

ARTICLES

IMMIGRATION FEDERALISM AND THE PROMISE OF STATE CONSTITUTIONS

by
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This Article explores state constitutions' promises and pitfalls for immigrant rights advocacy. This is a particularly urgent endeavor, given the anti-immigrant measures of President Trump's second term and a U.S. Supreme Court that is willing to reverse longstanding precedent. Even cases like Plyler v. Doe, with its guarantee of free public education to undocumented children, could be vulnerable. While U.S. Supreme Court opinions protecting immigrant rights are the gold standard because they apply nationwide, state courts and state constitutions provide critical alternative avenues for relief that should not be overlooked.

This Article considers some state constitutional provisions that may help expand noncitizens' rights and thwart anti-immigrant measures. It examines state constitutional provisions that have no analog in the federal Constitution in areas such as equal protection, public education, public welfare, and

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workers' rights, as well as some criminal procedure provisions that are analogous to the federal Constitution. It concludes that advocates should embrace state constitutional arguments and look to provisions already embedded in state constitutions, even if they are not explicitly pro-immigrant, particularly since explicitly pro-immigrant constitutional amendments may not be politically or practically feasible in the short term.

Challenging state anti-immigrant measures based only on violations of the U.S. Constitution is a missed opportunity for advocates. In addition, examining only the role of state and local statutes and regulations is a missed opportunity for scholars of immigration federalism because state constitutions also play an important part in the United States' complex federalist system.

- Introduction 3
- I. State Constitutions and Immigration Federalism 8
 - A. *Immigration Federalism Over Time* 8
 - B. *The Theory and Practice of State Constitutionalism* 13
 - 1. *State Constitutions Are an Important Piece of the Immigration Federalism Puzzle*..... 13
 - a. *State Constitutions Are Sources of More Expansive Rights*..... 13
 - b. *State Constitutions and State Courts Provide an Alternative Strategy in the Face of Negative Rulings by the U.S. Supreme Court* 14
 - c. *State Legislation that Violates State Constitutions Cannot Stand*..... 16
 - d. *State Constitutions Have Limits as Advocacy Tools* 16
 - 2. *Amending State Constitutions* 17
 - 3. *Typology of State Constitutional Provisions*..... 19
 - 4. *The Importance of State Courts' Independent Interpretation of State Constitutions*..... 19
- II. The Strategic Use of State Constitutions to Support Immigrant Integration and Defend Against Discrimination..... 22
 - A. *Equality Provisions and Alienage Discrimination* 22
 - 1. *Federal Equal Protection and Noncitizens*..... 22
 - 2. *State Equality Provisions and Noncitizens*..... 26
 - B. *Non-Analogous State Constitutional Provisions Setting Forth Affirmative Rights May Be Particularly Effective for Immigrant Advocacy*..... 30
 - 1. *Non-Analogous Provisions Regarding Public Education May Prove Critical if Plyler v. Doe Is Overturned*..... 30
 - 2. *State Public Welfare Provisions Have Preserved Health Care and Other Benefits for Immigrants*..... 35

3. <i>State Constitutional Labor, Equal Protection, and Other Provisions Benefit Immigrant Workers by Filling Gaps in Worker Protective Legislation</i>	40
C. <i>Analogous State Constitutional Criminal Procedure Provisions Protect All Defendants and Could Provide Additional Protections for Noncitizen Defendants</i>	44
Conclusion.....	49

INTRODUCTION

“[A]lthough in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.”¹

Justice William J. Brennan Jr.’s admonition from the 1970s—to look to state constitutions—should serve as a call to advocates seeking to resist anti-immigrant measures during the second Trump Administration. Against the backdrop of a long history of anti-immigrant measures in the United States, the Administration’s rhetoric and actions may inspire states and localities to enact new anti-immigrant policies.² Many in the Administration hope that the combination of federal mass-deportation efforts and state anti-immigrant measures will induce immigrants to “self-deport.”³ In this climate, state courts and state constitutions provide potential avenues for resistance and relief.

Scholars of “immigration federalism” examine the relationship between federal, state, and local governments regarding immigration policy and anti-immigrant

¹ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

² Local anti-immigrant measures date back centuries and continued during the Biden Administration. As far back as the late 1880s, cities like San Francisco implemented ordinances targeting Chinese-owned business. *See Yick Wo v. Hopkins*, 118 U.S. 356, 356–57 (1886). More recently, during President Biden’s term, Florida passed Senate Bill 1718 which, among other things, declares that certain driver’s licenses issued by other states to undocumented immigrants will not be recognized in the State of Florida. It also prohibits municipalities from issuing identification cards to individuals who cannot provide proof of their lawful presence in the United States. S.B. 1718, 28th Leg., Reg. Sess., 2023 Fla. Laws 703–06.

³ “Self-deportation” is the concept that if life is made unbearable for certain groups, they will choose to leave the United States. Typically states and localities have been major players in these efforts. *See generally* K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878 (2019) (describing how, in the early 2000s, states and municipalities enacted legislation which made it difficult for unauthorized individuals to gain employment, make contracts, access public benefits, or acquire driver’s licenses; in addition, “they levied increased state-level criminal sanctions against unauthorized persons, allowed local police officers to enforce federal immigration laws, and otherwise targeted immigrants’ lives, such as by banning the display of foreign flags and the use of languages other than English in public institutions”).

measures in a myriad of contexts.⁴ Usually, they focus on the tension between local and federal legislation, or between local legislation and the U.S. Constitution. However, the role of state constitutions in the immigration federalism framework remains largely unexamined. This Article seeks to fill that void by exploring state constitutions' promise and limits as tools for immigrant rights.

State courts have long independently interpreted their state constitutions to protect individual rights.⁵ State constitutions play a unique role in the United States' federal system and are often sources of more expansive rights than the federal Constitution.⁶ In the wake of the U.S. Supreme Court reversing *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*, the reproductive rights movement has embraced state constitutional advocacy.⁷ Proponents of reproductive rights have created maps of state constitutional provisions supporting gender equality.⁸ Where

⁴ Professor Hiroshi Motomura uses the term "immigration federalism" to refer to the role of state and local governments in creating laws and policies that impact immigration and immigrants, even though the U.S. Supreme Court long ago ruled that the federal government has "plenary power" to regulate immigration. See generally Hiroshi Motomura, Comment, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201 (1994) (discussing the elusive line between immigration and alienage, the misplaced emphases of foreign affairs preemption, and an equal protection model for state activity in immigration and alienage). Subnational involvement in immigration and the lives of immigrants takes many forms. As Professor Cristina Rodriguez notes, involvement usually falls "into two basic categories. . . . Whereas enforcement federalism concerns the extent to which localities should assist or resist federal removal policies, integration federalism encompasses measures designed to assist immigrants, regardless of status, to plant roots and acculturate to life in the United States." Cristina Rodriguez, *Enforcement, Integration, and the Future of Immigration Federalism*, 5 J. MIGRATION & HUM. SEC. 509, 509 (2017). Therefore, state and local engagement does not predict a particular outcome vis-à-vis the lives of noncitizens. Local involvement could result in more enforcement, or it could lead to better integration. See generally Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125 (2019) (discussing the responses of state and local governments to anti-immigrant Trump Administration policies); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (2007) (arguing for immigration federalism).

⁵ See G. Alan Tarr, *New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1097–1100, 1112 (1997) (describing state courts as the primary vehicle for protecting individual rights until the 1930s).

⁶ See EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* 16–17 (2013).

⁷ *State Constitutions: Fresh Strategy Emerges for Reproductive-Rights Advocates*, A.B.A. (Aug. 5, 2024), <https://www.americanbar.org/news/abanews/aba-news-archives/2024/08/state-constitutions-strategy-reproductive-rights/> [<https://perma.cc/8E9K-6N8H>]; see *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

⁸ See, e.g., *State Constitutions and Abortion Rights*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/state-constitutions-and-abortion-rights/> [<https://perma.cc/N32Y-B4SG>] (last visited Feb. 24, 2026); CTR. FOR REPROD. RTS., *STATE CONSTITUTIONS AND ABORTION RIGHTS* 28 (2022), <https://reproductiverights.org/wp->

provisions supporting gender equality and reproductive justice do not yet exist, they have mobilized to seek amendments.⁹ But there has not yet been a comparable embrace of the role of state constitutions in the immigrant rights movement and immigration federalism scholarship.

The goal of this Article is to focus on the role state constitutions have played—and could play—in the immigrant rights movement.¹⁰ For purposes of this Article, “immigrant rights” does not refer to rights in the federal deportation process, like the right to counsel in removal proceedings, or the right to be free from immigration detention. Nor does it refer to “sanctuary” measures that explicitly resist federal enforcement—like bars on local collaboration with Immigration and Customs Enforcement (ICE). Rather, “immigrant rights” as used here resembles Professor Cristina Rodriguez’s concept of “integration federalism.”¹¹ Integration federalism describes the ways in which state and local governments facilitate the integration of immigrant communities at the local level through policies and practices such as encouraging business ownership, professional licensing, and public education.¹² Some specific examples of integration federalism at work include state legislation granting driver’s licenses or in-state tuition for Deferred Action for Childhood Arrivals (DACA) recipients or other undocumented individuals.¹³ In many ways these policies overlap with the kinds of positive rights for which state constitutions are known.¹⁴ The term “immigrant rights” as used here also refers to resistance to “alienage laws” that

content/uploads/2022/04/State-Constitutions-Report-4.19.221.pdf [https://perma.cc/E4T6-FHXT].

⁹ *State Constitutions: Fresh Strategy Emerges for Reproductive-Rights Advocates*, *supra* note 7; *see also* CTR. FOR REPROD. RTS., *supra* note 8, at 2 (detailing the Center for Reproductive Rights’ involvement in numerous cases brought in state courts seeking to strengthen gender and abortion rights under state constitutions).

¹⁰ This is not to say that immigrant advocates do not bring state constitutional claims. Some of the ACLU’s state affiliates, in particular, pursue state constitutional claims on behalf of noncitizen residents. *See, e.g.*, Complaint at 3–4, *Farmworker Support Comm. v. Platkin*, No. MER-C-77-24 (N.J. Super. Ct. Aug. 7, 2024) (bringing a claim that the New Jersey Wage and Hour Law denies farmworkers the same wage protections guaranteed to similarly situated workers). But it does not seem to be as widespread as, for example, in the reproductive rights arena. Perhaps the tendency to think of immigration law as only involving federal law, or to focus on the plenary power doctrine or concerns about preemption, have tamped down on this phenomenon in the immigrant rights realm.

¹¹ Rodriguez, *supra* note 4, at 509.

¹² *See id.*

¹³ KARTHICK RAMAKRISHNAN & PRATHEEPAN GULASEKRAM, CTR. FOR AM. PROGRESS, UNDERSTANDING IMMIGRATION FEDERALISM IN THE UNITED STATES 19–20, 22 (2014), <https://www.americanprogress.org/wp-content/uploads/sites/2/2014/03/StateImmigration-reportv2.pdf> [https://perma.cc/GC8P-KZ76].

¹⁴ *See* ZACKIN, *supra* note 6, at 16–17 (discussing positive rights granted by state constitutions in the areas of education, labor, and environmental protections).

treat citizens and noncitizens differently based on status alone.¹⁵

Part I of this Article reviews the history of immigration federalism and the fundamental concepts underlying state constitutionalism. It answers the question, “Why is it important to consider the role of state constitutions in immigration federalism?” Part I provides multiple answers. First, it is important because state constitutions often provide more expansive rights than the federal Constitution. Second, constitutions can void legislation. Third, state constitutional arguments provide an alternate pathway to relief if arguments under the U.S. Constitution are not successful or if the U.S. Supreme Court is reluctant to issue a ruling that will bind all states. Moreover, state court decisions based solely on state law issues are generally final and may not be appealed to federal court.¹⁶ Part I also looks at approaches to state constitutional interpretation. State constitutions are likely to have a greater impact when courts are willing to interpret congruent state constitutional provisions independently from the U.S. Supreme Court’s interpretation of the U.S. Constitution.

Part II discusses the strategic use of state constitutions to facilitate integration federalism and defend immigrant rights. It considers some types of state constitutional provisions that may provide good foundations for further expansion of immigrant integration measures. I select several representative areas for analysis: equal protection, public education, public welfare, workers’ rights, and the right to effective assistance of counsel. In some of these areas, the state constitutional provisions are frequently textually identical to the U.S. Constitution (criminal procedure, equal protection). In others (public education, public welfare, workers’ rights), there is no federal analog to the state provisions.¹⁷ The throughline is the

¹⁵ See Motomura, *supra* note 4, at 202, 206 (describing the sometimes “elusive” distinction between immigration law and alienage law and how the regulation of immigration and alienage can play complementary roles within “a broader project of national self-definition”).

¹⁶ The U.S. Supreme Court follows the “adequate and independent state grounds” doctrine to determine whether it will hear appeals from state courts. The Court generally will not review state court decisions that rely on independent and adequate state grounds—even if the decision also relies on federal grounds. See, e.g., *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (describing the “firmly fixed” controlling rule: “where the judgement of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment”).

¹⁷ Although there has been much recent litigation in the area of noncitizens and voting rights, I am not discussing voting rights in this Article. See, e.g., *Ferry v. City of Montpelier*, 2023 VT 4, ¶ 1, 217 Vt. 450, 296 A.3d 749 (holding that noncitizen voting in Montpelier municipal elections is permitted under the state constitution); *Lacy v. City & Cnty. of S.F.*, 312 Cal. Rptr. 3d 391, 395–97 (Cal. Ct. App. 2023) (holding that a voter-enacted amendment to the San Francisco charter authorizing voting in local school board elections by noncitizen parents did not violate the California Constitution); *Fossella v. Adams*, No. 15, 2025 WL 864620, at *1 (N.Y. Ct. App. Mar. 20, 2025) (holding that a newly enacted local law enabling

potential for state constitutions to protect immigrant rights and to defend against discrimination based on alienage. I review state constitutional provisions in each of the representative areas from a range of states, not only from those with large immigrant populations or ones more frequently represented in the case law.¹⁸

State equal protection provisions are important to consider because many of the state constitutional cases involving noncitizens touch on equal protection issues. In addition, many scholars have critiqued the U.S. Supreme Court's convoluted approach to alienage discrimination. Looking to state courts and state constitutions could be an opportunity to advocate for a different approach.

Given concerns about future challenges to *Plyler v. Doe*, consideration of state public education provisions is particularly timely.¹⁹ Finally, public welfare and effective assistance of counsel case law and state constitutional provisions demonstrate how some state courts have bravely staked out independent holdings in these areas. In addition, these cases provide an opportunity to examine state court approaches to some state constitutional criminal procedure provisions that mirror the U.S. Constitution and to some that supplement the U.S. Constitution.

