

UNDOCUMENTED NO MORE: THE POWER OF STATE CITIZENSHIP

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An estimated eleven million undocumented immigrants live in the United States. These individuals have become integral members of American families and vital components of the American economy. Yet repeated efforts to meaningfully reform the nation's immigration laws—to more fully integrate these individuals into American society—have failed to garner sufficient political support in Congress. The prospects for significant congressional action on immigration reform remain bleak into the foreseeable future as our nation's debate on immigration has been warped by powerful, but largely inaccurate, themes of criminality, lax border enforcement, and national security threats. These themes have been crafted and cemented in large part by aggressive restrictionist state immigration laws in states like Arizona and Alabama. Until recently, integrationists have failed to similarly capitalize on the power of states to shape both the nation's policies and, perhaps more importantly, the nation's discourse on immigration. Recently, however, immigrant advocates have begun looking to the power of inclusive state citizenship schemes to reorient our nation's immigration conversation.

This Article explores the outer boundaries of state power to promote the integration of immigrants and to reorient the nation's conversation around more accurate and helpful themes of family, democracy, and economic vitality. Specifically, I explore the constitutional power of states to extend state citizenship to undocumented immigrants. This Article argues that the federalist structure enshrined in the Constitution and in the prevailing interpretations of the Fourteenth Amendment leaves untouched the historic power of the states to define the boundaries of their own political communities more generously than the federal

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government. In addition, this Article argues that such state citizenship schemes could deliver substantial tangible support for the integration of undocumented immigrants through traditional levers of state power: granting state political rights, granting access to state programs and benefits, and granting state protections against discrimination and mistreatment. Perhaps most importantly, state citizenship could be a powerful expressive tool for states to reorient our national conversation on immigration in ways that may, in the long term, be key to unlocking substantial federal reform.

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INTRODUCTION

In many ways, the regulation of immigration is a quintessential federal function. Developing a uniform national scheme that dictates who may enter the United States, who must leave, and who may become a national citizen is a power exclusively reserved to the federal government.¹ However, if there is one thing in the immigration debate that observers across the political spectrum agree upon, it is that the federal immigration system is badly broken and that the federal government seems unable to remedy the problems. Despite repeated and concerted efforts at the federal level, Congress has been unable to pass meaningful immigration reform legislation through these early years of the

1. See *infra* Part II.B.

twenty-first century.² Meanwhile, the consequences of our broken immigration system are felt most acutely in local and state communities, where immigrants live.

While Congress has been unable to act on immigration in the last decade, there has been an explosion of legislative activity on a wide variety of immigration issues in statehouses across the nation.³ Most notably, as part of an explicit strategy developed by a small group of conservative legal thinkers, restrictionists have obtained popular support for state laws aimed at ridding communities of unwanted immigrants.⁴ I use the term “restrictionist” throughout this Article to refer to individuals who see enforcement, the expulsion of undocumented immigrants, and the restriction of future immigration as the primary solutions to our current immigration crisis. Restrictionist laws—of which Arizona’s Senate Bill 1070 (S.B. 1070) is the most well known⁵—generally seek to empower state officials to directly enforce federal immigration laws,⁶ or seek to advance an “attrition through enforcement”⁷ strategy, cut-

2. See, e.g., Seung Min Kim & Jennifer Epstein, *Obama: GOP Failed to Pass a ‘Darn’ Immigration Bill*, POLITICO (June 30, 2014, 2:23 PM EDT), <http://politi.co/1nZDcur>; Ashley Parker, *Bleak Prognosis from Both Sides of Aisle in House for Immigration Overhaul*, N.Y. TIMES (June 26, 2014), <http://www.nytimes.com/2014/06/27/us/politics/on-both-sides-of-aisle-the-houses-hopes-fade-for-an-immigration-overhaul.html>; Robert Pear & Carl Hulse, *Immigration Bill Fails to Survive Senate Vote*, N.Y. TIMES (June 28, 2007), <http://www.nytimes.com/2007/06/28/washington/28cnd-immig.html>; Shankar Vedantam, *DREAM Act Defeat Reveals Failed Strategy*, WASH. POST (Dec. 19, 2010), <http://wapo.st/1vjhryf>.

3. See LAUREEN LAGLAGARON ET AL., MIGRATION POLICY INST., REGULATING IMMIGRATION AT THE STATE LEVEL: HIGHLIGHTS FROM THE DATABASE OF 2007 STATE IMMIGRATION LEGISLATION AND THE METHODOLOGY 3 (2008), available at <http://www.migrationpolicy.org/pubs/2007methodology.pdf>; see also *State Laws Related to Immigration and Immigrants*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/immigration/state-laws-related-to-immigration-and-immigrants.aspx> (last updated Jan. 7, 2015) (containing annual reports on state immigration bills from 2005 through 2014).

4. See S. POVERTY LAW CTR., WHEN MR. KOBACH COMES TO TOWN: NATIVIST LAWS AND THE COMMUNITIES THEY DAMAGE 5 (2011), available at <http://www.splcenter.org/get-informed/publications/when-mr-kobach-comes-to-town>; Alan Greenblatt, *Kris Kobach Tackles Illegal Immigration*, GOVERNING (Mar. 2012), <http://www.governing.com/topics/politics/gov-kris-kobach-tackles-illegal-immigration.html>; Heather Mac Donald, *Seeing Today’s Immigrants Straight*, CITY J. (Summer 2006), http://www.city-journal.org/html/16_3_immigration_reform.html; Manuel Roig-Franzia, *Mark Krikorian: The Provocateur Standing in the Way of Immigration Reform*, WASH. POST (June 17, 2013), <http://wapo.st/1g9KiNI>.

5. Support Our Law Enforcement and State Neighborhoods Act, S. 1070, 49th Leg., 2d Reg. Sess., ch. 113, 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of Ariz. Rev. Stat. Ann.). Most provisions of this statute were struck down by the Supreme Court in *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012).

6. See, e.g., ALA. CODE § 31-13-12 (2014) (empowering state officers to arrest individuals suspected of being deportable); ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2015) (same); IND. CODE § 35-33-1-1(a)(12)-(13) (2014) (same).

7. See, e.g., Ariz. S. 1070 § 1 (describing the legislature’s intent to “make attrition through enforcement the public policy of all state and local government agencies in Arizona”).

ting off or encumbering basic necessities of life in order to encourage noncitizens to either “self-deport”⁸ or at least leave the state.⁹

Integrationists have also turned to statehouses in recent years¹⁰ to advance their own immigration agendas, enacting laws providing driver’s licenses,¹¹ identification cards,¹² and in-state tuition¹³ to undocumented immigrants.¹⁴ I

8. Former governor and presidential candidate Mitt Romney explained that the concept of self-deportation involves making it harder for undocumented immigrants to obtain employment so they would “self-deport” to another place where they could obtain employment. Lucy Madison, *Romney on Immigration: I’m for “Self-Deportation,”* CBS NEWS (Jan. 24, 2012, 12:44 AM), <http://www.cbsnews.com/news/romney-on-immigration-im-for-self-deportation>.

9. *Arizona’s Controversial Law Scaring Away Immigrants, Police Chief Says*, FOX NEWS LATINO (Aug. 13, 2014), <http://latino.foxnews.com/latino/politics/2014/08/12/arizona-police-chief-aim-sb1070-was-scaring-immigrants> (“The Tucson police said Arizona’s controversial SB1070 immigration law was designed to make the immigrant community afraid of law enforcement authorities and leave the state.”).

10. There was an earlier wave of integrationist subfederal immigration campaigns in the twentieth century, as progressive jurisdictions took various steps to establish themselves as “sanctuaries” for undocumented immigrants. See Keith Aoki et al., *(In)visible Cities: Three Local Government Models and Immigration Regulation*, 10 OR. REV. INT’L L. 453, 491-93 (2009); Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Policies & Immigration Federalism: A Dialectic Analysis*, 55 WAYNE L. REV. 1683, 1683-84 (2009); Peter Skerry, *Many Borders to Cross: Is Immigration the Exclusive Responsibility of the Federal Government?*, 25 PUBLIUS 71, 79 (1995).

11. As of the end of the 2012 legislative session, three states—Washington, New Mexico, and Utah—provided driver’s licenses or driving privilege cards to immigrants regardless of immigration status. NAT’L IMMIGRATION LAW CTR., INCLUSIVE POLICIES ADVANCE DRAMATICALLY IN THE STATES: IMMIGRANTS’ ACCESS TO DRIVER’S LICENSES, HIGHER EDUCATION, WORKERS’ RIGHTS, AND COMMUNITY POLICING 2-3 (2013), available at <http://www.nilc.org/document.html?id=963>. In 2013, eight additional states—Illinois, Maryland, Oregon, Nevada, Colorado, Vermont, California, and Connecticut—as well as Puerto Rico passed laws expanding immigrants’ access to driver’s licenses. *Id.*; see Jaqueline Hurtado & Catherine E. Shoichet, *New California Law Gives Undocumented Immigrants Driver’s Licenses*, CNN (Oct. 3, 2013, 9:35 PM ET), <http://www.cnn.com/2013/10/03/us/california-undocumented-immigrant-drivers-licenses/index.html>.

12. See, e.g., Jennifer Medina, *New Haven Welcomes a Booming Population of Immigrants, Legal or Not*, N.Y. TIMES (Mar. 5, 2007), <http://www.nytimes.com/2007/03/05/nyregion/05haven.html>; Mara Revkin, *Offering Noncitizens a Local Identity*, AM. PROSPECT (July 30, 2007), <http://prospect.org/article/offering-noncitizens-local-identity>.

13. Seventeen states—California, Colorado, Connecticut, Florida, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oklahoma, Oregon, Texas, Utah, and Washington—have passed laws allowing certain undocumented students who have graduated from primary and secondary schools to pay the same tuition as their in-state classmates at public institutions of higher education. NAT’L IMMIGRATION LAW CTR., BASIC FACTS ABOUT IN-STATE TUITION FOR UNDOCUMENTED IMMIGRANT STUDENTS 1 (2014), available at <http://www.nilc.org/document.html?id=170>; see also Kirk Semple, *Christie Agrees to In-State Tuition for Undocumented Immigrants*, N.Y. TIMES (Dec. 19, 2013), <http://www.nytimes.com/2013/12/20/nyregion/christie-agrees-to-in-state-tuition-for-undocumented-immigrants.html>. Rhode Island’s Board of Governors for Higher Education also voted to provide access to in-state tuition to certain students at state public colleges and universities, regardless of their immigration status, and the University of Hawaii’s Board of Regents adopted a similar policy in 2013. NAT’L IMMIGRATION LAW CTR., *supra*, at 1.

use the term “integrationist” throughout this Article to refer to individuals who see the fuller inclusion of undocumented immigrants into American society, including the creation of a pathway for undocumented immigrants to obtain American citizenship, as a primary part of the solution to our current immigration crisis. Integrationist state campaigns, however, have generally been less aggressive than their restrictionist counterparts, insofar as they have not tended to assert a new role for states in defining who does and does not belong. Instead, integrationists have expended significant resources playing defense—working to undo or prevent aggressive restrictions laws—and have moved incrementally with affirmative assertions of state power.

While there are several factors that can help explain the asymmetric use of state power by integrationist and restrictionist immigration advocates,¹⁵ a critical and underappreciated piece of the puzzle is that restrictionists have demonstrated a superior understanding of how state laws can be used to shape the immigration debate.¹⁶ Restrictionist state efforts have captured headlines and reinforced themes of criminality, national security threats, and lax border enforcement, which have consequently come to dominate popular discourse around immigration. Integrationists, on the other hand, have failed to fully master the use of state policy as a tool to shape popular perceptions of the immigration issue. This asymmetry has generally played to restrictionists’ benefit as, even in legal defeat,¹⁷ their efforts have returned significant rewards by cementing a national narrative on immigration, which has continued to stymie any integrationist effort at federal immigration reform.

Integrationist discomfort with the aggressive insertions of states into the national immigration debate is both understandable and misplaced. It is understandable because the primary, and most successful, legal arguments integrationists have used to curb the most abusive state immigration laws have focused

14. I use the term “undocumented immigrants” throughout this Article to refer to individuals who lack current federal immigration status. These individuals generally fall into two categories: some entered the United States unlawfully; many others entered lawfully but violated the terms of their entry visas, usually by remaining in the United States beyond their authorized period of stay. Individuals in both groups remain “undocumented” sometimes for lengthy periods, notwithstanding their eligibility to obtain legal status, as applications and immigration procedures take months and often years to complete.

15. Part of the explanation is likely historical, insofar as restrictionists are aligned with the conservative legal thinkers who have been part of the new federalist movement to assert state power. *See, e.g.*, Mitchell F. Crusto, *The Supreme Court’s “New” Federalism: An Anti-Rights Agenda?*, 16 GA. ST. U. L. REV. 517, 536 (2000). Integrationists are aligned with progressive legal thinkers who have traditionally been wary of expanding state power. *See, e.g.*, Karla Maria McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579, 600 (2009). But this does not tell the whole story.

16. *See* Jessica Sanchez, *Cause and Effect: Criminalizing the American Dream*, 17 LOY. PUB. INT. L. REP. 137, 139 (2012) (discussing Kris Kobach’s fight for anti-immigration legislation).

17. Indeed, the majority of the most aggressive provisions of restrictionist state laws have been struck down or severely curtailed by the federal courts. *See infra* note 86.

on the preemption doctrine and themes of federal exclusivity.¹⁸ Their discomfort is misplaced, however, because the fatal flaw in most restrictionist state efforts is not the states' desire to express a normative view on immigration and shape our national debate, which would be an appropriate and productive role for states. Instead, the defect in these laws has been that they violate immigrants' federal constitutional rights and intrude upon the federal government's exclusive authority to regulate who may enter the United States and who must leave.¹⁹ The relative timidity of integrationist efforts has resulted in a lopsided dialogue, with vocal restrictionist-leaning states shaping our national discourse while integrationist-leaning states have remained muted.

While an important body of scholarship has chronicled the new role that states are playing in immigration matters,²⁰ integrationist immigration scholars have yet to fully investigate the outer boundaries of state power to regulate in the immigration arena—in particular, the power of states to define their own citizenry.²¹ There is, of course, an extraordinarily robust, indeed vast, scholarship on the concept of citizenship spanning a wide variety of disciplines.²²

18. *See infra* note 86.

19. *Cf.* HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 152 (2014) (“[L]imits on state and local involvement in immigration enforcement [should not] apply as strongly to state and local measures that try to integrate unauthorized migrants[.] . . . When the scope of implied or express preemption is uncertain, a far better approach—both as sound policy and as constitutional law—is limiting state and local enforcement, but allowing state and local measures to support the integration of unauthorized migrants.”).

20. *See, e.g., id.*; Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 704-05 (2013); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2074 (2013); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 788 (2008); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2039 (2008); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 27 U. CHI. LEGAL F. 27, 27 (2007); S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431, 1431 (2012); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 581-609 (2008); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 493 (2001).

21. As an ancillary matter, it is necessary to define what we mean by the concept of “citizenship.” This is no easy task. Much has been written on the subject. *See, e.g.*, T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 14 (1990); Stephen H. Legomsky, *Why Citizenship?*, 35 VA. J. INT’L L. 279, 287 (1994). I use the term, at base, to define the formal boundaries of the political community of a sovereign. There are few, if any, rights that necessarily flow from citizenship, and the sovereign is largely free to define those rights. However, there are certain core rights that are generally, though not necessarily, associated with citizenship. These include, most centrally, rights associated with democratic political participation—voting, most notably. In addition, citizens are generally eligible to participate in government programs and access government benefits. Finally, sovereigns owe a duty of protection to their citizens. A comprehensive discussion of the concept of citizenship is beyond the scope of this Article, but these foundational principles are central to the concept of citizenship as used throughout this Article.

22. *See, e.g.*, RAINER BAUBÖCK, TRANSNATIONAL CITIZENSHIP: MEMBERSHIP AND RIGHTS IN INTERNATIONAL MIGRATION (1994); CITIES AND CITIZENSHIP (James Holston ed.,

There is a more focused literature regarding the nature of state citizenship and the Fourteenth Amendment's prohibitions against restrictive definitions of state citizenship.²³ But there is virtually no modern scholarship that explores the power of states to advance inclusive constructions of state citizenship—to extend state citizenship more broadly than the federal government.²⁴ This Article seeks to begin filling that void.

