – and the rigidity of Mexico's education system both play a role in the exclusions they document. *See* CALLEJA & ANDERSON, *supra* note 82, at 8–9.

86. *See* CALLEJA & ANDERSON, *supra* note 82, at 43 (discussing success of Mexican campaign to eliminate documentation requirements for some students). By a conservative estimate, over 8.25

(National Migration Institute) issues *constancias de repatriación*, or certificates of repatriation, that are supposed to serve as temporary identification to recently deported Mexican citizens who pass through its reception centers.[87] In 2017, the Mexican Congress passed changes to Mexico's General Law on Education that also helped to ease some identification-related issues for Mexican and U.S. citizen children of former U.S. immigrants seeking to register for school.[88] The country also developed a partnership with the federal government of the United States to facilitate the authentication of birth certificates.[89] The passage of these laws improved (though did not end) the problems posed by state identification laws in Mexico.

However, the unusually well-documented example of Mexico illustrates a broader point. In countries that have not taken actions as comprehensive as Mexico's—that is, most of them[90]—identification and birth certificate laws can gravely and arbitrarily complicate the reintegration of former U.S. immigrants and their children if they lack U.S. proof of identity and other biographical data. Before Mexico passed changes to its education law, some former U.S. immigrants or their children waited years to be able to enroll in school; one nonprofit, Instituto para las Mujeres en la Migración ("IMUMI"),

million emigrants from Mexico, many of whom are still Mexican citizens, were living in the United States as of 2010. *See* OECD, LATIN AMERICAN ECONOMIC OUTLOOK 2010, at 237–38 (2009). One estimate of global migration flows found that approximately 1.3 million Mexican nationals had returned from the United States to Mexico over a five-year period from 2010 to 2015, as a result of both return migration and removals by DHS. *See* Jonathan J. Azose & Adrian E. Raftery, *Estimation of Emigration, Return Migration, and Transit Migration Between All Pairs of Countries*, 116 PNAS 116, 118–19 (2019). Given the tremendous size of the expatriate population in the United States, the country's policymakers have long grappled with facilitating reintegration for returnees from this country, and multiple government agencies exist to facilitate the process of reintegration. *See* Dominguez-Villegas, *supra* note 39. No other country in the world has such a large population of its citizens living in the United States.

87. *See* Dominguez-Villegas, *supra* note 39.

88. Ley General de Educación, art. 33, Diario Oficial de la Federación [DOF], últimas reformas DOF 22-03-2017 (Mex.) (protecting the right to access education for students without academic transcripts or identity documents and rescinding the requirement that these students present birth certificates or apostilles to register for school); *see also Senado Aprueba Reforma a Ley de Educación que Facilita Revalidación de Estudios a Migrantes*, SENADO DE LA REPÚBLICA (Feb. 28, 2017, 6:44 PM), http://comunicacion.senado.gob.mx/index.php/informacion/boletines/34623-senado-aprueba-reforma-a-ley-de-educacion-que-facilita-revalidacion-de-estudios-a-migrantes.html (announcing passage of the bill reforming Mexico's education law).

89. Cruz, *supra* note 84, at 4.

90. Mexico has a longer track record of reintegrating returned migrants than other countries in the Americas, with its first effort dating back to the 1980s. ARIEL G. RUIZ SOTO ET AL., MIGRATION POL'Y INST., SUSTAINABLE REINTEGRATION: STRATEGIES TO SUPPORT MIGRANTS RETURNING TO MEXICO AND CENTRAL AMERICA 13 n.25 (2019), https://www.migrationpolicy.org/sites/default/files/publications/MPI-ReceptionReintegration-FinalWeb.pdf.

has devoted a significant amount of its legal resources to helping parents obtain needed documentation from both the United States and Mexico.[91]

Like foreclosure law, identification laws have important constitutional and fundamental rights valences. In the United States, as in most countries, identification documents are required to access a broad variety of social services, including education, welfare, and health benefits. In turn, the deprivation of these entitlements has been found unconstitutional where it violates equal protection (in the case of education)[92] or due process (in the case of welfare benefits).[93] In other societies, depriving individuals of these entitlements may be a violation of rights to receive the underlying support—for example, a violation of the substantive right to education or health care.[94] And failing to duly issue proof of identity is a human rights violation, and may lead to other human rights violations if basic services are withheld.[95] Providing individuals with proper identification and biographical information, then, is essential for vindicating a variety of other rights, no matter how those rights are defined.

Motivated states could do far more to protect these rights and assist returned immigrants in rebuilding their lives abroad by facilitating access to documents. Identification is another area where states have legal and policy autonomy.[96] Many states continue to issue a variety of forms of non-REAL ID-compliant identification to undocumented immigrants, demonstrating a

91. *See id.* at 13.

92. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 215, 223–24 (1982) (depriving noncitizen students of ability to access public schools due to their immigration status violates Equal Protection Clause).

93. *See e.g.*, Mathews v. Eldridge, 424 U.S. 319, 332–35, 343 (1976) (finding Social Security benefits gave rise to a property right and requiring procedural due process protections applied to benefits terminations); Goldberg v. Kelly, 397 U.S. 254, 266–71 (1970) (finding Due Process Clause mandated a hearing with procedural protections before welfare benefits were taken away). Numerous commentators have observed the damaging exclusionary effects that ensue when noncitizens in the United States do not have access to driver's licenses or other valid proof of identity. *See, e.g.*, Gregory A. Odegaard, *A Yes or No Answer: A Plea to End the Oversimplification of the Debate on Licensing Aliens*, 24 J.L. & POL. 435, 465 (2008); María Pabón López, *More Than a License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91, 96–98 (2004).

94. A number of countries provide for social rights that guarantee access to certain types of entitlements, for instance housing and education, in their constitutions. *See* Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions*, 62 AM. J. COMPAR. L. 1043, 1044, 1054 (2014) (surveying prevalence of economic and social rights across world constitutions).

95. *See, e.g.*, UDHR, *supra* note 43, art. 6 (codifying right to be recognized as a person by law); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights art. 16, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (same); *id.* art. 24, para. 2 (codifying right to the registration of one's birth by the state); G.A. Res. 44/25, Convention on the Rights of the Child art. 7, Nov. 20, 1989, 1577 U.N.T.S. 3 (same).

96. *See*, *e.g.*, United States v. Best, 573 F.2d 1095, 1103 (9th Cir. 1978).

willingness to provide noncitizens with proof of identity.[97] There is nothing to stop states from working with sending countries to do more. For instance, they could work with sending countries to develop standards for state IDs that could serve as identification in their main diaspora communities' countries of origin; or states could make it easier for students overseas to secure valid academic transcripts from public schools and state universities. State governments also have the power to facilitate access to other important documents, including records from public hospitals and the birth certificates of U.S. citizen children.[98] And they could facilitate changes to documents like birth certificates and identity cards that are needed to align U.S. documents that use different spellings of names with paperwork from other countries. Seemingly small changes in policy or modest new programs could save some former immigrants years of frustration as they seek to reintegrate into their countries of origin.

### *C. Parental Rights: Termination of Parental Rights and the Deprivation of the Right to Family Relationships*

The Trump Administration's policy of separating families at the border beginning in 2017 caused a major scandal.[99] Observers expressed alarm that American families could adopt the separated children, terminating their parents' rights in the process.[100] The outcry over family separation stems from a deep sense of the inviolability of those relationships that is also reflected in U.S. law. The right to family relationships has been repeatedly recognized as a core substantive due process right in decades of Supreme Court jurisprudence,[101] and is also protected under international human rights law and the law of many individual countries.[102]

Lost in the emotionally charged debate over new family separation policies is the fact that our immigration system and our state courts *routinely* separate immigrant parents from their children, and have done so for years. State family courts terminate the parental rights of deported parents with

97. *See supra* note 78.

98. *See* RUIZ SOTO ET AL., *supra* note 90, at 22.

99. *See* Julie Hirschfeld Davis & Michael D. Shear, *How Trump Came to Enforce a Practice of Separating Migrant Families*, N.Y. TIMES (June 16, 2018), https://www.nytimes.com/2018/06/16/us/politics/family-separation-trump.html.

100. *See* Kathryn Joyce, *The Threat of International Adoption for Migrant Children Separated from Their Families*, INTERCEPT (July 1, 2018, 9:37 AM), https://theintercept.com/2018/07/01/separated-children-adoption-immigration.

101. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 665–66 (2015); Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

102. *See* UDHR, *supra* note 43, art. 16; ICCPR, *supra* note 95, art. 17, 23.

some regularity, leaving their children permanently in the custody of a relative or stranger.[103]

Termination of parental rights is a necessary predicate to an adoption—a third party cannot adopt a child so long as the parent still has rights.[104] Where a parent does not consent to the adoption, to terminate parental rights, a state court will find either that (1) termination is in the best interests of the child or (2) the parent is "unfit"—sometimes both.[105] There are a number of different grounds for termination, and these vary somewhat from state to state.[106] In no state is being deported expressly a ground for termination. However, existing empirical evidence and state case law suggest that detention and deportation can easily make a parent "unfit" in some courts—most often indirectly, because the detention and deportation lead to child "abandonment" or "neglect."[107]

While every state's system is different, child welfare proceedings can be initiated within a matter of days of a child coming into state custody. Detained or deported immigrants without a documented relative or friend to quickly claim their children may face extraordinary hurdles to maintaining their parental rights.[108] Writing for detained parents trying to remove their children from the Arizona child welfare system *pro se*, the Florence Immigrant and Refugee Rights Project noted the urgency with which these parents must act: "If CPS [Child Protective Services] has taken your children on an emergency basis and no one has come forward to care for them within 48 hours . . . . you and your children will become part of a court process called Dependency that can be very long and complicated, and could end by terminating your parental rights to your children . . . ."[109] Given that many

103. *See infra* notes 112–113.

104. *See Grounds for Involuntary Termination of Parental Rights*, CHILD WELFARE INFO. GATEWAY 1 (2021), https://www.childwelfare.gov/pubPDFs/groundtermin.pdf.

105. *Id.* at 2. While states may not constitutionally terminate the parental rights of a fit parent—making a finding of unfitness theoretically necessary for a termination—an increasing number of state courts have placed more and more analytic emphasis on the best interests standard, to the apparent detriment of immigrant parents. Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J.L. & SOC. JUST. 63, 66, 72–73 (2012).

106. *See Grounds for Involuntary Termination of Parental Rights*, *supra* note 104, at 2.

107. *See* Yablon-Zug, *supra* note 105, at 88, 95.

108. *Protecting Your Parental Rights: A Resource for Immigrant Detainees with Child Custody Issues in Arizona*, FLORENCE IMMIGRANT & REFUGEE RTS. PROJECT (Feb. 2010), http://www.firrp.org/media/HowToProtectYourParentalRights-en.pdf [hereinafter *Protecting Your Parental Rights*]. The Florence Immigration and Refugee Rights Project ("FIRRP") advises detained immigrants not to send undocumented relatives or friends to claim their children because some child welfare agencies, including Arizona's, refuse to release children to undocumented people and may even refer them to immigration authorities. *Id.* at 3–4; *see also Guide to Protecting Your Parental Rights*, FLORENCE IMMIGRANT & REFUGEE RTS. PROJECT 4–5 (May 2013), https://firrp.org/wp-content/uploads/2010/12/Parental-Rights-Guide-2013.pdf.