Drawing upon this analysis, I conclude by arguing for the increased deployment of state constitutional arguments in immigrant rights advocacy.²⁰ State

certain noncitizens to vote was a violation of the New York Constitution). At present, no state constitution explicitly includes the right to vote for noncitizens. Thirty-two state constitutions reference U.S. citizenship when describing who “may” vote but also do not explicitly exclude noncitizens. *Laws Permitting Noncitizens to Vote in the United States*, BALLOTPEdia, https://ballotpedia.org/Laws_permitting_noncitizens_to_vote_in_the_United_States [<https://perma.cc/2BAT-WZFP>] (last visited Feb. 24, 2026) (“As of February 2026 . . . [n]o state constitutions explicitly allowed noncitizens to vote in state or local elections.”); *see, e.g.*, CAL. CONST. art II, § 2; MONT. CONST. art. IV, § 2; N.Y. CONST. art. II, § 1. The question courts have primarily grappled with is whether state constitutional provisions set a floor or a ceiling for voting rights. *See, e.g., Lacy*, 312 Cal. Rptr. 3d at 395–97 (describing the primary point of dispute as whether the provision which states, “A United States citizen 18 years of age and resident in this State may vote,” precludes noncitizens from voting).

¹⁸ I returned many times to this wonderful resource from the University of Wisconsin Law School State Democracy Research Initiative: *Explore State Constitutions*, 50 CONSTS., <https://50constitutions.org/> [<https://perma.cc/EN4C-LWRZ>] (last visited Feb. 24, 2026).

¹⁹ Rachel F. Moran, *Personhood, Property, and Public Education: The Case of Plyler v. Doe*, 123 COLUM. L. REV. 1271, 1304–05, 1308 (2023); *see Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that Texas may not deny noncitizen children access to the public school system under the Equal Protection Clause).

²⁰ In this Article I use the terms “noncitizen” and “immigrant” interchangeably to avoid undue repetition, although noncitizen is a broader term to describe anyone who is not a United States citizen, while “immigrant” typically refers only to someone who intends to reside in the United States permanently. I am concerned with state constitutions as a tool for immigrant rights more broadly—both for those with legal status and without. Although I recognize that in some situations the legal issues may be different depending on status, for purposes of this Article, I do not dwell extensively on those differences.

constitutions are known—and sometimes even mocked—for their granular provisions.²¹ But one theme that emerges is that in some states, broad constitutional provisions that do not explicitly reference immigrants have been effective tools for resisting anti-immigrant measures. With localities emboldened to enact new anti-immigrant policies, time is of the essence. Even in the absence of immigrant-specific constitutional provisions, advocates can and should rely on broad state constitutional provisions that apply to all residents, citizens and noncitizens alike, and argue for independent constitutional analysis by state courts.

I. STATE CONSTITUTIONS AND IMMIGRATION FEDERALISM

A. *Immigration Federalism Over Time*

Immigration federalism trends over time show that state constitutionalism is a salient resource to call upon at the current anti-immigrant moment. The early days of the United States were marked by very little federal involvement in the regulation of immigration.²² Instead, states and localities regulated migration to and from their jurisdictions.²³ Even though Congress passed some federal legislation regarding immigration, most notably the Alien and Sedition Acts, its enforcement was lax or nonexistent.²⁴ Other examples of early regulations include the 1790 naturalization law, the congressional authority for which was grounded in Article I, Section 8 of the U.S. Constitution, which gave Congress the authority to pass a “uniform rule of naturalization.”²⁵ However, unlike naturalization, Congress’ general authority to regulate immigration was not explicitly spelled out in the Constitution.

As the United States entered its second century, and after the Civil War threatened the existence of the Union, the federal government asserted its control over immigration. Congress first moved to restrict immigration by passing the Page Act in 1875, targeting laborers and women coming to the United States for

²¹ See, e.g., TEX. CONST. art. III, § 47(b) (mandating that all bingo games in the State of Texas be for “charitable purposes”).

²² PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM 12–13 (2015) (referring to the period Gerald L. Neuman, a professor of immigration law, called the “Lost Century” of immigration law); see Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1833, 1834 (1993).

²³ See Benjamin J. Klebaner, *State and Local Immigration Regulation in the United States Before 1882*, in 3 INTERNATIONAL REVIEW OF SOCIAL HISTORY 269, 290–95 (1958) (providing a list of provisions from states and localities regulating migration, mostly in the form of bonds and head taxes imposed on the newly-arrived).

²⁴ GULASEKARAM & RAMAKRISHNAN, *supra* note 22, at 15 (explaining that a “portion of the Alien and Sedition Acts of 1798, termed the Alien Friends Act,” was never enforced before it expired).

²⁵ *Id.* (citing the Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795)).

“immoral purposes.”²⁶ Congress then followed this with the Chinese Exclusion Act of 1882, which suspended legal immigration from China for ten years and denied Chinese immigrants the right to naturalize.²⁷ The U.S. Supreme Court facilitated the increase in federal control when it articulated a theory of immigration federalism that squarely placed authority over immigration regulation with the federal government. As Justice Stephen J. Field stated in the majority opinion in *Chae Chan Ping v. United States*, known as the *Chinese Exclusion Case*:

The control of local matters being left to local authorities, and national matters being entrusted to the government of the Union, the problem of free institutions existing over a widely extended country, having different climates and varied interests, has been happily solved. 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.

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.²⁸

The *Chae Chan Ping* decision establishes the primacy of the federal government in immigration regulation. However, the Court still permitted states and localities to exercise control over the lives of immigrants within their borders through workplace and other regulations based on alienage.²⁹ The *Chae Chan Ping* decision also reflects a view of federal immigration regulation that continues to hold sway today in many corners of the United States, as reflected by some of the rhetoric leading up to the 2024 election.³⁰ Then, as now, immigration regulation was held

²⁶ See Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974).

²⁷ Chinese Exclusion Act, ch. 126, 22 Stat. 58, 58–61 (1882) (repealed 1943).

²⁸ *Chae Chan Ping v. United States*, 130 U.S. 581, 605–06 (1889).

²⁹ GULASEKARAM & RAMAKRISHNAN, *supra* note 22, at 29–31, 34–35.

³⁰ *Compare Chae Chan Ping*, 130 U.S. at 606 (“If . . . the government of the United States . . . considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.”), with Ginger Gibson, *Trump Says Immigrants Are ‘Poisoning the Blood of our Country.’ Biden Campaign Likens Comments to Hitler*, NBC NEWS (Dec. 17, 2023, at 08:18 PST), <https://www.nbcnews.com/politics/2024-election/trump-says-immigrants-are-poisoning-blood-country-biden-campaign-likens-rcna130141> [<https://perma.cc/SW7V-A5B5>] (reporting that during his campaign rally, now-President Trump declared that immigrants are “poisoning the blood of our country”), and Alexandra Hutzler, *Trump Continues to Demonize Migrants, Falsely Claims They’re ‘Building an Army.’* ABC NEWS (May 24, 2024, at 11:18 PT), <https://abcnews.com/Politics/trump-continues-demonize-migrants-falsely-claims-building->

up by some as an essential tool to keep the nation safe from “hordes” of primarily non-white immigrants.³¹

The third phase of immigration federalism, noted by Professors Gulasekaram and Ramakrishnan in their book *The New Immigration Federalism*, began gradually in the 1960s with a rise in immigration from countries outside of Western Europe.³² Although major federal immigration legislation was passed during this period, such as the Hart-Celler Act in 1965 and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996,³³ this phase is also notable for an increase in state and local policies impacting immigrants. Restrictionist measures predominated in the period from 2004–2012, followed by a period of integrationist reforms post-2012.³⁴

While scholars like Professors Gulasekaram and Ramakrishnan identify the 1960s as the start of increased state involvement, many other scholars see 1994 and Proposition 187 (Prop 187) in California as a turning point.³⁵ Prior to Prop 187, local collaboration in enforcement was not a major aspect of the immigration system.³⁶ Prop 187 was a ballot initiative that restricted undocumented immigrants’ access to state public benefits, including public education and welfare benefits.³⁷ It also encouraged the reporting of undocumented immigrants and required collaboration with federal authorities.³⁸ Rather than requiring the direct arrest of

army/story?id=110535732 [https://perma.cc/C7JU-C6KN] (reporting that now-President Trump, when speaking about migrants from China, said they were “probably building an army”).

³¹ *Chae Chan Ping*, 130 U.S. at 606; GULASEKARAM & RAMAKRISHNAN, *supra* note 22, at 1–11; see also Rose Cuison Villazor, *Chae Chan Ping v. United States: Immigration as Property*, 68 OKLA. L. REV. 137, 140–41 (2015) (discussing the racial animosity undergirding restrictions on Chinese immigration in the late 19th century).

³² See GULASEKARAM & RAMAKRISHNAN, *supra* note 22, at 41–44.

³³ See Immigration and Nationality (Hart-Celler) Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.).

³⁴ GULASEKARAM & RAMAKRISHNAN, *supra* note 22, at 58–59, 119.

³⁵ See Huyen Pham, *Proposition 187 and the Legacy of Its Law Enforcement Provisions*, 53 U.C. DAVIS L. REV. 1957, 1967 (2020); Rick Su, *The First Anti-Sanctuary Law: Proposition 187 and the Transformation of Immigration Enforcement*, 53 U.C. DAVIS L. REV. 1983, 2003 (2020).

³⁶ Pham, *supra* note 35, at 1967.

³⁷ California Proposition 187: Illegal Aliens. Ineligibility for Public Services. Verification and Reporting. Initiative Statute. (1994); see *Proposition 187: The Granddaddy of Anti-Immigrant Measures*, MALDEF (Oct. 24, 2019), <https://www.maldef.org/2019/10/proposition-187-the-grand-daddy-of-anti-immigrant-measures/> [https://perma.cc/4LNL-JMSF] (referring to Proposition 187 as “the granddaddy of anti-immigrant measures”).

³⁸ Pham, *supra* note 35, at 1959–60.

noncitizens for immigration offenses, the proposed system required law enforcement agencies to check the immigration status of individuals arrested for non-immigration offenses and then report those individuals to federal authorities.³⁹ While Prop 187 faced many legal challenges and was ultimately not enforced, it inspired new federal and state legislation.⁴⁰

In 1996, the IIRIRA introduced section 287(g), a provision that invited cooperation between state and federal law enforcement.⁴¹ Section 287(g) included programs under which state and local police identify noncitizens at jails upon booking and report them to federal authorities, as well as programs in which local law enforcement are deputized to act on behalf of the Department of Homeland Security.⁴²

A substantial increase in state legislation followed the IIRIRA in the early 2000s.⁴³ For example, Senate Bill 1070 (S.B. 1070) in Arizona created state penalties for immigration violations, instructed police to inquire into immigration status, and sanctioned individuals who worked without authorization.⁴⁴ The law's stated purpose was to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."⁴⁵ The Obama Administration's challenge to S.B. 1070 led to the U.S. Supreme Court's decision in *Arizona v. United States*.⁴⁶ The Court reiterated the federal government's broad powers over immigration, based in part on its constitutional authority over naturalization and its "inherent" power over foreign affairs.⁴⁷ The Court then concluded that several provisions of S.B. 1070 were preempted and that while "Arizona may have understandable frustrations with the problems caused by illegal immigration . . . the State may not pursue policies that undermine federal law."⁴⁸

While states were passing laws to deputize local law enforcement and collaborate with ICE, they were also finding other ways to make life difficult for undocumented individuals. As mentioned above, the intent behind these efforts was often to induce immigrants to "self-deport."⁴⁹ A frequent technique was to

³⁹ *Id.* at 1971.

⁴⁰ *Id.* at 1967, 1971–72.

⁴¹ Immigration and Nationality Act (INA) § 287(g), 8 U.S.C. § 1357(g).

⁴² *Id.*; see Pham, *supra* note 35, at 1975, 1976 n.92.

⁴³ Huyen Pham & Pham Hoang Van, *Measuring the Climate for Immigrants: A State-by-State Analysis*, in STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY 21, 22 (Clarissa Byrne Hessick & Gabriel J. Chin eds., 2014).

⁴⁴ S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

⁴⁵ *Id.*

⁴⁶ *Arizona v. United States*, 567 U.S. 387, 393 (2012).

⁴⁷ *Id.* at 394–95.

⁴⁸ *Id.* at 416.

⁴⁹ Mary Fan, *Post-Racial Proxy Battles Over Immigration*, in STRANGE NEIGHBORS: THE

criminalize ordinary commercial exchanges with noncitizens. Examples include local ordinances like the one in Hazleton, Pennsylvania that limited landlords' ability to rent to unauthorized immigrants and penalized employers for hiring them.⁵⁰ Even a state like New Jersey, which is now known for its immigrant-friendly policies, was squarely on the restrictionist bandwagon in the 1990s.⁵¹ At that time, several towns in North Jersey enacted ordinances directed against businesses owned by Asians and Asian Americans.⁵² In Palisades Park, New Jersey, for example, a law was enacted requiring any commercial sign in Korean to include lettering of equal size in English.⁵³

In more recent years, the flurry of state and local lawmaking targeting noncitizen residents has continued alongside integrationist measures. Some of these measures include "sanctuary" efforts to create safer spaces for undocumented immigrants and to disentangle local criminal law enforcement from federal immigration enforcement.⁵⁴ For example, some jurisdictions passed laws limiting compliance with "detainers," federal requests for local authorities to hold noncitizens for purposes of federal detention and deportation.⁵⁵ Other jurisdictions

ROLE OF STATES IN IMMIGRATION POLICY, *supra* note 43, at 229, 231–35 (describing the intent behind states passing laws to deputize local law enforcement and collaborate with ICE as "attrition through enforcement").

⁵⁰ Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 3 (2007).

⁵¹ See Robert Hanley, *Debating the Language of Signs; New Jersey Towns Tell Asian-Owned Stores: Advertise in English, Too*, N.Y. TIMES (Apr. 9, 1996), <https://www.nytimes.com/1996/04/09/nyregion/debating-language-signs-new-jersey-towns-tell-asian-owned-stores-advertise.html> [<https://perma.cc/VB5L-PU9T>] (highlighting the cultural pushback to Korean immigrants in New Jersey via mandated commercial language ordinances); see also RAMAKRISHNAN & GULASEKRAM, *supra* note 13, at 16, 18, 21, 29 (explaining New Jersey's current immigrant-friendly policies).

⁵² See Hanley, *supra* note 51 (documenting statements made by officials from Fort Lee, Englewood, Leonia, Cliffside, Ridgefield, and Englewood Cliffs, all explaining they put sign laws in place to target an influx of Asian merchants).

⁵³ See *id.*

⁵⁴ In their article *Sanctuary Networks*, Professors Villazor and Gulasekaram go beyond a federalism framework by examining both private and public actors' embrace of the concept of sanctuary. Rose Cuisson Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1213–14 (2019). However, often "sanctuary" has been framed as local government resistance to federal enforcement efforts. See Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding "Sanctuary Cities"*, 59 B.C. L. REV. 1703, 1707 (2018) (providing a typology of the forms of local criminal procedural resistance to federal immigration enforcement).