The first effort to enact an inclusive citizenship scheme of the type discussed in this Article is currently underway in the State of New York.²⁵ This author has played a primary role in shaping a bill that would grant New York state citizenship to certain undocumented immigrants. If enacted into law, the rights that accompany state citizenship would fall into three categories: state political rights (for example, voting); rights of access to state public programs and benefits (for example, public health care programs, in-state tuition, and

1999); CITIZENSHIP (Geoff Andrews ed., 1991); THE CONDITION OF CITIZENSHIP (Bart van Steenberg ed., 1994); COSMOPOLITAN CITIZENSHIP (Kimberly Hutchings & Roland Dannreuther eds., 1999); DIMENSIONS OF RADICAL DEMOCRACY: PLURALISM, CITIZENSHIP, COMMUNITY (Chantal Mouffe ed., 1992); DIVERSITY AND CITIZENSHIP: REDISCOVERING AMERICAN NATIONHOOD (Gary Jeffrey Jacobsohn & Susan Dunn eds., 1996); THE FRONTIERS OF CITIZENSHIP (Ursula Vogel & Michael Moran eds., 1991); DEREK HEATER, CITIZENSHIP: THE CIVIC IDEAL IN WORLD HISTORY, POLITICS AND EDUCATION (1990); DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP (1996); PETER KIVISTO & THOMAS FAIST, CITIZENSHIP: DISCOURSE, THEORY, AND TRANSNATIONAL PROSPECTS (2007); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995); RUTH LISTER, CITIZENSHIP: FEMINIST PERSPECTIVES (2d ed. 2003); STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM (1990); ELIZABETH MEEHAN, CITIZENSHIP AND THE EUROPEAN COMMUNITY (1993); SASKIA SASSEN, LOSING CONTROL?: SOVEREIGNTY IN AN AGE OF GLOBALIZATION (1996); YASEMIN NUHOĞLU SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE (1994); THEORIZING CITIZENSHIP (Ronald Beiner ed., 1995); Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352 (1994).

23. See, e.g., Jonathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 677-83 (1995); Shane Pennington, *Completing Ely's Representation Reinforcing Theory of Judicial Review by Accounting for the Constitutional Values of State Citizenship*, 15 TEX. REV. L. & POL. 219, 231-32 (2010).

24. The notable exception to this void is Peter J. Spiro's insightful article discussing the power of local governments to grant citizenship to nonfederal citizens and arguing in favor of local citizenship schemes based solely on durational residency requirements. Peter J. Spiro, *Formalizing Local Citizenship*, 37 FORDHAM URB. L.J. 559, 569 (2010); cf. RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES 16 (2006) (discussing the history of noncitizen voting); Rainer Bauböck, *Reinventing Urban Citizenship*, 7 CITIZENSHIP STUD. 139, 150 (2003) (arguing that cities should have greater autonomy in matters related to immigration); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1107-09 (1977) (arguing that states should allow lawful permanent residents to vote); Rose Cuison Villazor, "Sanctuary Cities" and Local Citizenship, 37 FORDHAM URB. L.J. 573, 576-78 (2010) (arguing that "sanctuary cities" have arguably constructed membership for undocumented immigrants located within their jurisdictions" and equating that membership with de facto local citizenship for undocumented immigrants).

25. See *infra* Part III.B (discussing the New York Is Home Act).

driver's licenses); and rights to protection against mistreatment (for example, protection under antidiscrimination statutes). The contemplated state citizenship scheme would not purport to confer national American citizenship, nor would it necessarily insulate state citizens from deportation. Although other states have yet to follow suit, the nascent New York effort provides a useful example through which to explore the boundaries and utility of state power in the immigration realm.

This Article argues not only that states have the power to grant citizenship to undocumented immigrants, but also that a movement among integrationist states to exercise this power is normatively desirable. The contemplated state citizenship schemes would assist with the integration of undocumented immigrants, thereby helping to stabilize families and encourage healthy economic activity. Perhaps more importantly, such a movement could powerfully reorient our national immigration discourse around more accurate and productive themes—such as democracy, family, and economic vitality. This reorientation could, in turn, move us closer to eventual federal reform.

With the increasingly intransigent gridlock that characterizes the federal legislative system, states are assuming a new role in national policymaking. In the movements for marriage equality and legalization of medical marijuana, for example, states have moved policy where Congress could not.²⁶ By developing innovative solutions to national problems—acting as policymaking laboratories²⁷ in the best sense—states are increasingly the engines that drive progressive national political changes. The effort to enact inclusive state citizenship schemes, should it gain political traction, has similar potential to drive progressive national policy. Indeed, if integrationists aim to leverage state power to reorient our national discourse on immigration, express in the most powerful terms possible their judgment that undocumented immigrants are members of our political community, and integrate those immigrants as fully as possible into civil society, no better tool exists in the state arsenal than state citizenship.²⁸

This Article proceeds in three Parts. In Part I, I explore the constitutional status of state citizenship and conclude that longstanding Supreme Court precedent, the federalist structure of the Union, the Fourteenth Amendment, and the history of our national practices related to state citizenship all preserve a robust role for the states in controlling the parameters of their own citizenry. In Part II,

26. See, e.g., Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. COLO. L. REV. 1105, 1106-12 (2014); Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 678-83 (2012); see also Judith Resnik et al., *Kyoto at the Local Level: Federalism and Translocal Organizations of Government Actors (TOGAS)*, 40 ENVTL. L. REP. 10,768, 10,771 (2010).

27. *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.”).

28. See generally Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005) (discussing the power of using state law as a way to elevate dissent on a national issue).

I assess the interaction between the constitutional power of states to define their own citizenry and the preemptive power of the federal government to determine national immigration policy, and I conclude that the core aspects of the contemplated inclusive state citizenship scheme cannot and have not been preempted. Finally, in Part III, I evaluate the potential impact inclusive state citizenship schemes could have on local immigrant communities and on our national conversation on immigration.

I. THE CONSTITUTIONAL STATUS OF STATE CITIZENSHIP

A foundational premise of the dual sovereign and federalist structure of the United States is that the states and the federal government each have the independent authority to define the boundaries of their own political communities.²⁹ The autonomy of states to establish the parameters of their own citizenry is enshrined in the Constitution and in the history of the Union, and is subject only to constitutional prohibitions against discrimination.³⁰

A. *Historical Precedent for Inclusive State Citizenship Schemes*

At the time of the Declaration of Independence, state citizenship was the principal marker of American political identity; no national citizenship was recognized.³¹ Under the Articles of Confederation, the states remained sovereign and maintained exclusive control of citizenship.³² Unlike the onerous road our current law paves for aspiring citizens, at the time of Independence, residents of the colonies needed only to declare a desire to attain citizenship and such citizenship would be granted by virtue of the individual's consent to join the political community of the United States.³³ This early use of a "volitional allegiance" as a basis for conferring citizenship has been carried forward today in American law, which continues to require a voluntary oath of allegiance as a prerequisite to granting citizenship. Volition on its own, of course, no longer suffices to confer citizenship.³⁴ Familial ties and birthright citizenship also had

29. *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973); *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970) (Black, J., announcing the judgments of the Court), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI; *United States v. Cruikshank*, 92 U.S. 542, 549 (1876); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74 (1873); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 405 (1856).

30. *See infra* Part I.A-B.

31. JOHN S. WISE, A TREATISE ON AMERICAN CITIZENSHIP 6 (1906).

32. *Id.* at 8.

33. PRENTISS WEBSTER, A TREATISE ON THE LAW OF CITIZENSHIP IN THE UNITED STATES 80 (Albany, N.Y., Matthew Bender 1891) ("All who wished to become citizens exercised the right of choice or option and became citizens of the United States, or remained English subjects as they wished.")

34. *See* Immigration and Nationality Act, Pub. L. No. 82-414, § 337(a), 66 Stat. 163, 258-59 (1952) (codified as amended at 8 U.S.C. § 1448 (2013)); *see also* JOHN LOCKE, TWO

a place in these early citizenship schemes,³⁵ and these elements are reflected in our current laws as well.

The lack of national identity under the Articles of Confederation was, of course, one of the flaws the Framers sought to rectify in drafting the Constitution.³⁶ Thus, with the inclusion of the Naturalization Clause in Article I of the Constitution, national American citizenship was born.³⁷ Even with the federal naturalization power in place, however, in the early years of the Union, a citizen's primary allegiance was to the state.³⁸ In its initial exercise of the power granted by the Naturalization Clause, the first Congress enacted the Naturalization Act of 1790, which granted state courts the power to confer federal citizenship.³⁹ Throughout much of the nineteenth century, state citizenship persisted as the primary marker of civil identity for most individuals, whereas federal citizenship was often viewed as derivative of state citizenship—a view that has since been conclusively repudiated.⁴⁰

TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 149-50 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

35. See WEBSTER, *supra* note 33, at 85; WISE, *supra* note 31, at 51.

36. THE FEDERALIST NO. 42, at 269-71 (James Madison) (Clinton Rossiter ed., 1961) (discussing the need for a uniform rule of naturalization); ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 120 (1997) (explaining that the Constitution's "main thrust was to make Americans citizens of a large, commercial, national republic").

37. U.S. CONST. art. I, § 8, cl. 4.

38. JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 249-50 (1978); WISE, *supra* note 31, at 70-71; see Pennington, *supra* note 23, at 232; Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546-47 (1954).

39. Ch. 3, 1 Stat. 103, *repealed by* Naturalization Act of 1795, ch. 20, § 4, 1 Stat. 414, 415; *Holmgren v. United States*, 217 U.S. 509, 517 (1910).

40. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 565 (Bos., Mass., Hilliard, Gray & Co. 1833) ("Every citizen of a state is *ipso facto* a citizen of the United States."); see also *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 126 (1873) (Swayne, J., dissenting) ("A citizen of a State is *ipso facto* a citizen of the United States."); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 576 (1856) (Curtis, J., dissenting) ("[U]nder the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States"); CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Johnson) ("[E]very man who is a citizen of a State becomes *ipso facto* a citizen of the United States; . . . there is no definition as to how citizenship can exist in the United States except through the medium of a citizenship in a State."); *Citizenship*, 10 Op. Att'y Gen. 3, 5 (1862) ("The Constitution of the United States does not declare who are and who are not citizens, nor does it attempt to describe the constituent elements of citizenship. It leaves that quality where it found it, resting upon the fact of home, birth, and upon the laws of the several States."); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 85-86 (Phila., Pa., H.C. Carey & I. Lea 1825); WISE, *supra* note 31, at 13, 70; Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1858 (1993) (discussing how early American practice granted states a significant role in defining citizenship and that, even in areas of acknowledged and explicit federal power, states routinely regulated who was and who was not a state citizen). *But see Dred Scott*, 60 U.S. (19 How.) at 406 ("[N]o State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community cre-

During this period, there were also abundant examples of states extending state citizenship to individuals who were not national citizens of the United States. Several states granted state citizenship to denizens—individuals who had stated an intention to acquire national citizenship but had not yet achieved that status.⁴¹ Many other states, however, chose to predicate state citizenship on federal citizenship.⁴² Critically, however, the power of states to define the boundaries of their own citizenship more broadly than the federal government, if they so desired, was largely unquestioned in this early period.

Beginning with the passage of the Fourteenth Amendment and continuing throughout the twentieth century, federal citizenship came to supplant state citizenship as the primary marker of an individual's political identity. But even as federal citizenship gained supremacy, nonfederal citizens continued to enjoy significant political rights in many states. At the beginning of the twentieth century, at least twenty-two states and territories permitted non-U.S. citizens to vote in local, state, and national elections,⁴³ but this practice was gradually discontinued, and, by 1926, all states restricted voting to federal citizens.⁴⁴ While voting rights and citizenship need not necessarily (and indeed have not always historically) run together, there is nevertheless a “fundamental connection between citizenship and voting.”⁴⁵ In holding that “alien voters” were state citizens, the Wisconsin Supreme Court explained that:

Under our complex system of government there may be a citizen of a state who is not a citizen of the United States in the full sense of the term. This result would seem to follow unavoidably from the nature of the two systems of government. Each state, being sovereign except as to matters referred to the

ated by the Constitution of the United States. It cannot make him a member of this [United States] community by making him a member of its own [State community].”).

41. *See, e.g.*, *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 177 (1874); *State ex rel. Leche v. Fowler*, 6 So. 602, 602 (La. 1889); *Abrigo v. State*, 15 S.W. 408, 410 (Tex. Ct. App. 1890); *In re Conway*, 17 Wis. 526, 528-29 (1863); *In re Wehlitz*, 16 Wis. 443, 455-56 (1863); *State ex rel. Off v. Smith*, 14 Wis. 497, 500 (1861).

42. *See, e.g.*, W. VA. CONST. art. II, § 3 (“All persons residing in this State, born, or naturalized in the United States, and subject to the jurisdiction thereof, shall be citizens of this State.”); *Steuart v. State ex rel. Dolcimascolo*, 161 So. 378, 379 (Fla. 1935) (holding that state citizenship is predicated upon U.S. citizenship for the purposes of a tax exemption under the Florida Constitution), *superseded by constitutional amendment*, FLA. CONST. art. X, § 7.

43. HAYDUK, *supra* note 24, at 16 (noting that between twenty-two and forty states permitted noncitizen voting prior to 1928); CHRISTOPHER MALONE, *BETWEEN FREEDOM AND BONDAGE: RACE, PARTY, AND VOTING RIGHTS IN THE ANTEBELLUM NORTH* 8-9 (2008) (recounting how some states enfranchised their black residents before they had identities as federal citizens by granting them voting rights); *see, e.g.*, *Fowler*, 6 So. at 602; *Abrigo*, 15 S.W. at 410; *Conway*, 17 Wis. at 528-29; *see also* Rosberg, *supra* note 24, at 1107-09 (arguing that states should allow lawful permanent residents to vote).

44. Ron Hayduk, *Political Rights in the Age of Migration: Lessons from the United States*, 16 J. INT'L MIGRATION & INTEGRATION 99, 106 (2015).

45. Gerald L. Neuman, “*We Are the People*”: *Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259, 301 (1992).

general government may, as an undoubted result of that sovereignty, confer such rights of citizenship as it pleases, so far as it relates to itself only.⁴⁶

No state currently extends full citizenship rights to nonfederal citizens. Indeed, many states today have no formal definition of state citizenship, and some accord citizenship status to individuals for some purposes but not others.⁴⁷ Thus, notwithstanding the historical precedent, the idea of a state asserting its authority to extend citizenship to nonfederal citizens will sound to many contemporary observers as a bold challenge to federal power.⁴⁸ Our modern history, however, is not completely devoid of broader assertions of local citizenship. Most famously, Takoma Park, Maryland, became the first municipality in decades to extend the franchise to nonfederal citizens in 1992.⁴⁹ Thus, while no state currently extends full citizenship benefits to any individuals who are not citizens of the United States, there is ample historical precedent in our early history for such action.

B. *The Constitutional Foundation of State Citizenship*

Originally, the Constitution contained no definition of federal or state citizenship.⁵⁰ The text only mentioned “citizens of the United States” three

46. *Wehlitz*, 16 Wis. at 446.

47. *See, e.g.*, *Vachikinas v. Vachikinas*, 112 S.E. 316 (W. Va. 1922). In *Vachikinas*, the Supreme Court of Appeals of West Virginia held that nonfederal citizens may access the West Virginia courts under a statute that limited the filing of divorce actions to “bona fide citizen[s] of th[e] state” notwithstanding a provision in the state constitution which limited state citizenship to federal citizens residing in the state. *Id.* at 317 (quoting W. VA. CODE § 3642). In so holding, the court noted the state constitutional definition of citizenship and concluded that “[o]f course the powers of government and the participation therein by representation or otherwise could under the Constitution be exercised only by citizens thus defined.” *Id.* at 318. However, the court decided that, for the purposes of access to the West Virginia court system, citizenship could be defined by “bona fide residence” in the state: “By providing who are to be regarded citizens, with the privileges of government, we do not think it was intended by the Constitution to say that other residents of the state are not to be regarded as citizens with rights not pertaining to sovereignty.” *Id.*

48. *See, e.g.*, Carl Campanile, *NY Democrats Seek Citizen Rights for Illegal Immigrants*, N.Y. POST (Sept. 15, 2014, 12:01 AM), <http://nypost.com/2014/09/15/democratic-pols-look-into-amnesty-rights-under-ny-state-law-for-illegal-immigrants>; Editorial, *A Job Congress Should Do*, TIMES UNION (Sept. 22, 2014, 6:03 PM), <http://www.timesunion.com/opinion/article/Editorial-A-job-Congress-should-do-5772946.php>.