109. *Protecting Your Parental Rights*, *supra* note 108, at 4.

detained immigrants are barely able to place calls from immigration detention, this timeline to locate an alternate caregiver who is documented—or otherwise willing to claim the children from CPS—is impossibly compressed.[110]

A major 2011 study of the immigration and child welfare systems conservatively estimated that 5,100 children nationally were in foster care (a predicate to termination of parental rights) due to an immigrant parent's detention or deportation, and that another 15,000 would cycle through this position over the following five years, through 2016.[111] While this 2011 report is still the most comprehensive empirical account of the termination problem, legal scholars have taken note of this problem both before and since,[112] as have journalists.[113] With deportations of long-term residents continuing apace under the Trump Administration, these more recent anecdotal reports leave no reason to believe this figure has decreased.

Detention and deportation can trigger child custody problems and subsequently hinder a parent's efforts to fight termination.[114] With a parent

110. *See* Zachary Manfredi & Joseph Meyers, *Isolated and Unreachable: Contesting Unconstitutional Restrictions on Communication in Immigration Detention*, 95 N.Y.U. L. REV. 130, 139–45 (2020) (outlining severe barriers to communication from immigration detention including isolated location of detention centers, arbitrary transfers of detainees, and cost and low quality of phone calls).

111. SETH FREED WESSLER, APPLIED RSCH. CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 6 (2011).

112. *See, e.g.*, Anita Ortiz Maddali, *The Immigrant "Other": Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643, 645–46 (2014) (identifying role of deportation in separation of undocumented families through the child welfare system); Stacy Byrd, Note, *Learning from the Past: Why Termination of a Non-Citizen Parent's Rights Should Not Be Based on the Child's Best Interest*, 68 U. MIA. L. REV. 323, 323–26 (2013) (same); C. Elizabeth Hall, Note, *Where Are My Children . . . and My Rights? Parental Rights Termination as a Consequence of Deportation*, 60 DUKE L.J. 1459, 1459, 1462–63 (2011) (same); Yablon-Zug, *supra* note 105, at 65–66 (same); Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99, 114–15 (2011) (same); S. Adam Ferguson, Note, *Not Without My Daughter: Deportation and the Termination of Parental Rights*, 22 GEO. IMMIGR. L.J. 85, 92 (2007) (same). *See generally* David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45 (2005) (assessing, at an early date, how immigration status more generally affects parental rights in termination proceedings, including how courts assess the threat that an undocumented parent may be deported).

113. Associated Press, *Deported Parents May Lose Kids to Adoption, Investigation Finds*, NBC NEWS (Oct. 9, 2018, 2:59 PM), https://www.nbcnews.com/news/latino/deported-parents-may-lose-kids-adoption-investigation-finds-n918261. Again, journalists' reports probably underestimate the magnitude of the problem, since—as the Associated Press expressly noted in its reporting—many child custody cases are sealed and thus not searchable.

114. Numerous detention trends are likely to have exacerbated this problem. For instance, in 2011, far fewer immigrants were subject to mandatory immigration detention. Since the Supreme Court's decision in *Nielsen v. Preap*, 139 S. Ct. 954 (2019), a vastly larger subset of lawful permanent residents is now subject to mandatory detention. This means that they are unable to attend child custody hearings in person or participate in home visits so long as they are fighting their

detained or deported, a child may be considered neglected or abandoned, which leads to the child going to foster care if no relative with lawful status can step in.[115] And the conditions child services agencies set for reunification with the parent can be difficult or impossible to meet from detention or abroad. Many courts require parents to attend child custody hearings as a minimum condition of retaining their parental rights—an accommodation that ICE will not make for parents in detention.[116] In other cases, parents must comply with elaborate case management plans, including completing home visits that are impossible from detention or the country of removal.[117]

The cases show how tough it can be to surmount the hurdles to reunification after deportation. For instance, in *In re C.M.*,[118] the California Court of Appeals considered whether a Mexican citizen father would retain parental rights to his two U.S. citizen children. When his children, C.M. and D.M., were six and three years old, the father was deported to Mexico.[119] In 2005, he reentered the United States and found work in the Midwest as a seasonal farm laborer.[120] By returning to the United States after his deportation, the father had committed the federal crime of unlawful reentry, which is punishable by a term in prison.[121] Eventually, the father was arrested and incarcerated.[122]

In the interim, C.M. and D.M.'s mother had died, and through a series of connections the children had ended up in the care of another, non-related family.[123] Eventually, the foster family decided to adopt the children, and—

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cases. The Trump Administration also began systematically denying immigration detainees' parole, another avenue immigrants can use to leave detention, despite court challenges. *See* Miriam Jordan, *Court Blocks Trump Administration from Blanket Detention of Asylum Seekers*, N.Y. TIMES (July 2, 2018), https://www.nytimes.com/2018/07/02/us/asylum-court-ruling-detention.html. Meanwhile, conditions in the nation's expanded immigration prison system make participation by telephone in child custody hearings impossible for most immigrants; most detainees are barely able to contact a lawyer. *See, e.g.*, Complaint for Injunctive and Declaratory Relief at 4, 9, 11–14, Torres v. Dep't of Homeland Sec., 411 F. Supp. 3d 1036 (C.D. Cal. 2019) (No. EDCV 18-2604 JGB (SHKx)); *see also* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 34–35 (2015).

115. WESSLER, *supra* note 111, at 26. Family courts may be further primed to find parental abandonment and unfitness when evaluating the cases of immigrant children because, so often for undocumented children, parental abandonment and unfitness are part of an important path to relief via Special Immigrant Juvenile Status. *Id.*

116. *Id.* at 36–37.

117. *See, e.g.*, *In re* Maria S., 98 Cal. Rptr. 2d 655, 656, 659–60 (Cal. Ct. App. 2000) (mother could not comply with case plan because she was deported to El Salvador; court found she had not been given a reasonable opportunity to comply); *see also* WESSLER, *supra* note 111, at 38–40, 50.

118. No. G042411, 2010 WL 3048439 (Cal. Ct. App. Aug. 5, 2010).

119. *Id.* at *1.

120. *Id.*

121. *Id.*

122. *Id.* at *2.

123. *Id.*

as a necessary first step to completing the adoption—petitioned to terminate the father's parental rights.[124] The father opposed the petition, arguing that he had never intended to permanently give up his rights to his children.[125]

In finding that the father had abandoned the children and severing his rights in favor of the foster family, the family court judge decided to "accept the testimony of [respondents], simply because I watched them testify; they seem like nice people; they're citizens; they work and pay taxes like the rest of us; and they are not in the joint."[126] The judge contrasted them with the father, "somebody who is over the border illegally, and having been convicted as a federal felon."[127]

The family court judge appeared particularly skeptical of the immigrant father's claims that he attempted to stay in touch with his children.[128] However, the judge failed to consider the hardships immigration detainees face when calling family. Detainees must pay for calls to family out of their commissary accounts.[129] At the time of this case, the Federal Communications Commission ("FCC") had not yet implemented reforms to prison phone providers, and these calls could easily cost about a dollar per minute.[130] The father stated that, by working in detention, he was able to earn an average of about $18 per month, most of which he spent on calls to his children.[131] Even if the father spent all of his money on calls, this could easily equate to just 18 minutes of phone time with his children every month.

The family court judge was unsympathetic to the constraints placed on the father:

> [W]here we're at on this for [father] is that basically he wants to reserve the right to say to his pals down in Mexico, or wherever he winds up when they let him out, that "I never gave up my kids. I didn't abandon them. I fought down to the wire. That dummy judge took them away, along with [respondents], those rats. I fought it all the way and I took a bullet for them." The problem is, in the meantime, while they are growing up, he hasn't bothered to

124. *Id.*

125. *Id.*

126. *Id.* (alteration in original).

127. *Id.*

128. *Id.* at *2–3.

129. Manfredi & Meyers, *supra* note 110, at 141–42.

130. *See* Mignon Clyburn, *Another Step Toward Fairness in Inmate Calling Services*, FCC (Sept. 30, 2015, 12:45 PM), https://www.fcc.gov/news-events/blog/2015/09/30/another-step-toward-fairness-inmate-calling-services; Drew Kukorowski, *The Price to Call Home: State-Sanctioned Monopolization in the Prison Phone Industry*, PRISON POL'Y INITIATIVE (Sept. 11, 2012), https://www.prisonpolicy.org/phones/report.html.

131. *In re* C.M., 2010 WL 3048439, at *2.

> support them and his contact with them has been, to say the least, token.[132]

A state appellate court affirmed the trial judge's ruling, upholding his finding that the father had abandoned the children and citing as evidence his failure to call or send money for gifts.[133] The appellate court found that:

> While some of the judge's comments were rather harsh, we do not believe they are cause for a reversal. . . . [I]t is clear the judge did not discredit him because he was an illegal alien, as he maintains. Rather, the court discredited him because he was *convicted* of a federal offense for illegally reentering the country after having been deported.[134]

As one commentator has observed, the best interests of the child standard has, in some cases, become a cover for anti-immigrant bias, and that is apparently how it was applied here.[135] Other courts appear unaware of the hurdles that face detained and deported parents in caring for their children.[136]

Few former immigrant parents will find that state laws effectively protect them from discriminatory termination processes like the one C.M. and D.M.'s father endured. A handful of state supreme and appellate courts that have considered the issue have signaled that the termination of parental rights for reasons of immigration status, detention, or deportation violates the Due Process Clause.[137] Though the results of many of these appeals are

132. *Id.* at *3 (second and third alterations in original).

133. *Id.* at *4–5.

134. *Id.* at *5.

135. Yablon-Zug, *supra* note 105, at 101–05; *see also* Ortiz Maddali, *supra* note 112, at 666.

136. *See, e.g.*, State *ex rel.* Interest of M.F., No. 20080250–CA, 2008 WL 2224277, at *1–2 (Utah Ct. App. May 30, 2008) (upholding termination of deported father's parental rights on grounds that he had not seen his children or provided support in two years); Tenn. Dep't of Child.'s Servs. v. Ahmad, No. M2004-02604-COA-R3-PT, 2005 WL 975339, at *1–3 (Tenn. Ct. App. April 26, 2005) (upholding termination of mother's rights after deportation); *In re* M.A.P.A., No. 98-1218, 1999 WL 711447, at *2 (Iowa Ct. App. July 23, 1999) (upholding termination of undocumented father's parental rights on grounds that he would likely be deported after his incarceration ended). For additional examples of such cases, see Yablon-Zug, *supra* note 105, at 88–90.

137. *See, e.g.*, Adoption of Posy, 119 N.E.3d 747, 752 (Mass. App. Ct. 2019) (reversing termination of deported Guatemalan father's parental rights while expressing concern about "the swiftness with which the [child welfare] department changed its goal from reunification to adoption" and noting that "the department's charge to establish permanency for the children . . . must be met, however, consistent with due process"); *In re* E.N.C., 384 S.W.3d 796, 805, 810 (Tex. 2012) (reversing termination of deported father's rights, finding that treating any threat of deportation arising from a criminal act as a grounds for termination would violate the Due Process Clause); *In re* B. & J., 756 N.W.2d 234, 239 (Mich. Ct. App. 2008) (reversing termination of parental rights based on parents' alleged inability to provide proper care in Guatemala, and noting that "a state may not, consistent with due process of law, create the conditions that will strip an individual of an interest protected under the due process clause") (quoting *In re* Valerie D., 613 A.2d 748, 770 (Conn. 1992)); *In re* Interest of Mainor T., 674 N.W.2d 442, 460, 464 (Neb. 2004) (reversing termination of parental rights of mother deported to Guatemala after finding numerous

encouraging, the limited existing case law on termination of parental rights is itself disturbing because the dearth of cases suggests that few former immigrants are able to litigate a termination case on appeal or otherwise pursue their claims successfully.[138] One Mexican father who was reunited with his U.S. citizen sons three years after his deportation was only able to win his case after an extensive public outcry led DHS to temporarily parole him into the United States to attend his child custody hearings.[139] Not every case receives national attention, and this kind of luck is rare.