⁵⁵ *National Map of Local Entanglement with ICE*, IMMIGRANT LEGAL RES. CTR. (Nov. 13, 2019), <https://www.ilrc.org/resources/national-map-local-entanglement-ice> [<https://perma.cc/UER6-UQ55>].

have refused to notify ICE regarding arrests of noncitizens.⁵⁶ Outside of the immigration enforcement and criminal legal systems, integrationist measures have included policies to provide municipal identification cards to all municipal residents, and to issue driver's licenses and provide in-state tuition without regard to immigration status.⁵⁷ As subsequent Sections will discuss, state constitutional provisions can provide legal support for these sorts of integrationist measures and combat anti-immigrant ones.

B. The Theory and Practice of State Constitutionalism

1. State Constitutions Are an Important Piece of the Immigration Federalism Puzzle

Why should scholars and advocates consider state constitutions' role as potential tools to defend and expand immigrants' rights? What work do state constitutions do that is different from the U.S. Constitution or from state and local legislation? State constitutions are important because they are an independent source of rights, and their interpretation is not bound by federal courts' interpretations of the federal Constitution. Moreover, the U.S. Constitution provides only a floor for rights. State constitutions can raise that floor and provide greater protections. Courts can also overturn state regulations and legislation based on state constitutional arguments. In addition, state constitutions and state courts provide an alternate forum to the U.S. Supreme Court. With the current Supreme Court taking a narrow view of individual rights and demonstrating a willingness to overturn precedent, this may prove critical for protecting immigrant rights.⁵⁸

a. State Constitutions Are Sources of More Expansive Rights

The 1970s marked the start of a renewed interest in state constitutions as sources of more expansive rights than the U.S. Constitution.⁵⁹ As Professor

⁵⁶ The Immigrant Trust Directive issued by the New Jersey Attorney General in 2018 is an example of these kinds of policies, although it does not prohibit *all* reporting to ICE. Law Enforcement Directive No. 2018-6 v2.0 from Gurbir S. Grewal, Atty Gen., to All Law Enforcement Chief Executives, Directive Strengthening Trust Between Law Enforcement and Immigrant Communities (Sep. 27, 2019), https://www.nj.gov/oag/dcj/agguide/directives/ag-directive-2018-6_v2.pdf [<https://perma.cc/2HAD-F92P>].

⁵⁷ See Eric Figueroa & Iris Hinh, *More States Adopting Inclusive Policies for Immigrants*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 12, 2022, at 10:12 PT), <https://www.cbpp.org/blog/more-states-adopting-inclusive-policies-for-immigrants> [<https://perma.cc/XT2D-SNPF>].

⁵⁸ Jerry Dickinson, *The U.S. Supreme Court's History of Adopting State Supreme Court Guidance*, STATE CT. REP. (Feb. 12, 2024), <https://statecourtreport.org/our-work/analysis-opinion/us-supreme-courts-history-adopting-state-supreme-court-guidance> [<https://perma.cc/C5VF-BWCT>]; see, e.g., Jorge M. Farinacci-Fernós, *Progressive State Constitutionalism*, 71 BUFF. L. REV. 425, 435 (2023) (exploring methods of using state constitutions as a stop against judicial backsliding on progressive protections).

⁵⁹ Tarr, *supra* note 5, at 1097–1100, 1112.

Robert F. Williams explains in *The State of State Constitutions: The New Judicial Federalism and Beyond*, the “New Judicial Federalism” arose during this period in which the U.S. Supreme Court was staking out more conservative positions.⁶⁰ “This phenomenon . . . saw state supreme courts relying on their own constitutions to recognize rights that were *more protective* than those recognized by the United States Supreme Court under the Federal Constitution.”⁶¹

As Justice Brennan pointed out in a landmark Harvard Law Review article in 1977,

The essential point I am making . . . is not that the United States Supreme Court is necessarily wrong in its interpretation of the federal Constitution. . . . It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. . . . I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.⁶²

Aliessa v. Novello, a New York Court of Appeals case that will be discussed in more detail below, provides an example of how state constitutions can supplement federal rights. Advocates successfully argued that state legislation limiting immigrants’ access to Medicaid violated both the New York and U.S. Constitutions, and thereby defeated separate sections of the legislation.⁶³ One part of the *Aliessa* decision relied on a New York constitutional provision mandating “the aid, care and support of the needy” that had no federal parallel,⁶⁴ demonstrating that sometimes state constitutions provide more expansive protection by addressing matters about which the U.S. Constitution is silent. As will be discussed below, even where state constitutional provisions mirror the language of the U.S. Constitution, state courts may interpret the language differently and construe the state constitution as providing greater rights.⁶⁵

b. State Constitutions and State Courts Provide an Alternative Strategy in the Face of Negative Rulings by the U.S. Supreme Court

With almost any legal issue, the holy grail is a favorable decision from the U.S.

⁶⁰ See Robert F. Williams, Foreword, *Robert F. Williams State Constitutional Law Lecture: The State of State Constitutional Law, The New Judicial Federalism and Beyond*, 72 RUTGERS U. L. REV. 949, 952–54 (2020) (explaining the rise of “New Judicial Federalism” jurisprudence as a response to the appointment of Chief Justice Warren E. Burger and conservative retrenchment from the earlier positions of the Warren Court).

⁶¹ *Id.* at 951.

⁶² Brennan, *supra* note 1, at 502 (footnote omitted).

⁶³ *Aliessa v. Novello*, 754 N.E.2d 1085, 1088 (N.Y. 2001).

⁶⁴ *Id.* at 1092–93 (citing N.Y. CONST. art. XVII, § 1).

⁶⁵ Brennan, *supra* note 1, at 495.

Supreme Court because it applies nationwide and to all levels of government. The same is true of issues affecting noncitizens. For example, in *Padilla v. Kentucky*, the U.S. Supreme Court held that the Sixth Amendment of the U.S. Constitution requires defense counsel to properly advise noncitizen defendants about the immigration consequences of a criminal plea.⁶⁶ *Padilla* was a major decision and the first time that the Sixth Amendment was extended to plea negotiations and to immigration consequences.⁶⁷ Previously, civil consequences of convictions were considered “collateral” and as not warranting Sixth Amendment protection.⁶⁸ In July 2009, only months before the *Padilla* decision, the New Jersey Supreme Court issued an opinion in *State v. Nuñez-Valdéz* relying on the New Jersey Constitution to hold that Mr. Nuñez-Valdéz was entitled to post-conviction relief because his criminal defense attorney had misinformed him about the immigration consequences of his plea.⁶⁹ *Nuñez-Valdéz* is an example of how state courts and state constitutions can expand protection beyond decisions of the U.S. Supreme Court. Had the U.S. Supreme Court not found that the Sixth Amendment required immigration advice for noncitizen defendants before entering a criminal plea, defendants would still have had significant protection in New Jersey thanks to the New Jersey State Constitution and the holding of the state’s highest court.

While some critics question the legitimacy of turning to state constitutions and state courts as an alternative to the U.S. Supreme Court,⁷⁰ others assert that that is exactly what the Framers envisioned.⁷¹ California Supreme Court Justice Goodwin Liu argues that this “redundancy” in federal and state rights protections

⁶⁶ *Padilla v. Kentucky*, 559 U.S. 356, 366, 369 (2010).

⁶⁷ *Id.*

⁶⁸ *Id.* at 364–65.

⁶⁹ *State v. Nuñez-Valdéz*, 975 A.2d 418, 419 (N.J. 2009).

⁷⁰ G. Alan Tarr, *Constitutional Theory, and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 853 (1991) (“For federal constitutional law, the primary legitimacy concern has involved the relation between the United States Supreme Court and other purportedly more democratic branches, such as Congress or state legislatures. For state constitutional law, in contrast, the major legitimacy concern has involved the relation between state courts and the U.S. Supreme Court: when can a state court interpret its state guarantees to reach a result different from that obtained by the Supreme Court interpreting the Federal Constitution?” (footnotes omitted) (citing James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893))).

⁷¹ See Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1338 (2017) (“[T]he Framers’ act of fission bequeathed to us, somewhat paradoxically, a durable structure for fusing a diverse citizenry into one nation. Judicial federalism is part of this structure, and state constitutionalism is part of the conversation that sustains us as one people.”); see also Catherine R. Connors & Connor Finch, *Primacy in Theory and Application: Lessons From a Half-Century of New Judicial Federalism*, 75 ME. L. REV. 1, 12–14 (2023) (arguing the Framers’ approach to fundamental rights principally relied on dispersal of authority, including through dual state and federal guarantees).

is a benefit of the American system.⁷² As he says:

State constitutionalism is properly understood as a mechanism by which ongoing disagreement over fundamental principles is acknowledged and channeled in our democracy. Far from endangering the legitimacy of constitutional law, interpretive pluralism is a source of its resilience and deep resonance with our diverse citizenry. When a state court departs from Supreme Court precedent to secure greater protection for individual rights under a parallel provision of its state constitution, the state court “registers a forceful and often very public dissent.”⁷³

Therefore, the potential for stronger, or at least supplemental, rights protections in state constitutions should not be viewed as delegitimizing, but rather as precisely their role.

c. State Legislation that Violates State Constitutions Cannot Stand

Just as *Marbury v. Madison* established that an act of Congress that violates the federal Constitution cannot become law, it is a long-established principle that state legislation that is contrary to state constitutions cannot stand.⁷⁴ Therefore, challenging state anti-immigrant measures based only on violations of the U.S. Constitution is a missed opportunity for advocates. And looking only at the role of statutes, regulations, and ballot initiatives—and not at state constitutions—is also a missed opportunity for scholars of immigration federalism because they, too, play a part in the complex intersections between immigration law and state law.

d. State Constitutions Have Limits as Advocacy Tools

Relying on state constitutions to protect or expand individual rights is not a panacea for a conservative U.S. Supreme Court. Any state court rulings would apply only to that state.⁷⁵ In addition, decisions could be overturned, and state constitutional provisions amended.⁷⁶ Further, in the same way that state constitutions might be useful tools to expand individual rights in the face of a more

⁷² Liu, *supra* note 71, at 1312.

⁷³ *Id.* at 1336 (quoting JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 100 (2005)).

⁷⁴ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803); Mary Sarah Bilder, *Why We Have Judicial Review*, YALE L.J.: F. (Jan. 9, 2007), <https://www.yalelawjournal.org/forum/why-we-have-judicial-review> [<https://perma.cc/T8PM-P6GY>].

⁷⁵ At least one scholar has argued that through federal equal protection, state constitutional rights might be applied nationally. See, e.g., Derek W. Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1364 (2010); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 338 (2011); see also Dickinson, *supra* note 58 (suggesting there is public interest in state constitutional law as a bulwark against rollback of federal constitutional protections by the current U.S. Supreme Court).

⁷⁶ Williams, *supra* note 60, at 968, 972.

conservative U.S. Supreme Court, in theory they could also be used to limit individual rights.⁷⁷

Another critique of state constitutional jurisprudence is that it is underdeveloped, meaning that judges don't often expound on their reasoning regarding state constitutional claims in their opinions.⁷⁸ But this could be remedied if more litigants brought state constitutional claims and more judges responded to them. Attorneys do not raise state constitutional claims frequently enough, and law schools don't regularly educate students on state constitutions.⁷⁹ Civil rights litigators suggest that practical hurdles, such as the lack of attorney's fees for state constitutional claims can be a deterrent to bringing those claims and that uncertainty due to the dearth of relevant precedent is another.⁸⁰ Many state court decisions do not squarely address state constitutional issues even while mentioning them in passing.⁸¹ Sometimes a court may mention the federal and state constitutional claims in the same breath without providing separate analysis.⁸² However, even when the reasoning is not presented in detail, a court may still have relied on the state constitution. More frequent employment of state constitutional arguments would likely lead to a more developed jurisprudence.

2. Amending State Constitutions

One potential advocacy approach is to seek state constitutional amendments that expand immigrants' rights. State constitutions change much more frequently than the federal Constitution does. For example, the U.S. Constitution has only been amended 27 times, but in states like Alabama, Louisiana, South Carolina,

⁷⁷ For example, the Arizona Constitution provides an example of a state constitution being used to limit noncitizens' rights. It restricts the ability of some undocumented individuals to seek punitive damages. ARIZ. CONST. art. II, § 35 ("A person who is present in this state in violation of federal immigration law related to improper entry by an alien shall not be awarded punitive damages in any action in any court in this state."). In 1890, the Mississippi Constitution added a provision directing the legislature to "enact laws to limit, restrict, or prevent the acquiring and holding of land in this State by nonresident aliens." MISS. CONST. art. IV, § 84.

⁷⁸ James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 781–82 (1992).

⁷⁹ Ellie Margolis & Leonore F. Carpenter, *What Law Schools Teach When They Don't Teach About State Constitutionals*, 55 N.M. L. REV. 391, 392–93 (2025); Connors & Finch, *supra* note 71, at 22–23.

⁸⁰ See Eyal Press, *Can State Supreme Courts Preserve—or Expand—Rights?*, NEW YORKER (June 3, 2024), <https://www.newyorker.com/magazine/2024/06/10/can-state-supreme-courts-preserve-or-expand-rights> [<https://perma.cc/7FN9-RXTT>].

⁸¹ See Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 382 (1980) ("[M]any state courts and the lawyers who practice before them . . . ignore the state's law, enforcing only those personal rights guaranteed by federal law, or . . . assume that the state's own guarantees must reflect whatever the United States Supreme Court finds in their federal analogues.").

⁸² See Gardner, *supra* note 78, at 781–82.

Texas, and California, the state constitution may be amended several times a year.⁸³ Even states that amend their constitutions much less frequently, still may amend them every few years.⁸⁴ “Without the proper context, individual state constitutions can sometimes read like an eclectic laundry list of unique and narrow concerns. However, many of the details that seem so idiosyncratic in isolation were actually common constitutional responses to salient national controversies and widespread political movements.”⁸⁵ Thus, the frequency of amendment reflects the responsiveness of state constitutions. Some might see this as a strength, to others it is a weakness.

In her book *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America’s Positive Rights*, Emily Zackin traces the history of and ties between state constitutional and political movements, such as ones to protect the poor, preserve the environment, and provide free education.⁸⁶ In the present day, the United States is witnessing similar movements when it comes to reproductive rights and state constitutions.⁸⁷ Particularly since *Roe v. Wade* was overturned, advocates have turned to state courthouses and state constitutions to protect reproductive choice. Following *Dobbs*, advocates have sought to amend state constitutions to explicitly enumerate reproductive rights and at the same time challenge abortion bans in state courts.⁸⁸ The immigrant rights movement should take note as well. Even though in many states, constitutional amendments in support of immigrants may not be politically feasible, existing provisions in state constitutions can still be protective of noncitizens’ rights.⁸⁹

⁸³ John Dinan, *Constitutional Amendment Processes in the 50 States*, STATE CT. REP. (July 24, 2023), <https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states> [https://perma.cc/S2AY-EYE4].