49. Aaron Kraut, *Takoma Park Stands by Non-U.S. Citizen Voting Law*, WASH. POST (Mar. 14, 2012), <http://wapo.st/1yAhPYE>. In addition, a serious effort is currently underway in New York City to extend local voting rights to certain nonfederal citizens. *See* Matthew Chayes, *NYC Council to Decide on Letting Noncitizens Vote in Local Elections*, NEWSDAY (Mar. 22, 2015, 9:50 PM), <http://www.newsday.com/news/new-york/nyc-council-to-decide-on-letting-noncitizens-vote-in-local-elections-1.10100418>.

50. *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 158 (1892) (“[P]rior to the adoption of the fourteenth amendment there was no definition of citizenship of the United States in the [Constitution].”). *But cf. infra* Part I.C (discussing the definition of citizenship contained in the Fourteenth Amendment).

times—all related to prescribing the qualifications for certain federal offices.⁵¹ Congress was empowered to “establish a uniform Rule of Naturalization,” but the Constitution itself established no guidelines for the boundaries of national citizenship.⁵² The text did, however, unambiguously recognize the distinct status of “state citizenship.”⁵³ State citizenship, as opposed to federal citizenship, was referenced in the original text in relation to establishing diversity jurisdiction⁵⁴ and in the context of the Privileges and Immunities Clause of Article IV.⁵⁵ Nothing in the plain language of the text, however, necessarily dictates whether states have the power to extend their citizenship to nonfederal citizens. Two structural features of the Constitution and an unambiguous line of Supreme Court precedent, however, resolve the issue.

First, a defining feature of the Constitution is the federal structure of dual sovereigns, each supreme in its own realm.⁵⁶ As explained by Justice Field, the states are “qualified sovereignties,” and, pursuant to the Tenth Amendment, they possess all “powers of an independent political organization,” except to the extent that “such powers are ceded to the general government or prohibited to them.”⁵⁷ This articulation, however, raises the question of whether, in forming the Union, states ceded some authority regarding their power to define their own citizenry. The Supreme Court, however, has consistently and historically held that the states did not cede such power.⁵⁸

51. First, it requires seven years as a citizen to become a member of the House of Representatives. U.S. CONST. art. I, § 2, cl. 2. Second, it requires nine years as a citizen to become a Senator. *Id.* art. I, § 3, cl. 3. Third, it stipulates that only natural-born citizens or those who were citizens at the time the Constitution was ratified are eligible to be President. *Id.* art. II, § 1, cl. 5; see WISE, *supra* note 31, at 19.

52. U.S. CONST. art. I, § 8, cl. 4.

53. Pennington, *supra* note 23, at 232 (“[I]t is clear that the Framers recognized a conceptual difference between state citizenship and United States citizenship . . .”).

54. U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend . . . to Controversies . . . between a State and *Citizens of another State*; between *Citizens of different States*; [and] between *Citizens of the same State* claiming Lands under Grants of different States . . .”) (emphases added); see also *infra* note 65 (discussing the distinct use of state citizenship in the diversity jurisdiction context).

55. U.S. CONST. art. IV, § 2, cl. 1 (“The *Citizens of each State* shall be entitled to all Privileges and Immunities of Citizens in the several States.” (emphasis added)).

56. *Collector v. Day*, 78 U.S. (11 Wall.) 113, 124 (1871) (“The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, ‘reserved,’ are as independent of the general government as that government within its sphere is independent of the States.”).

57. *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 182 (1892) (Field, J., dissenting); see also U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

58. See *infra* notes 59-64, 71-84 and accompanying text.

The Court has explicitly recognized “the State’s broad power to define its political community”⁵⁹ and has explained that “the Constitution was . . . intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments.”⁶⁰ The Court has further explained that state and federal citizenship are distinct statuses with independent qualifications and benefits—neither dictating the other, at least not before the passage of the Fourteenth Amendment:

We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other.⁶¹

Most infamously, in *Dred Scott v. Sandford*, the Supreme Court held that persons of African ancestry could not be citizens of the United States but explicitly recognized that such persons may nonetheless be citizens of the states.⁶² While the Court’s denial of citizenship to African descendants was eventually corrected with the passage of the Fourteenth Amendment, the latter holding—regarding the ability of states to confer their own citizenship independent of the federal government—remains good law and untainted by the racist foundations of Chief Justice Taney’s reasoning. As the Court explained in *Dred Scott*:

[W]e must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States.⁶³

The *Dred Scott* case has, of course, been appropriately maligned by scholars and courts alike and thankfully limited by the Fourteenth Amendment. However, the aspects of the holdings regarding the power of states to define the parameters of their own state citizenship have escaped unscathed.⁶⁴

59. *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973).

60. *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970) (Black, J., announcing the judgments of the Court), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI.

61. *United States v. Cruikshank*, 92 U.S. 542, 549 (1876); *see also Dougall*, 413 U.S. at 647 (“[E]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.’ Such power inheres in the State by virtue of its obligation, already noted above, ‘to preserve the basic conception of a political community.’ And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.” (citations omitted) (quoting *Boyd v. Thayer*, 143 U.S. 135, 161 (1892); *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972))).

62. 60 U.S. (19 How.) 393, 405 (1857).

63. *Id.*

64. As one Justice characterized it as recently as 1996:

Accordingly, as a constitutional matter, it seems untenable to argue, at this late stage, that states lack sufficient autonomy under the original Constitution to confer state citizenship on any individual or class of individuals they please.⁶⁵

Regardless of its other faults, Chief Justice Taney's opinion in *Dred Scott v. Sandford* recognized as a structural matter that "[t]he new [federalist system of] Government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one." *Seminole Tribe v. Florida*, 517 U.S. 44, 150 n.43 (1996) (Souter, J., dissenting) (first alteration in original) (citation omitted) (quoting *Dred Scott*, 60 U.S. (19 How.) at 441); *see also* *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 159-60 (1892) (quoting *Dred Scott*, 60 U.S. (19 How.) at 404 (enunciating the federalist concept of state/national citizenship)); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1417 (1993) ("The [*Dred Scott*] Court's observations about the permissibility of alien voting [premised on its conception of state citizenship] survived the enactment of the Fourteenth Amendment even if its central holding—that African-Americans could not be 'citizens' within the meaning of the federal Constitution—did not.").

65. Whether the federal government can limit that power through an act of Congress is, of course, a separate issue discussed in Part II below. It is worth noting, however, that there is one context—diversity jurisdiction—in which federal citizenship is considered a necessary precursor to state citizenship. *See, e.g., Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989) ("In order to be a citizen of a State within the meaning of the diversity statute, a natural person must both be a citizen of the United States *and* be domiciled within the State."). This limitation on the scope of state citizenship in the diversity context does not, however, serve as a general limit on the states' power to define their own citizenry, for at least three reasons.

First, diversity jurisdiction is a privilege of *federal* citizenship, and thus while the limitation may be appropriate in that context, it cannot be similarly applied to states' abilities to define state citizenship as that citizenship relates to state, but not federal, rights. *See Crosse v. Bd. of Supervisors of Elections*, 221 A.2d 431, 436 (Md. 1966) (per curiam) ("*Reum* dealt only with the question of jurisdiction of federal courts under the diversity of citizenship clause of the federal Constitution. That a state cannot affect that jurisdiction by granting state citizenship to an unnaturalized alien does not mean it cannot make an alien a state citizen for other purposes."). *See generally* *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873) (listing among the privileges and immunities of federal citizenship the right to access "courts of justice in the several States" (quoting *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1868))).

Second, Congress has already implicitly rejected the suggestion that U.S. citizenship is required for diversity jurisdiction purposes, since it considers permanent residents to be state citizens in that context. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, sec. 203(a), § 1332(a), 102 Stat. 4642, 4646 (1988) (codified as amended at 28 U.S.C. § 1332(a) (2013)) (amending § 1332(a) to include permanent residents among those who can be considered state citizens for diversity jurisdiction purposes); *see Singh v. Daimler-Benz AG*, 9 F.3d 303, 311 n.4 (3d Cir. 1993) ("Congress has abrogated, albeit without discussion, the Supreme Court's consistent interpretation of the diversity statute as requiring that a citizen of a state must also be a citizen of the United States.").

Third, to the extent that "state citizenship," as used in 28 U.S.C. § 1332(a)(1), excludes nonfederal citizens, that exclusion must be understood in the context of the statutory scheme. In accordance with Article III, Section 2 of the Constitution ("The judicial Power shall extend to . . . Controversies . . . between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."), § 1332(a) offers a comprehensive scheme for federal subject matter jurisdiction, including both diversity jurisdiction, which offers a neutral federal forum for citizens of separate states, and alienage jurisdiction, which offers a reliable and more diplomatic forum for foreign nationals. *See generally* Kevin

Such was the state of constitutional authority regarding state citizenship from the Founding through the enactment of the Fourteenth Amendment.

C. *The Fourteenth Amendment: Establishing a Constitutional Floor, but Not a Ceiling, for State Citizenship*

In contrast to the Constitution's original text, the Fourteenth Amendment, in the plainest of terms, limits the discretion of a state to define the boundaries of its own citizenship. Section 1 of the Fourteenth Amendment, also known as the Citizenship Clause or the Naturalization Clause, dictates that federal citizens are citizens of the states in which they reside. Specifically, it provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States *and of the State wherein they reside*."⁶⁶ By its plain language, however, the amendment sets a floor, not a ceiling, for state citizenship. That is, it defines a class of people—U.S. citizens—who must be deemed state citizens, but it does not purport to limit the discretion of states to extend state citizenship more broadly to additional classes of people. The historical context in which the amendment was enacted and subsequent judicial interpretations of the amendment confirm that the power of states to extend their citizenship to nonfederal citizens endured after the passage of the Reconstruction Amendments.

Following the end of the Civil War in 1865, the Reconstruction Amendments were enacted, in part to overrule the Supreme Court's conclusion in *Dred Scott* that persons of African descent could not be citizens of the United States.⁶⁷ However, in addition to creating a clear definition of federal citizen-

R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 22-24 (1996). Recognizing that any suits involving noncitizens could impact foreign diplomacy with that individual's home country, even for matters completely unrelated to treaties or international law, the drafters of the Constitution and, later, the Judiciary Act of 1789, specifically provided for separate alienage jurisdiction. *Id.* at 11-12 (citing THE FEDERALIST NO. 80, at 535-36 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)). This may explain why federal courts have so carefully demarcated § 1332(a)(1) so as to exclude noncitizens.

Thus, the considerations that have led courts to require federal citizenship as a prerequisite to state citizenship in the diversity context simply have no application outside that context.

66. U.S. CONST. amend. XIV, § 1 (emphasis added).

67. See *United States v. Wong Kim Ark*, 169 U.S. 649, 676 (1898); see also *McDonald v. City of Chi.*, 561 U.S. 742, 807-08 (2010) (Thomas, J., concurring) (noting that Section 1 of the Fourteenth Amendment was intended to overrule *Dred Scott's* holding that "the Constitution did not recognize black Americans as citizens of the United States or their own State"); *Afroyim v. Rusk*, 387 U.S. 253, 262-63, 268 (1967) ("We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race."); 6 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88, at 1291-96 (1971) (noting that the Citizenship Clause affirmed that the Thirteenth Amendment granted former slaves U.S. citizenship, along with freedom); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 69-70, 73 (1993). Senator John Bingham, the pri-

ship, as the Supreme Court has explained, the Fourteenth Amendment was also intended to “preclude any effort by state legislatures to circumvent the Amendment by denying freedmen state citizenship.”⁶⁸ As explained by Senator Howard at the time of its passage:

The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. . . .

. . . .

. . . . It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction.⁶⁹

Accordingly, consistent with the plain language, the intent of the Fourteenth Amendment was to prevent states from *denying* rights to marginalized communities and persons—former slaves in particular—rather than to prevent states from advancing inclusive constructions of state citizenship or extending rights and protections more broadly than the federal government.⁷⁰

In the years after the passage of the Fourteenth Amendment, the Supreme Court reaffirmed the remaining autonomy of the states in defining their own political communities. Most notably, in the *Slaughter-House Cases*, wherein the Supreme Court was first called upon to interpret the Fourteenth Amendment, the Court specifically discussed the distinction between state and federal citizenship, as set forth in the Citizenship Clause.⁷¹ The issue in the opinion related to the breadth and interpretation of the Privileges and Immunities Clause of the Fourteenth Amendment, but insofar as that clause protects “privileges or

mary author of the Citizenship Clause, stated during the debates on the amendment: “Every slave the moment he is emancipated becomes a ‘free citizen,’ in the words of the Confederation, becomes a ‘free person,’ which embraces all citizens, in the words of our Constitution, becomes equal before the law with every other citizen of the United States.” CONG. GLOBE, 39th Cong., 1st Sess. 430 (1866) (statement of Sen. Bingham).

68. *Afroyim*, 387 U.S. at 284 (Harlan, J., dissenting).

69. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard).

70. As Senator Hotchkiss explained:

I understand the amendment as now proposed by its terms to authorize Congress to establish uniform laws throughout the United States upon the subject named, the protection of life, liberty, and property. . . . The object of a Constitution is not only to confer power upon the majority, but to restrict the power of the majority and to protect the rights of the minority. . . . Should the power of this Government, as the gentleman from Ohio fears, pass into the hands of the rebels, I do not want rebel laws to govern and be uniform throughout this Union.

Id. at 1095 (statement of Sen. Hotchkiss). Senator Bingham noted that the amendment only ensured that if the states “conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with power to hold them to answer.” *Id.* at 1090 (statement of Sen. Bingham); *see also Oregon v. Mitchell*, 400 U.S. 112, 126 (1970) (Black, J., announcing the judgments of the Court) (“Above all else, the framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race.”), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI.

71. 83 U.S. (16 Wall.) 36, 73-74 (1873).

immunities of citizens of *the United States*,” the Court drew a sharp distinction between state and federal citizenship.⁷² It explained that “the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established” and that “[i]t is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.”⁷³ Moreover, the Court noted that the rights belonging to individuals as citizens of a state “have always been held to be the class of rights which the State governments were created to establish and secure”—thus acknowledging the power of states to define the rights and privileges of their own citizenship.⁷⁴ While the Court’s narrow interpretation of the Privileges and Immunities Clause has been sharply criticized,⁷⁵ it nevertheless remains good law. More importantly, the critiques do not stain the Court’s distinction between state and federal citizenship.

In *Boyd v. Nebraska ex rel. Thayer*, the Court reaffirmed the power of the states to define the boundaries of their own citizenry as that power relates to the axiomatic principle embodied in the Tenth Amendment⁷⁶—that the federal government has only limited enumerated powers and that all powers not explicitly granted to the federal government are reserved to the states.⁷⁷ As the Court explained:

[P]revious to the adoption of the constitution of the United States, every state had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. . . . [T]he several states [did not] surrender[] the power of conferring these rights and privileges by adopting the constitution of the United States. [Thus, e]ach state may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons⁷⁸

In *United States v. Cruikshank*, the Court dismissed a federal criminal indictment alleging that members of a white militia that killed a group of African

72. *Id.* (quoting U.S. CONST. amend. XIV).

73. *Id.*

74. *Id.* at 76.

75. See *Nordyke v. King*, 563 F.3d 439, 446 n.5 (9th Cir.) (“We are aware that judges and academics have criticized *Slaughter-House*’s reading of the Privileges or Immunities Clause.”), *reh’g en banc granted*, 575 F.3d 890 (9th Cir. 2009), *vacated*, 611 F.3d 1015 (9th Cir. 2010).

76. 143 U.S. 135, 159 (1892).

77. *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) (“Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones.”); *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion) (“The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.” (footnote omitted)).

78. *Boyd*, 143 U.S. at 159 (emphasis added) (quoting *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 405 (1857)); see also *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (Black, J., announcing the judgments of the Court), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI.