As with the foreclosure issue, states have it within their power to protect the parental rights of detained and deported parents. The law of termination is almost wholly within state control—indeed, in few areas of law is the principle of state control so sacrosanct as in family law.[140]

Nonetheless, virtually the only states to address this problem have done so through the court rulings mentioned above, not by legislation. As of 2019, only California and New York have adopted relatively forward-thinking legislation to aid in reunifying children with deported parents—these states have allowed judges discretion to give detained or deported parents extensions, and required them to consider barriers parents might face to comply with court orders.[141] More commonly, state legislatures have

errors by trial court in conduct of case while mother was in immigration detention that vitiated her due process rights).

138. *See* Ortiz Maddali, *supra* note 112, at 645–46.

139. Seth Freed Wessler, *Deported Father's Case Ends as Congress Debates Immigration Changes*, COLORLINES (Feb. 19, 2013, 2:15 PM), https://www.colorlines.com/articles/deported-fathers-case-ends-congress-debates-immigration-changes.

140. The domestic relations exception, which covers family law matters, is among the oldest and most inflexible exceptions to federal court jurisdiction in U.S. law. *See* Barber v. Barber, 62 U.S. (1 How.) 582, 584 (1858); *In re* Burrus, 136 U.S. 586, 593–94 (1890). Asked to consider the issue again relatively recently, the Supreme Court stated that "state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over divorce, alimony, and child custody decrees." Ankenbrandt v. Richards, 504 U.S. 689, 704 (1992). Though federal statutes do exist in the area of termination of parental rights and family law more broadly, states have wide authority to legislate in these areas without much threat of preemption, although certain well-defined domains are now also subject to national legislation. *See* Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 270–71 (2009).

141. *See* Ann Park, *Keeping Immigrant Families in the Child Protection System Together*, AM. BAR ASS'N (Dec. 30, 2020), https://www.americanbar.org/groups/public_interest/child_law/project-areas/immigration/keeping-immigrant-families-in-the-child-protection-system-togeth. California's Reuniting Immigrant Families Act implemented several reforms to the child welfare and family court system to reduce barriers to reunification, including creating discretion to give extensions, forbidding courts from considering immigration status when placing children with family members, and requiring judges to consider barriers detained or deported parents face to compliance with court orders. S.B. 1064, 2012 Leg., Reg. Sess. (Cal. 2012). The New York State Reuniting Families Act, which was modeled on the California bill, passed and was signed by the governor in 2019. S.B. 5024A, 2019 Leg., Reg. Sess. (N.Y. 2019). *See also* Ann Park, *Keeping Immigrant Families in the Child Protection System Together*, CHILD L. PRAC., Apr. 2014, at 49, 50.

considered protective bills but ultimately dropped them in favor of softer changes in agency policy; in other cases, state legislatures have elected to do nothing.[142]

Compared to other actions within the states' power, most of these responses are modest. Because states have broad authority over family law,[143] they have the capacity to protect deported parents' rights in a robust and comprehensive way. The path to change is relatively clear: many reforms that have been proposed to aid incarcerated parents would also help detained or deported parents.[144] States could either permit or require child welfare agencies or judges to extend permanency deadlines where a parent is detained or has been deported, as several states do for incarcerated parents.[145] They could bar the consideration of immigration status in child custody

142. *See, e.g.*, S.B. 1303, 51st Leg., Reg. Sess. (Ariz. 2013) (provided a six-month extension for incarcerated immigrant parents in foster care trying to reunify with their children, but did not pass into law); H.B. 3050, 98th Gen. Assemb., Reg. Sess. (Ill. 2013) (closely following model of California Reuniting Immigrant Families Act, but did not pass into law).

143. An important exception with ramifications for detained and deported parents is the Adoption and Safe Families Act of 1997 ("ASFA"), Pub. L. 105-89, 111 Stat. 2115, which significantly intervened in states' discretion to shape the law of parental termination by shifting the presumption away from family reunification and giving greater weight to children's health and safety and lesser weight to parental rights. *See* Olivia Golden & Jennifer Ehrle Macomber, *Framework Paper: The Adoption and Safe Families Act (ASFA)*, *in* URB. INST., INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 5, 7, 11–16 (2009), https://www.urban.org/research/publication/intentions-and-results-look-back-adoption-and-safe-families-act/view/full_report; *see also* Katharine Q. Seelye, *Clinton to Approve Sweeping Shift in Adoption*, N.Y. TIMES (Nov. 17, 1997), https://www.nytimes.com/1997/11/17/us/clinton-to-approve-sweeping-shift-in-adoption.html. Though ASFA was designed to reduce the focus on family reunification, states that have wanted to continue to prioritize parental rights and reunification in their family law have relied on exceptions contained in AFSA to avoid the law's stricter rules and timelines for the termination of parental rights. *See* Katherine A. Hort, Note, *Is Twenty-Two Months Beyond the Best Interest of the Child? ASFA's Guidelines for the Termination of Parental Rights*, 28 FORDHAM URB. L.J. 1879, 1881–82 (2001). Ultimately, given the strategies states have developed to give themselves flexibility under ASFA, its intervention in state family law should place relatively few barriers on efforts to keep separated immigrant families together.

144. Advocates have observed parallels between the termination of incarcerated parents' rights and family separation, and indeed incarcerated parents and detained or deported parents tend to lose their rights to their children for very similar reasons. *See* Eli Hager & Anna Flagg, *How Incarcerated Parents Are Losing Their Children Forever*, MARSHALL PROJECT (Dec. 2, 2018, 10:00 PM), https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever.

145. Several states have laws that give agencies or family courts discretion to extend the fifteen-month timeline for termination of parental rights, though they do not require them to do so. *See* Cal. S.B. 1064; N.Y. S.B. 5024A; WESSLER, *supra* note 111, at 41; *see also* Alison Walsh, *States, Help Families Stay Together by Correcting a Consequence of the Adoption and Safe Families Act*, PRISON POL'Y INITIATIVE (May 24, 2016), https://www.prisonpolicy.org/blog/2016/05/24/asfa/#:~:text=New%20York%20passed%20the%20ASFA,a%20residential%20drug%20treatment%20program.

proceedings, as California and New York have done by statute and a few other states have done by judicially created rulings.[146]

And, of course, in addition to changing the legal standards, states could reform their child welfare departments and retrain staff so that deported parents—particularly those from common migrant-sending countries—have a better chance to comply with case management plans and ultimately retain their rights.[147] States could expand their cooperation with consular officials from countries that are heavily represented in the state's immigrant population, helping to facilitate family reunification after deportation.[148] Expanded use of televideo check-ins and home visits and cooperation with in-country child welfare officials would help at least some parents with relatively robust access to resources comply with case management plans. All of these reforms could reduce the number of families that are permanently separated like C.M. and D.M.'s.

## II. CITIZENSHIP FEDERALISM: HOW STATES CAN REDEFINE THE SUBJECTS OF RIGHTS FOR THE TWENTY-FIRST CENTURY

As Part I of this Article shows, states exercise a huge amount of power to shape the lives of a large and growing group of noncitizens outside of the United States. Through laws and policies, they control former immigrants' substantive outcomes in many areas of life long after their deportation. Yet few states, even states that have shown themselves in recent years to be deeply committed to progressive federalism and expressive challenges to Executive Branch immigration policies, have pursued policies or laws to aid this group. Indeed, perhaps they are unaware that they can. This Part of the Article offers a theory of why states have failed to make policy on the issues detailed in Part I, as well as others outside the scope of this Article.

States have not overlooked the problems in Part I out of a lack of interest or will. As the following Section will explain, more states are doing immigration federalism than ever before, targeting an expanding set of issues, and advocates and scholars have consistently called on them to do still more.[149] Instead, this Article argues, states have not entered the arenas

146. *See supra* note 137. The issue of whether family court judges should be able to consider immigration status in termination proceedings is particularly ripe for litigation because of the serious constitutional questions it raises.

147. Without adequate training on the intersection of child welfare and immigration and the flexibility to tailor plans, case workers often produce intensely inappropriate case management plans that require home visits, counseling, supervised time with children, and other steps that are physically impossible for a detained or deported parent to comply with. *See* WESSLER, *supra* note 111, at 38.

148. *See id.* at 58.

149. *See, e.g.*, Markowitz, *supra* note 11, at 904–15 (calling on states to grant citizenship to undocumented immigrants as a way to confer valuable benefits, foster integration, and set

described in Part I because they unthinkingly hew to the federal model for determining the boundaries of our circle of concern, a model that is primarily territorial.[150] Because states have reacted to the federal paradigm and to federal law rather than stepping back to ask broader questions about how they want to define political and social membership, they have suffered up until now from a fundamental failure to reorient and depart from this paradigm.

But as Part I demonstrates, states have a power that they fail to exercise: treating former immigrants as worthy of consideration by removing impediments to their wellbeing and livelihood. If states began to exercise this power, then gradually they might test and adopt a different model for the boundaries of our community than the federal government, using the well-documented capacity, in a federalist system, to change policies and values at the national level from the bottom up.[151] Just as other nationwide campaigns, like the struggle for marriage equality, relied on grassroots advocacy and local changes in law to create dialogue around deeply held norms, immigrant rights advocates can use calls for local change to open space for transformative shifts in national values around membership and inclusion.[152]

Section II.A offers a theory of why states have reactively adopted the territorial paradigm for noncitizen rights rather than engaging in citizenship federalism. Section II.B briefly outlines the promise of citizenship federalism for activists and policymakers, and discusses why this Article's approach to rethinking state immigration lawmaking may be of interest to a broad group of scholars who deal with both migration and federalism.

alternative boundaries for the political community). The fullest academic reimagining of how states and localities draw the boundaries of the community of rights-holders has come in the area of noncitizen voting, which some states allowed even in presidential elections until the early twentieth century, but which today is rare. *See* Raskin, *supra* note 12, at 1393; *see also* Kimia Pakdaman, *Noncitizen Voting Rights in the United States*, BERKELEY PUB. POL'Y J., Spring 2019, at 33 (summarizing jurisdictions allowing noncitizen voting). Noncitizen voting, its possibilities, and the values that underlie it have received sustained scholarly treatment from legal scholars, citizenship theorists, and political scientists in the past. *See, e.g.*, *supra* note 12.

150. *See supra* text accompanying notes 15–16.

151. *See* Markowitz, *supra* note 11, at 914; Heather Gerken, Windsor*'s Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 594–97 (2015). As Gerken observed in 2015, the discursive interplay between local change and national debate that she identifies applies just as clearly to immigrant rights: "My focus here is the same-sex marriage debate, but you can play this game with almost any topic. What moved immigration to the front page in recent years? Arizona's anti-immigration initiatives." Gerken, *supra*, at 597.

152. *See* Gerken, *supra* note 151, at 597.

### *A. Immigration Federalism: Reacting to the Federal Government, Replicating a Paradigm*

Though the scholarship on "immigration federalism" originally started with a narrow definition,[153] recent scholarship has defined "immigration federalism" broadly, using the term to refer to all state lawmaking affecting immigrants and immigration, whether pro-immigrant or anti-immigrant.[154]

While this definition is vast, an examination of both past lawmaking and the scholarly literature reveals that immigration federalism in practice has limits. Generally speaking, and as discussed in more detail below, immigration federalism has asked what rights should be extended to the group of noncitizens the federal government has already identified as within the circle of concern—that is, the group on state territory. Citizenship federalism, the paradigm I propose, asks (and can answer) an antecedent question: What values should define who is within the circle of concern in the first instance, and should territory be paramount among them?[155] I do not mean to suggest that immigration federalism has not tested values around inclusion. Certainly, deciding whether and how much to protect noncitizens living in the states raises important questions about the scope of community. Yet as much as it has sought to amend federal law and blunt or sharpen the effects of federal policy, most immigration federalism, even in its progressive forms, has not challenged the deep territorial bias that pervades our constitutional law of immigration, alienage discrimination, and membership. The practice of demanding and enacting, in policy and in law, changes to the boundary of the circle of concern—which the reforms discussed briefly in Part I would exemplify—is what I mean by citizenship federalism.