⁸⁴ *Id.*

⁸⁵ ZACKIN, *supra* note 6, at 22.

⁸⁶ *Id.* at 16–17.

⁸⁷ Robert F. Williams, *State Constitutional Law after Dobbs and Bruen*, STATE CT. REP. (Sep. 7, 2023), <https://statecourtreport.org/our-work/analysis-opinion/state-constitutional-law-after-dobbs-and-bruen> [https://perma.cc/GT6C-B5DE].

⁸⁸ Kate Zernike, *A Volatile Tool Emerges in the Abortion Battle: State Constitutions*, N.Y. TIMES (Jan. 31, 2023), <https://www.nytimes.com/2023/01/29/us/abortion-rights-state-constitutions.html> [https://perma.cc/7VG9-R6RP]; *State Court Abortion Litigation Tracker*, BRENNAN CTR. FOR JUST. (Jan. 11, 2024), <https://www.brennancenter.org/our-work/research-reports/state-court-abortion-litigation-tracker> [https://perma.cc/K2R6-NPV4]; see also Press, *supra* note 80 (describing state high courts of 11 states that “have recognized that their constitutions protect abortion rights independently from the federal Constitution. Some states have also framed abortion access in novel ways—for example, as a matter of equality rather than privacy, an argument that many feminist scholars have long considered superior”).

⁸⁹ See, e.g., *supra* notes 63–64, 69 and accompanying text.

3. *Typology of State Constitutional Provisions*

A variety of state constitutional provisions have a potential role to play in the immigrant justice movement. First are provisions that are textually identical to the U.S. Constitution. The state criminal procedure provisions discussed in this Article often fit in this category. Second are provisions that are similar but vary somewhat from the U.S. Constitution. Some of the equal protection provisions discussed below fall into this category. Third are provisions that typically provide for affirmative rights and have no federal analog. Many of the public education, public welfare, and workers' rights provisions discussed below fit in this category.

When it comes to non-analogous provisions, state constitutions are famous for some of their minutiae. The right to hunt and fish is found in 24 state constitutions.⁹⁰ Alabama's constitution contains protocols for the operation of Bingo games in Jefferson County.⁹¹ The Florida Constitution regulates the proper confinement of pregnant pigs.⁹² Such granular provisions are not often the subject of published cases involving noncitizens. Cases concerning noncitizens' rights generally center on state constitutional provisions involving more sweeping principles and broad rights.⁹³ Any of one of these varieties of provisions has the potential to be used to defend immigrants' rights. However, the typology is important to keep in mind because how similar a state constitution provision is to the federal constitutional text may impact a state court's approach to constitutional interpretation.

4. *The Importance of State Courts' Independent Interpretation of State Constitutions*

As with the U.S. Constitution, debates about how to interpret state constitutions have raged for decades. One of the most significant debates focuses on the degree to which state courts should follow the interpretation of the U.S. Supreme Court, particularly when a state constitutional provision mirrors the U.S. Constitution. For state constitutions that mirror the federal Constitution to support immigrant integration, state courts may need to engage in independent constitutional interpretation.

The practice of state courts following U.S. Supreme Court interpretation of

⁹⁰ Jennifer Schultz, *State Constitutional Right to Hunt and Fish*, NCSL (Nov. 11, 2025), <https://www.ncsl.org/environment-and-natural-resources/state-constitutional-right-to-hunt-and-fish> [<https://perma.cc/DW8Y-DVFM>].

⁹¹ ALA. CONST. LOC. PROVISIONS, tit. 37, § 37-7.00.

⁹² FLA. CONST. art. X, § 21 (requiring that pregnant pigs be able to turn around freely in their enclosures).

⁹³ See, e.g., *Aliessa v. Novello*, 754 N.E.2d 1085, 1088 (N.Y. 2001) (arguing successfully that New York's constitutional mandate that "the aid, care and support of the needy are public concerns and shall be provided by the state" required the state to extend certain medical benefits to noncitizen residents (citing N.Y. CONST. art. XVII, § 1)).

similar constitutional provisions is known as “lockstepping.”⁹⁴ While the practice is widespread, not all state courts follow a lockstepping approach.⁹⁵ One argument against lockstepping is that even when the federal and state provisions are identical, the state provision might predate the federal Constitution and the history and intent behind the provisions may differ.⁹⁶ Judges and scholars also argue that state courts should feel free to diverge from U.S. Supreme Court interpretation because otherwise, what is the purpose of state courts in our federal system?⁹⁷ Those state courts that diverge from the U.S. Supreme Court’s constitutional interpretation assert a range of rationales for doing so. Some examples include the “interstitial model” of constitutional interpretation, in which the federal Constitution is viewed as providing a floor for individual rights which state courts are free to raise.⁹⁸ The U.S. Supreme Court may be reluctant to issue a ruling that will bind all 50 states.⁹⁹ Therefore, the Court may explicitly or implicitly invite state courts to raise the floor and not to blindly follow the Court’s interpretation.¹⁰⁰ The New Jersey Supreme Court has regularly departed from the U.S. Supreme Court and has referred to the U.S. Constitution as providing a floor.¹⁰¹

⁹⁴ See ROBERT WILLIAMS & LAWRENCE FRIEDMAN, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 226–27 (2d ed. 2023) (highlighting that the judicial practice of adopting federal Constitutional interpretations as state constitutional law is termed “lockstepping”). In a review of state court decisions over about two decades that relied on state constitutions in the criminal law realm, Professor Barry Latzer found that state court judges followed the U.S. Supreme Court’s reasoning in over two-thirds of their decisions. BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* 160–61 (1991).

⁹⁵ LATZER, *supra* note 94, at 160–61; see, e.g., Jack L. Landau, *The Unfinished Revolution: Interpreting the Oregon Constitution*, OR. STATE BAR BULL. (Nov. 2001), <https://www.osbar.org/publications/bulletin/01nov/revolution.htm> [<https://perma.cc/D66E-LHTN>] (describing Oregon’s reliance on its state constitution, as opposed to lockstepping with the federal government, when interpreting provisions).

⁹⁶ See Tarr, *supra* note 70, at 851–54.

⁹⁷ See, e.g., *State v. Melvin*, 258 A.3d 1075, 1090 (N.J. 2021) (“The New Jersey Constitution is a source of fundamental rights independent of the United States Constitution.”); *State v. Gilmore*, 511 A.2d 1150, 1156–57 (N.J. 1986) (holding that the New Jersey Constitution, independent of the U.S. Constitution, protected the right to a trial by jury by forbidding the exclusion of Black jurors by use of peremptory challenges).

⁹⁸ *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1356–58 (1982).

⁹⁹ Jeffrey S. Sutton, *What Should be National and What Should Be Local in American Judicial Review*, in 2022 SUPREME COURT REVIEW 191, 208–09 (David A. Strauss, Geoffrey R. Stone, Justin Driver & William Baude eds., 2022).

¹⁰⁰ See *State v. Hunt*, 450 A.2d 952, 956, 968 (N.J. 1982) (holding that the warrantless search and seizure of telephone billing records violated article I, paragraph 7 of the New Jersey Constitution, even though the U.S. Supreme Court had indicated that the federal Constitution would not protect such records even though the constitutional language was congruous).

¹⁰¹ *Id.* at 959 (“[T]his Court, and other state courts across the country, have been construing

Other state courts may adhere to the “primacy approach” to state constitutional interpretation, in which courts address state constitutional issues *before* federal ones and view federal court opinions interpreting the United States Constitution as persuasive rather than binding authority.¹⁰² As Justice Hans Linde, a strong proponent of the primacy approach, explained:

The right question is what the state’s guarantee means and how it applies to the case at hand. The answer may turn out the same as it would under federal law. The state’s law may prove to be more protective than federal law. The state law also may be less protective. In that case the court must go on to decide the claim under federal law, assuming it has been raised.¹⁰³

Thus, the primacy approach is a model that encourages independence from federal precedent. Some courts that have followed this approach also include Maine, New Hampshire, Oregon, and Washington.¹⁰⁴

The ability and willingness of state courts to diverge from federal precedent has led some to question the legitimacy of raising state constitutional claims in state courts. These critics say it reflects an effort by liberal-leaning litigants to avoid federal decisions they don’t like by seeking a different answer in state court under the state constitution.¹⁰⁵ As Justice Goodwin Liu and others have argued, the desire

state constitutions to extend a greater measure of protection for fundamental constitutional rights than the United States Constitution has been construed to afford.”).

¹⁰² Joshua D. Dunlap, *A Venerable Bulwark: Reaffirming the Primacy Approach to Interpreting Maine’s Free Exercise Clause*, 73 ME. L. REV. 1, 3 (2020).

¹⁰³ Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984).

¹⁰⁴ See, e.g., *State v. Reeves*, 268 A.3d 281, 292–94 (Me. 2022) (discussing application of the primacy approach in Maine by considering the analogous Sixth Amendment right as persuasive, rather than binding precedent); *State v. Beauchesne*, 868 A.2d 972, 975 (N.H. 2005) (discussing how New Hampshire has “consistently followed the ‘primacy’ approach to adjudication of constitutional issues”); *State v. Kennedy*, 666 P.2d 1316, 1321 (Or. 1983) (“Lest there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines.”); *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986) (articulating six nonexclusive factors to consider before extending broader rights than under the U.S. Constitution: (1) the text; (2) significant differences in the texts of the parallel federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) whether the matter is of particular state interest or local concern); see also David Schultz, *When Do State Courts Depart from Federal Precedent*, STATE CT. REP. (June 30, 2023), <https://statecourtreport.org/our-work/analysis-opinion/when-do-state-courts-depart-federal-precedents> [<https://perma.cc/ATC4-MDBF>] (“[T]he Washington Supreme Court has said that if both federal and state claims are raised, it will consider the state claims first and only go on to consider the federal ones if the issue is not resolved with the former.”).

¹⁰⁵ See Earl M. Maltz, *The Political Dynamic of the “New Judicial Federalism,”* 2 EMERGING ISSUES STATE CONST. L. 233, 238 (1989).

to seek a different outcome in a state court does not mean that the state court decisions or state constitutional provisions lack legitimacy.¹⁰⁶ This is simply the role that state constitutions were designed to play in the federal system.¹⁰⁷

II. THE STRATEGIC USE OF STATE CONSTITUTIONS TO SUPPORT IMMIGRANT INTEGRATION AND DEFEND AGAINST DISCRIMINATION

A. *Equality Provisions and Alienage Discrimination*

This Section explains the application of equal protection under the federal Constitution to noncitizens and the exceptions that have been built out by the Supreme Court. It then describes select state equality provisions—some analogous to the federal Constitution and others unique. Finally, it encourages immigrant advocates to familiarize themselves with their state equality provisions and to consider how they may be employed to address the limits of federal equal protection jurisprudence relating to noncitizens.

1. *Federal Equal Protection and Noncitizens*

To date, most scholarship about noncitizens and equal protection has focused on equal protection under the Fourteenth Amendment of the U.S. Constitution.¹⁰⁸ Because of the prevalence of the lockstepping approach to interpreting state constitutions, it is important to understand the federal jurisprudence as a backdrop to equal protection claims for noncitizens under state constitutions. A few broad trends are apparent in the jurisprudence. First, while noncitizens are considered “persons” under the Fourteenth Amendment to the U.S. Constitution,¹⁰⁹ immigration status matters. Tiered levels of scrutiny may apply depending on whether the noncitizen is undocumented or a lawful

¹⁰⁶ Liu, *supra* note 71, at 1312 (“The legitimacy of state constitutionalism does not primarily depend on the development of a distinctive, state-centered jurisprudence. . . . [I]t is no embarrassment for a state court to disagree with federal precedent on the basis of constitutional reasoning that transcends state boundaries.”); see Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitution Religion Clauses*, 38 VALPARAISO U. L. REV. 353, 366–71 (2004) (outlining the opportunities state constitutions offer for protecting religious rights beyond protections offered by federal courts); Hans A. Linde, *supra* note 81, at 380–83 (arguing generally for the importance of using state constitutions in making individual rights claims).

¹⁰⁷ Liu, *supra* note 71, at 1312–13.

¹⁰⁸ See generally, e.g., Jenny-Brooke Condon, *The Preempting of Equal Protection for Immigrants?*, 73 WASH. & LEE L. REV. 77 (2016) (examining recent Equal Protection cases brought by noncitizens).

¹⁰⁹ *Yick Wo v. Hopkins*, 118 U.S. 356, 356, 369 (1886) (“The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.”).

permanent resident.¹¹⁰ Second, the U.S. Supreme Court is much more deferential to the federal government classifying individuals based on alienage than it is to state government classifications.¹¹¹ Third, the Court has typically employed a higher level of scrutiny to void alienage classifications in matters related to state spending, such as for public welfare.¹¹² Fourth, the Court has been reticent to let states keep economic opportunities for U.S. citizens alone.¹¹³ Finally, the Court has been open to employing a rational basis test and letting state classifications stand if they are perceived as relating to a political purpose rather than an economic one.¹¹⁴ However, definitions of political versus economic purposes blur easily.

Graham v. Richardson highlights the Court's skepticism about differential treatment of noncitizens, or at least of lawful permanent residents, when it comes to state spending.¹¹⁵ In *Graham*, the Court considered the constitutionality of Arizona and Pennsylvania legislation that conditioned the receipt of welfare benefits on U.S. citizenship, or on extended legal residence in the United States.¹¹⁶ The Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹¹⁷ Prior to *Graham*, it was long settled that both citizens and noncitizens were "persons" under the Fourteenth Amendment.¹¹⁸ The Court had also previously noted that state discrimination against "discrete and insular" minorities is suspect and subject to a higher level of scrutiny.¹¹⁹

¹¹⁰ See Jenny-Brooke Condon, *Equal Protection Exceptionalism*, 69 RUTGERS U. L. REV. 563, 564–65 (2017).

¹¹¹ See, e.g., Plyler v. Doe, 457 U.S. 202, 237 n.1 (Powell, J., concurring) (1982); *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971); see Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357, 357 (2022).

¹¹² *Graham*, 403 U.S. at 371–72; see Chang, *supra* note 111, at 366 (explaining that when states discriminate against noncitizens in providing public benefits the Supreme Court applies strict judicial scrutiny, as compared to the rational basis review it applies outside the public benefit context).

¹¹³ See *Sugarman v. Dougall*, 413 U.S. 634, 642, 646 (1973) (holding that a New York statute "which denies all aliens the right to hold positions in New York's classified competitive civil service, violates the Fourteenth Amendment's equal protection guarantee").

¹¹⁴ *Cabell v. Chavez-Salido*, 454 U.S. 432, 438–39 (1982) (citing *Sugarman*, 413 U.S. at 648).

¹¹⁵ *Graham*, 403 U.S. at 372, 374.

¹¹⁶ *Id.* at 367–68, 372.

¹¹⁷ U.S. CONST. amend. XIV, § 1.