Americans were criminally liable for violating various rights enshrined in the Constitution.⁷⁹ The decision was premised, in large part, on a now-rejected theory that the rights protected by the Bill of Rights operate only against the federal government. Nevertheless, in so holding, the Court had occasion to reaffirm and opine at length regarding the separate and autonomous political systems of the federal and state governments, the distinct statuses of state and federal citizenship, and each government's respective supremacy within its own realm.⁸⁰

Similarly, in *Colgate v. Harvey*, the Court again addressed the scope of the Privileges and Immunities Clause of the Fourteenth Amendment, this time as it applied to a state tax scheme that treated certain economic activity differently depending on whether it occurred within or outside the state.⁸¹ In the course of its decision, and in explaining the distinction between the Privileges and Immunities Clauses of Article IV and of the Fourteenth Amendment, the Court again reaffirmed the distinct and separate character of the citizenship schemes of the state and federal governments.⁸²

The enduring power of states to define the boundaries of their own political community has also been reaffirmed by the Supreme Court in the modern era. In *Oregon v. Mitchell*, where the Court considered and rejected the power of Congress to force states to enfranchise eighteen-year-olds in state elections, the Court explained that “the Fourteenth Amendment was [not] intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves.”⁸³ Again in *U.S. Term Limits, Inc. v. Thornton*, the Court held that states may not impose qualifications for the offices of U.S. Representatives or Senators in addition to those set forth by the Constitution. In his concurrence, Justice Kennedy explained:

79. 92 U.S. 542, 544-45, 559 (1876).

80. *Id.* at 549-50 (“We have in our political system a government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other. . . . Within the scope of [the federal government’s] powers, as enumerated and defined, it is *supreme and above the States; but beyond, it has no existence.*” (emphasis added)).

81. 296 U.S. 404, 426-28 (1935).

82. *Id.* at 427, 429 (“[A] citizen of the United States is *ipso facto* and at the same time a citizen of the state in which he resides. And while the Fourteenth Amendment does not *create* a national citizenship, it has the effect of making that citizenship ‘*paramount and dominant*’ instead of ‘*derivative and dependent*’ upon state citizenship. . . . The governments of the United States and of each of the several states are distinct from one another. The rights of a citizen under one may be quite different from those which he has under the other.” (second emphasis added) (quoting *Selective Draft Law Cases*, 245 U.S. 366, 377, 389 (1918))).

83. 400 U.S. at 127. *But see* *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 112 (1873) (Bradley, J., dissenting) (expressing the view that state citizenship is now derivative of federal citizenship).

The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.⁸⁴

In addition, a number of state courts in the modern era have specifically affirmed their continuing power to extend state citizenship to nonfederal citizens.⁸⁵

Thus, while the Supreme Court has not, in the modern era, had occasion to specifically reaffirm the power of states to extend their citizenship to nonfederal citizens, state court precedent, the plain language of the Fourteenth Amendment, the structure of our Constitution, historical precedent, longstanding Supreme Court authority, and recent authority from the Court reaffirming the dual sovereign structure of our Union collectively compel the conclusion that the Constitution does not limit a state's ability to extend its citizenship more broadly than the federal government. Whether, and to what extent, Congress may do so is, of course, a separate question discussed below in Part II.

84. 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

85. *Crosse v. Bd. of Supervisors of Elections*, 221 A.2d 431, 433 (Md. 1966) (per curiam) ("Both before and after the Fourteenth Amendment to the federal Constitution, it has not been necessary for a person to be a citizen of the United States in order to be a citizen of his state."); *Scott v. Comptroller of the Treasury*, 659 A.2d 341, 342-43 (Md. Ct. Spec. App. 1995) (considering a claim by an individual born in the United States but claiming not to be a state citizen, and holding that "even if the *Dred Scott* decision had not been overturned by Constitutional amendment, . . . [although] the Supreme Court in *Scott* did hold that those of African descent were not citizens of the United States, it did not hold that they could not be citizens of the state in which they resided"); *Halaby v. Bd. of Dirs.*, 123 N.E.2d 3, 7 (Ohio 1954) (holding that nonfederal citizens could be deemed local citizens for purposes of a statutory reference to in-state tuition criteria); see also *McKenzie v. Murphy*, 24 Ark. 155, 157-59 (1863) (holding that a domiciled unnaturalized person was entitled to homestead exemptions provided to Arkansas citizens); *Hughes v. Jackson*, 12 Md. 450, 463-64 (1858) (noting that free persons of African descent had long enjoyed the state voting franchise and other limited rights of Maryland citizenship even before the Civil War and notwithstanding *Dred Scott*); *In re Wehlitz*, 16 Wis. 443, 446 (1863) ("Under our complex system of government there may be a citizen of a state who is not a citizen of the United States in the full sense of the term."). *But cf.* *Arai v. Tachibana*, 778 F. Supp. 1535, 1541 (D. Haw. 1991) ("One cannot be a citizen of a state without first being a citizen of the United States."); *Gardina v. Bd. of Registrars*, 48 So. 788, 790-91 (Ala. 1909) (holding that the Fourteenth Amendment rendered both federal and state citizenship the exclusive province of the federal government); *Prowd v. Gore*, 207 P. 490, 491 (Cal. Dist. Ct. App. 1922) (noting that "when we speak of a citizen of a state we mean a citizen of the United States whose domicile is in such state," but ultimately holding that one can be a citizen under the relevant statute if that person is a resident of the state, even if he or she is not a U.S. citizen).

II. STATE CITIZENSHIP AND THE LIMITS OF FEDERAL IMMIGRATION SUPREMACY

Litigation challenging aggressive anti-immigrant state laws has focused on the ways in which such laws may conflict or interfere with federal immigration law. Such challenges have been significantly successful, as many such laws have been struck down or severely curtailed.⁸⁶ As a result, many observers' initial reaction to the equally aggressive pro-immigrant proposal of extending state citizenship to certain undocumented immigrants is to question whether this initiative too would be deemed to interfere with the unique province of the federal government in the immigration realm. To that end, restrictionists would likely argue that states that grant undocumented immigrants citizenship would effectively be unlawfully harboring individuals who have broken federal immigration laws or incentivizing illegal immigration, and such state action would thus interfere with the effective administration of such laws. Additionally, some voices from within the immigrants' rights movement may also be wary of intruding upon the federal government's unique immigration power because the principle of federal supremacy over immigration has been the movement's most effective tool to combat the harshest and most regressive aspects of anti-immigrant state laws.⁸⁷ However, as discussed below, the use of state power to create positive grants of state citizenship does not unconstitutionally infringe upon the federal government's power.

Two main factors distinguish the preemption analysis of state citizenship laws from the preemption analysis of the anti-immigrant state laws of Arizona and elsewhere. First, state citizenship laws, unlike anti-immigrant state laws, would exercise a power that the federalist structure of the Constitution necessarily vests in the states; a power that Congress is not constitutionally authorized to preempt. Second, unlike anti-immigrant state laws, a properly drafted state citizenship law would not conflict or interfere with the federal immigra-

86. *See, e.g.*, *Arizona v. United States*, 132 S. Ct. 2492, 2497-506 (2012) (striking down most provisions of S.B. 1070); *Lozano v. City of Hazleton*, 724 F.3d 297, 300 (3d Cir. 2013) (striking down a local law penalizing employers of undocumented immigrants and requiring proof of immigration status to obtain housing), *cert. denied*, 134 S. Ct. 1491 (2014); *United States v. South Carolina*, 720 F.3d 518, 522 (4th Cir. 2013) (striking down significant portions of South Carolina's Act 69, a package of immigration laws); *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 528-29 (5th Cir. 2013) (en banc) (striking down a local ordinance that barred landlords from renting housing to tenants who could not prove lawful presence), *cert. denied*, 134 S. Ct. 1491 (2014); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1012 (9th Cir. 2013) (striking down Arizona Revised Statutes § 13-2929, which attempted to criminalize the harboring and transporting of unauthorized aliens within the State of Arizona), *cert. denied*, 134 S. Ct. 1876 (2014); *United States v. Alabama*, 691 F.3d 1269, 1276, 1280 (11th Cir. 2012) (striking down significant portions of Alabama's House Bill 56), *cert. denied*, 133 S. Ct. 2022 (2013); *Ga. Latino Alliance for Human Rights v. Governor*, 691 F.3d 1250, 1269 (11th Cir. 2012) (striking down significant portions of Georgia's House Bill 87); *Hispanic Interest Coal. v. Governor*, 691 F.3d 1236, 1240, 1249-50 (11th Cir. 2012) (striking down significant portions of Alabama's House Bill 56).

87. *See, e.g.*, *Arizona*, 132 S. Ct. at 2505-08.

tion scheme insofar as it would not seek to regulate who may stay and who must leave the United States—the exclusive province of the federal government.

A. *The Limits of Congressional Preemptive Power over State Citizenship Schemes*

As discussed above in Part I.B, the federal government may only act and, consequently, Congress may only legislate in those realms enumerated in the Constitution.⁸⁸ The Supremacy Clause declares that the “Constitution, and the Laws of the United States *which shall be made in Pursuance thereof*; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”⁸⁹ Thus only laws *made pursuant to the Constitution* have preemptive force. Because the power to control state citizenship,⁹⁰ within the boundaries of the Fourteenth Amendment, is among those powers reserved in the Constitution to the states⁹¹—a power over which Congress has no power to legislate—Congress cannot preempt a state from passing a law granting state citizenship to nonfederal citizens.⁹²

88. *Afroyim v. Rusk*, 387 U.S. 253, 267-68 (1967); *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion); *see also supra* Part I.B.

89. U.S. CONST. art. VI, cl. 2 (emphasis added).

90. Defining the boundaries of national citizenship is, of course, the unique and exclusive province of the federal government by virtue of the Naturalization Clause of the Constitution. *Id.* art. I, § 8, cl. 4 (“[Congress shall have the Power t]o establish an uniform Rule of Naturalization . . .”). However, as established by the body of Supreme Court case law affirming the states’ authority to establish the boundaries of their own citizenry, the Naturalization Clause is simply inapposite to the issue of state citizenship. *See supra* Part I.B. Naturalization, by definition, is “the admission of a foreign subject or citizen into the political body of a *nation*,” not the political subdivisions thereof. *City of Minneapolis v. Reum*, 56 F. 576, 577 (8th Cir. 1893) (emphasis added). As the Supreme Court explained in the early days of the Union:

The true reason for investing *Congress* with the power of naturalization . . . was to guard against too narrow, instead of too liberal, a mode of conferring the rights of citizenship. Thus, the individual States cannot exclude those citizens, who have been adopted by the *United States*; but they can adopt citizens upon easier terms, than those which *Congress* may deem it expedient to impose.

Collet v. Collet, 2 U.S. (2 Dall.) 294, 296 (1792). The early debates regarding the scope of the power contained in the Naturalization Clause focused on whether states possessed any power to confer national citizenship. *Id.* It was unfathomable then, and has never been suggested in case law since, that the Naturalization Clause has any bearing whatsoever on the states’ power to confer their own citizenship.

91. As explained in Part I, the text and history of the Constitution lead to the conclusion that the power of a state to define the boundaries of its own political community—its own citizenry—was an “area preserved to the States by the Constitution.” *Oregon v. Mitchell*, 400 U.S. 112, 130 (1970) (Black, J., announcing the judgments of the Court), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI.

92. As Justice Black explained in *Mitchell*:

As broad as the congressional enforcement power is, it is not unlimited. . . . [T]he power granted to Congress was not intended to strip the States of their power to govern themselves

However, while Congress is impotent to control the boundaries of state citizenship, this merely prompts the question of what rights states can attach to their citizenship and, among those rights, which Congress can proscribe.⁹³ Put another way, when Congress acts pursuant to its constitutionally vested authority, what limits, if any, exist regarding the restraints it may impose upon the rights states can grant to their citizens? How do we balance the constitutionally assigned powers of Congress against the constitutionally protected sovereignty of the states?⁹⁴ To understand the constraints on federal power in this realm we must first understand the purpose behind the federalist structure guaranteed by the Constitution.⁹⁵ As the Supreme Court has explained, federalism “preserves to the people numerous advantages”:

[1] It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; [2] it increases opportunity for citizen involvement in democratic processes; [3] it allows for more innovation and experimentation in government; and [4] it makes government more responsive by putting the States in competition for a mobile citizenry.⁹⁶

As an initial matter, it is worth noting that it is difficult to imagine a state initiative more closely aligned with these values than the contemplated inclusive state citizenship schemes. Extending state citizenship to immigrants is, of course, an “innovati[ve] and experimentati[ve]” initiative intended to make government “more sensitive to the diverse needs of a heterogenous society,” and “it increases opportunity for citizen involvement in democratic processes” while putting “States in competition for a mobile citizenry.”⁹⁷

As a general rule, “[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States” even “in areas traditionally regulated by the States.”⁹⁸ Accordingly, as a default, the Suprema-

or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation.

Id. at 128.

93. Beyond any limitations Congress may impose, the power of states to bestow state citizenship and define the rights attendant thereto is also, of course, bounded by other provisions in the Constitution. States could not, for example, decide to bestow state citizenship on residents from Latin America but not from Asia, as such designation would run afoul of the Fourteenth Amendment. Similarly, states cannot grant federal citizenship, as the Naturalization Clause gives Congress exclusive power to bestow such citizenship.

94. See generally Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 264 (“Preemption must be cabined more carefully . . . in a concurrent world where preemptive federal action threatens to cut off state access to the wellsprings of popular support.”).

95. See, e.g., U.S. CONST. art. IV; *id.* amend. X.

96. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

97. *Id.* Another explanation for the federalist structure offered by the Framers is to ensure that if people’s “rights are invaded by either [sovereign], they can make use of the other as the instrument of redress.” THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* note 36, at 180-81. At a time when immigrant communities are feeling under siege from the federal government, Hamilton’s explanation offers an alternative justification for inclusive state action.

98. *Gregory*, 501 U.S. at 460.

cy Clause of the Constitution dictates that when congressional power and state sovereignty come in conflict, state sovereignty must give way.⁹⁹ But for decades, the Supreme Court has recognized that there are limits to this general principle.

In *Sugarman v. Dougall*, the Court was called upon to decide whether a New York state statute, which prohibited the employment of noncitizens in a broad range of public positions, including primarily low-level nonpolicymaking positions, violated the Equal Protection Clause of the Constitution.¹⁰⁰ The Court held that the statute violated the guarantee of equal protection and rejected the State's claim that the employment prohibition was an exercise of the State's sovereign authority to define the identity of its own government. However, in considering the issue, the Court "recognize[d] a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community'" as well as "the State's broad power to define its political community."¹⁰¹ Most notably, the Court explained that if the statute had implicated "functions that [went] to the heart of representative government," the Court's equal protection scrutiny would not have been "so demanding where we deal[t] with matters resting firmly within a State's constitutional prerogatives."¹⁰² This is a truly extraordinary statement. The Court here indicates that even where constitutional mandates come into conflict with fundamental aspects of state sovereignty, let alone statutory proscriptions, those constitutional rules must sometimes bend out of respect for the power constitutionally reserved to states.¹⁰³ It seems the default rule, set forth in the Supremacy Clause, is not absolute.

Just a few years later, in *National League of Cities v. Usery*, the Court established the high-water mark for the inviolability of state sovereignty.¹⁰⁴ In *National League of Cities*, the Court held that Congress may not exercise its commerce power to interfere with state sovereignty "in areas of traditional governmental functions."¹⁰⁵ This rule was short-lived, however, as nine years later, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Court abandoned this rule, holding that the "traditional governmental functions" test was unworkable.¹⁰⁶ In *Garcia*, the Court acknowledged that there are undoubtedly

99. See U.S. CONST. art. VI, cl. 2.

100. 413 U.S. 634, 636 (1973).

101. *Id.* at 642-43 (citation omitted) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)) (internal quotation marks omitted).

102. *Id.* at 647-48.

103. See *Gregory*, 501 U.S. at 468 ("But this Court has never held that the [Fourteenth] Amendment may be applied in complete disregard for a State's constitutional powers. Rather, the Court has recognized that the States' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment.")

104. 426 U.S. 833 (1976).

105. *Id.* at 852.