If most states have not challenged the federal model, it is not out of a lack of interest in legislating on immigration. State immigration law has vastly expanded over the past two decades, driven equally by immigrant integrationist and immigrant restrictionist impulses.[156] In 2017, forty-nine

153. *See, e.g.*, Wishnie, *supra* note 14, at 509–10 (defining immigration federalism in terms of state attempts to discriminate against immigrants).

154. *See supra* note 11.

155. The scholarship on noncitizen voting and state citizenship is an exception because it seeks to challenge criteria for political inclusion; it thus can be thought of as an antecedent of the broader concept of citizenship federalism. *See supra* note 12.

156. Perhaps the two most infamous pieces of state immigration lawmaking, Arizona S.B. 1070 and California Proposition 187, were anti-immigrant in intent. The Arizona legislation dealt with collaboration on immigration enforcement, while the California ballot initiative sought to deny immigrants access to a wide variety of critical state benefits including public schooling and health care. *Arizona SB 1070*, BALLOTPEDIA, https://ballotpedia.org/Arizona_SB_1070 (last visited Jan. 2, 2022); *California Proposition 187, Prohibit Undocumented Immigrants from Using Public Healthcare, Schools, and Social Services Initiative (1994)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_187,_Prohibit_Undocumented_Immigrants_from_Using_Public_Healthcare,_Schools,_and_Social_Services_Initiative_(1994) (last visited Jan. 2,

states and the District of Columbia passed at least one law relating to immigration enforcement or access to entitlements like state Medicaid; back in 2005, the figure stood at twenty-five states.[157] Today, examples abound of both dramatic inclusionary measures providing access to higher education, health care, and disaster relief and aggressive restrictionist laws seeking to make it virtually impossible for immigrants to live in a given place.[158]

However, a closer examination of the immigration federalism that states have engaged in demonstrates how thoroughly states have allowed the federal government to set the terms of the debate. On inspection, immigration federalism's effects are not pervasive throughout all areas of state law. The existing academic literature on immigration federalism reveals that most legislative activity falls into one of two categories: measures that promote or impede immigration enforcement[159] and measures that provide or restrict access to social services or entitlements like health care or funding for higher education.[160] There are exceptions—scholars have also considered antidiscrimination laws and noncitizen voting.[161] However, the former type

2022); *see also* Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1.

157. States do not regulate immigration directly, and what one considers a "state immigration bill" is partly a matter of perspective. The National Conference of State Legislatures' relatively broad definition includes bills with some effect on immigrants' or noncitizens' rights or benefits in ten general categories: budget, education, employment, health, human trafficking, IDs and drivers' licenses, law enforcement, public benefits, and a "[m]iscellaneous" category that in 2017 included bills authorizing the study of refugee populations and advancing Muslim-American civic participation in state policymaking. *See 2017 Immigration Report*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 12, 2018), https://www.ncsl.org/research/immigration/2017-immigration-report.aspx.

158. *See, e.g.*, *infra* notes 164–165.

159. *See, e.g.*, Christopher N. Lasch et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1707 (2018); Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13, 43 (2016); Rose Cuison Villazor, *What Is a "Sanctuary?,"* 61 SMU L. REV. 133, 148 (2008); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 799–804 (2008); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 591–93 (2008); Wishnie, *supra* note 14, at 494–96.

160. This is roughly the same "[t]ypology" that Cristina Rodríguez gave in 2008, indicating how little trends have since changed. Rodríguez, *supra* note 159, at 591 ("State and local measures designed to prevent or diminish unauthorized immigration can be broken down roughly into three categories: direct enforcement, indirect enforcement, and benefits restriction."). For scholarship that attends to the issue of access to benefits for noncitizens who are state residents, see, for example, Markowitz, *supra* note 11, at 906–11; Burch Elias, *supra* note 11, at 734–48; Huntington, *supra* note 159, at 803–04; Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453, 1460–62 (1995).

161. On antidiscrimination laws, *see* Burch Elias, *supra* note 11, at 734. On noncitizen voting, *see supra* note 12. Other scholars have begun to point to the relative narrowness of scholarship on immigration federalism, noting that regulation of undocumented immigrants occurs outside of these areas of traditional focus. *See* Sarkar, *supra* note 56, at 1564–65 (noting focus in scholarship on state and federal law on "policing," "labor law," "higher education," "professional licensing,"

of measure tends to be duplicative of federal laws prohibiting alienage discrimination, and the latter is rare, existing in just a few cities in the United States.[162]

These trends are not an accident: Benefits and enforcement in particular have been focuses of federal immigration policy and politics over the past few decades.[163] Benefits became an area of intense state legislative activity in response to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), which both cut federal welfare benefits for immigrants and gave states power to deny other welfare benefits.[164] The passage of PRWORA precipitated a flurry of bills that in most cases aided immigrants by replacing retracted federal benefits with a state substitute.[165] More recently, immigrant rights advocates have campaigned hard—and, in many cases, successfully—to extend a variety of state benefits and programs to undocumented immigrants and other noncitizens, including college financial aid and coronavirus relief money.[166]

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"private humanitarian aid," and so-called "welfare benefits"). Though I would group these three areas of regulation into the categories of enforcement (policing), benefits (higher education, humanitarian aid, and welfare), and antidiscrimination (labor law and professional licensing), I share Sarkar's sense that the literature would benefit from taking a broader focus, perhaps by resisting the tendency to react purely to federal policy and to instead consider the possibilities that might exist outside of the framework the federal government sets.

162. *See supra* note 12.

163. *See* Peter J. Spiro, *Learning to Live With Immigration Federalism*, 29 CONN. L. REV. 1627, 1627–30 (1997) (noting dominance of federal control of immigration was virtually unchallenged for the twentieth century until the 1990s and the passage of PRWORA); *see also* Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 60 (noting "[a]nxieties over whether states would follow the federal government's lead in restricting public benefits for immigrants after [the federal government's] 1996 immigration reforms").

164. Pub. L. 104-193, 110 Stat. 2105; *see also* Schuck, *supra* note 163, at 60. PRWORA was itself triggered by increasing skepticism about immigrants' receipt of benefits at the state level, culminating in the 1994 passage of California's Proposition 187, which restricted undocumented immigrants from virtually all public benefits. Kathleen A. Connolly, Comment, *In Search of the American Dream: An Examination of Undocumented Students, In-State Tuition, and the Dream Act*, 55 CATH. U. L. REV. 193, 202 (2005).

165. One study found that in two years after PRWORA, twenty-eight states had passed legislation making immigrants eligible for at least one state benefits program, fifteen had passed legislation for at least two, ten had passed legislation for at least three, and two had passed legislation for four. WENDY ZIMMERMANN & KAREN C. TUMLIN, URB. INST., PATCHWORK POLICIES: STATE ASSISTANCE FOR IMMIGRANTS UNDER WELFARE REFORM 22–23 (1999), https://www.urban.org/sites/default/files/publication/69586/309007-Patchwork-Policies-State-Assistance-for-Immigrants-under-Welfare-Reform.PDF.

166. For instance, in 2020 and 2021, advocates won access to state relief funding to help undocumented people cope with the impacts of COVID-19 in several states, including New York, New Jersey, California, and Illinois. *See* Karen Yi, *NJ Finally Opens Applications For $40 Million Excluded Worker Fund*, GOTHAMIST (Oct. 28, 2021, 12:58 AM), https://gothamist.com/news/nj-finally-opens-applications-40-million-excluded-worker-fund; *Resources for Undocumented Immigrants and Their Families During COVID-19*, MY UNDOCUMENTED LIFE, https://mydocumentedlife.org/2020/03/30/resources-for-undocumented-immigrants-and-their-families-during-covid-19 (last updated Jan. 2021). Over years of campaigns, activists in several

State enforcement measures, meanwhile, have ebbed and flowed with federal immigration policy but also became much more common beginning in the 1990s. In 1996, Congress created the 287(g) program as part of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), allowing state and local police officers to collaborate with the federal government in enforcing immigration laws.[167] One year later, the Supreme Court affirmed the rights of states and localities to decline to participate in federal law enforcement activity with its decision in *Printz v. United States*.[168] These twin developments set the stage for state and local attempts to manipulate levels of immigration into states by engaging in or declining to participate in enforcement collaboration—for instance, by creating "sanctuary" states or cities where local law enforcement and other officials do not cooperate with ICE.[169] Most recently, states and local governments have passed a wave of sanctuary laws and regulations that forbid local law

states won access to state college financial aid for undocumented youth who are otherwise ineligible for federal funds. California, Colorado, Minnesota, New Mexico, Oregon, Texas, and Washington currently allow undocumented students to receive state financial aid thanks in great part to the work of these organizers. *See Undocumented Student Tuition: Overview*, NAT'L CONF. STATE LEGISLATURES (June 9, 2021), https://www.ncsl.org/research/education/undocumented-student-tuition-overview; Jacqueline Rabe Thomas et al., *Financial Aid for 'Dreamers' Becomes a Reality in Connecticut*, CT MIRROR (Apr. 25, 2018), https://ctmirror.org/2018/04/25/financial-aid-dreamers-becomes-reality-connecticut; *see also* Burch Elias, *supra* note 11, at 743–48.

167. Pub. L. 104-208, 110 Stat. 3009–546; *see also Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, ICE, https://www.ice.gov/287g (last updated Dec. 15, 2021).

168. 521 U.S. 898, 925–26 (1997). Though the *Printz* decision dealt directly with state non-cooperation in federal gun control efforts, the principle it stands for has been helpful to states resisting cooperation with federal immigration enforcement. *See* Hannah Michalove, Comment, *Expanding* Printz *in the Sanctuary City Debate*, 40 CAMPBELL L. REV. 237, 239–43 (2018); Ilya Somin, Opinion, *Federalism, the Constitution, and Sanctuary Cities*, WASH. POST (Nov. 26, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/26/federalism-the-constitution-and-sanctuary-cities. An action New York City brought immediately after IIRIRA to declare unconstitutional one provision promoting federal and local immigration enforcement cooperation relied heavily on the reasoning in *Printz* as grounds for striking down that portion of the law. *See* City of New York v. United States, 179 F.3d 29, 34 (2d Cir. 1999).

169. *See* HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 58–59, 72–76 (2014). For a broad overview of sanctuary jurisdiction policies in place across the country, see CONG. RSCH. SERV., R44795, "SANCTUARY" JURISDICTIONS: FEDERAL, STATE, AND LOCAL POLICIES AND RELATED LITIGATION (2019), https://fas.org/sgp/crs/homesec/R44795.pdf [hereinafter "SANCTUARY" JURISDICTIONS]. Other jurisdictions entered into agreements or passed measures to heighten and facilitate state cooperation with federal immigration enforcement or to indirectly discourage immigrants from staying in a jurisdiction. *See* Rodríguez, *supra* note 159, at 591–93. Perhaps the most infamous attempt to increase enforcement through state-federal cooperation, Arizona's S.B. 1070, was partially struck down on federal preemption grounds in *Arizona v. United States*, 567 U.S. 387 (2012), demonstrating that there are some limits on how far states can go, beyond what federal law itself requires, to promote more aggressive immigration enforcement. *See, e.g.*, *id.* at 401–10.

enforcement from cooperating with ICE,[170] while some immigrant-exclusionary jurisdictions have passed a wide array of housing, employment, benefits, and criminal laws designed to encourage immigrants to "self-deport."[171]

What is clear, looking back on this activity, is that immigration federalism has generally reacted to changes in federal law, like the passage of PRWORA and IIRIRA—not a surprise, given the federal government's plenary authority to regulate admission and removal and the way that authority ultimately structures all immigrants' relationships with this country.[172] It is understandable that, in a federal system, states and the people who study them would react to this federal focus. However, as Part I clearly demonstrates, states need not be limited in their thinking by what the federal government does.