¹¹⁸ *Yick Wo v. Hopkins*, 118 U.S. 356, 356, 369 (1886).

¹¹⁹ Noncitizens are considered to be a discrete and insular minority. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (citing *Nixon v. Herndon*, 273 U.S. 536, 540–41 (1927); *Nixon v. Condon*, 286 U.S. 73, 89 (1932)).

Graham was significant for employing a higher level of scrutiny to a law involving alienage for the first time.¹²⁰

In *Graham*, the Court found that Arizona and Pennsylvania's desires to preserve welfare funding for citizens and longtime legal residents was not sufficient justification for limiting welfare benefits available to other lawful permanent residents because the states were making an "invidious" distinction based on alienage.¹²¹ The Court noted that, as of the time of the *Graham* decision, the federal government had not imposed restrictions on noncitizens who became indigent after their entry to the United States.¹²² Therefore, it implied that consistency with federal immigration law could help state laws like this withstand scrutiny, even though the Court was clear that the federal government could not sanction an equal protection violation.¹²³

The Court's deference to the federal government was also clear a few years after *Graham* when Congress sought to limit the Medicare eligibility of lawful permanent residents who had not yet resided in the United States for at least five years.¹²⁴ In upholding the regulation and the distinction between lawful permanent residents and U.S. citizens in *Mathews v. Diaz*, the Court deferred to the federal government's plenary power to regulate the entry and exit of immigrants.¹²⁵ Therefore, unlike with other areas of equal protection law, federal laws that classify on the basis of alienage status are often treated differently from

¹²⁰ *Graham*, 403 U.S. at 372; see *Amdt14.S1.8.7.2 Alienage Classification*, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/amdt14-S1-8-7-2/ALDE_00000829/\[https://perma.cc/H2ZB-3UZC\]](https://constitution.congress.gov/browse/essay/amdt14-S1-8-7-2/ALDE_00000829/[https://perma.cc/H2ZB-3UZC]) (last visited Feb. 28, 2026) (explaining that the "Court began applying a more explicitly rigorous standard of review to alienage classification statutes in the 1970s," starting with *Graham v. Richardson* in 1971).

¹²¹ *Graham*, 403 U.S. at 370–71, 374.

¹²² *Id.* at 377. Although rarely used, there is now a ground of deportability that applies to an individual who "within five years from the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable." Immigration and Nationality Act § 237(a)(5), 8 U.S.C. § 1227(a)(5); see CONG. RSCH. SERV., R43220, PUBLIC CHARGE GROUNDS OF INADMISSIBILITY AND DEPORTABILITY: LEGAL OVERVIEW 3 (2017) (explaining that this provision is construed narrowly as grounds for deportability).

¹²³ See *Graham*, 403 U.S. at 372, 382.

¹²⁴ See *Mathews v. Diaz*, 426 U.S. 67, 71, 84–85 (1976).

¹²⁵ See *id.* at 84 (distinguishing *Graham* and noting that "it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens"). Jenny-Brooke Condon discusses the erosion of *Graham* and federal and state courts' deference to the federal government's authority over immigration policy rather than a commitment to equal treatment of noncitizens in *The Preempting of Equal Protection for Immigrants*. Condon, *supra* note 108, at 84–86; see also Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155, 158 (2014) (noting that despite the principle of congruence requiring that equal protection be interpreted the same way when applied to federal and state action, when it comes to alienage discrimination, "noncongruence still remains, sometimes unnoticed, within equal protection doctrine").

state laws because of this plenary power deference.¹²⁶

Professor Jenny-Brooke Condon describes the way that alienage claims are treated differently by federal courts as “equal protection exceptionalism.”¹²⁷ In addition to varying levels of deference depending on whether the state actor is the federal government or a state or local government, this “exceptionalism” includes tiered levels of scrutiny depending on the particular status of a noncitizen.¹²⁸ Federal courts have also failed to recognize the way in which immigration status is often a proxy for race and have set high hurdles for finding intentional race-based discrimination in cases involving distinctions based on alienage.¹²⁹ Some scholars have argued that while immigration exceptionalism is rooted in the plenary power doctrine, it often extends to other laws impacting noncitizens rather than only to laws relating to the entry and exit of noncitizens.¹³⁰ Professor Condon critiques the way that this “exceptional” treatment of alienage claims by federal courts gives the federal government broad opportunities to discriminate.¹³¹

¹²⁶ As Professor Kevin Johnson notes in his response to Professor Condon’s article, even if the goal was to protect immigrants’ rights, many of the litigants challenging state legislation focus on preemption arguments and addressing the boundary between state and federal power over immigration rather than on equal protection arguments. Kevin R. Johnson, *Federalism and the Disappearing Equal Protection Rights of Immigrants*, 73 WASH & LEE L. REV. ONLINE 269, 271–72, 279 (2016).

¹²⁷ Condon, *supra* note 110, at 564–65, 573–74 (describing the “silencing” of noncitizens’ equal protection claims).

¹²⁸ *Id.* at 565.

¹²⁹ See, e.g., *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1915–16 (2020) (holding that respondents did not have a plausible equal protection claim based on the rescission of their DACA status, despite the disparate impact of the rescission on Latinos from Mexico, the unusual history of the rescission, and statements by President Trump); see Carrie L. Rosenbaum, *(Un)Equal Immigration Protection*, 50 SW. L. REV. 231, 237–43 (2021) (noting that the combined effect of the intent doctrine’s demand for proof of explicit racial motive and the plenary power doctrine’s near-total deference to the political branches results in courts upholding facially neutral laws that perpetuate discrimination); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 497–98 (2001).

¹³⁰ See David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1074–75 (1979); Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1057 (1994) (“[H]ow far does sovereignty reach before it must give way to equality; when, that is, does discrimination against aliens implicate a different kind of government power, subject to far more rigorous constraints? To what degree, in short, is the status of aliens to be understood as a matter of national borders, to what degree a matter of personhood, and how are we to tell the difference? These questions, I argue, shape the law’s conflicted understanding of the difference that alienage makes.”).

¹³¹ Condon, *supra* note 110, at 609.

2. *State Equality Provisions and Noncitizens*

There are a range of state constitutional approaches to equality protections.¹³² Some state constitutions contain non-discrimination provisions, others contain equal protection provisions, and some include both.¹³³ Some state constitutions frame equal protection as an affirmative duty, while others frame it as a constraint on government.¹³⁴ Some state constitutions limit only state actors, while New York's, for example, explicitly regulates private actors by using broader language that includes "any firm, corporation, or institution, or . . . the state or any agency or subdivision of the state."¹³⁵ Many state constitutions mirror the Fourteenth Amendment to the U.S. Constitution.¹³⁶

Few state constitutional equality provisions explicitly reference alienage, although some refer to race or national origin.¹³⁷ As many scholars have pointed out, equal protection jurisprudence has not done a good job addressing discrimination based on intersectional identities, and discussions of discrimination based on

¹³² See generally Jeffrey A. Parness, *American State Constitutional Equalities*, 45 GONZ. L. REV. 773 (2010) (examining various ways in which state constitutions expressly protect equality).

¹³³ For example, the Hawaii Constitution includes both equal protection and anti-discrimination language: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." HAW. CONST. art. 1, § 5.

¹³⁴ Parness, *supra* note 132, at 774–76. The New Mexico Constitution includes an affirmative statement of "inherent equality." N.M. CONST. art. II, § 4 ("All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.").

¹³⁵ N.Y. CONST. art. I, § 11. New York amended this provision in 2025. The previous iteration only referenced discrimination based on race or religion. N.Y. CONST. art. I, § 11 (amended Nov. 5, 2024). The inclusion of "national origin" as a basis for protection could prove helpful to noncitizens in the future.

¹³⁶ It might be more correct to say that the Fourteenth Amendment mirrors the state constitutions, since some state provisions predate the Fourteenth Amendment. See Earl A. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 S.D. L. REV. 499, 506–08 (discussing pre-Fourteenth Amendment equality provisions in the Pennsylvania and Ohio state constitutions).

¹³⁷ See, e.g., N.Y. CONST. art. I, § 11. I have not found a broadly worded state equality provision mentioning alienage. The most common references to "aliens" or noncitizens in state constitutions are in provisions concerning ownership of property or employment in government jobs. See, e.g., IOWA CONST. art. I, § 22 ("Resident aliens. Foreigners who are, or may hereafter become residents of this state, shall enjoy the same rights in respect to the possession, enjoyment and descent of property, as native born citizens."); AZ CONST. art. 18, § 10 ("No person not a citizen or ward of the United States shall be employed upon or in connection with any state, county or municipal works or employment.").

citizenship, race, and national origin often involve blurred lines.¹³⁸ State constitutional jurisprudence could suffer from similar problems, but nevertheless state courts and state provisions may provide litigants with the opportunity for more expansive relief.

In a search of the term “equal protection” in a database of state constitutions, 31 provisions appeared in 22 different state constitutions.¹³⁹ As one example, article I, section 3 of the 1974 Louisiana Constitution provides:

No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.¹⁴⁰

This example does not explicitly reference immigration status or even “national origin,” but it mentions “race” and includes the very vague term “culture,” which arguably could include “culture” arising from national origin or citizenship status. The Michigan Constitution explicitly references national origin, although not immigration status. It states, “No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin.”¹⁴¹ Like Michigan, several other states also list categories in their equal protection clauses that include some version of “ancestry” or “national origin.”¹⁴² Some others, like the Wisconsin Constitution, instead state expansively

¹³⁸ Ming Hsu Chen, *Colorblind Nationalism and the Limits of Citizenship*, 44 CARDOZO L. REV. 945, 951 (2023) (describing how the “othering” of immigrants is often extended to Asian American, Latinx, and Muslim American citizens who are often perceived of and treated as foreigners and outsiders); see also Kevin R. Johnson, *The Intersection of Race and Class in Immigration Law and Enforcement*, 72 L. & CONTEMP. PROBS. 1, 4–5 (2009) (describing the intersectional identities of many immigrants and the multiple forms of discrimination they face).

¹³⁹ While not all constitutional provisions that touch on issues of equality use these terms, the search still generated useful examples of a range of state constitutional provisions that do. See *Search the Constitutions*, 50 CONSTS., <https://50constitutions.org/search> (search in the search bar “equal protection”) [<https://perma.cc/76TE-F7FX>] (last visited Feb. 28, 2026).

¹⁴⁰ LA. CONST. art I, § 3.

¹⁴¹ MICH. CONST. art. I, § 2.

¹⁴² The Massachusetts Supreme Court held that “national origin” discrimination is distinguishable from “alienage” discrimination. *Finch v. Commonwealth Health Ins. Connector Auth.*, 946 N.E.2d 1262, 1269–70 (Mass. 2011) (“The mere fact that the United States is a nation with a rich history of immigration does not mean that the United States lacks emigrants and the attendant possibility that aliens will have familial and cultural roots in the United States.” (footnote omitted)); see also FLA. CONST. art. I, § 2 (“All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and

that “all people are born equally free and independent, and have certain inherent rights.”¹⁴³ The Wyoming Constitution also broadly provides that “[i]n their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal.”¹⁴⁴

Given the second Trump Administration’s onslaught of federal, state, and local anti-immigrant policies, advocates should examine their state constitution’s equality provision. Is it broadly worded like Wisconsin’s? Even if it mirrors the Fourteenth Amendment to the U.S. Constitution, perhaps the state’s high court might be open to independent interpretation? This approach will by no means lead to success across the board in thwarting anti-immigrant measures. Some states may have narrow equality provisions. Some high courts may not be willing to interpret their constitution to favor noncitizens. However, to overlook state constitutional arguments is a mistake.

For example, in Florida, a state not currently known for welcoming immigrants, its Supreme Court has followed a primacy approach to state constitutional interpretation.¹⁴⁵ Relying on the state’s equal protection provision has led to positive outcomes for noncitizens in several Florida cases, albeit from a few decades ago. Like some of the successful equal protection claims in federal court, these cases also involve state limitations on economic rights based on alienage as opposed to rights that are more political in nature.

Specifically, in *De Ayala v. Florida Farm Casualty Insurance Co.*, a state statute limited the amount of workers’ compensation benefits received by family members of deceased workers who were “nonresident aliens.”¹⁴⁶ The issue was “whether the legislature may limit the worker’s compensation death benefits for some nonresident alien dependents in a way not applicable to Florida citizens, resident aliens, or certain other nonresident aliens.”¹⁴⁷ In issuing its decision, the Florida Supreme Court looked to the Florida Constitution, which provides, “*All natural persons are equal before the law* and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, *to be rewarded for industry*, and to acquire, possess and protect property.”¹⁴⁸ Article I, section 2 of the Florida Constitution states in full:

protect property. No person shall be deprived of any right because of race, religion, national origin, or physical disability.”)

¹⁴³ WIS. CONST. art. I, § 1. It is broadly framed in terms of alienage, if not in terms of gender. *See id.*

¹⁴⁴ WYO. CONST art. I, § 2.

¹⁴⁵ *See supra* discussion note 2; *In re T.W.*, 551 So. 2d 1186, 1190 (Fla. 1989) (explaining the Florida Supreme Court’s primacy constitutional interpretation approach).

¹⁴⁶ *De Ayala v. Fla. Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204, 205 (Fla. 1989).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 206 (citing FLA. CONST. art I, § 2 (amended 2018)).

All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. No person shall be deprived of any right because of race, religion, national origin, or physical disability.¹⁴⁹

The court noted that “[u]nder both our federal and state constitutions, as well as our common law heritage, all similarly situated persons are equal before the law.”¹⁵⁰ Unlike relatives who resided in Mexico, relatives who resided in Canada were able to recover the full amount of workers’ compensation benefits. The court found that there was no rational basis for the denial of full benefits to family members who were residents of Mexico.¹⁵¹ The court in *De Ayala* references the federal and state constitutions in one breath in its holding but, notably, the court spends a significant amount of time analyzing the Florida Constitution before ultimately finding for the noncitizens.¹⁵²

In a second equal protection case in Florida from the same time period, *Palm Harbor Special Fire Control District v. Kelly*, several entities appealed the grant of a business license to a noncitizen.¹⁵³ The noncitizen had applied for a license to act as a business agent for the Palm Harbor Fire Fighters Union.¹⁵⁴ The Florida Supreme Court held that the state statute denying noncitizens’ business licenses was unconstitutional under both the U.S. and Florida Constitutions as a violation of equal protection.¹⁵⁵ The appellant unsuccessfully argued that the statute denying noncitizens’ business licenses should stand because it fell under the

¹⁴⁹ FLA. CONST. art I, § 2.