106. 469 U.S. 528, 546-48 (1985).

limits on the power of Congress to exercise its commerce power so as to infringe on state sovereignty, but it expressed doubt “that courts ultimately can identify principled constitutional limitations on the scope of Congress’ Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty.”¹⁰⁷ Instead, the Court suggested that the political process, not the courts, may be the appropriate constitutional mechanism to define the boundaries of inviolable state sovereignty.¹⁰⁸

However, most recently, in *Gregory v. Ashcroft*, the Court has come full circle and once again embraced the balance originally suggested in *Dougall*. In *Gregory*, the Court was considering a challenge brought by Missouri state judges, claiming that the state constitution’s mandatory retirement age violated, inter alia, the Federal Age Discrimination in Employment Act of 1967 (ADEA).¹⁰⁹ If the provision violated the ADEA, the case presented the issue of whether Congress could constitutionally interfere with a state’s ability to determine the qualifications for its own judges. The Court ultimately constructed a clear statement rule to avoid the difficult constitutional issue and held that the judges were not covered by the ADEA under the language of that statute.¹¹⁰ However, in so holding, the Court strongly suggested that even where Congress is constitutionally empowered to act, it may not act in a way that infringes on “state decisions that ‘go to the heart of representative government’” because such infringement “would upset the usual constitutional balance of federal and state powers.”¹¹¹

Accordingly, in determining what rights states may universally deliver to their citizenship and what rights the federal government may prohibit a state from delivering, we are guided by the Court’s decisions in *Dougall* and *Gregory*. It seems that those rights which go most directly to the “heart of [a state’s] representative government” may not be infringed upon by Congress, even through the exercise of its constitutionally enumerated powers.¹¹²

107. *Id.* at 548.

108. *Id.* at 547-52.

109. 501 U.S. 452, 455 (1991).

110. *Id.* at 470.

111. *Id.* at 460-61 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)); see also *Garcia*, 469 U.S. at 547 (noting that the Supreme Court has long acknowledged that even where Congress is empowered to act, “the Constitution precludes ‘the National Government [from] devour[ing] the essentials of state sovereignty’” (alterations in original) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting))).

112. It is interesting to consider to what extent these limits would apply if Congress were to attempt to use its spending power to impose conditions on who could become a state citizen or on what rights they would enjoy. See U.S. CONST. art. I, § 8, cl. 1. As a general matter, “the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution,” *United States v. Butler*, 297 U.S. 1, 66 (1936), and thus “objectives not thought to be within Article I’s ‘enumerated legislative fields’ may nevertheless be attained through the use of the spending power and the conditional grant of federal funds,” *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citation omitted) (quoting *Butler*, 297 U.S. at 65). But the “spending power is of course not unlimited,” and “other constitutional provisions may provide an independent bar

As discussed in greater detail below, the rights contemplated under an inclusive state citizenship scheme fall generally into three categories: political rights, rights of access to public programs and benefits, and rights to protection against mistreatment.¹¹³ Political rights include the right to vote and hold public office. Rights of access to public programs and benefits include the rights to state-issued identification, driver's licenses, and equal access to state educational and health care programs. Finally, rights to protection against mistreatment include privacy protections, antidiscrimination protections, and assurances that the state and its subdivisions will not voluntarily participate in federal immigration enforcement activities targeting state citizens.

The legal inquiry for each of these rights is thus whether the right goes to the "heart of representative government." Many rights may not, and thus Congress could in theory limit the ability of states to deliver these rights—though it has not.¹¹⁴ However, some of the rights attendant to an inclusive state citizenship scheme are essential to a functioning democracy, and thus any attempt to federally proscribe these rights should fail. Most notably, the political rights—to vote and hold office—have been repeatedly singled out by the Court as central to state sovereignty.¹¹⁵ In addition, the right to state-issued identification is intimately connected to the power of states to define who is and who is not part

to the conditional grant of federal funds." *Id.* at 207-08. While the Court has read "other constitutional provisions" narrowly, it has also made clear that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 208, 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). However, while the coercion standard set by the Court is a high bar, as the Court has recently made clear, it is not unreachable. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603-04 (2012) (holding that the Affordable Care Act provision authorizing penalties against states that chose not to participate in the Act's expansion of the Medicaid program exceeded Congress's power under the Spending Clause). The analysis is fact intensive and would turn on the particulars of any congressional effort to use its spending power to curtail state citizenship. However, at base, I find it difficult to imagine that the Court would permit Congress to use its spending power to effectively compel states to cede control of decisions that go to the heart of their democratic processes.

113. *See infra* Part III.B.

114. *See infra* Part II.B.

115. *Gregory*, 501 U.S. at 460 ("It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." (alteration in original) (quoting *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900)) (internal quotation marks omitted)); *Dougall*, 413 U.S. at 647 ("And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government."); *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970) (Black, J., announcing the judgments of the Court) ("[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." (footnote omitted)), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI; *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892) ("Each state has the power to prescribe the qualifications of its officers, and the manner in which they shall be chosen . . .").

of the political community, which is also central to state sovereignty and to “the State’s broad power to define its political community.”¹¹⁶ Similarly, insofar as the education of the citizenry is a necessity for functioning democracy, educational rights attendant to state citizenship could also potentially be conceived of as going to the “heart of representative government.”¹¹⁷

At base, Congress is powerless to interfere with a state’s desire to extend its citizenship to whomever it pleases. Similarly, Congress cannot deprive state citizens of the core political or other rights necessary to establish a functioning democratic system of government. However, this inquiry regarding the ability of Congress to proscribe the rights attendant to citizenship is for now purely academic, as Congress has not acted to curtail any of the rights contained in the contemplated inclusive state citizenship scheme.

B. *Traditional Preemption Analysis: Properly Drafted Inclusive State Citizenship Laws Would Not Conflict or Interfere with Federal Immigration Law*

To the extent Congress has the power to limit the rights a state can grant its citizens, state citizenship laws would be federally preempted only if (1) Congress has expressly prohibited states from conferring such rights, (2) the Constitution or Congress has reserved the entire field of law related to such rights, or (3) the proposed state laws conflict or interfere with federal law.¹¹⁸ At present, there exists no federal law that explicitly purports to limit the power of states to confer state citizenship on nonfederal citizens or to deliver onto them the contemplated bundle of rights. Thus, Congress has not expressly preempted the contemplated state citizenship laws. Furthermore, as discussed below, since

116. *Dougall*, 413 U.S. at 643.

117. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 315 n.8 (1986) (Stevens, J., dissenting) (“The Court has frequently emphasized the role of public schools in our national life.”); *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion) (“[P]ublic schools are vitally important . . . as vehicles for ‘inculcating fundamental values necessary to the maintenance of a democratic political system.’” (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979))); *Ambach*, 441 U.S. at 76 (“The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (“[T]he grave significance of education both to the individual and to our society’ cannot be doubted.” (quoting *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 283 (W.D. Tex. 1972))); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation . . . is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”).

118. The different ways in which a state law can be federally preempted are correspondingly referred to as (1) express preemption, (2) field preemption, and (3) conflict preemption. See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (explaining three ways in which a state law may be preempted: (1) if Congress has expressly legislated an express provision for preemption, (2) if Congress intends to occupy a field of law, or (3) if the existence of the state law would conflict with existing federal law).

the federal government has not occupied the field of state citizenship, or of any of the rights contemplated by an inclusive state citizenship regime, and since the contemplated laws meticulously avoid interference with the federal regulation of immigration, the proposed laws would not be “field” or “conflict” preempted.

1. *State citizenship laws are not preempted under the doctrine of field preemption*

The federal government’s exclusive power over our nation’s foreign affairs and the naturalization of federal citizens enables Congress to exclusively occupy the field of law regulating the *admission, deportation, and naturalization* (granting of federal citizenship) of noncitizens.¹¹⁹ As the Supreme Court has explained, the “Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.”¹²⁰ Pursuant to this power, Congress has passed myriad federal immigration laws to regulate, specifically, the admission, deportation, and naturalization of noncitizens.¹²¹

However, it has long been settled that this exclusive federal power does not mean that *all* state regulation that touches upon noncitizens is necessarily preempted.¹²² Indeed, only state laws that are “essentially a determination of

119. See *De Canas v. Bica*, 424 U.S. 351, 354, 363 (1976); see also *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 601-02 (E.D. Va. 2004); cf. U.S. CONST. art. I, § 8, cls. 3-4 (presenting the Foreign Commerce Clause and the Naturalization Clause, respectively). As Spiro has explained, state laws that target noncitizens for harsher treatment could, in theory, impact our foreign relations and thus potentially intrude upon this exclusive federal realm. Spiro, *supra* note 24, at 561-62. However, the contemplated state citizenship laws, which would inure to the benefit of noncitizens, are unlikely to negatively impact the federal government’s foreign affairs agenda.

120. *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948); see also *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (noting the inherent power of a sovereign to control entry, exit, and its borders); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889) (“For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876) (“The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. . . . If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.”).

121. *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941) (stating that Congress “enacted a complete scheme of regulation” in the field of immigration); see also *Immigration and Nationality Act*, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537 (2013)) (providing a comprehensive statutory scheme for, inter alia, regulating the admission, deportation, and naturalization of noncitizens).

122. *Toll v. Moreno*, 458 U.S. 1, 26 (1982) (Rehnquist, J., dissenting) (stating that “regulations affecting aliens” are not field preempted); *De Canas*, 424 U.S. at 355 (“[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted . . .”).

who should or should not be admitted into the country, and the conditions under which a legal entrant may remain,” infringe upon the exclusive federal immigration power.¹²³ Thus, a state law that regulates *immigrants* is not necessarily one that regulates *immigration*—the exclusive realm of the federal government. Laws regulating immigrants, rather than immigration, are referred to as alienage, rather than immigration, laws.¹²⁴ Alienage laws, including existing state laws that regulate immigrant access to higher education,¹²⁵ public benefits,¹²⁶ driver’s licenses, and licenses to practice law¹²⁷ have repeatedly been upheld as *not* infringing upon the exclusive immigration power of the federal government. To be sure, the line between alienage and immigration laws can, at times, be somewhat “elusive.”¹²⁸ But insofar as the contemplated state citizenship laws do not purport to authorize state citizens to enter or remain in the United States, they should fall safely on the alienage side of that distinction and will not impermissibly intrude upon the exclusive power of the federal government to regulate immigration. Thus, because the federal government occupies only the field of *immigration*, but not alienage laws, and because state citizenship laws do not purport to regulate immigration, such laws would not be field preempted.

It is possible to conceive of the contemplated state citizenship laws as an expression of a state’s disagreement with the federal government’s immigration policy. Indeed, a primary motivating factor for such laws is the sentiment that the federal government has wrongfully excluded a broad class of individuals from civil society, to the detriment of individuals, communities, and society as a whole. However, state expressions of disagreement with federal policy, even in exclusively federal realms, will not be sufficient to trigger preemption absent actual intrusion into the federal arena.

An example from the nation’s early history establishes this principle. In the antebellum period, Northern states, frustrated with the federal government’s complicity with the institution of slavery, and specifically with the operation of the Fugitive Slave Act of 1793, passed “personal liberty laws” seeking to ex-

123. *De Canas*, 424 U.S. at 355 (noting that there would not even need to be an inquiry into whether state law conflicted with the Immigration and Nationality Act if the Constitution preempted *any* laws touching on aliens, and turning away from this possibility); see also *Galvan v. Press*, 347 U.S. 522, 531 (1954) (“Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. . . . [T]he formulation of these policies is entrusted exclusively to Congress . . .”).

124. See, e.g., Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT’L L. 201, 202 (1994).

125. *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 608, 611 (E.D. Va. 2004); *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 859-60 (Cal. 2010).

126. *Madeira v. Affordable Hous. Found., Inc.*, 315 F. Supp. 2d 504, 507 (S.D.N.Y. 2004) (finding that an undocumented immigrant could receive workers’ compensation under New York law); *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56, 58 (App. Div. 2005) (same), *aff’d sub nom. Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246 (N.Y. 2006).

127. *In re Garcia*, 315 P.3d 117, 120-21 (Cal. 2014).

128. Motomura, *supra* note 124, at 202.

press their disagreement with federal policy.¹²⁹ The original wave of these laws encumbered the process established by Congress for the return of enslaved individuals who had fled to Northern states. In *Prigg v. Pennsylvania*, the Supreme Court struck down Pennsylvania's personal liberty law, finding that it actively interfered with the federal scheme.¹³⁰ In doing so, however, the Court noted that while states could not interfere with the federal scheme, neither could they be forced to participate in the federal scheme with which they disagreed.¹³¹ In response, states passed personal liberty laws that avoided active interference and instead simply prohibited public participation in any effort to capture a person who had escaped from slavery.¹³² This second wave of laws was not subject to successful legal challenge, thus establishing the principle that vocal disagreement with exclusive federal policy, absent actual interference or intrusion, should not trigger preemption.¹³³

2. *State citizenship laws are not preempted under the doctrine of conflict preemption*

Even though the federal government has not occupied the entire field of alienage laws, a state citizenship law could nonetheless be preempted if it effectively "st[ood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹³⁴ One significant goal of federal immigration law is to "deter[] unauthorized immigration."¹³⁵ To the extent the con-

129. James A. Kraehenbuehl, *Lessons from the Past: How the Antebellum Fugitive Slave Debate Informs State Enforcement of Federal Immigration Law*, 78 U. CHI. L. REV. 1465, 1473-74 (2011).

130. 41 U.S. (16 Pet.) 539, 617-18 (1842).

131. See *id.* at 625. This is a theme that has been carried forward in modern anticommandeering jurisprudence. *E.g.*, *New York v. United States*, 505 U.S. 144, 169 (1992) ("Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation.").

132. See, *e.g.*, Act of Mar. 24, 1843, ch. 69, §§ 1-2, 1843 Mass. Acts 33, 33; see also Kraehenbuehl, *supra* note 129, at 1478-79.

133. A modern example of state action aimed, at least in part, as a critique of federal policy in an exclusive federal realm is *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). In *Crosby*, Massachusetts imposed a sanction scheme on the foreign nation of Burma (Myanmar) that was distinct from, and arguably stronger than, the scheme imposed by Congress. *Id.* at 366-70. The Court found the state sanctions preempted because they actively interfered with the federal government's foreign relations by, *inter alia*, depriving the President of the ability to remove sanctions. *Id.* at 374-77. Notably, nowhere did the Court suggest that it was inappropriate for Massachusetts to act in a way that commented on the federal government's exclusive international relations power. Instead, the Court was myopically focused on whether the state action had the *actual practical effect* of interfering with federal policy. See *id.* at 373-88. Unlike the Massachusetts sanctions scheme, inclusive state citizenship regimes are unlikely to aggravate foreign nations and are thus unlikely to actually impede federal foreign policy in any way.

134. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

135. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984).

templated state citizenship laws would ensure more humane treatment of some undocumented immigrants, one could argue that such laws “stand as an obstacle” to “detering unauthorized immigration.” But this line of reasoning would prove too much. Indeed, the Supreme Court has explained that state laws that merely have “some purely speculative and indirect impact on immigration” will not be deemed to conflict with federal law.¹³⁶ Moreover, states have a host of legitimate state interests in passing certain laws that could benefit undocumented populations. Laws extending driver’s licenses to undocumented immigrants can improve road safety.¹³⁷ Laws extending medical benefits to undocumented immigrants can improve public health.¹³⁸ Laws extending in-state tuition to undocumented immigrants can improve educational outcomes and thus increase economic activity.¹³⁹ Indeed, the Supreme Court has repeatedly affirmed the autonomy of the states to define their own political communities, as such communities relate to “political functions” of the states.¹⁴⁰ It cannot be that state laws passed in furtherance of legitimate state interests that incidentally make the United States less hostile to certain undocumented immigrants are necessarily impermissible.¹⁴¹

Generally, those state laws that directly interfere with enforcement mechanisms laid out by Congress are deemed to impermissibly conflict with federal law.¹⁴² Even state laws that purport to aid or advance a federal goal have been

136. *De Canas v. Bica*, 424 U.S. 351, 355-56 (1976); *see also* *English v. Gen. Elec. Co.*, 496 U.S. 72, 85 (1990) (holding that interference with a federal scheme must be “direct and substantial” to trigger preemption).

137. *See, e.g.*, Alexandra Forter Sirota, *Licensing All Drivers in North Carolina: A Policy that Supports Public Safety and Boosts the Economy*, BUDGET & TAX CENTER 2 (Apr. 2014), <http://www.ncjustice.org/?q=budget-and-tax/btc-brief-licensing-all-drivers-north-carolina-policy-supports-public-safety-and>.

138. *See, e.g.*, *California Lawmaker Pushes Bill Extending Obamacare to Undocumented Immigrants*, FOX NEWS LATINO (Jan. 13, 2014), <http://latino.foxnews.com/latino/politics/2014/01/13/california-lawmaker-pushes-for-government-health-care-plans-to-cover>.