Because so much of immigration federalism is reactive to federal law, it does not contest the federal paradigm for who is within the circle of concern, let alone for who possesses membership in the community of rights-holders. This paradigm is fundamentally territorially based. As our constitutional jurisprudence currently draws the line, noncitizens on the territory of the United States have some rights; noncitizens abroad, off of U.S. territory, go relatively unprotected, even from aggressive forms of infringement on their wellbeing, like targeted killings or indefinite detention (to take just two examples).[173] This principle, known in immigration law as the "territorial distinction,"[174] has since been constricted even further at the

170. *See generally* "SANCTUARY" JURISDICTIONS, *supra* note 169, at 11–14 (surveying sanctuary measures in a variety of jurisdictions).

171. For an authoritative historical summary of the concept of "self-deportation" as it emerged in recent years, see K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1880–82 (2019). Park defines "self-deportation" as the strategy of "mak[ing] individuals into agents of the state's goal of their removal by making their lives unbearable." *Id.* at 1882.

172. *See* Spiro, *supra* note 163, at 1628–30.

173. This is to some extent an oversimplification, as (for instance) scholars closely following the Guantanamo Military Commissions might argue. *See supra* note 16 (collecting Guantanamo habeas cases). However, the shades of nuance in these cases, while important in context, are orthogonal to my more general point about the overwhelming predominance in our constitutional jurisprudence of a territorial paradigm for allocating rights to noncitizens. This paradigm and the binary distinction it draws are well established. As Justice Murphy articulated the territorial distinction in *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring):

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution . . . . includ[ing] those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment.

174. *See* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 938 (1995).

margins[175] but continues to structure our constitutional immigration jurisprudence in a deep way.[176]

The territorial distinction is also visible—and in some ways more striking—in other areas of the law, where unlike in the immigration context it may run counter to our expectations. For example, in *United States v. Verdugo-Urquidez*,[177] the Supreme Court considered a constitutional challenge to the legality of a search and seizure brought by a Mexican citizen and resident who sought to suppress evidence brought into his U.S. trial for drug smuggling.[178] The defendant was a suspected narcotrafficker who was arrested in Mexico and brought to the United States for trial by the Drug Enforcement Agency ("DEA").[179] After receiving the permission of the Mexican government, but without obtaining a warrant, DEA agents searched the defendant's home and found what they believed to be records of drug shipments.[180]

Both the district court and Ninth Circuit agreed with the defendant that the Fourth Amendment required a warrant, given that Verdugo-Urquidez was subjected to a U.S. criminal trial, and ordered the evidence suppressed.[181] The Supreme Court reversed.[182] Analyzing the text of the Fourth Amendment, the Court looked to founding era sources to conclude that "it was never suggested that [the Fourth Amendment] was intended to restrain the actions of the Federal Government against aliens outside of the United States territory."[183] Though Verdugo-Urquidez was being criminally tried in a U.S. court and facing a lengthy sentence in this country, the Supreme Court

175. The Supreme Court's recent decision in *Department of Homeland Security v. Thuraissigiam* upheld the basic principle of not allocating rights to noncitizens outside of U.S. territory, but also purported to further narrow the group of rightsholders by insisting that a noncitizen who merely crosses a few feet beyond the U.S. border is not *sufficiently* on the territory to receive due process protections. 140 S. Ct. 1959, 1982–83 (2020). It is not hard to imagine the ambiguous dictum at the end of the opinion that offers this view leading to years of litigation over the precise geographical location within the territory where these rights inhere.

176. *See* Weisselberg, *supra* note 174, at 936–38. *Compare* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (granting lawful resident who had been traveling for several months due process protections after "assimilat[ing] [his] status to that of an alien continuously residing and physically present in the United States"), *with* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 158–59, 173–74 (1993) (permitting detention of Haitian asylum seekers at Guantanamo because they were intercepted on the high seas), *and* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (finding no due process floor in U.S. Constitution for the processing and award or denial of visas to noncitizens outside the U.S.), *and* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (same).

177. 494 U.S. 259 (1990).

178. *Id.* at 262–63.

179. *Id.* at 262.

180. *Id.* at 262–63.

181. *Id.* at 263.

182. *Id.* at 275.

183. *Id.* at 266–67.

found that even his territorial presence at trial and the heavy exercise of federal power over him did not create "sufficient connection with this country"—at least in the absence of other personal ties—to entitle him to Fourth Amendment protection from a search in Mexico.[184]

Though a criminal procedure case involving a federal drug smuggling prosecution, *Verdugo-Urquidez* is routinely discussed by immigration scholars interested in the deep structure of how the Constitution allocates rights to noncitizens because the territorial distinction is so clear.[185] Territoriality is the defining factor that mediates the defendant Verdugo-Urquidez's rights: Over pages and pages, the Court distinguishes nearly a dozen cases granting noncitizens constitutional protections on the grounds that "[t]hese cases . . . establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."[186] *Verdugo-Urquidez* is one of the clearest recent statements in all of U.S. constitutional law of the overriding importance of the territorial distinction in allocating rights.[187]

Ultimately, our constitutional immigration and alienage jurisprudence operates on the same principles articulated with such force in this criminal procedure case. Even most immigrants who enter without inspection have generally expected to receive some due process rights in removal

184. *Id.* at 265.

185. *See, e.g.*, GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 103–08 (2010) (situating *Verdugo-Urquidez* within broader debate over extraterritorial scope of both constitutional protections and the underlying moral obligations they reflect as they relate to noncitizens); D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 86, 92, 103 (2011) (analyzing *Verdugo-Urquidez*, counter to this Article, as "evidence of an emerging 'post-territorial' approach to membership," due to its reference to "sufficient connections"); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, *in* 3 SHARK INFESTED WATERS: PROCEDURAL DUE PROCESS IN CONSTITUTIONAL IMMIGRATION LAW 129, 177 (Gabriel J. Chin, Victor C. Romero & Michael A. Scaperlanda eds., 2000) (noting *Verdugo-Urquidez* as a relevant example of the Court "withholding constitutional protection from aliens even when the governmental conduct at issue is not an exercise of the federal immigration power").

186. *Verdugo-Urquidez*, 494 U.S. at 270–73.

187. A competitor would have to be the Court's infamous statement in *United States v. Curtiss-Wright Export Corp.* that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens." 299 U.S. 304, 318 (1936).

proceedings[188] and are entitled (at a minimum) to First,[189] Fourth,[190] Fifth,[191] Sixth,[192] and Fourteenth[193] Amendment protections while on U.S. soil. Meanwhile, would-be entrants outside the United States often are entitled to no more due process in immigration than federal agencies and their employees discretionarily give them[194]—nor, as *Verdugo-Urquidez* exemplifies, do they receive many other constitutional protections despite the U.S. government's rather frequent propensity to exercise its authority abroad.[195] This framework is not unique to immigration law. International law and national security law scholars well know that the same reasoning pervades both current and historical decisions determining the rights of

188. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."). *But see supra* note 175 (discussing *Thuraissigiam*'s dicta constricting the allocation of rights, so that entrants without inspection may now not be sufficiently *on the territory* if they just barely cross the border into the United States).

189. Bridges v. Wixon, 326 U.S. 135, 162 (1945) (Murphy, J., concurring).

190. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1044 (1984) (appearing to assume that some Fourth Amendment protections apply in a deportation proceeding, in an opinion that ultimately held respondent's Fourth Amendment rights were not violated).

191. Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931) (just compensation clause applies to noncitizens whose property the U.S. government expropriates); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (due process clause applies to protect noncitizens in the United States from arbitrary punishment).

192. *Wong Wing*, 163 U.S. at 238.

193. Plyler v. Doe, 457 U.S. 202, 211–12 (1982); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

194. Under the doctrine of consular non-reviewability, a noncitizen outside the territory of the United States has no judicially enforceable right to enter, such that many decisions by consular officials to deny a visa are not even subject to judicial review. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). The only exception occurs where the reason proffered for a denial is not "facially legitimate and bona fide." *See* Kleindienst v. Mandel, 408 U.S. 753, 770 (1972). The Court has since indicated that the bar for a facially legitimate and bona fide reason is low; a *pro forma* citation to a specific statutory provision as a reason for denial is enough. *See* Kerry v. Din, 576 U.S. 86, 102 (2015) (Kennedy, J., concurring).

195. For instance, it is perfectly permissible for the U.S. government to deny a person a visa based on statements they have made, whereas precisely that same speech would likely be protected by the First Amendment were the noncitizen located in the United States. *Compare Mandel*, 408 U.S. at 769–70 (refusing to review denial of visa to Marxist academic), *and* United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292–94 (1904) (authorizing denial of visa to British anarchist), *with* Bridges v. Wixon, 326 U.S. 135, 161–62 (1945) (Murphy, J., concurring) (holding First Amendment protected statements of Australian citizen and U.S. resident who was labor activist). That said, there are concerning indications that the First Amendment rights of even resident noncitizens are increasingly under attack as a matter of both constitutional law and government policy. *See* Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237, 1238–39 (2016).

defendants in military tribunals,[196] of Guantanamo detainees,[197] and of residents of U.S.-occupied possessions.[198] Of course, these decisions are framed in terms of "rights" because they involve protections (or the lack thereof) for noncitizens in a U.S. legal proceeding. But their translation to our concept of the "circle of concern" is straightforward: Substantive outcomes for noncitizens are of little concern to the United States when those noncitizens are not on our territory.

The territorial distinction is not unique to the United States but is pervasive throughout world legal systems. The way nations grant citizenship is one obvious example. Some nations, like the United States and nearly all countries in the Western Hemisphere, confer citizenship on virtually all people born on the territory of the state.[199] Other nations, including most in Europe and Asia and the majority in Africa, confer citizenship primarily through parentage rather than by "the law of the soil."[200] Even in the case of *jus sanguinis*, or "law of blood" countries, however, the right to citizenship is linked to originating on the land of a particular nation via the concept of ethnicity, which is almost always territorially mediated (even if in an ancient prehistory).[201]

196. Johnson v. Eisentrager, 339 U.S. 763, 767–68 (1950) (finding respondents not entitled to seek habeas relief because they were tried by military tribunal in a theater of war and never within the territorial jurisdiction of the United States).

197. Notably, the Supreme Court has found that Guantanamo detainees' right to seek habeas corpus is protected by the Suspension Clause. *See* Boumediene v. Bush, 553 U.S. 723, 771 (2008). The status of other constitutional protections is less certain and the subject of ongoing litigation in the D.C. Circuit, but it would be fair to say that they do not apply fulsomely to detainees. *See* Robert Loeb, *Due Process for Guantanamo Detainees: The D.C. Circuit Rules in Qassim*, LAWFARE (June 25, 2019, 4:09 PM), https://www.lawfareblog.com/due-process-guantanamo-detainees-dc-circuit-rules-qassim (describing ongoing back-and-forth on application of Fifth Amendment Due Process to Guantanamo detainees in the narrow case of their pursuit of habeas review).