¹⁵⁰ *De Ayala*, 543 So. 2d at 206 (citing *McLaughlin v. Florida*, 379 U.S. 184, 190–91 (1964) (holding unconstitutional, under the Equal Protection Clause, a Florida statute imposing disparate criminal penalties on similarly situated persons based solely on race); *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 251 (Fla. 1987) (holding a Florida statute unconstitutional because it violated the Florida and U.S. Constitutions’ equal protection guarantees by treating citizens and noncitizens differently); *Haber v. State*, 396 So. 2d 707, 708 (Fla. 1981) (“[A] statute must treat all persons within a class the same, and the division into classes must bear some rational relationship to a legitimate state objective.”); *Soverino v. State*, 356 So. 2d 269, 271 (Fla. 1978) (holding that differential treatment of defendants who batter law enforcement officers is permissible because the statutory classification was reasonably related to the object of the legislation)).

¹⁵¹ *Id.* at 207.

¹⁵² *Id.* at 204, 206. Notably, in some of the state appellate decisions in other states involving similar workers’ compensation provisions, courts were not as open to petitioners’ claims. For example, the Supreme Court of Illinois found that the parents of the deceased did not have standing to bring the claim as nonresident “aliens.” *Jarabe v. Indus. Comm’n*, 666 N.E.2d 1, 3 (Ill. 1996).

¹⁵³ *Kelly*, 516 So. 2d at 250.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 251.

“political function” exemption.¹⁵⁶

In reviewing statutes that make distinctions based on alienage, the Florida Supreme Court paused to discuss the state constitution: “However, nothing in the Florida Constitution prevents the state from restricting avenues of self government to those persons who have become full members of this state’s political community.”¹⁵⁷ Therefore, similar themes to the federal case law emerge in these two state cases raising equal protection issues. As in the federal cases, varying degrees of scrutiny are applied at different times. In addition, whether a restriction is considered economic or political in nature affects the outcome. It is possible that the Florida Supreme Court of today would be less open to equal protection claims for noncitizens than the court was in the 1980s, however, it is still worth noting the past success of these state constitutional equality arguments. Because many cases involving noncitizens touch on discrimination and equality issues, I will return to state equality provisions in later Sections.

B. Non-Analogous State Constitutional Provisions Setting Forth Affirmative Rights May Be Particularly Effective for Immigrant Advocacy

Non-analogous provisions setting forth affirmative rights are the hallmark of state constitutions. This Section examines select state constitutional provisions that have no analog in the U.S. Constitution and considers their potential application to noncitizens. Precedent from several states already establishes the effectiveness of these provisions, particularly in the workers’ rights and public welfare contexts.

1. Non-Analogous Provisions Regarding Public Education May Prove Critical if Plyler v. Doe Is Overturned

The potential for state constitutions to establish a right to free public education for noncitizen children may become critical should *Plyler v. Doe* be overturned during the second Trump Administration.¹⁵⁸ Having to turn to state constitutions because *Plyler* is overturned would be ironic given that the majority opinion in *Plyler* was authored by Justice Brennan, one of the most vocal supporters of broad state constitutional interpretation.¹⁵⁹ In *Plyler*, the U.S. Supreme Court held that states

¹⁵⁶ *Id.* at 251–53 (citing *Sugarman v. Dougall*, 413 U.S. 634, 646–647 (1973) (allowing citizenship requirements for positions involving “functions that go to the heart of representative government” but rejecting citizenship requirements for positions lacking policymaking or representative authority)).

¹⁵⁷ *Id.* at 252. This position is likely based on *Sugarman*, 413 U.S. at 649 (holding that “[a] restriction on the employment of noncitizens, narrowly confined, could have particular relevance to this important state responsibility, for alienage itself is a factor that reasonably could be employed in defining ‘political community.’”).

¹⁵⁸ See generally *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that if a state offers free public education, it may not deny children access based on a child’s immigration status).

¹⁵⁹ *Id.* at 205; Stephen J. Wermiel, *Brennan and State Constitutions*, JUDGES’ J.,

cannot constitutionally deny free public education to children based on their immigration status.¹⁶⁰ The case arose because the Texas legislature authorized school districts to deny enrollment to children who were not “legally admitted” to the United States.¹⁶¹ When the Tyler Independent School District required foreign-born students who could not demonstrate legal admission to pay tuition, a group of students sued.¹⁶² The U.S. Supreme Court based its decision on the Equal Protection Clause of the Fourteenth Amendment. It applied a heightened form of scrutiny in holding that there was no rational basis to deny a free public education to these children given the harm they would otherwise suffer.¹⁶³ The dissent argued that states should be permitted to deny a free education to undocumented students because the U.S. Constitution does not prohibit discrimination on the basis of unlawful status.¹⁶⁴

The Court had previously held that public education was not a fundamental right and in *Plyler* it did not go so far as to say that undocumented individuals comprised a suspect class.¹⁶⁵ Instead, Justice Brennan distinguishes undocumented immigrants who live in the United States long term as a family unit from those who come temporarily to work.¹⁶⁶ The majority found that there was no rational basis for penalizing children whose parents had brought them to the United States.¹⁶⁷ Moreover, the Court noted that even though it did not hold that education is a fundamental right, access to public education is still distinctive because of the harms lack of education would inflict on children and society as a whole.¹⁶⁸ It also distinguished between the extent to which states could permissibly legislate versus the extent to which the federal government could legislate regarding noncitizens, and found it relevant that there was no national policy to support denying undocumented children a public elementary education.¹⁶⁹

Even while applauding the outcome, some have criticized the reasoning in the

Spring 2025, at 10, 10.

¹⁶⁰ *Plyler*, 457 U.S. at 230.

¹⁶¹ *Id.* at 205.

¹⁶² *Id.* at 206 n.2.

¹⁶³ *Id.* at 216–20; *id.* at 238–39 (Powell, J., concurring).

¹⁶⁴ *Id.* at 242–44, 250 (Burger, C.J., dissenting).

¹⁶⁵ *Id.* at 223 (majority opinion).

¹⁶⁶ MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN 20 (2012) (citing *Plyler*, 457 U.S. at 230).

¹⁶⁷ See *Plyler*, 457 U.S. at 219–20. Shoba Sivaprasad Wadhia critiques the way in which the *Plyler* Court differentiates between the parents, who are at fault, and the children, who are victims, and joins others who dispute the Court’s finding that plaintiffs are not a suspect class. Shoba Sivaprasad Wadhia, *Opening Remarks*, 96 ST. JOHN’S L. REV. 823, 826–27 (2022).

¹⁶⁸ *Plyler*, 457 U.S. at 223–24, 230.

¹⁶⁹ OLIVAS, *supra* note 166, at 21–22 (citing *Plyler*, 457 U.S. at 226).

Plyler decision, which side-stepped arguments that state law was preempted by federal immigration law.¹⁷⁰ But, what is important for purposes of this Article is that federal equal protection doctrine relating to alienage is muddled, and that *Plyler* is at risk. Recently, politicians and activists have urged states to deny free education to undocumented students with the explicit goal of challenging *Plyler*.¹⁷¹ Given the current composition of the U.S. Supreme Court and the way in which the Court has not shied away from overturning other longstanding precedent, like *Roe v. Wade*, the possibility that *Plyler* could be overturned is real.¹⁷² Therefore, it is worth considering whether state constitutions might play a future role in protecting a right to public education for undocumented and other noncitizen children, even if past state case law does not address this topic.

State constitutions played a large role in education financing litigation in light of some state constitutions' broad education financing provisions and the roadblocks advocates encountered in federal litigation. In *San Antonio Independent School District v. Rodriguez*, decided before *Plyler*, a group of Mexican American parents brought a class action lawsuit on behalf of low-income children of color challenging the school financing system that resulted in school districts with widely varying resources.¹⁷³ The district court found that wealth is a suspect classification and education a fundamental interest.¹⁷⁴ Therefore, Texas needed to show a compelling state interest to maintain a system in which different school districts had vastly disparate budgets and expenditures.¹⁷⁵ However, the U.S. Supreme Court disagreed. It held that there was a rational basis for the Texas system, which did not discriminate against a suspect class.¹⁷⁶ It also held that education was neither explicitly nor implicitly protected by the U.S. Constitution.¹⁷⁷

Rodriguez did not stop efforts to challenge the systems of financing that negatively impacted school districts made up primarily of poor children of color.

¹⁷⁰ For a discussion of the reaction to *Plyler*, see OLIVAS, *supra* note 166, at 27.

¹⁷¹ Kalyn Belsha, *Think Tank With Ties to Trump Lays Out Plan to Deny Free Education to Undocumented Students*, CHALKBEAT (Apr. 9, 2024, at 12:33 PDT), <https://www.chalkbeat.org/2024/04/09/plyler-protects-undocumented-students-heritage-foundation-seeks-challenge/> [<https://perma.cc/NKP6-GQHD>].

¹⁷² Danielle Kurtzleben, *After Roe v Wade, Supreme Court Overturns Another Major Legal Precedent*, NPR (June 29, 2024, at 08:06 ET), <https://www.npr.org/2024/06/29/nx-s1-5023013/after-roe-v-wade-supreme-court-overturns-another-major-legal-precedent> [<https://perma.cc/K87P-8GNJ>]; see Moran, *supra* note 19, at 1304–05 (suggesting that *Plyler*'s doctrinally fragile reasoning, lack of super-precedent status, and recent political calls for its reversal make renewed Supreme Court review—and possible overruling—plausible).

¹⁷³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4–5 (1973).

¹⁷⁴ *Id.* at 16.

¹⁷⁵ *Id.*

¹⁷⁶ See *id.* at 28.

¹⁷⁷ *Id.* at 35.

Instead, advocates turned their attention to the states and, more specifically, to state constitutional litigation. Initially, litigation relied on state equal protection provisions, but a subsequent wave of litigation following *Rodriguez* looked to state constitutional provisions guaranteeing “adequate” or “thorough and efficient” education.¹⁷⁸

Since the beginning of the 20th century, most state constitutions have required free public education and, at present, every state constitution contains at least one provision regarding public education.¹⁷⁹ However, the types of education provisions vary widely. Some state constitutional provisions address organizational concerns, like the composition of school boards or the requirements for school board elections.¹⁸⁰ Other constitutional provisions, may address funding for public schools.¹⁸¹ But some include provisions that speak more generally to a right to public education and some also address the quality of that education, although often using basic and general descriptors like “adequate.”¹⁸²

Some states with broader provisions include North Carolina, whose constitution provides, “[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”¹⁸³ The New York Constitution directs that “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”¹⁸⁴ In thinking about relying on these provisions to advocate for the rights of noncitizen children, it is notable that the North Carolina and New York constitutional provisions apply to “the people” or “all the children of this state,” which advocates could easily argue apply to all children notwithstanding their immigration status.¹⁸⁵ Both the Florida and Washington State Constitutions are even more helpful because they explicitly refer to the right to education of “all

¹⁷⁸ Katie Eyer & Robert F. Williams, *State Constitutional Law Teaching Materials for 1L Constitutional Law Classes 1, 2–3* (Rutgers L. Rsch. Paper, Apr. 3, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3418938# (on file with the Lewis & Clark Law Review); *see also* Black, *supra* note 75, at 1349 (discussing state constitutions and supreme courts’ recognition of education as a “constitutional and/or fundamental right with substantive dimensions” in the wake of *Rodriguez*).

¹⁷⁹ ZACKIN, *supra* note 6, at 70–71; Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1 B.Y.U. EDUC. & L. J. 1, 3 (1997).

¹⁸⁰ *See, e.g.*, N.M. CONST. art. XII, § 15 (providing that “qualified electors of the districts may choose to have a local school board composed of seven members, residents of and elected from single member districts.”).

¹⁸¹ *See, e.g.*, COLO. CONST. art. IX, § 17 (stipulating the annual rate increase for education funding per pupil).

¹⁸² *See* Jensen, *supra* note 179, at 3–5 (listing specific qualitative phrases that describe the educational standards of states’ schools).

¹⁸³ N.C. CONST. art. I, § 15.

¹⁸⁴ N.Y. CONST. art. XI, § 1.

¹⁸⁵ *See* N.C. CONST. art. I, § 15; N.Y. CONST. art. XI, § 1.

children residing within [their] borders.”¹⁸⁶ The Washington State Constitution says that education “is the *paramount* duty of the state” and that it should be provided to “all children *residing within its borders*.”¹⁸⁷ Even though the Washington Constitution does not list immigration status when listing “race, color, caste, or sex,” the reference to all children within its borders makes its application to noncitizen children living in the state explicit.¹⁸⁸ Similarly, the Florida Constitution also deems education “a fundamental value” and uses similar “paramount duty” language.¹⁸⁹

Other state constitutions may be less helpful in advocating for the right of noncitizen children to public education and, no doubt, reflect the priorities and politics of that state. For example, the Wyoming Constitution is more circumspect: “The right of the citizens to opportunities for education should have practical recognition. The legislature shall suitably encourage means and agencies calculated to advance the sciences and liberal arts.”¹⁹⁰ Does Wyoming’s use of the term “the citizens” refer only to U.S. citizens residing in Wyoming or could it mean a “citizen” or resident of the state? In addition, the scope is very restrained. Even the term “shall” is used only in conjunction with “encourage.”¹⁹¹ Thus, there is very little substance to the ostensible requirement.

While the Wyoming State Constitution may not help to establish a right to public education for noncitizen children, several other state constitutions are much more helpful. In addition to the Florida, New York, North Carolina, and Washington provisions mentioned above, other states with broadly worded provisions include Alaska, Illinois and North Dakota.¹⁹² Public education provisions

¹⁸⁶ FLA. CONST. art. IX, § 1(a); WASH. CONST. art. IX, § 1.

¹⁸⁷ WASH. CONST. art. IX, § 1 (emphasis added).

¹⁸⁸ *Id.* Washington and Florida were the only two state constitutions that used the “children residing within its borders” language, based on a search of 50stateconstitutions.org. *Search the Constitutions*, *supra* note 139 (search in the search bar “children residing within its borders”).

¹⁸⁹ FLA. CONST. art. IX, § 1(a). An older version of the Florida Constitution contained even stronger language about not differentiating children: “[i]t is the paramount duty of the State to make ample provision for the education of all children residing within its borders, without distinction or preference.” FLA. CONST. art. VIII, § 1 (1868).

¹⁹⁰ WYO. CONST. art. I, § 23.

¹⁹¹ *See id.*

¹⁹² For a summary of state constitutional education provisions, see EMILY PARKER, EDUC. COMM’N OF THE STATES, 50-STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION 5–22 (2016), <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> [<https://perma.cc/GV4X-DGL8>]. As of 2025, numerous state constitutions contain broadly worded education provisions. *See Search the Constitutions*, *supra* note 139. Other examples include ALASKA CONST. art. VII, § 1 (“The legislature shall by general law establish and maintain a system of public schools *open to all children of the State*.” (emphasis added)); ILL. CONST. art. X, § 1 (“A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.”). The North Dakota Constitution has broad language, but also an implication that it could potentially apply only to future “voters.” *See*

are an example of the kinds of non-analogous state constitutional provisions that could prove critical in future immigrant advocacy.