139. NAT’L IMMIGRATION LAW CTR., *supra* note 13, at 2.

140. *Cabell v. Chavez-Salido*, 454 U.S. 432, 439-40, 447 (1982) (permitting states to require that all probation officers be citizens); *Ambach v. Norwick*, 441 U.S. 68, 81 (1979) (permitting states to require that all teachers be citizens); *Foley v. Connelie*, 435 U.S. 291, 292-93 (1978) (permitting states to require that all state troopers be citizens). While these cases arose in the context of restrictionist state definitions of eligibility, the principles that underlie the decisions make clear they are premised on the autonomy of states to define the parameters of these eligibility criteria for themselves.

141. *See De Canas*, 424 U.S. at 355-56. *See generally* Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 159-60 (2009) (discussing how undocumented immigrants are residents in all critical respects and how basic government protection is justified both for these individuals and for the betterment of the community).

142. *See, e.g.*, *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 528-29 (5th Cir. 2013) (en banc) (preempting a state law sanctioning landlords for renting to undocumented immigrants because it did not follow the process of the Immigration and Naturalization Act); *City of N.Y. v. United States*, 179 F.3d 29, 31 (2d Cir. 1999) (declaring that New York City’s prohibition on communicating immigration status to federal authorities was preempted because it was a direct obstruction of the information-sharing scheme set

frequently struck down insofar as they usurp the prerogative of the federal government to appropriately balance competing federal interests.¹⁴³ Most famously, the Supreme Court struck down the central provisions of Arizona's S.B. 1070, which empowered state officers to arrest persons suspected of immigration law violations, in part because it was for the federal government, and the federal government alone, to exercise discretion regarding how, when, and whether to initiate enforcement action for such violations.¹⁴⁴

Thus, the emergent theme from immigration preemption jurisprudence is that when states attempt to either affirmatively supplant or insert themselves in a decisionmaking role regarding the goals and mechanisms of federal immigration law, or when they assume for themselves the authority to balance the competing interests underlying federal immigration law, courts have viewed such laws as conflicting with federal immigration law.¹⁴⁵ In contrast, where states merely regulate the lives of immigrants in areas "which the States have traditionally occupied," such regulations have not generally been viewed as an obstacle to federal immigration law.¹⁴⁶ As the Court has explained, "[s]tates tradi-

forth in 8 U.S.C. § 1373); *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 733-34 (Ct. App. 2009) (finding that a state law prohibiting police from cooperating with Immigration and Customs Enforcement (ICE) was preempted because it was a regulation of immigration that conflicted with federal policy).

143. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2503 (2012) (finding that a state-law penalty for an alien failing to possess a registration document is an "intrusion upon the federal scheme"); *Rogers v. Larson*, 563 F.2d 617, 626 (3d Cir. 1977) (finding Virgin Islands law preempted because it struck a balance between "assur[ing] an adequate labor force on the one hand and . . . protect[ing] the jobs of citizens on the other" differently from federal immigration law); *United States v. South Carolina*, 840 F. Supp. 2d 898, 916 (D.S.C. 2011) (holding that a state law sanctioning transportation and harboring of undocumented immigrants was preempted); see also *Villas at Parkside Partners*, 726 F.3d at 528-29 (holding that a subfederal law was preempted because it conflicted with federal immigration law); *Lozano v. City of Hazleton*, 620 F.3d 170, 220 (3d Cir. 2010) (same), *vacated*, 131 S. Ct. 2958 (2011); *United States v. Alabama*, 813 F. Supp. 2d 1282, 1315 (N.D. Ala. 2011) (same), *aff'd in part, rev'd in part*, 691 F.3d 1269 (11th Cir. 2012); *Ga. Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317, 1336 (N.D. Ga. 2011) (same), *aff'd in part, rev'd in part sub nom.* *Ga. Latino Alliance for Human Rights v. Governor*, 691 F.3d 1250 (11th Cir. 2012); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 769-72 (C.D. Cal. 1995) (same).

144. *Arizona*, 132 S. Ct. at 2505-08.

145. See *supra* note 143.

146. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see also *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1976, 1981 (2011) (upholding a state employment verification law, which required compliance with federal immigration law but did not allow state officials to make immigration determinations); *Madeira v. Affordable Hous. Found., Inc.*, 315 F. Supp. 2d 504, 506-07 (S.D.N.Y. 2004) (holding that extending workers compensation benefits to undocumented immigrants does not conflict with federal immigration law); *League of United Latin Am. Citizens*, 908 F. Supp. at 776 (declaring that a state law restricting immigrants' access to welfare benefits was not field preempted); *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 860 (Cal. 2010) (finding that California's grant of in-state tuition to undocumented immigrants is not preempted by 8 U.S.C. § 1623); *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56, 69-70 (App. Div. 2005) (holding that extending workers compensation benefits to undocumented immigrants does not conflict with fed-

tionally have had great latitude under their police powers to legislate as ‘to the protection of the lives, limbs, health, comfort, and quiet of all persons.’”¹⁴⁷ Thus, as discussed below in Part III, insofar as a state citizenship law limits the benefits thereunder to traditional areas of state control—state voting rights, driver’s licenses, education benefits, medical benefits, etc.—and insofar as the law does not make any independent determination of federal immigration status or purport to limit the authority of the federal government to regulate the admission or deportation of such citizens, such laws should fit squarely in the realm of traditional state power and should not conflict or intrude upon the federal regulation of immigration.¹⁴⁸

In regard to the bundle of rights to be delivered to state citizens, none would conflict or interfere with any existing congressional scheme. The political rights, as discussed below, are beyond the power of Congress to preempt. Moreover, nothing in federal law purports to limit the ability of states to grant the franchise to individuals in state and local elections or to define the qualifications for state or local public office.¹⁴⁹ With regard to state-issued identification and driver’s licenses, the federal scheme specifically envisions the possibility that such licenses may be issued by certain states to persons without federal immigration status.¹⁵⁰ While Congress has imposed some limits on the ability of states to grant certain educational benefits to undocumented immigrants,¹⁵¹ workable solutions consistent with the federal scheme have already been implemented. Congress has also explicitly authorized state legislatures to extend eligibility for professional licenses and other public benefits, including health benefits, to undocumented immigrants.¹⁵² Finally, nothing in federal law

eral immigration law), *aff’d sub nom.* Balbuena v. IDR Realty LLC, 845 N.E.2d 1246 (N.Y. 2006); *Cano v. Mallory Mgmt.*, 760 N.Y.S.2d 816, 818 (Sup. Ct. 2003) (holding that extending workers compensation benefits to undocumented immigrants does not conflict with federal immigration law); *cf.* *United States v. South Carolina*, 840 F. Supp. 2d 898, 913-14 (D.S.C. 2011) (noting that preemption does not necessarily stretch to areas of historic state power).

147. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1873) (quoting *Thorpe v. Rutland & Burlington R.R.*, 27 Vt. 140, 149 (1855)) (internal quotation marks omitted)).

148. Elias, *supra* note 20, at 748-49 (discussing recent Supreme Court immigration federalism cases and concluding that they “portend a new era of immigration federalism, defined not by state and local efforts to enforce immigration laws and deport immigrants, but rather by state and local experimentation with measures intended to foster immigrant inclusion”); Spiro, *supra* note 24, at 560 (suggesting that extending local citizenship to nonfederal citizens is permissible because it would merely “bundle” privileges that a state is empowered to bestow).

149. *Compare* 42 U.S.C. § 15483 (2013) (establishing procedures and rules required in federal elections), *with* New York Is Home Act, S. 7879, A. 10129, 237th Leg., Reg. Sess. § 4 (N.Y. 2014) (establishing the right of certain noncitizens to vote in state and local elections).

150. *See* 49 U.S.C. § 30301 note sec. 202(c)(2)(B)(v)-(ix) (2013); *see also infra* note 179.

151. *See* 8 U.S.C. § 1623 (2013); *see infra* note 165.

152. *See* 8 U.S.C. § 1621.

has, and arguably could, prevent extending the types of protections against mistreatment envisioned under an inclusive state citizenship scheme.¹⁵³ In short, none of the contemplated rights conflict with federal law.

III. EXPLORING THE BOUNDARIES OF STATE POWER: WHAT WOULD STATE CITIZENSHIP ACHIEVE?

The United States' constitutional structure contemplates both federal and state citizenship, with each level of government empowered to define the boundaries of its own citizenry, at least insofar as a state does not deny state citizenship to a federal citizen or violate constitutional prohibitions against discrimination.¹⁵⁴ Within this dual sovereign structure, a state may extend a positive grant of citizenship to its undocumented individuals. However, just because a state has the power to grant state citizenship to undocumented immigrants does not mean it should.¹⁵⁵ What might be gained by extending state citizenship to undocumented immigrants? What are the limits of state citizenship, and what potential unintended consequences could flow from a modern expansion of our political community? To fully evaluate the normative merits of state citizenship for undocumented immigrants, one must weigh these limits and consequences against the individual and collective benefits that could flow from such expansion.

A. *Limits and Dangers of Inclusive State Citizenship Schemes*

It is important to recognize what state citizenship cannot achieve. State citizenship is by no means a substitute for comprehensive immigration reform. As discussed above, only the federal government can extend federal citizenship,

153. See *infra* notes 186-98 and accompanying text.

154. See *supra* Part I.B.

155. See Op-Ed., *Is State Citizenship the Answer to Immigration Reform?*, N.Y. TIMES ROOM FOR DEBATE (June 24, 2014), <http://www.nytimes.com/roomfordebate/2014/06/24/is-state-citizenship-the-answer-to-immigration-reform> (collecting divergent opinions of four commentators on a bill to extend New York citizenship to certain undocumented immigrants); Peter L. Markowitz, Op-Ed., *State Citizenship Is a National Solution to Immigration Reform*, N.Y. TIMES ROOM FOR DEBATE (June 24, 2014), <http://www.nytimes.com/roomfordebate/2014/06/24/is-state-citizenship-the-answer-to-immigration-reform/state-citizenship-is-a-national-solution-to-immigration-reform>; Ted Ruthizer, Op-Ed., *New York's State Citizenship Initiative Cheapens U.S. Citizenship*, N.Y. TIMES ROOM FOR DEBATE (June 25, 2014, 2:43 PM), <http://www.nytimes.com/roomfordebate/2014/06/24/is-state-citizenship-the-answer-to-immigration-reform/new-yorks-state-citizenship-initiative-cheapens-us-citizenship>; Peter Spiro, Op-Ed., *State Citizenship Has Roots in American History*, N.Y. TIMES ROOM FOR DEBATE (June 24, 2014), <http://www.nytimes.com/roomfordebate/2014/06/24/is-state-citizenship-the-answer-to-immigration-reform/state-citizenship-has-roots-in-american-history>; Rose Cuison Villazor, Op-Ed., *State Citizenship Strengthens What It Means to Be a Citizen*, N.Y. TIMES ROOM FOR DEBATE (July 30, 2014, 2:25 PM), <http://www.nytimes.com/roomfordebate/2014/06/24/is-state-citizenship-the-answer-to-immigration-reform/state-citizenship-strengthens-what-it-means-to-be-a-citizen>.

provide protection against deportation, and authorize employment in the United States.¹⁵⁶ These are, of course, the rights at the center of the immigration debate and the rights that are, in many ways, most critical to stabilize the lives of the vast undocumented population living in the United States. Any effort by a state to infringe upon these exclusive federal powers would most certainly be struck down. Thus, any state citizenship scheme must not purport to intrude upon the federal government's power to determine who may come in and who must leave, or upon any of the specific areas Congress has reserved for the federal government.

However, even a carefully crafted state citizenship regime, which steers clear of the specific areas that Congress and the Constitution have reserved for the federal government, may still prompt normative objections. The most common normative objections to date include fear that aggressive assertions of state citizenship could prompt a backlash against immigrants, concern that this expansion of state citizenship would "cheapen" the institution of citizenship, and the sentiment that, even if we thread the legal needle on preemption, it is not the place of states to insert themselves into the federal immigration debate.¹⁵⁷ I will discuss these in turn.

First, some within the immigrants' rights community may fear that state citizenship laws will prompt a backlash from anti-immigrant forces as hostile states could define citizenship down to its constitutional floor and exclude all non-U.S. citizens. The concern is that these states could then discriminate against immigrants through state citizenship designations in ways that would otherwise be prohibited by the Fourteenth Amendment. This fear is misplaced. A state citizenship scheme based upon alienage would be viewed for equal protection purposes as an alienage designation and evaluated as such.¹⁵⁸ That said, insofar as we adopt the view that the federal government may not interfere with certain aspects of citizenship, such as those that go to the heart of representative government, we can conceive of some theoretical danger that we could be immunizing some forms of discrimination.¹⁵⁹ But as we pursue the analysis deeper, we see that these protected arenas are both quite limited and largely already employed against immigrants. The contemplated state citizenship schemes seek to exploit existing realms wherein states are permitted sufficient autonomy to overcome equal protection issues to expand immigrant rights—arenas like vot-

156. See *supra* Part II.B.1.

157. See, e.g., Ruthizer, *supra* note 155; sources cited *supra* note 48.

158. Notably, the inclusive state citizenship model I propose does not make any alienage determination whatsoever. Rather, it extends state citizenship to residents based primarily on volition and duration of residency *regardless of alienage or immigration status*.

159. Others have persuasively argued, however, that discrimination driven by animus against noncitizens should be viewed differently than alienage classifications designed to foster the positive inclusion of noncitizens. See, e.g., Lucas Guttentag, *Discrimination, Preemption, and Arizona's Immigration Law: A Broader View*, 65 STAN. L. REV. ONLINE 1, 1-2 (2012), http://www.stanfordlawreview.org/sites/default/files/online/articles/Guttentag_65_Stan_L_Rev_1.pdf.

ing and defining the qualifications for public office—but they do not open up new tools for discrimination.

Second, some have charged that the contemplated state citizenship regimes “cheapen” the institution of citizenship.¹⁶⁰ I must confess to not fully comprehending this objection. Perhaps the objection is that the contemplated state citizenship schemes have a more streamlined process for attaining citizenship than our federal naturalization process and that the relative ease of attaining citizenship dilutes its value. This view, however, ignores the history of citizenship, wherein our current arduous road to federal naturalization, not the contemplated regimes, is the historical anomaly.¹⁶¹ I suspect, however, that the real basis of this objection is the normative judgment that the people who would benefit from the contemplated regimes are not sufficiently rooted in our community to be deserving of the title of citizen. This objection seems entirely to depend upon one’s view of the larger national debate about who is deserving of a pathway to citizenship. Reasonable minds will certainly differ on this point, but the objection seems to have little to do with the novel modern assertion of state power in the citizenship realm and everything to do with one’s view of our current national immigration debate.

Finally, others have suggested that even if we presume the legality of the contemplated state citizenship model, it is nonetheless inappropriate for states to insert themselves into what is undeniably a national debate about federal immigration policy.¹⁶² This view, however, overlooks the fact that restrictionist-leaning states have already robustly inserted themselves into the federal immigration debate. If integrationist-leaning states continue to stand mute, we do not vindicate a principle of federal exclusivity. Rather, we allow our national debate to continue to be lopsided and distorted. Moreover, it misconceives the role of states in our federal union to suggest that they should speak only when spoken to on issues of federal concern. States are, by design, critical mechanisms citizens can use to insert themselves into our national dialogue.¹⁶³ Having states participate in debates on federal policy is exactly how our democracy was designed to function.

B. *Individual Responsibilities and Benefits of State Citizenship*

States are empowered to bestow upon their citizens any and all of the many rights and privileges controlled by state law.¹⁶⁴ States can extend their own cit-

160. Ruthizer, *supra* note 155.

161. *See supra* Part II.B.1.

162. *See, e.g.*, Editorial, *supra* note 48.

163. Heather K. Gerken, Professor, Yale Law Sch., Exit, Voice, and Disloyalty (Mar. 26, 2012), in 62 DUKE L.J. 1349, 1362-65 (2013) (discussing the productive way our decentralized federalist system provides important policymaking opportunities for minority groups through the levers of state and local power, particularly with regard to federal law or policy found objectionable by these groups).