198. *See, e.g.*, Balzac v. Porto Rico [sic], 258 U.S. 298, 304–05, 313 (1922) (finding no Sixth Amendment right to jury trial in Puerto Rico); Ocampo v. United States, 234 U.S. 91, 98 (1914) (finding no Fifth Amendment grand jury requirement in Philippines); Dorr v. United States, 195 U.S. 138, 143–46 (1904) (finding no right to jury trial in Philippines); Hawaii v. Mankichi, 190 U.S. 197, 203, 217–18 (1903) (finding no right to jury trial or indictment by grand jury in Hawaii). These decisions are collectively known as the *Insular Cases*. For an in-depth discussion of the debate over the extraterritoriality of the Constitution as it related to Puerto Rico, see generally Juan R. Torruella, *Ruling America's Colonies: The* Insular Cases, 32 YALE L. & POL'Y REV. 57 (2013).

199. *See* LIBR. OF CONG., LL FILE NO. 2018-017010, BIRTHRIGHT CITIZENSHIP AROUND THE WORLD 1–2, (2018) [herinafter BIRTHRIGHT CITIZENSHIP AROUND THE WORLD]; Katherine Culliton-González, *Born in the Americas: Birthright Citizenship and Human Rights*, 25 HARV. HUM. RTS. J. 127, 135–36 (2012) (listing laws establishing *jus soli* citizenship, most via constitutions, in the vast majority of countries in the Americas).

200. *See* BIRTHRIGHT CITIZENSHIP AROUND THE WORLD, *supra* note 199.

201. *See* DORA KOSTAKOPOULOU, THE FUTURE GOVERNANCE OF CITIZENSHIP 26–27 (2008). This is somewhat of an oversimplification of the world's patchwork of citizenship laws, which frequently combine elements of *jus sanguinis* and *jus soli*. While this Article is certainly indebted to and relies on a rich body of work on membership theory, a deep analysis and comparison of the nuances of the philosophical underpinnings of different countries' citizenship laws is outside its

Nor have the moral problems that the territorial distinction engenders escaped notice. Both human rights thinkers and democratic theorists—many of whom have much to say about the problems affecting migrants—have long been preoccupied with the overriding problem of how to make sovereigns treat all people whose lives they touch as within the circle of concern, often with a particular focus on those not in the political community or on the territory of the state. The idea that sovereigns should be accountable to those people who their actions touch is sometimes called the "all-affected principle,"[202] though similar concepts have been referred to under a variety of names.[203] In democratic theory, the all-affected principle is one response to what democratic theorists call the "boundary problem," or the question of how to draw the boundaries of the political community.[204] The concept of the boundary problem can illuminate current normative debates in legal scholarship and U.S. politics about how we set the limits of our political community, and, relatedly, how we decide when those who do not participate politically nonetheless should enjoy rights.[205] The normative commitments of immigrant inclusionists tend to align with the all-affected principle,[206]

scope. For a seminal analysis of the interplay of territorial and parentage-based theories of citizenship and the inequalities they engender in access to rights, see generally AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY (2009).

202. *See, e.g.*, Sofia Näsström, *The Challenge of the All-Affected Principle*, 59 POL. STUD. 116, 117 (2011).

203. Some version of this argument has been around since John Stuart Mill, but a classic recent articulation of this position is ROBERT A. DAHL, AFTER THE REVOLUTION?: AUTHORITY IN A GOOD SOCIETY 49–63 (1970). *See also* SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS 14 (2004) (characterizing all affected principle as extending "the *moral conversation*" around state action to all those touched by it "potentially extending to all of *humanity*"); IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 22–24 (2000) (characterizing inclusion of all affected by decisionmaking on equal terms as fundamental to deliberative models of democracy); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 450 (1996) (presuming inclusion of all affected by laws in their formulation as basic precondition of law's legitimacy). *See generally* Näsström, *supra* note 202 (addressing conditions under which the group of all affected people can be legitimately bounded and defined (that is, not by the group itself)).

204. *See, e.g.*, Näsström, *supra* note 202, at 116–17.

205. In this Article, we are not talking yet about including all affected people within the political community—merely about treating them as within the group whose substantive outcomes we care about. Yet many democratic theorists would suggest that inclusion in the political community is ultimately the only effective way to guarantee that people are also within the circle of concern.

206. One of the reasons to adopt the all-affected principle, according to some of its proponents, is that it can serve as a check on the tendency of government to oppress certain minority groups. *See, e.g.*, YOUNG, *supra* note 203, at 21–22. This concern will be more than familiar to people who have some exposure to both the immigrant rights movement in the United States and to human rights thinking. While human rights are concerned with the distribution of rights-holding rather than decision-making, for some human rights thinkers these ultimately may be two sides of the same coin. *See* CAROL C. GOULD, GLOBALIZING DEMOCRACY AND HUMAN RIGHTS 1–3 (2004). While an all-affected democracy is not necessary for the realization of human rights, some thinkers whose work is associated with the human rights movement, perhaps chief among them Hannah Arendt,

which suggests that a morally defensible boundary for the political community must include all persons affected by decision-making.[207]

This group of "all affected" people encompasses noncitizens on a country's territory. But also, and beyond this, it may include everyone from citizens of a foreign state that the country's military is occupying to people in developing nations who are affected by the country's greenhouse gas emissions—and, yes, former immigrants whom the country has subsequently deported but who retain close ties there.[208] The question of how to follow the moral intuition that all affected should receive some degree of say has been so vexing precisely because political membership and rights-holding in most nation-states, as in the United States, is linked in a deep way to territoriality.

U.S. immigration federalism rarely if ever directly engages with the territorial distinction and the universal system of inclusion and exclusion that it structures. Ultimately, the benefits and enforcement laws that have typified most immigration federalism do not trouble or undermine the territorial distinction that structures all rights-holding under federal law. An immigrant who is residing on the territory of a state may receive (or lose) benefits or be protected by (or exposed to) enforcement so long as they are living within state borders. These protections, however, do not follow them after they leave. A state's enforcement protections end as soon as an immigrant drives or walks across its border to its neighbor; and without state residence, the immigrant is not eligible for state benefits, just as any person making an interstate move would lose these benefits.

As Part I shows with specific examples of law and policy reforms that would enact citizenship federalism, there is nothing to stop states from more deeply interrogating the dominant model for drawing the circle of concern,

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have been preoccupied with the relationship between a minority group's lack of membership in a state's political community and the resulting lack of protection from depredations by both the state and third parties. *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 267–304 (1966); *see also* BENHABIB, *supra* note 203, at 49–64. The formal international human rights mechanisms were conceived precisely to provide a backstop beyond political membership as a safeguard to protect minority rights—minorities could seek recourse and protection within an extranational system—but their inadequacy as a safeguard has been a constant theme since their establishment and is continually invoked by critics today. *See* ARENDT, *supra*, at 270–304; *see also, e.g.*, ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW 1–8, 41–44 (2014) (describing failures by the international human rights framework and bodies to prevent atrocities, including in supposed human rights respecting countries, as grounds to declare the international human rights project defunct).

207. To some extent, though they seek to answer a similar question to membership theorists—whose work U.S. immigration scholars draw on more routinely—the most stalwart proponents of the all-affected principle are fundamentally at odds with membership theorists because they do not recognize any legitimate membership-based constraints on inclusion in decision-making. *See* BENHABIB, *supra* note 203, at 14–15; *see also* Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, *in* THEORIZING CITIZENSHIP 229 (Ronald Beiner ed., 1995).

208. Some democratic theorists have expressly addressed the rights of emigrants in the country of origin; deportees are in a similar posture. *See* Näsström, *supra* note 202, at 119.

attempting to protect individuals beyond their territory, or defining their own political community differently than federal constitutional law or federal policy define the nation's. Indeed, states that seek to contest federal power and federal policy—as many have in recent years—might deliberately seek to challenge the territorial distinction by engaging in citizenship federalism.

This Article is not the first to observe that states could articulate a different boundary for political membership in a way that would challenge the federal government and move the national conversation.[209] Yet generally, this conversation has been limited to the relatively straightforward proposals of noncitizen state citizenship and noncitizen voting, which explicitly extend membership in the state political community to people who are not citizens at the federal level.[210] These proposals are both more and less radical than those discussed in Part I of this Article: more so because they bluntly strike at our values around political membership by moving directly to the granting of state citizenship or voting rights, yet also less so because they do not challenge the territorial distinction or imagine how states could apply cosmopolitan values when allocating rights at the local level.

This Article demonstrates that a broader challenge from the states is possible. There are many ways to extend important civil rights to former immigrants not on the territory of the United States—people who in the eyes of the Federal Constitution are virtually "rights-less." By continuing to protect the property, parental rights, and access to proof of identity of deported people, states can begin to challenge the territorial distinction and entire paradigm that structures our approach to rights-holding. This shift in mindset about who is within the circle of concern could apply not only to immigration, but to other contexts that implicate global obligations and impacts, like the climate crisis.[211] Moving beyond territory, states might choose to make laws and policies that prioritize linkages and obligations based on family ties, property ties, or engagement with state institutions—as

209. Markowitz expressly frames his proposal for state citizenship for undocumented people in terms of its expressive effect and potential for spurring a conversation around values at the national level, writing:

> By declaring undocumented members of society to be citizens, states can express, in the most powerful political terms, their judgment that these individuals have become so integrated in, and so valuable to, our communities so as to warrant full political inclusion. If multiple states were to adopt such citizenship schemes, the power of such declarations could move our national conversation on immigration.

Markowitz, *supra* note 11, at 914; *see also* Peter J. Spiro, *Formalizing Local Citizenship*, 37 FORDHAM URB. L.J. 559, 560, 567 (2010).

210. *See supra* note 12.

211. A number of political theorists have taken environmental problems, and the difficulty of cabining their effects to individual nation-states, as important grounds to adopt a cosmopolitan view of justice that factors in people outside the territory of the state. *See, e.g.*, David Held, *Democracy and Globalization*, 3 GLOB. GOVERNANCE 251, 258–59 (1997).

the examples in this Article naturally suggest. Or they might choose still other criteria, such as historical relationships between the state's community and the communities of certain nations.[212] Moreover, states can begin practicing citizenship federalism by adopting measures that advocates can easily connect to the separated families narrative and other recognized symbols of the moral harm in our immigration system.

The legal reforms I have proposed in Part I may seem small, specific, and particularized, rather than expressive of the need for fundamental change to the immigration system or to our beliefs about the appropriate scope of the circle of concern. But as part of a coordinated advocacy strategy, these reforms have the potential to deeply interrogate our values regarding who has a right to have rights, for the reasons discussed in this Section. Moreover, the proposals in Part I and other ideas like them offer opportunities for organizing and dialogue at a grassroots level, where social movement history shows it is often easiest to begin the process of a transformative paradigmatic shift.

### *B. Citizenship Federalism: Redefining the Subject of Rights*

This Section takes a step back to evaluate both the practical applications of citizenship federalism[213] and its significance for legal scholars of immigration, international migration, and federalism.[214]

#### *1. The Activist's or Policymaker's Perspective*

Since the 2016 election, immigrant rights organizations have increased resources to states and cities,[215] and have taken advantage of strong local organizing and increased public sympathy to achieve significant wins at the state, local,[216] and even national levels, including the 2020 Supreme Court decision upholding Deferred Action for Childhood Arrivals ("DACA").[217]

212. Certain states do have a link to particular nations or diasporic communities. For instance, Texas and California have a long history of deep ties to Mexico, while Louisiana has ties to the Francophone diaspora and a number of states have especially strong ties to the Black diaspora from Africa.

213. *See infra* Section II.B.1.

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

215. RANDY CAPPS ET AL., MIGRATION POL'Y INST., REVVING UP THE DEPORTATION MACHINERY: ENFORCEMENT AND PUSHBACK UNDER TRUMP 4 (2018), https://www.migrationpolicy.org/sites/default/files/publications/ImmigrationEnforcement-FullReport_FINALWEB.pdf.