2. *State Public Welfare Provisions Have Preserved Health Care and Other Benefits for Immigrants*

Public welfare is a realm in which equal protection and non-analogous provisions in state constitutions helped preserve critical benefits for some noncitizens. When Congress sought to reduce access to public benefits for legal immigrants in the 1990s, some advocates successfully turned to state constitutions to try to reinstate those benefits. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) restricts noncitizen eligibility for federally funded public benefits.¹⁹³ Congress' stated goals for the legislation included deterring immigrants from coming to the United States to avail themselves of public financial support.¹⁹⁴ The PRWORA bars noncitizens who enter the United States after August 22, 1996, from receiving either federal or state Medicaid for at least five years.¹⁹⁵ It also authorizes states to further limit eligibility.¹⁹⁶ Subject to some limitations, states are also permitted to provide state Medicaid to noncitizens, whether or not lawfully residing in the United States, by enacting new legislation.¹⁹⁷

For decades, New York State had provided health care to residents deemed "needy" without distinction to whether they were United States citizens or lawfully present noncitizens.¹⁹⁸ In response to the PRWORA, New York amended its medical assistance program by prohibiting any category of lawfully present noncitizens from accessing its state Medicaid program for five years.¹⁹⁹

N.D. CONST. art. VIII, § 147 ("A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all the children of the State of North Dakota and free from sectarian control.").

¹⁹³ Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104–193, § 403(a), 110 Stat. 2105, 2265 (codified at 8 U.S.C. § 1613).

¹⁹⁴ See 8 U.S.C. § 1601 (declaring as national policy that the public benefits should "not constitute an incentive for immigration to the United States").

¹⁹⁵ *Id.* § 1613 (stating that only qualified noncitizens are eligible for federal public benefits); *id.* § 1641 (defining "qualified alien").

¹⁹⁶ See *id.* § 1612(b)(1) (authorizing states to determine eligibility for qualified noncitizens); *id.* § 1601(7) ("[A] State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.").

¹⁹⁷ See *id.* §§ 1621(d), 1622(a).

¹⁹⁸ *Aliessa v. Novello*, 754 N.E.2d 1085, 1089–90 (N.Y. 2001).

¹⁹⁹ N.Y. SOC. SERV. LAW § 122(b)(ii) (McKinney 2022).

In *Aliessa v. Novello*, several noncitizens who were either lawful permanent residents or Permanently Residing Under Color of Law (PRUCOL)²⁰⁰ brought a class action lawsuit seeking a declaration that the New York Medicaid program violated article XVII, sections 1 and 3 of the New York State Constitution and the Equal Protection Clauses of the U.S. and New York State Constitutions.²⁰¹ The first named plaintiff, Mohamed Aliessa, was from Syria and had lived with his wife and U.S.-citizen children in New York for many years.²⁰² Mr. Aliessa worked as a livery car driver until he was struck by a car in 1997 while working.²⁰³ As a result of the accident, he suffered a head injury, severe brain damage, and partial paralysis.²⁰⁴ In addition to needing emergency medical aid to stabilize his condition, he subsequently required assistance with daily living, intense physical and speech therapy, and medical monitoring in a nursing home.²⁰⁵ Because he had no health insurance, no income, and was PRUCOL, he was able to obtain Medicaid to pay for his hospitalization and nursing home stay before the implementation of the revised New York Medicaid program.²⁰⁶ However, in 1998 he received a notice saying that he would lose his Medicaid coverage based on his immigration status and the operation of New York's 1997 law.²⁰⁷

The *Aliessa* decision was significant because New York State's highest court held unanimously that New York's discrimination against lawfully residing immigrants based on alienage violated the U.S. Constitution's equal protection guarantees, even if authorized by Congress.²⁰⁸ Plaintiffs argued that the legislation relied on distinctions based on alienage, and thus strict scrutiny should apply.²⁰⁹ The state asserted that a rational basis test was appropriate because the legislation implemented federal immigration policy.²¹⁰ The court sided with plaintiffs. It reasoned that despite Congress' broad authority to make policies in the immigration realm, and even though it is constitutional for Congress to distinguish between citizens and noncitizens in granting federal welfare benefits, strict scrutiny must be

²⁰⁰ *Aliessa*, 754 N.E.2d at 1085. "Permanently residing under color of law" is a category created by courts to determine eligibility for public benefits. To be residing "under color of law," the government must know about the person's presence and not be planning their deportation. 20 C.F.R. § 416.1618(a) (2026).

²⁰¹ *Aliessa*, 754 N.E.2d at 1088–89.

²⁰² Ellen M. Yacknin, *Aliessa and Equal Protection for Immigrants*, 58 N.Y.U. ANN. SURV. AM. L. 391, 398 (2002).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 398–99.

²⁰⁸ *Aliessa v. Novello*, 754 N.E.2d 1085, 1094–96 (N.Y. 2001).

²⁰⁹ *Id.* at 1094.

²¹⁰ *Id.*

applied to consideration of a state policy that discriminates against lawfully residing immigrants.²¹¹ Moreover, the state did “not attempt to justify” the policy under strict scrutiny.²¹²

In discussing equal protection, the court did not dwell on the state constitutional claims. Instead, it mentioned them in passing and moved quickly on to the U.S. Constitution.²¹³ However, the state constitutional claims related to public welfare provided fertile grounds for advocates. Article XVII, section 1 of the New York State Constitution provides that “[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions and in such manner and by such means, as the legislature may from time to time determine.”²¹⁴ The court noted in its decision that “care for the needy is not a matter of ‘legislative grace’, it is a constitutional mandate.”²¹⁵ The court had previously ruled in other cases that, based on this constitutional mandate, the legislature could not deny aid to those it had classified as “needy.”²¹⁶ The plaintiffs in this case were “needy.”²¹⁷ Mr. Aliessa had previously received Medicaid benefits and would have continued to receive them if not for his immigration status and the requirements imposed by New York’s new law.²¹⁸ Even though the plaintiffs were still eligible for more limited emergency medical aid under New York’s scheme, that was not sufficient to meet the constitutional obligation.²¹⁹ From the court’s perspective, “section 122 violates the letter and spirit of article XVII, § 1 by imposing on plaintiffs an overly burdensome eligibility condition having nothing to do with need, depriving them of an entire category of otherwise available basic necessity benefits.”²²⁰

The *Aliessa* decision has been lauded for its significant federal equal protection holding.²²¹ The attention is certainly warranted, but the decision is also an example of a state court relying on a state constitution to overturn state legislation detrimental to immigrant integration. In thinking about why immigration advocates and scholars should pay attention to state constitutions, and the unique role that they play in immigration federalism, it is important to remember the basic

²¹¹ *Id.* at 1094–98.

²¹² *Id.* at 1095.

²¹³ *Id.* at 1094. The full extent of the court’s discussion of the state constitutional claim consisted of: “The New York State Constitution contains its own equal protection requirement.” *Id.* (citing N.Y. CONST. art. 1, § 11).

²¹⁴ N.Y. CONST. art. XVII, § 1.

²¹⁵ *Aliessa*, 754 N.E.2d at 1092 (quoting *Tucker v. Toia*, 371 N.E.2d 449, 451 (N.Y. 1977)).

²¹⁶ *Id.*

²¹⁷ *Id.* at 1093.

²¹⁸ Yacknin, *supra* note 202, at 398–99.

²¹⁹ *Aliessa*, 754 N.E.2d at 1093.

²²⁰ *Id.*

²²¹ See Yacknin, *supra* note 202, at 392.

principle that statutes must conform to constitutional requirements. Even in an “immigrant-friendly” state like New York, legislation may be passed that rolls back integration measures. In those moments, state constitutions may be critical tools to reinforce immigrants’ rights.

While the advocates’ approach was successful in New York, attempts to roll back public welfare restrictions for noncitizens were less successful in other jurisdictions. In New Jersey, another immigrant-friendly state with a large immigrant population, the state responded to the PRWORA by imposing a five-year residency requirement for Medicaid on lawful permanent residents and individuals who were PRUCOL.²²² In 2005, the residency requirement was lifted in response to studies showing that emergency charity care costs had risen.²²³ In 2010, budget pressures led the legislature to reimpose the requirement.²²⁴ When the restrictions were challenged in *Guaman v. Velez*, the plaintiffs relied on both federal and state equal protection grounds.²²⁵ Unlike the New York Court of Appeals, the New Jersey Appellate Division deferred to Congress’ broad powers over immigration in finding the legislation constitutional.²²⁶ Because of the federal government’s plenary power to regulate immigration, discrimination based on alienage in federal programs receives only rational basis review.²²⁷ However, the same program implemented by a state would be subject to strict scrutiny.²²⁸ The New Jersey Appellate Division found the legislation did not violate the federal Equal Protection Clause because Congress had set out a “federal direction” in the PRWORA’s five-year residency requirement that the state had opted to follow.²²⁹ Even though Congress made the five-year residency requirement for low-cost medical care up to the discretion of the states, the Appellate Division still found that Congress had expressed a strong and “uniform” preference for the self-sufficiency of recently arrived noncitizens.²³⁰

Under New Jersey’s flexible balancing test, the court held that New Jersey’s adoption of the federal eligibility criteria for noncitizens was appropriate to fulfilling

²²² *Guaman v. Velez*, 74 A.3d 931, 933 (N.J. Super. Ct. App. Div. 2013).

²²³ *Id.* at 934 (describing how the state legislature made this change based on “findings that limiting State subsidized healthcare coverage had resulted in increased costs for emergency hospital charity care”).

²²⁴ *Id.*

²²⁵ *Id.* at 944.

²²⁶ *Id.* at 942.

²²⁷ *Mathews v. Diaz*, 426 U.S. 67, 85–87 (1976); Anna C. Tavis, *Healthcare for All: Ensuring States Comply with the Equal Protection Rights of Legal Immigrants*, 51 B.C. L. REV. 1627, 1641–1643 (2010) (explaining that courts have subjected alienage classifications in federal programs to rational basis review under the plenary power doctrine).

²²⁸ *Guaman*, 74 A.3d at 934 (citing *Graham v. Richardson*, 403 U.S. 365, 376 (1971)).

²²⁹ *Id.* (citing *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982)).

²³⁰ *Id.* at 942.

Congress' goal of assuring the self-reliance of noncitizens and New Jersey's goal of not exceeding the appropriation for subsidized medical care.²³¹ The New Jersey Supreme Court affirmed, in a divided opinion, that there was no state equal protection violation.²³² Therefore, New Jersey's residency restrictions survived challenge.

Unlike New York, New Jersey does not have a general public welfare clause in its state constitution. Whereas New York has a broad mandate to provide for the "needy," New Jersey's state constitution protects a variety of rights relating to speech, assembly, and religion, but not economic rights (other than workers' right to organize).²³³ Perhaps if New Jersey had expressed a stronger constitutional interest in providing for the "needy," without regard to immigration status, the legislation would not have survived the state constitutional challenge. The *Guaman* decision reflects an overarching deference of state courts to federal immigration policy. It also reflects the potential need for broad constitutional provisions setting forth positive rights to better defend immigrant rights, and the absence of such broad protections as limitations.

Similar legislation did not survive state constitutional challenge in Massachusetts. In *Finch v. Commonwealth Health Insurance Connector Authority*, the Supreme Judicial Court of Massachusetts applied strict scrutiny and held that a Massachusetts law implementing the PRWORA violated state equal protection and unlawfully discriminated on the basis of alienage and national origin.²³⁴ The high court determined that Congress' finding of facts in the PRWORA did not provide a compelling interest for discrimination by Massachusetts.²³⁵ Initially, Massachusetts covered the cost of qualified aliens, including some not eligible for federal benefits, enrolled in Commonwealth Care. That changed in 2009 when the legislature excluded federally ineligible noncitizens from coverage.²³⁶ The court cited to *Graham's* prohibition against fiscal considerations alone as justification for discrimination against aliens.²³⁷ In rejecting Massachusetts' approach, it stated, "The Legislature may not lean on Federal policy as a crutch to absolve it of examining whether its own invidious discrimination is truly necessary."²³⁸ What is notable about *Finch* is that the Supreme Judicial Court of Massachusetts did not need a broad public welfare provision like New York's to find that the state statute

²³¹ *Id.* at 942–44.

²³² *Guaman v. Velez*, 110 A.3d 927, 927–28 (N.J. 2015).

²³³ N.Y. CONST. art. XVII, § 1; N.J. CONST. art. I, §§ 3–4, 6, 18–19.

²³⁴ *Finch v. Commonwealth Health Ins. Connector Auth.*, 959 N.E.2d 970, 975, 984 (Mass. 2012).

²³⁵ *Id.* at 974.

²³⁶ *Id.* at 974–75.

²³⁷ *Id.* at 976 (citing *Graham v. Richardson*, 403 U.S. 365, 374 (1971)).

²³⁸ *Id.* at 981.

was unconstitutional. The court applied strict scrutiny and did not simply defer to Congress' plenary power over immigration, highlighting the state court's independent approach to constitutional interpretation as a critical ingredient for success.

3. *State Constitutional Labor, Equal Protection, and Other Provisions Benefit Immigrant Workers by Filling Gaps in Worker Protective Legislation*

Workers' rights have been an integral part of progressive state constitutional movements for over a century.²³⁹ State constitutions often include provisions about wage and hour issues, collective bargaining, and workers' compensation.²⁴⁰ However, movements to add these provisions were not always immigrant friendly. As Emily Zackin points out, "Some labor organizations even attempted to bar immigrants from residing in their state, and states in which labor organizations created the most robust constitutional protections for laborers were frequently states in which anti-immigrant sentiment proved strongest."²⁴¹ Despite this history, immigrant workers, especially undocumented workers, tend to work in dangerous professions, and thus benefit from these and other progressive provisions.²⁴² State constitutional provisions significantly benefit immigrant workers by expanding state workplace protections to previously excluded types of work.²⁴³

As workplace injuries increased with industrialization, workers' compensation programs were designed, in part, as a bargain among employers, workers, and insurance companies to resolve uncertainty around negligence payments.²⁴⁴ However, many workers' compensation programs excluded some or all agricultural workers.²⁴⁵ Immigrant workers tend to be more prevalent in farm work.²⁴⁶ For

²³⁹ See ZACKIN, *supra* note 6, at 111 (showing the growth of labor-related constitutional provisions during the progressive era).

²⁴⁰ Farinacci-Fernós, *supra* note 58, at 441.

²⁴¹ ZACKIN, *supra* note 6, at 110.

²⁴² W. Kip Viscusi & Nick Marquiss, *A Regulatory Policy Strategy for Protecting Immigrant Workers*, 51 SETON HALL L. REV. 933, 943–44 (2021) ("The economics and policy literatures also find that immigrants, particularly Hispanic immigrants, work in the most dangerous occupations.").

²⁴³ See, e.g., *Martinez-Cuevas v. DeRuyter Bros. Dairy Inc.*, 475 P.3d 164, 171–74 (Wash. 2020) (reading article II, § 35 of the Washington Constitution to require overtime protections for previously excluded dairy workers).