164. *See supra* Part I.B.

izenship as broadly or as narrowly as they deem prudent, within the bounds of the Fourteenth Amendment.¹⁶⁵ The New York Is Home Act, which is the first modern bill to advance a concept of state citizenship which includes undocumented immigrants, was introduced in the New York State legislature in June 2014 and provides a window into the responsibilities and benefits that could flow from the state citizenship model.¹⁶⁶ The proposed legislation recognizes the state citizenship of all U.S. citizens residing in the state—the floor required by the Fourteenth Amendment—but goes further to extend state citizenship to any individual, regardless of federal immigration status or lack thereof, if she can establish the following: proof of identity, residency and tax payment in the state for three years, a commitment to abide by New York laws and to uphold the state constitution, and a willingness to fulfill the continuing obligations of citizenship, such as jury service and continuing tax payments.¹⁶⁷

165. It is important to note that restrictionist efforts to limit state citizenship based on the ideals of the “Birthright Citizenship Movement” are not supported by this Article’s proposal. For example, State Legislators for Legal Immigration (SLLI), a coalition founded in 2007, drafted model legislation to deny state, but not federal, citizenship to children born in the United States if the children’s parents lack permanent legal immigration status. See State Legislators for Legal Immigration, Draft Legislation (Jan. 5, 2011), available at <http://politi.co/1aYOdM9>. There have been “birthright” legislative efforts in at least fourteen states, though no state has passed such a law. Julia Preston, *State Lawmakers Outline Plans to End Birthright Citizenship, Drawing Outcry*, N.Y. TIMES (Jan. 5, 2011), <http://www.nytimes.com/2011/01/06/us/06immig.html>.

In contrast to this Article’s assertion that the Fourteenth Amendment’s Citizenship Clause functions as a *floor* on state citizenship, the Birthright Citizenship Movement argues that the floor does not apply to the children of undocumented immigrants because such children, they assert, are not “subject to the jurisdiction” of the United States. See U.S. CONST. amend. XIV, § 1 (“All persons born . . . in the United States *and subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside.” (emphasis added)); JON FEERE, CTR. FOR IMMIGRATION STUDIES, BIRTHRIGHT CITIZENSHIP IN THE UNITED STATES: A GLOBAL COMPARISON 5 (2010), available at <http://www.cis.org/sites/cis.org/files/articles/2010/birthright.pdf>. The proposed SLLI legislation is widely, and correctly, regarded as unconstitutional and is in direct conflict with the prevailing interpretation of the Fourteenth Amendment. In large part because of their suspect constitutionality, none of these bills have gained traction. Preston, *supra*.

These efforts nonetheless stand as the most robust modern assertion of state power to define a state’s own citizenry. Constitutionality aside, the presence of and media attention given to these bills and the associated Birthright Citizenship Movement nonetheless propel the restrictionist narrative of the “anchor baby” problem. See, e.g., Elise Foley, *Steve King Introduces Bill to Stop ‘Anchor Babies,’* HUFFINGTON POST (Jan. 4, 2013, 5:37 PM EST), http://www.huffingtonpost.com/2013/01/04/steve-king-anchor-babies_n_2411989.html. These efforts stand as yet another example of the robust state legislation strategies employed by restrictionists, and the effect these efforts have had on the national dialogue on immigration, even in the absence of their passage into law.

166. New York Is Home Act, S. 7879, A. 10129, 237th Leg., Reg. Sess. (N.Y. 2014).

167. *Id.* § 3. It is important to note that the bill takes care to emphasize the limits and the extent of its power to create the state citizenship scheme under the doctrine of federal preemption. *Id.* § 2 (“The state of New York respects the exclusive province of the federal government to regulate immigration and the flow of immigrants into and out of our country. However, this state retains and asserts its historic authority to define its citizenry, and to affirmatively provide state and local public benefits to citizens of the state of New York.”).

The eligibility criteria are largely driven by policy rather than legal considerations and are used to establish a reciprocal system of citizenship rights and responsibilities.¹⁶⁸ Like the early state citizenship schemes, the use of a residency requirement and an oath demonstrating “volitional allegiance” are the central criteria for eligibility.¹⁶⁹ The three-year residency requirement is intended to ensure that state citizens are sufficiently rooted in the state to be considered part of the political community. The tax payment, jury service, and commitment to abide by the laws of the state are intended to convey that state citizenship is not solely about the benefits that a person can derive from the state but also about upholding a civic responsibility that all citizens owe to their governments.

The rights that accompany state citizenship generally fall into three categories, which I call political rights, rights of access to public programs and benefits, and rights to protection against mistreatment. In many ways the political rights—the ability to vote in elections and run for public office—are the core characteristics of citizenship in a democracy.¹⁷⁰ Nothing is more central to a democracy than the ability of its citizens to shape the political institutions of government.¹⁷¹ The New York Is Home Act would empower all state citizens to vote in state and local elections.¹⁷² The proposed legislation does not, however, purport to give nonfederal citizens any right to vote in federal elections.¹⁷³ The bill does empower all state citizens, regardless of federal immi-

168. *Id.* § 2; see also T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* 10-11 (1950) (establishing an influential framework for thinking about citizenship as the possession of rights).

169. See *supra* notes 32-36 and accompanying text; see also LOCKE, *supra* note 34, at 150.

170. Linda Bosniak, *Universal Citizenship and the Problem of Alienage*, 94 *Nw. U. L. REV.* 963, 970-74 (2000) (describing “the right to vote” as one of the “essential rights ordinarily associated with citizenship”); Peter H. Schuck, *The Re-Evaluation of American Citizenship*, 12 *GEO. IMMIGR. L.J.* 1, 13 (1997) (explaining that conferring the rights to vote, to serve on juries, and to hold public office on citizens alone “carries an important symbolic message about the value and significance of full membership”). However, we must recognize that not all citizens have the right to vote. See, e.g., N.Y. CONST. art. II, § 1 (setting the voting age minimum at eighteen years of age); N.Y. ELEC. LAW § 5-106(2) (McKinney 2014) (showing that New York state law disenfranchises felons). But see HAYDUK, *supra* note 24, at 16 (citing examples of noncitizen voting).

171. President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (“Four score and seven years ago our fathers brought forth, upon this continent, a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal. . . . [T]hat this nation . . . shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.”).

172. N.Y. S. 7879, A. 10129 § 4. The ability of a state to mandate that localities honor the voting rights of nonfederal citizens will turn on the home rule provisions of the various state constitutions—some of which may not empower states to make such determinations regarding local elections. Compare N.Y. CONST. art. IX, § 2 (setting forth New York’s home rule standards), with PA. CONST. art. IX, § 2 (setting forth Pennsylvania’s home rule standards).

173. N.Y. S. 7879, A. 10129 § 67 (“The provisions of this act shall not be construed to conflict with any provision of federal law, rule or regulation, and in any circumstance in

gration status, to run for and hold public office in local and state government.¹⁷⁴

For many immigrants, however, the core benefits of state citizenship will be the tangible rights of access to public programs and benefits. For example, lack of official identification and lack of a Social Security number are major impediments in the daily lives of many undocumented immigrants.¹⁷⁵ Renting an apartment, entering a child's school, opening a bank account, and many more basic life necessities in modern society require access to government-issued identification that many undocumented individuals lack.¹⁷⁶ The New York bill makes all state citizens eligible for state-issued identification and provides them with a state identification number that can be used in lieu of a Social Security number for all purposes not prohibited by federal law.¹⁷⁷ Likewise, the inability to obtain a driver's license is a crippling hurdle for immigrants in many parts of the country. It often becomes the indirect trigger for deportation as many people without licenses are stopped by local police and referred to the Department of Homeland Security for deportation.¹⁷⁸ The New York bill makes all state citizens eligible for driver's licenses.¹⁷⁹

Moreover, lack of educational opportunities and lack of access to medical care are two of the key factors that keep undocumented communities locked in

which a conflict may exist, the appropriate federal law, rule or regulation shall be controlling.”).

174. *Id.* § 5; see also *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892) (“Each state has the power to prescribe the qualifications of its officers, and the manner in which they shall be chosen, and the title to offices shall be tried, whether in the judicial courts or otherwise.”). Note, however, that under the New York Constitution, certain public officials must be U.S. citizens. See, e.g., N.Y. CONST. art. IV, § 2 (requiring that the state governor and the lieutenant-governor be U.S. citizens). Since this requirement could only be overridden by a state constitutional amendment, the bill does not purport to give nonfederal citizens the ability to hold these public offices.

175. James Ford, *New York City to Issue Municipal ID Cards*, PIX 11 (June 25, 2014, 4:56 PM), <http://pix11.com/2014/06/25/new-york-city-to-issue-municipal-id-cards>; Kirk Semple, *Available Soon for People Needing ID: City-Issued Cards*, N.Y. TIMES (July 10, 2014), <http://www.nytimes.com/2014/07/11/nyregion/de-blasio-signs-bill-creating-city-id-card-that-is-open-to-all-residents.html>.

176. Semple, *supra* note 175.

177. N.Y. S. 7879, A. 10129 § 3.

178. See, e.g., Guillermo Garcia, *Immigration Nightmare: Army Soldier's Wife Detained After Arizona Traffic Stop*, NBC NEWS (May 3, 2012, 3:38 PM), <http://usnews.nbcnews.com/news/2012/05/03/11525729-immigration-nightmare-army-soldiers-wife-detained-after-arizona-traffic-stop>; Jeremy Hoover, *Mother of Four Facing Deportation After Traffic Stop in Arapahoe County*, COLO. PUB. NEWS (Aug. 30, 2011, 6:11 PM), <http://www.cpt12.org/news/index.php/mother-of-four-facing-deportation-after-traffic-stop-in-arapahoe-county>; *Traffic Stop Could Lead to Deportation of Illinois Father*, #NOT1MORE, <http://www.notonemoredeportation.com/portfolio/traffic-stop-could-lead-to-deportation-of-illinois-father> (last visited Mar. 30, 2015).

179. N.Y. S. 7879, A. 10129 § 35. Under the Federal REAL ID Act, states are permitted to issue two “tiers” of licenses wherein one type of license, obtainable only by those who can demonstrate proof of citizenship, is valid for federal purposes, and the second type is not. 49 U.S.C. § 30301 note sec. 202(d) (2013).

poverty. The New York bill makes all state citizens, regardless of immigration status, eligible for in-state tuition¹⁸⁰ and extends safety net assistance and medical assistance to all eligible state citizens.¹⁸¹ In addition, while the federal government controls work authorization, professional licensing is largely controlled by the states.¹⁸² Because of a provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), even some immigrants with work authorization cannot obtain professional licenses—such as licenses to practice law—without specific approval from the state legislature.¹⁸³ The New York bill ensures that no state citizen is deprived of a professional license because of his or her federal immigration status.¹⁸⁴ This list of programs and benefits is by no means exhaustive. However, these changes would collectively improve the health and safety of the immigrant community and would enable immigrants to contribute more fully to the economic and community life of the state.¹⁸⁵

The third category of rights attendant to state citizenship would be rights to protection against mistreatment. The New York Is Home Act includes protections regarding confidential information,¹⁸⁶ protection against discrimina-

180. N.Y. S. 7879, A. 10129 § 50. While 8 U.S.C. § 1623 (2013) purports to prohibit states from granting postsecondary educational benefits to undocumented students on the basis of residency, numerous states have found lawful solutions that allow undocumented residents to receive in-state tuition rates for higher education. Specifically, states like California have passed in-state tuition laws that are not based on residency and thus not preempted by § 1623. *See* *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 859-60 (Cal. 2010) (stating that California's in-state tuition criteria admit some nonresident U.S. citizens and exclude some resident undocumented immigrants, and thus are not mere surrogates for a residency test).

181. N.Y. S. 7879, A. 10129 § 46.

182. *Compare* 8 U.S.C. § 1324a (making employment of “unauthorized alien[s]” unlawful), *with id.* § 1621 (permitting states to affirmatively provide “an alien who is not lawfully present in the United States” with any state or local public benefit for which such alien would otherwise be ineligible under § 1621).

183. *Id.* § 1621. Recently, the California Supreme Court determined that the PRWORA does not preclude admitting undocumented immigrants to the state's bar. *In re Garcia*, 315 P.3d 117, 121 (Cal. 2014). In spite of this ruling, because of other federal immigration laws that prohibit hiring undocumented workers, at present an undocumented immigrant admitted to the California bar may not legally be hired as a lawyer. Jennifer Medina, *Allowed to Join the Bar, but Not to Take a Job*, N.Y. TIMES (Jan. 2, 2014), <http://www.nytimes.com/2014/01/03/us/immigrant-in-us-illegally-may-practice-law-california-court-rules.html>. Efforts to enable undocumented immigrants and immigrants with Deferred Action for Childhood Arrivals (DACA) status to be admitted to the bar have been ongoing in Florida and New York. Kirk Semple, *Bar Exam Passed, Immigrant Still Can't Practice Law*, N.Y. TIMES (Dec. 3, 2013), <http://www.nytimes.com/2013/12/04/nyregion/for-immigrant-passing-the-bar-exam-wasnt-enough.html>. *But see* Fla. Bd. of Bar Exam'rs, 134 So. 3d 432, 434 (Fla. 2014) (holding that undocumented immigrants are not eligible for state bar membership).

184. N.Y. S. 7879, A. 10129 § 3.

185. *See id.* § 2.

186. *Id.* § 3 (“The state shall not retain originals or copies of records provided by an applicant to prove identity or residency or other eligibility requirements of state citizenship.” (capitalization altered)).

tion,¹⁸⁷ and a commitment of the state to refuse to voluntarily participate in federal deportation programs that target state citizens.¹⁸⁸ In the past, immigrant fears about providing information to the government presented a significant obstacle when new public benefits became available to undocumented populations.¹⁸⁹ Accordingly, in order to ensure full participation, the New York Is Home Act includes robust privacy protections to ensure that sensitive information about applicants collected for the purposes of state citizenship is not retained and applicants are provided the most robust privacy protections available under state law.¹⁹⁰ The bill also expands New York's human rights law to protect against discrimination based on an individual's real or perceived status as a noncitizen of the state.¹⁹¹

Finally, while New York cannot legally prevent or actively interfere with the federal government's efforts to deport individuals¹⁹²—even if they are state citizens—it can choose not to voluntarily participate in any programs that lead to the deportation of such citizens. The most significant example of such a program is the federal government's use of state criminal justice systems to funnel noncitizens into the federal immigration detention system, in many instances regardless of whether or not they are ever convicted of a crime.¹⁹³ The primary mechanism employed by the federal immigration authorities to effectuate this purpose is the use of “immigration detainers.”¹⁹⁴ Detainers are now widely recognized as, at best, voluntary requests that a state or locality hold an individual for transfer to immigration detention.¹⁹⁵ Many jurisdictions, including

187. *Id.* § 44.

188. *Id.* § 65.

189. *See, e.g.,* Marjorie Cortez, *Deferred Action for Illegal Immigrants Stymied by Fear*, DESERET NEWS (Oct. 10, 2012, 7:27 PM MDT), <http://www.deseretnews.com/article/865564220/Deferred-action-for-illegal-immigrants-stymied-by-fear.html>; Erica Pearson, *Immigrants in NY Mostly Shun Deferral Program that Lets Them Work Legally*, N.Y. DAILY NEWS (June 30, 2013, 7:48 PM), <http://www.nydailynews.com/new-york/immigrants-ny-shun-daca-article-1.1386654>; *see also* Melissa Bailey, *City Wins ID Battle*, NEW HAVEN INDEP. (June 25, 2008, 5:38 PM), http://www.newhavenindependent.org/index.php/archives/entry/city_wins_id_battle.

190. N.Y. S. 7879, A. 10129 § 3.

191. *Id.* §§ 37-38. The bill recognizes, as it must, the limits of state power and thus does not purport to proscribe discrimination mandated by federal law. For example, an employer cannot be held liable for refusing to hire a state citizen who lacks federal work authorization. *See id.* § 67; *see also* 8 U.S.C. § 1324b(a)(2)(C) (2013).

192. *See supra* Part II.B.

193. DORA SCHIRO, IMMIGRATION & CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 12-13 (2009) (noting that in FY 2009, 48% of individuals detained by ICE were encountered through the “Criminal Alien Program” but that 57% of individuals arrested through that program were not criminals).

194. 8 C.F.R. § 287.7 (2014); *see generally* *Immigration Detainers Decline 39 Percent Since FY 2012*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Nov. 12, 2014), <http://trac.syr.edu/immigration/reports/370> (describing immigration detainers as “a primary tool that ICE uses in order to detain and deport individuals it is seeking”).