216. *See, e.g.*, *id.* at 57–61, 64–66 (chronicling wide variety of post-Trump state and local reforms and non-cooperation policies, including sanctuary policies, legal representation programs and efforts to curtail the expansion of immigration detention, all of which have significantly hampered federal immigration enforcement).

217. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2020); *see also* Rabe Thomas et al., *supra* note 166.

Unlike two decades ago, when the immigrant rights movement first began to engage systematically with state-level advocacy, today the mainstream of the movement is asking for transformative, systemic change to the U.S. immigration system, and urging state policymakers to support this goal.[218] Some policymakers, for their part, have proven increasingly willing to accept this challenge and throw their support behind inclusionary state-law proposals.

Citizenship federalism naturally lends itself to a grassroots, local advocacy strategy that could be particularly effective for shifting the deeply held worldviews of individual voters. This advocacy might look different than most current state-level immigration work. For instance, current advocacy often focuses on families that are at risk of being permanently separated.[219] By contrast, advocacy centered on citizenship federalism might focus on organizing and telling the stories of the families of deported people, and deported people themselves, leading advocates to take on some transnational organizing work.

The immigrant rights movement might choose to deploy citizenship federalism, and this grassroots-focused strategy, for four reasons. First, and most obviously, citizenship federalism can help change the public's view of which noncitizens fall within our circle of concern, in both the immigration context and more broadly.

Second, because it highlights the rights and claims of deported former community members, citizenship federalism can help call into question the legitimacy of deportation, even as it works practically to extend rights to people with close community ties. Citizenship federalism calls attention to the ways that former immigrants are inextricably linked to our communities and our society in the United States. In so doing, it asks us to consider whether future deportations are justifiable or socially beneficial.

Third, over the long term, advocates who engage with citizenship federalism could create advocacy momentum for a "right to return" to the

218. The level of ambition is reflected in the platform that immigration advocacy group United We Dream and its allied organizations put forth in the Democratic primary. The "Free to Move, Free to Stay" platform proposes (1) legislation that creates a pathway to citizenship without additional funding for enforcement, a rejection of recent legislation that conditioned legalization on enforcement; (2) a 100-day moratorium on all deportations; (3) closure of all immigration detention facilities within 100 days; (4) defunding and dismantling of ICE and CBP; and (5) restructuring of the visa system to better serve the needs of families and communities. *See Free to Move, Free to Stay: A New Framework on Immigration for Progressives*, UNITED WE DREAM ACTION, https://unitedwedreamaction.org/framework-2020 (last visited Aug. 4, 2020).

219. For instance, many state and local advocates have focused largely on ending the use of immigration detention and on stopping the detention and deportation of individual community members. While these are worthy advocacy battles, they primarily center around people and families who have not yet been deported, as opposed to those that have already experienced deportation.

United States for deported former immigrants. At this point, the possibility of rejoining their loved ones in the United States is remote for many deported people.[220] Increasingly, however, political momentum is gathering for the idea that some deported former immigrants should be able to return. In 2021, for the first time, United We Dream included in its policy platform a demand that deported people be allowed to return to the United States.[221] Shortly thereafter, the Biden Administration began allowing a small number of families who were separated at the border to reunify in the United States,[222] and announced that it would create a review process to potentially reverse select deportations, including those of veterans.[223] Though this individualized review process stops short of a generalized right,[224] a window may have opened to make a right to return politically viable. To continue moving this concept into the mainstream, advocates could begin a conversation at the grassroots level about the lives, challenges, and rights of these deported loved ones, just as the marriage equality movement managed a transformative shift in the way Americans viewed marriage by starting with messaging and advocacy to change local views.[225]

Fourth and finally, citizenship federalism offers a way to begin thinking and organizing at the grassroots level across borders around broader issues of global justice that have become complicated to broach in an environment

220. In the U.S. context, creating a "right to return" that goes beyond the review of individual deportations might involve, for instance, enacting legislation to modify, eliminate, or expand waivers for the three-, five-, and ten-year unlawful presence bars to reentry, the permanent criminal and immigration violation bars, and related restrictions on admission to the United States to allow for the readmission of some previously deported people. It might also require re-envisioning how we prioritize new migration to privilege people with the strongest family and social ties to the United States. As this concept becomes increasingly politically salient, further development of the legal changes that would have to occur to enact a right to return may be warranted. *See* CALDWELL, *supra* note 6, at 186–88 (pointing to need for legislative reforms to allow some deported immigrants to return to United States).

221. *Protect Immigrants Now!*, UNITED WE DREAM, https://unitedwedream.org/protect-immigrants-now/#demands (last visited Jan. 23, 2021) (listing organization's demands for the first 100 days of the Biden Administration).

222. Miriam Jordan, *Migrants Separated from Their Children Will Be Allowed into U.S.*, N.Y. TIMES (July 27, 2021), https://www.nytimes.com/2021/05/03/us/migrant-family-separation.html.

223. Julia Preston, *They Were Deported by Trump. Now Biden Wants to Bring Them Back.*, POLITICO (June 29, 2021, 4:30 AM), https://www.politico.com/news/magazine/2021/06/29/trump-deported-immigrants-biden-return-496786.

224. The concept has some way to go politically. For instance, a right to return was not in the expansive immigration bill that the Biden Administration sent to Congress when it took office. *Factbox: What's in Biden's Immigration Bill Proposal?*, REUTERS (Jan. 20, 2021), https://www.reuters.com/article/us-usa-biden-immigration-bill-factbox/factbox-whats-in-bidens-immigration-bill-proposal-idUSKBN29P27G.

225. For a detailed account of how the marriage equality movement used various grassroots advocacy strategies to win state-level changes, and ultimately create national momentum, see MARC SOLOMON, WINNING MARRIAGE: THE INSIDE STORY OF HOW SAME-SEX COUPLES TOOK ON THE POLITICIANS AND PUNDITS—AND WON (2014).

of increasing nationalism worldwide. To take just one example, there are obvious differences between the group of former immigrants in particular, and all would-be migrants generally. Nonetheless, transnational organizing with former immigrants offers one possibility for supporters of the broader rights to migrate and to move as they seek to follow the example of the U.S. immigrant youth movement and build coalitions of affected people.

Despite the recent change in presidential administration, the road to deep and lasting change in our immigration system is long.[226] Incorporating the perspective of citizenship federalism as they set state and local advocacy priorities is one way advocates can gain tangible wins for a group of people with deep moral claims on the United States, while spurring us to ask profound questions about how we wish to define our local and national communities.

### *2. Implications for Immigration, Migration, and Federalism Scholars*

#### *Immigration and Migration*

While immigration advocates have ambitious but clear goals for the Biden Administration, immigration scholars may find themselves at a crossroads, asking, "what's next?" Four years of ugly legal conflict over DACA and dozens of other immigration policies[227] have cast some shadow on the strategic centrality of constitutional impact litigation and executive actions to attempt to shape our nation's immigration system. Though attorneys and impact litigators have clearly helped avert or delay harm to many immigrants since 2016, the past decade of constitutional litigation over immigrant rights has yielded a mixed record.[228] While scholars continue to

226. *See* United We Dream (@UNITEDWEDREAM), TWITTER (June 18, 2020, 10:30 AM), https://twitter.com/UNITEDWEDREAM/status/1273624163937386496 ("We won at the Supreme Court — #DACA is here to stay! Today we celebrate & tomorrow we will continue to fight b/c Trump's attacks on the immigrant community must end."); Sunrise Movement (@sunrisemvmt), TWITTER (June 22, 2020, 11:28 AM), https://twitter.com/sunrisemvmt/status/1275088205340119050 ("DACA stays, for now, but the fight isn't over."); *see also* Nicole Narea, *The Supreme Court Kept DACA Alive – for Now. DREAMers Still Face a Long Road Ahead.*, VOX (June 19, 2020, 10:00 AM), https://www.vox.com/2020/6/19/21295528/supreme-court-daca-trump-congress-dream-act (noting that legislative fix for Dreamers is necessary and the most durable pathway to status).

227. *See* MICHAEL A. OLIVAS, PERCHANCE TO DREAM: A LEGAL AND POLITICAL HISTORY OF THE DREAM ACT AND DACA 92–107 (2020) (describing litigation over validity of DACA and using example of professional licensing to demonstrate how it has thrown many aspects of Dreamers' lives into confusion); *see also id.* at 108–16 (describing Trump Administration rescission of DACA and the complicated background against which legal challenges ensued).

228. *See id.*; Shoba Sivaprasad Wadhia, *Immigration Litigation in the Time of Trump*, 53 U.C. DAVIS L. REV. ONLINE 121, 122–26, 128–29, 130–34, 138 (2019), https://lawreview.law.ucdavis.edu/online/53/53-online-wadhia.html (detailing the mixed track

produce valuable, important work that proposes or refines legal theories consistent with these pathways to law reform, new ways of engaging with immigration law in U.S. legal scholarship are warranted.

Hiroshi Motomura, surveying the current state of immigration scholarship, has recently declared that "[o]nce every generation or so, entire fields of law require a full reset," and argued that the time has come for immigration law scholarship.[229] This Article has attempted to answer this call in two ways: (1) by asking how we can use or mold immigration law not just to win cases or create programs, but to shape immigration discourse and policy;[230] and (2) by placing our immigration system in a transnational perspective.[231]

Each of these two moves has potential value to invigorate immigration scholarship. As the Introduction to this Article notes, the first move—asking how immigration law can be used to shape immigration discourse, policy, and values—is at this moment an urgent one.

While questions of identity, race, and community belonging have always been a key point of contention in U.S. politics, there are signs that a political realignment is occurring that may make them the central axis of dispute between the two political parties. As some Republicans move closer to Democrats on economic and social policy, the likelihood increases that they will distinguish themselves through a focus on identity politics, and specifically immigration. For several decades, Republicans and Democrats contested economic as well as identity issues, with Republicans advancing a set of corporatist, anti-welfarist, and pro-business positions that included lowering tax rates, shrinking the social safety net, and reducing the size of

record of victories and defeats for immigration impact litigators bringing constitutional and administrative challenges to Trump Administration policies, including litigation over the Muslim Ban (which the Supreme Court allowed to stand), Remain in Mexico (which is currently still in place), and the rescission of DACA (which immigrant advocates won on administrative and lost on equal protection grounds), and concluding that "the courts will not save us" and "the Constitution has not always been the legal 'hook' for successful litigation").

229. Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 458 (2020).

230. Given this Article's focus on the relationship of legal scholarship (in this case, immigration scholarship) to the goals of social movements to drive transformative change, it arguably fits within the developing body of scholarship that Amna Akbar, Sameer Ashar, and Jocelyn Simonson have termed "Movement Law." *See* Amna A. Akbar et al., *Movement Law*, 73 STAN. L. REV. 821, 821–22 (2021).