195. *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014) (“Section 287.7 merely authorizes the issuance of detainers as requests to local [law enforcement agencies]. Given this,

California and Connecticut, the cities of Chicago, Miami, New York City, Philadelphia, San Francisco, and Washington, D.C., and over 250 other counties and localities now have policies or laws prohibiting or limiting the circumstances under which such jurisdictions will hold an individual for transfer to immigration detention.¹⁹⁶ The New York Is Home Act contains a similar provision.¹⁹⁷ The Tenth Amendment ensures that the federal government cannot commandeer state or local resources to effectuate a federal regulatory program and, thus, empowers any subfederal jurisdiction to advance a state citizenship law and to opt out of participating in the mass deportation of its citizens.¹⁹⁸

Taken together, the political, individual, and protective rights that a state could convey through state citizenship are substantial. The guiding principle of such efforts is to place all state citizens on equal footing regarding the obligations and benefits of such citizenship to the fullest extent possible under state and federal law. The contemplated citizenship scheme could help stabilize im-

Lehigh County was free to disregard the ICE detainer . . .”); *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *8 (D. Or. Apr. 11, 2014). Indeed, not only are detainers voluntary, but in many instances localities that hold individuals based solely on immigration detainers—which are not necessarily supported by a probable cause finding nor issued by an impartial magistrate—can run afoul of the Fourth Amendment prohibition against unlawful seizures. See *Miranda-Olivares*, 2014 WL 1414305, at *11 (holding that the county violated *Miranda-Olivares*’s Fourth Amendment right by relying on an ICE detainer that did not provide probable cause regarding removability); see also *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 39 (D.R.I. 2014) (concluding that detention pursuant to an immigration detainer “for purposes of mere investigation is not permitted”). In large part because of these constitutional concerns, President Obama has recently announced that the federal government will no longer issue requests for detention to localities in the normal course. See Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski et al., *Secure Communities 1* (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf. However, the federal government has stated that it will still issue requests for detention in some circumstances and requests for notification in others. *Id.* at 2. The significance of this stated policy shift remains unclear.

196. Tim Henderson, *More Jurisdictions Defying Feds on Deporting Immigrants*, PEW CHARITABLE TR. STATELINE (Oct. 31, 2014), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/10/31/more-jurisdictions-defying-feds-on-deporting-immigrants>; *Immigration Enforcement*, IMMIGRANT LEGAL RESOURCE CENTER, <http://www.ilrc.org/enforcement> (last visited Mar. 30, 2015).

197. S. 7879, A. 10129, 237th Leg., Reg. Sess. § 65 (N.Y. 2014).

198. *Galarza*, 745 F.3d at 643. See generally *Printz v. United States*, 521 U.S. 898, 919, 935 (1997); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625 (1842). Indeed, there is now significant doubt that states and localities are authorized to hold individuals on immigration detainers without running afoul of the Fourth Amendment, at least absent a judicial warrant. See *Galarza*, 745 F.3d at 639; *Miranda-Olivares*, 2014 WL 1414305, at *9-11; see also Julia Preston, *Sheriffs Limit Detention of Immigrants*, N.Y. TIMES (Apr. 18, 2014), <http://www.nytimes.com/2014/04/19/us/politics/sheriffs-limit-detention-of-immigrants.html>; Kirk Semple, *New York State Sheriffs Shying Away from Immigration Detention*, N.Y. TIMES (July 30, 2014), <http://www.nytimes.com/2014/07/31/nyregion/new-york-state-sheriffs-shying-away-from-immigration-detention-.html>.

migrant communities in very tangible ways and thereby significantly improve the health, safety, and economy of a state.¹⁹⁹

There are also some less tangible, but still substantial, benefits that individual immigrants would realize from state citizenship. Once an individual is a citizen of a state, the state government has an obligation to work with other jurisdictions—either the federal government or other states—to ensure the fair and humane treatment of its citizens. So often, the harshest treatment of immigrants in the United States is enabled by the presumption that the jurisdictions responsible for such mistreatment can act with impunity because the immigrants they target are not empowered to hold such jurisdictions accountable. But once Alabama, Arizona, or even the federal government has to answer to a state that considers an immigrant its citizen, the dynamics around such mistreatment could change dramatically. In the most extreme case, quasi-diplomatic protection applied by governors and other officials could potentially be brought to bear to persuade the federal government to forgo the deportation of state citizens. As Spiro explains, such citizenship “could make . . . a powerful discursive tool in defeating federal interference with local community structures. It is one thing to deport a mere resident of New York City, another to deport someone who has been formally designated as a member of the local community—one of its own.”²⁰⁰ The power of the states to combat the deportation of a state citizen would be limited to the state’s power to persuade, but the quasi-diplomatic protections could, nonetheless, be substantial.

Finally, there is the power of recognition. Being “undocumented,” not legally recognized, a so-called “illegal alien,” living in the shadows of society, trying to avoid any official contact, is a heavy weight carried by millions of individuals across the United States. Official recognition of one’s belonging by a state is a powerful tool that can help alleviate this psychological burden.²⁰¹ As Stephen Legomsky describes it, a significant facet of the “value [of citizenship] might be thought to lie . . . in its capacity to nourish the emotional needs of individuals.”²⁰² This dynamic has played out with the so-called “dreamers,” comprised of young immigrants who have benefited from the Obama Administration’s Deferred Action for Childhood Arrivals program.²⁰³ To be “undoc-

199. *See* N.Y. S. 7879, A. 10129 § 2 (“This act addresses the compelling need to lift up all state residents, upon whom this state’s society, vibrancy, health and economic growth depend. Our state recognizes the value of those who contribute to and make our state home.”).

200. Spiro, *supra* note 24, at 561.

201. As Joseph Carens explains it, there is “[a]nother way to belong to a political community” beyond the political aspects of citizenship: there is also a psychological component of citizenship that is “to feel that one belongs, to be connected to it through one’s sense of emotional attachment, identification, and loyalty.” JOSEPH H. CARENS, *CULTURE, CITIZENSHIP, AND COMMUNITY: A CONTEXTUAL EXPLORATION OF JUSTICE AS EVENHANDEDNESS* 166 (2000).

202. *See* Legomsky, *supra* note 21, at 291.

203. Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who*

umented no more” could be a turning point for the psychological development of immigrants themselves and, as detailed below, could help facilitate a shift in our national dialogue on immigration.

C. *Collective Benefits of State Citizenship*

Many, if not all, of the individual benefits enumerated above could be conveyed, however, without making undocumented immigrants citizens of the state. Indeed, there are individual campaigns currently underway to enact state-law changes on many of these issues.²⁰⁴ What then is gained by the citizenship frame and by the bundling of these rights together? Beyond the improvement to be realized in the lived experience of individual immigrants, state citizenship for undocumented immigrants could yield at least three significant collective benefits. First, helping to stabilize the lives of individuals would inevitably stabilize communities, thereby increasing economic activity and decreasing public harms. This returns tangible benefits to the state as a whole. Second, such a scheme would help to merge theory and practice by beginning to bring our formal citizenship framework into harmony with modern theoretical conceptions of citizenship. Finally, and perhaps most importantly, such schemes would help to shift our national narrative on immigration toward more accurate and productive themes, which would advance the ultimate push for comprehensive federal immigration reform. Each of these benefits is discussed in turn below.

The direct collective benefits of state citizenship are not difficult to imagine.²⁰⁵ Having a large segment of the population unable to legally drive (because they cannot get driver’s licenses), unable to access banks and other community institutions (because they cannot get identification), unable to obtain affordable health care (because they are ineligible for state safety net programs), unable to avail themselves of basic police protection (because they fear

Came to the United States as Children (June 15, 2012), *available at* <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>; Ted Hesson, *50 DREAMers Who Prove Deportation Relief Was Smart*, ABC NEWS (June 15, 2013), http://abcnews.go.com/ABC_Univision/Politics/dreamers-talk-daca-deportation-relief-program-year/story?id=19405456.

204. *See, e.g.*, Cristina Costantini, *Municipal ID Cards Given to Undocumented Immigrants in Cities Across the U.S. with Varied Success*, HUFFINGTON POST (Oct. 24, 2011, 7:52 AM EDT), http://www.huffingtonpost.com/2011/10/21/municipal-id-cards-undocumented-immigrants_n_1024412.html; Jenny Deam, *Unauthorized Immigrants Line Up for Driver’s Licenses in Colorado*, L.A. TIMES (Aug. 1, 2014, 8:52 PM), <http://www.latimes.com/nation/nationnow/la-na-colorado-licenses-20140801-story.html>; Emily Alpert Reyes & Kate Linthicum, *LAPD Stops Honoring Some Federal Immigration Detention Requests*, L.A. TIMES (July 7, 2014, 7:35 PM), <http://www.latimes.com/local/cityhall/la-me-immigration-holds-20140708-story.html>; David Stout, *Florida Inches Closer to Passing Immigrant In-State Tuition Bill*, TIME (May 2, 2014), <http://time.com/85477/bill-immigrants-tuition>.

205. MOTOMURA, *supra* note 19, at 154-55 (discussing the community benefits of state and local efforts to foster the integration of unauthorized migrants); Legomsky, *supra* note 21, at 292-95 (discussing the community benefits of inclusive citizenship schemes).

police contact will trigger deportation), and unable to pursue higher education (because they are ineligible for in-state tuition) makes states less safe, more susceptible to public health dangers, and less able to leverage the economic vitality of immigrant communities. State citizenship would not only improve the lives of immigrants but also improve the economic vitality, safety, and well-being of states as a whole.²⁰⁶

Second, on a theoretical level, most modern citizenship theorists tend to operate under an assumption of universality—that all members of society are entitled to citizenship.²⁰⁷ The presumption of universality, as Linda Bosniak explains it, derives from the progressive inclusion of categories of society in liberal democracies' formal structure of citizenship (nonlandowners, non-whites, women, etc.).²⁰⁸ But the presumption of universality that is central to most modern theorists belies a disconnect between theory and practice. So-called “aliens” lack inclusion in the modern structures of citizenship.²⁰⁹ Bosniak explains the theoretical disconnect:

[T]he tendency among many theorists of citizenship to bracket citizenship's threshold questions [of who gets citizenship] is intellectually problematic. Doing so is problematic, in the first place, because it reflects an insular view of political life, one which ignores the fact that political communities exist in a wider world, where membership arrangements raise pressing questions of distributive justice at a global level. Stated differently, bracketing serves to reproduce a long tradition in political and social thought in which analysts take the boundaries and membership of the political community they are concerned with as given, without considering the logically prior questions of how those boundaries are established and enforced, and how that membership is constituted in the first place.²¹⁰

Bosniak argues:

[C]itizenship theory's common disregard of citizenship's threshold questions is ultimately untenable. This is because these questions have a crucial bearing on the nature and meaning of citizenship as it is practiced *within* the liberal democratic political community. As such, threshold questions are integral to any normative study of citizenship and need to be made part of the analysis.²¹¹

This disconnect between formal citizenship and modern normative citizenship theory is driven by the divergence between structures of citizenship, which

206. Cf. CTR. FOR POPULAR DEMOCRACY ET AL., THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: GOOD FOR FAMILIES, GOOD FOR EMPLOYERS, AND GOOD FOR ALL NEW YORKERS (2014) (finding that a deportation defense system that helped prevent deportations and stabilize New York's families and workforce would generate approximately \$5.9 million in annual savings to the state and to the state's employers).

207. See, e.g., Bosniak, *supra* note 170, at 970; Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 251 (1989).

208. Bosniak, *supra* note 170, at 969.

209. *Id.* at 970.

210. *Id.* at 965.

211. *Id.* at 966.

are increasingly restrictive,²¹² and the theories of citizenship, which are increasingly inclusive as they adapt to our transnational world. As Michael Walzer explains, core democratic concepts of justice are offended by the existence of a permanent societal underclass that labors on behalf of society but fails to enjoy full membership.²¹³ By developing inclusive formal structures of state citizenship, we can begin to find an intersection between modern citizenship theory and the formal legal structures of citizenship.

Finally, and perhaps most importantly, extending state citizenship to undocumented immigrants who have become integral members of our communities could be “a powerful discursive tool in securing rights for a group historically subordinated.”²¹⁴ Just as with the marriage equality movement and the movement for the legalization of medical marijuana—where states have moved policy when Congress could not act²¹⁵—state citizenship schemes have a similar potential to drive national policy evolution. A primary benefit of our federal system is that we, as a nation, can benefit from the political experimentation of the several states.²¹⁶ Inclusive state citizenship schemes, once enacted, could demonstrate the utility of such schemes and move our dialogue past tired rhetorical arguments and toward an evidence-based evaluation of more inclusive immigration policies.

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.²¹⁷ Restrictionists have demonstrated the power of state laws to

212. Beginning in the second half of the twentieth century, the formal structures of citizenship have taken on an alarmingly restrictive structure. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.).

213. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 58 (1983); Bosniak, *supra* note 170, at 976 (quoting and discussing WALZER, *supra*, at 31-63).

214. Spiro, *supra* note 24, at 567.

215. *See, e.g.*, Gerken, *supra* note 28, at 1748; Kamin, *supra* note 26, at 1106-12; NeJaime, *supra* note 26, at 678-83.

216. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

217. *See* Bauböck, *supra* note 24, at 150 (“[T]he most significant effects would be symbolic ones: immigrants from other parts of the country as well as from abroad would be made aware that they are now full members of the polity and are also expected to use their rights of participation; the native population would be made aware that they share a common membership in the city with the immigrant population; and the city would formally assert its distinct character as a local polity *vis-à-vis* the national government.”); Spiro, *supra* note 24, at 560 (“Local citizenship decoupled from federal citizenship and immigration status would have expressive value beyond the sum of its parts.”); *see also* Legomsky, *supra* note 141, at 69 (“[T]he way we conceptualize undocumented immigrants does and should influence both our perceptions of illegal immigration and our policy responses . . .”).

control our national dialogue on immigration. Inclusive state citizenship schemes could have a similar potential to set our national discourse, and ultimately our national policy, on a path toward the fuller inclusion of immigrants in American society. Indeed, even the proposal of this model of state citizenship in New York has garnered significant public attention and prompted a productive public debate,²¹⁸ providing advocates with a platform to highlight the positive role undocumented immigrants play in our families and in our economy.

CONCLUSION

Our national dialogue on immigration is stuck. Millions of individuals living without legal documentation are nonetheless deeply integrated into our economy and our families, and have become something of a semipermanent underclass. All reasonable observers agree that these individuals are largely here to stay. Nevertheless, they are unable to participate in our political process, thereby undermining our democracy, and the instability caused by their status not only visits hardships on immigrant communities but also negatively impacts our collective well-being. While a significant majority of Americans favor federal reform, including a legalization program for undocumented immigrants,²¹⁹ Congress is unlikely to act soon. States thus have an opportunity to take the lead on the immigration issue. By adopting a broad definition of state citizenship and formally welcoming immigrant populations into state political communities, states can begin to move our national conversation forward. At the same time, they can substantially improve the lives of marginalized immigrant communities and improve the health, safety, and economies of the states as a whole.

218. See, e.g., Adrian Carrasquillo, *A New Front on Immigration: N.Y. Legislation Would Let Undocumented Vote, Drive*, BUZZFEED (June 16, 2014, 5:42 PM), <http://www.buzzfeed.com/adriancarrasquillo/a-new-front-on-immigration-ny-legislation-would-let-undocume>; Josh Eidelson, *New York State Mulls Citizenship for Undocumented Workers*, BLOOMBERG BUSINESSWEEK (June 16, 2014), <http://www.businessweek.com/articles/2014-06-16/in-new-york-a-bill-to-grant-undocumented-immigrants-state-citizenship>; Curtis Skinner, *N.Y. Lawmaker Aims to Give Voting Rights to Illegal Immigrants*, REUTERS (June 16, 2014), <http://www.reuters.com/assets/print?aid=USKBN0ER2KU20140616>; sources cited *supra* note 155.

219. Meghan Thee-Brenan, *Immigration: What Americans Think*, N.Y. TIMES (June 11, 2014), <http://www.nytimes.com/2014/06/12/upshot/immigration-what-americans-think.html> (“National polls consistently show that a majority of Americans support allowing illegal immigrants a chance to stay in the United States.” (bolding omitted)).