231. Such a transnational outlook is still relatively rare in U.S. immigration legal scholarship, though some scholars have taken this approach. For a partial sampling, see, for example, Motomura, *supra* note 229, at 499–517 (engaging with both human rights and development); E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1510 (2019) (applying normative insights from postcolonial theory and third-world approaches to international law); Daniel Kanstroom, *The "Right to Remain Here" as an Evolving Component of Global Refugee Protection: Current Initiatives and Critical Questions*, 5 J. ON MIGRATION & HUM. SEC. 614, 617–18 (2017) (considering relationship to human rights discourse).

government.[232] Particularly since 2016, however, Republican economic rhetoric has become more heterodox. Many of the party's most prominent figures (and likely 2024 presidential candidates) have embraced some economic ideas usually associated with progressives.[233] In rhetoric and to a certain extent in policy, they are mirroring their colleagues on the left by attacking large technology companies[234] and other corporations[235] and expressing support for increased social spending.[236] Perhaps the signal figure of this realignment is Missouri Senator and presidential aspirant Josh Hawley, who has gained nationwide attention both for his alignment with progressive Democrats on certain economic issues, like pandemic cash

232. Republicans' previous economic approach is exemplified by the 1994 Contract with America, an electoral platform issued by Newt Gingrich and congressional Republicans that committed the party to cutting government benefits and taxes and to slowing the creation of new government regulations. *See* Republican Nat'l Comm., *Republican Contract with America*, TEACHING AM. HIST. (Sept. 27, 1994), https://teachingamericanhistory.org/document/republican-contract-with-america/; *see also* Jeffrey B. Gaynor, *The Contract with America: Implementing New Ideas in the U.S.*, *in* THE HERITAGE FOUND., THE HERITAGE LECTURES (1995), http://s3.amazonaws.com/thf_media/1995/pdf/hl549.pdf. The Contract with America drew on economic ideas associated with the conservative wing of the party and the presidency of Ronald Reagan, and Republicans' congressional victory in the year's elections ratified these views, helping to cement them as party orthodoxy for many years to come. For an accounting of this narrative, see, for example, John Steele Gordon, *Time for a New Contract With America*, AM. ENTER. INST. (May 16, 2014), https://www.aei.org/articles/time-for-a-new-contract-with-america/. Until relatively recently, the ideas represented in the Contract With America were still the economic platform of the vast majority of congressional Republicans, but since 2016, this consensus has begun to dissipate. Compare, for instance, intense Republican opposition to the Obama Administration's 2008–2009 economic bailout plans to Republican cooperation in President Trump's coronavirus stimulus packages in 2020.

233. Among those likely candidates most associated with economic populism, at least rhetorically, are Josh Hawley, Marco Rubio, and Tom Cotton. *See, e.g.*, Justin H. Vassallo, *Populism After Trump*, AM. PROSPECT (Aug. 26, 2020), https://prospect.org/politics/populism-after-trump-josh-hawley/.

234. *See, e.g.*, Dana Mattioli & Ryan Tracy, *House Bills Seek to Break Up Amazon and Other Big Tech Companies*, WALL ST. J. (June 11, 2021), https://www.wsj.com/articles/amazon-other-tech-giants-could-be-forced-to-shed-assets-under-house-bill-11623423248; David McCabe, *Seven House Republicans Pledge to Take No Donations from Major Tech Companies.*, N.Y. TIMES (Apr. 21, 2021), https://www.nytimes.com/2021/04/21/technology/republican-lawmakers-big-tech.html.

235. Increasingly, some Trump-aligned Republicans have carved out a broader anti-corporate position, asserting that conservatives are being targeted by companies that have taken positions on voting rights and other political issues. *See* Brian Schwartz, *GOP Donors, Leaders Discussed Plans to Take on Big Tech, Corporations During Retreat at Trump's Mar-a-Lago*, CNBC (Apr. 14, 2021, 12:09 PM), https://www.cnbc.com/2021/04/13/gop-donors-lawmakers-plot-next-attacks-on-corporate-america-big-tech-.html.

236. *See* Sahil Kapur & Allan Smith, *The GOP Is Having a Change of Heart on Economics. It Could Have Implications for Policymaking*, NBC NEWS (Mar. 7, 2021, 5:00 AM), https://www.nbcnews.com/politics/congress/gop-having-change-heart-economics-it-could-have-implications-policymaking-n1258863 (describing leftward shift by Republican Party on economic issues, including usually conventional Senator Mitt Romney's championing of an effort to expand the child tax credit and raise the minimum wage).

relief,[237] and for his expressions of support for the right-wing mob that stormed the U.S. Capitol on January 6, 2021.[238]

These developments may inflame political conflict over immigration in two ways. First, as some conservative politicians warm to the idea that government should increase social spending, conflict over which communities are the proper target of that spending may increase.[239] Second, when distinctions between the two parties on economic issues erode, electoral battles may increasingly shift to other terrain,[240] and issues of identity and belonging are primed to become the focus of intense dispute.[241] Whatever the reason, immigrants will be trapped in the middle of these political fights. Immigration scholarship urgently needs to account not only for the ways that legal developments and legal theories can reform or transform components of our immigration system, but for the ways immigration law can shape our underlying conception of who is within our circle of concern and mold the realm of the politically possible. This task is particularly urgent because of the role immigration law can potentially play

237. *See, e.g.*, Lorie Konish, *Sens. Bernie Sanders and Josh Hawley Team Up in Push for Second $1,200 Stimulus Checks*, BERNIE SANDERS: U.S. SENATOR FOR VT. (Dec. 11, 2020), https://www.sanders.senate.gov/in-the-news/sens-bernie-sanders-and-josh-hawley-team-up-in-push-for-second-1200-stimulus-checks/.

238. A photo of Hawley with his fist raised in a defiant salute to the mob that later overwhelmed the Capitol on January 6 has become perhaps the defining image of some congressional Republicans' perceived sympathy with the attackers, who were motivated by President Trump's false claims of election fraud. *See* Katie Bernard, *A Photographer and a Fist Pump. The Story Behind the Image That Will Haunt Josh Hawley*, KAN. CITY STAR (Feb. 3, 2021, 11:54 AM), https://www.kansascity.com/news/politics-government/article248354085.html.

239. This would be consistent with a broader dynamic on the political right that political scientists in Europe have named "welfare chauvinism." Welfare chauvinism describes a policy stance that supports both a robust social safety net and restricted access to this safety net along racial, ethnic, or national lines. *See* Zoe Lefkofridi & Elie Michel, *The Electoral Politics of Solidarity: The Welfare Agendas of Radical Right Parties*, *in* THE STRAINS OF COMMITMENT: THE POLITICAL SOURCES OF SOLIDARITY IN DIVERSE SOCIETIES 233–35 (Keith Banting & Will Kymlicka eds., 2017) (surveying radical right parties across Europe, and finding that over time most reframed their economic platforms to support welfare benefits but oppose their extension to immigrants). Welfare chauvinism in Europe often comes coupled with extreme hostility to immigrants, as exemplified by the platforms of right-wing European parties like Alternative for Germany.

240. A traditional (and sometimes challenged) view of partisan change in political science suggests that as parties become less polarized on certain issues, they become more polarized on others, a process known as "conflict displacement." *See, e.g.*, JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES 13 (1983). In this view, as both the Republican and Democratic parties become increasingly heterodox on economic issues, they ought to become more polarized and more active in contesting other areas.

241. This phenomenon is already occurring, as political polarization over race and immigration increases—interestingly, due to Democrats' attitudes toward immigration becoming more positive while Republicans' remain the same. *See* Michael Hout & Christopher Maggio, *Immigration, Race & Political Polarization*, DÆDALUS, Spring 2021, at 40, 41–42.

in deescalating political conflicts over the boundaries of national community, just as much as it has served to reinforce and deepen these conflicts in the past.

Contextualizing the U.S. immigration system, including its subnational components, within a system of global rights and transnational relationships—as citizenship federalism pushes us to do—may also create space for conversations, and ultimately action, to connect the United States to debates around the need for and structure of a "global mobility" system.[242] Placing deportation—or chosen departure—from the United States in the broader context of an individual's lifelong mobility trajectory can help reorient our perspective, asking us to see the United States as merely one option within an entire world of potential destinations for migrants. A more widespread engagement with cosmopolitan currents may push us to look past myths of American immigration exceptionalism[243] that have arguably blinded us to the actual needs, values, and preferences of migrants within the immigration system. For instance, the same American exceptionalism implicit in criticized concepts like earned citizenship[244] can arguably also be discerned in the views of advocates who see the widespread achievement of U.S. citizenship for all immigrants (as opposed to, say, rock-solid protections for migrant labor and unlimited freedom of movement) as the only relevant goal of immigration reform.

*For Federalism Scholars*

Citizenship federalism may interest federalism scholars as well as immigration scholars for two reasons. First, citizenship federalism places emphasis on the expressive and morally normative dimensions of state policymaking as it counter-defines itself against federal law and policy. When it practices citizenship federalism, the state uses policy as an

242. Recent scholarship emerging initially from the refugee protection context has used the concept of "global mobility" to reflect a need for a global system of migration governance that attends to the needs of migrants outside traditional refugee protection categories. *See, e.g.*, Thomas Spijkerboer, *The Global Mobility Infrastructure: Reconceptualizing the Externalisation of Migration Control*, 20 EUR. J. MIGRATION & L. 452, 454, 464–67 (2018) (discussing global mobility and the rights of migrants without differentiating refugees from other categories of migrants); T. Alexander Aleinikoff, *Toward a Global System of Human Mobility: Three Thoughts*, 111 AM. J. INT'L L. UNBOUND 24, 25 (2017) (arguing for use of "mobility" terminology broad enough to encompass movement of peoples beyond individuals entitled to refugee protection).

243. *See generally* KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS (2004) (providing a corrective to exceptionalist narratives by demonstrating the ways that U.S. immigration law has at various times excluded the poor, people of color, and LGBT people, among others).

244. *See* Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L. L. REV. 257, 279–86 (2017) (discussing earned citizenship in the United States as both a desirable benefit attained by performing "worthiness" and as a process of assimilation into a presumably desirable cultural community).

expressive tool for engaging in debate over the values embedded in national law and policy. In highlighting this capacity of states, citizenship federalism surfaces the potential of federalist systems to serve as sites of contestation and discourse between sovereigns not just over policy preferences,[245] but over underlying values and norms, particularly those that define the boundaries of community. Though a more extensive exploration of this phenomenon is beyond the scope of the Article, interested federalism scholars will find numerous examples of this type of expressive and normative contestation between state and federal government in the history of the Trump Administration and state reactions to its policies.

Second, citizenship federalism may generate new phenomena of interest to scholars of foreign affairs federalism, who are already well aware of the relevance of immigration federalism to their work.[246] Citizenship federalism, if put into practice, has the potential to generate significant state intervention and interaction in the transnational arena. For example, as proposed in Part I, states that engage in citizenship federalism may increase their collaboration with child welfare agencies[247] or migrant-receiving agencies[248] in major migrant-sending countries. This subnational collaboration may have significant tangible benefits for both former and future immigrants to the United States. On the theoretical side, it could also incrementally complicate the status quo of federal supremacy in foreign affairs, using some of the areas of regulation most clearly reserved to the states as a point of entry to transnationally expand state action.

## CONCLUSION

The deep challenges posed by our fractures over national belonging also contain opportunities. They give us a chance to re-envision how our immigration system—both as a freestanding entity and as one node in the global movement of peoples—might more justly and more abundantly serve migrants, their families, our society, and the world. In elaborating the concept of citizenship federalism, this Article bridges the gap between a set of plausible legal reforms and a shift in the territorial paradigm for who is within our circle of concern. By so doing, it offers a path forward for

245. This feature of federalist systems was explored in Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

246. *See, e.g.*, Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723, 724–26 (2013) (noting federalism and preemption arguments against Arizona S.B. 1070 and the relevance of the decision to foreign affairs federalism); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 81–162 (2002) (discussing historical state immigration regulation).

247. *See supra* text accompanying notes 147–148.

248. *See supra* text accompanying notes 86–89, 96–98.

rethinking our current territory-based conception of community, if we choose to do so.

The open conflict we are having today about who is within our American community is frightening and demoralizing, at times calling into question the strength of our democratic institutions. At the same time, this open conflict has surfaced longstanding issues of societal inclusion that we must address. By thinking expansively about the ways law structures, and can restructure, our American community, we can create space to re-envision what the boundaries of that community should be.