²⁴⁴ Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305, 314–15 (1998).

²⁴⁵ Many of these exclusions were rooted in racism. At the time, many farmworkers were Black. REBECCA DIXON, NAT'L EMP. L. PROJECT, FROM EXCLUDED TO ESSENTIAL: TRACING THE RACIST EXCLUSION OF FARMWORKERS, DOMESTIC WORKERS, AND TIPPED WORKERS FROM THE FAIR LABOR STANDARDS ACT 5–6 (2021), <https://www.nelp.org/app/uploads/2021/05/NELP-Testimony-FLSA-May-2021.pdf> [<https://perma.cc/U8QE-3VG9>].

²⁴⁶ TRISH HERNANDEZ & SUSAN GABBARD, JBS INT'L, FINDINGS FROM THE NATIONAL

example, 13.9% of the general population of the United States was foreign born in 2022.²⁴⁷ However, in 2018, the National Agricultural Workers Survey revealed that 75% of farmworkers interviewed were foreign born.²⁴⁸

Exclusion of farmworkers from state workers' compensation programs was successfully challenged on state equal protection grounds in New Mexico.²⁴⁹ The New Mexico Constitution's equal protection provision states, "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person."²⁵⁰

The New Mexico Supreme Court applied rational basis review and found that farmworkers' exclusion from the state's workers' compensation program, even though other agricultural workers were included, violated New Mexico's equal protection provision.²⁵¹ The New Mexico Supreme Court did not rely on distinctions between citizen and noncitizen workers, but rather on the arbitrariness of distinguishing among different types of agricultural workers.²⁵² Yet even without explicit discussion of the impact on noncitizens, the court's decision had a beneficial impact for immigrant workers, who were disproportionately engaged in farm labor.²⁵³

Litigation employing state equal protection arguments is also underway to address disparities in wage and hour protections for farmworkers in New Jersey.²⁵⁴

AGRICULTURAL WORKERS SURVEY (NAWS) 2015–2016: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS 1 (2018), https://www.dol.gov/sites/dolgov/files/ETA/publications/ETAOP_2019-01_NAWS_Research_Report_13.pdf [<https://perma.cc/J4U8-7TDK>].

²⁴⁷ SHABNAM SHENASI AZARI, VIRGINIA JENKINS, JOYCE HAHN & LAUREN MEDINA, U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2022: AMERICAN COMMUNITY SURVEY BRIEFS 1 (2024), <https://www2.census.gov/library/publications/2024/demo/acsbr-019.pdf> [<https://perma.cc/4N87-ZJ7Y>].

²⁴⁸ HERNANDEZ & GABBARD, *supra* note 246, at 1.

²⁴⁹ *Rodriguez v. Brand W. Dairy*, 2016-NMSC-029, ¶ 2, 378 P.3d 13.

²⁵⁰ N.M. CONST. art. II, § 18.

²⁵¹ *Rodriguez*, 2016-NMSC-029, ¶ 17 ("[W]e conclude that there is no unique characteristic that distinguishes injured farm and ranch laborers from other employees of agricultural employers, and such a distinction is not essential to accomplishing the Act's purposes.").

²⁵² *Id.* ¶ 27.

²⁵³ With the erosion of many state workers' compensation programs in recent years as states have limited the scope of programs, raised eligibility requirements, or opted out entirely, state constitutions have also played a role in stemming this "race to the bottom." Robert F. Williams, *Can State Constitutions Block the Workers' Compensation Race to the Bottom*, 69 RUTGERS U. L. REV. 1081, 1085 (2017); *see, e.g.*, *Castellanos v. Next Door Co.*, 192 So.3d 431, 449 (Fla. 2016) ("We conclude that the mandatory fee schedule [for attorney's fees in workers' compensation claims] is unconstitutional as a violation of due process under both the Florida and United States Constitutions.").

²⁵⁴ Press Release, ACLU N.J., On Behalf of Farmworker Advocates, ACLU-NJ, ACLU, and

According to ACLU-NJ Director Jeanne LoCicero, “New Jersey’s arbitrary exclusions of farmworkers from wage protections are based in racism and effectively relegate farmworkers to a second-class legal status, depriving [plaintiffs] of their rights to equality, dignity, safety, and health.”²⁵⁵ In addition to raising equality concerns, the complaint alleges violation of a state constitutional provision protecting the right to “pursu[e] and obtain[] *safety* and happiness” by denying the workers overtime pay.²⁵⁶ The complaint also alleges violation of a constitutional provision prohibiting the legislature from enacting “special legislation,” by passing a law that favors certain employers over others.²⁵⁷ These state constitutional provisions, unconnected to alienage, or even to employment, may also lead to valuable relief for noncitizen workers.

State constitutional minimum wage provisions could also be employed to fill in gaps in federal wage and hour legislation. Exclusions of domestic workers and some agricultural workers from portions of the Fair Labor Standards Act (FLSA) protections inordinately, negatively impact immigrant workers who tend to be more prevalent in these sectors.²⁵⁸ For example, some minimum wage and overtime requirements in the federal FLSA do not apply to domestic workers or to certain small agricultural employers.²⁵⁹ Many state regulatory schemes, like Florida’s, reference the FLSA in setting the scope of their coverage. However, article X, section 24 of Florida’s constitution has broader language than the FLSA and stipulates:

All working Floridians are entitled to be paid a minimum wage that is sufficient to provide a decent and healthy life for them and their families, that

Seton Hall Center for Social Justice File Complaint Seeking to End Wage and Overtime Discrimination (Aug. 7, 2024, at 14:30 PT), <https://www.aclu-nj.org/en/press-releases/behalf-farmworker-advocates-aclu-nj-aclu-and-seton-hall-center-social-justice-file> [<https://perma.cc/45VM-F6RV>]; see Complaint at 2–3, *El Comité de Apoyo a los Trabajadores Agrícolas v. Platkin* (N.J. Super. Ct. 2024).

²⁵⁵ Press Release, ACLU N.J., *supra* note 254.

²⁵⁶ Complaint, *supra* note 254, at 37 (citing N.J. CONST. art. I, § 1).

²⁵⁷ *Id.* at 39–40 (citing N.J. CONST. art. IV, § 7, ¶¶ 7, 9); see also N.J. CONST. art. IV, § 7, ¶ 8 (“No private, special or local law shall be passed unless public notice of the intention to apply therefor, and of the general object thereof, shall have been previously given. Such notice shall be given at such time and in such manner and shall be so evidenced and the evidence thereof shall be so preserved as may be provided by law.”).

²⁵⁸ See HERNANDEZ & GABBARD, *supra* note 246, at 1.

²⁵⁹ See 29 U.S.C. §§ 207, 213. The FLSA provides exemptions for some agricultural workers who work on smaller farms defined as those that did not use more than 500 “man-days” of agricultural labor during any calendar quarter of the preceding calendar year. 29 U.S.C. § 213(a)(6)(A)–(B). The FLSA also excludes agricultural workers from its overtime pay provisions. 29 U.S.C. § 213(b)(12); see also Alexis Guild & Iris Figueroa, *The Neighbors Who Feed Us: Farmworkers and Government Policy—Challenges and Solutions*, 13 HARV. L. & POL’Y REV. 157, 158–62 (2018) (discussing the exclusion of farmworkers from FLSA protections).

protects their employers from unfair low-wage competition, and that does not force them to rely on taxpayer-funded public services in order to avoid economic hardship.²⁶⁰

This provision refers to “all working Floridians” and does not carve out any particular types of employment. Therefore, workers from small farms in Florida could argue that they are entitled to a minimum wage “sufficient to provide a decent life,” just like those who work on large farms, despite the state regulatory scheme.²⁶¹ And, it is not hard to imagine, based on demographic data, that many of those workers on small farms are noncitizens.²⁶² While no case in Florida yet raises this argument, support for it is embedded in the constitutional language and in principles of state constitutional interpretation that prohibit delegation of state legislative authority to administrative agencies.²⁶³

This Section is not meant to provide an exhaustive list of state constitutional provisions that could benefit immigrant workers, but rather to encourage both scholars and advocates to explore their potential more fully. Agricultural and domestic workers, who are disproportionately immigrants, are also excluded from the National Labor Relations Act (NLRA) and may benefit from raising state constitutional arguments in litigation.²⁶⁴ As Andrew Elmore argues: “State constitutional labor law can enable low-wage workers excluded from the NLRA to build collective power in unions.”²⁶⁵ State constitutional collective bargaining

²⁶⁰ FLA. CONST. art. X, § 24, cl. a. Another example of an even more broadly worded provision that could be relied on by low-wage workers comes from Alaska. Its constitution declares that it “is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry.” ALASKA CONST. art. I, § 1.

²⁶¹ See FLA. CONST. art. X, § 24, cl. a.

²⁶² See HERNANDEZ & GABBARD, *supra* note 246, at 4–5.

²⁶³ The state implementing legislation for article X, section 24 purports to incorporate the federal FLSA. It states:

Only those individuals entitled to receive the federal minimum wage under the federal Fair Labor Standards Act and its implementing regulations shall be eligible to receive the state minimum wage pursuant to s. 24, Art. X of the State Constitution and this section. The provisions of ss. 213 and 214 of the federal Fair Labor Standards Act, as interpreted by applicable federal regulations and implemented by the Secretary of Labor, are incorporated herein.

FLA. STAT. § 448.110(3) (2018). However, Florida has adhered to the nondelegation doctrine. Its supreme court has held that the legislature could not delegate to an administrative agency the responsibility to define an element of a crime. *B.H. v. State*, 645 So. 2d 987, 990–93 (Fla. 1994). Therefore, it seems that it would be worthwhile to argue that in this circumstance, the legislature may also have improperly delegated authority to the federal Department of Labor.

²⁶⁴ 29 U.S.C. § 152(3) (excluding “any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home” from the statutory definition of “employee”).

²⁶⁵ Andrew Elmore, *Confronting Structural Inequality in State Labor Law*, 83 MD. L. REV. 1192, 1260 (2024); see also CTR. FOR LAB. & A JUST ECON., HARV. L. SCH., BUILDING WORKER

provisions are a tool that is available to noncitizen workers in some states who are excluded from the NLRA.²⁶⁶ Beyond the labor context, additional areas of research might include state licensing provisions that could provide a basis for undocumented students to obtain professional licenses in the fields in which they have trained. Or, consider how the following exhortation from Delaware's constitution might be embraced by advocates: "The said Commissioners may devise such plans for securing immigration to this State of industrious and useful settlers as they may deem expedient, and such plans may be executed as prescribed by the General Assembly."²⁶⁷ Constitutional encouragement for immigration in a provision like this one could be helpful if a locality were to propose anti-immigrant measures that impacted workers.

C. Analogous State Constitutional Criminal Procedure Provisions Protect All Defendants and Could Provide Additional Protections for Noncitizen Defendants

State constitutions are often viewed as a potential source of more expansive rights for criminal defendants. What about the rights of noncitizen criminal defendants? What impact might state constitutions have in the "crimmigration" realm? The term "crimmigration" was coined by Professor Juliet Stumpf in 2006, ten years after the enactment of the IIRIRA. Professor Stumpf uses the term crimmigration to describe the increasing overlap of the criminal and immigration law systems and the ways the immigration law enforcement system now mirrors criminal law enforcement.²⁶⁸ The IIRIRA played a significant part in this "criminalization" of the immigration system. It radically transformed immigration

POWER IN CITIES & STATES: STATE CONSTITUTIONS AND PUBLIC SECTOR COLLECTIVE BARGAINING RIGHTS 8–12 (2024), https://clje.law.harvard.edu/app/uploads/2024/08/2024.08.29_CLJE_Toolkit-DIGITAL_FINAL.pdf [<https://perma.cc/W327-9PEG>] (listing state constitutional collective bargaining provisions).

²⁶⁶ There may be limited circumstances when unconditional reinstatement and full backpay under the NLRA are not permitted because of a worker's lack of work authorization. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002) (holding that the NLRB was foreclosed by immigration laws from awarding backpay to an individual who was not legally authorized to work in the United States during the backpay period).

²⁶⁷ DEL. CONST. art. XI, § 5. A similar reference to welcoming "industrious" immigrants was included in a Texas state law in 1876,

[W]hereas an impression prevails that the people of this state are indifferent or opposed to immigration from the older States of the Union and from foreign nations. . . . *Be it Resolved by the Legislature of the State of Texas*, That the people of Texas extend a cordial invitation to the good and industrious immigrant to come and make his home among us, and that we will extend to him a hearty welcome.

Tex. J. Res. No. 9, 15th Leg., 1876 Tex. Gen. Laws 317.

²⁶⁸ Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376–77, 380 (2006).

law by increasing the use of detention.²⁶⁹ It also expanded the range of offenses leading to deportation, limited the number of individuals eligible for relief from deportation, and restricted the scope of judicial review of removal orders, among other things.²⁷⁰ As Justice Stevens put it in the majority opinion in *Padilla v. Kentucky*:

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.²⁷¹

This famous quote underscores the severity of the immigration consequences of criminal activity under the IIRIRA. It also serves as the introduction to a groundbreaking decision that held that failure to advise noncitizen defendants about the immigration consequences of criminal pleas constitutes ineffective assistance of counsel under the Sixth Amendment of the U.S. Constitution.²⁷²

With increasingly severe immigration consequences of convictions, the jurisprudence around the right to counsel in criminal proceedings has had an outsized impact on noncitizens. Since the IIRIRA, convictions that are vacated under state law for rehabilitative reasons or in the “interest [of] avoiding an immigration consequence” do not actually vacate the conviction for immigration purposes.²⁷³ But, convictions that are vacated for legal defects, including because they violate a state or federal constitution, are considered vacated for immigration purposes.²⁷⁴ This is one additional reason that *Padilla v. Kentucky* was so significant. *Padilla* provides a basis for vacating criminal pleas in a way that may ameliorate the often-draconian immigration consequences of a conviction. It also marked the first time the U.S. Supreme Court has granted an ineffective assistance of counsel claim based on non-penal consequences flowing from a conviction.²⁷⁵

The ineffective assistance of counsel case law provides fertile ground to consider

²⁶⁹ See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1946–47 (2000) (outlining the effects of the IIRIRA relating to the broadened mandatory detention scheme).

²⁷⁰ *Id.* at 1938–43 (providing an overview of the criminal and immigration provisions of the 1996 immigration law).

²⁷¹ *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

²⁷² *Id.* at 374.

²⁷³ *Matter of Azrag*, 28 I. & N. Dec. 784, 785–86 (B.I.A. 2024) (internal quotation and citation omitted).

²⁷⁴ *Id.* at 786.

²⁷⁵ See *Padilla*, 559 U.S. at 374–75.

the role of state constitutions in crimmigration law. As ineffective assistance of counsel claims based on lack of immigration advice made their way through the courts post-IIRIRA enactment, several state courts followed Justice Brennan's invitation to look to their state constitutions.²⁷⁶ The outcomes were significant.

The New Jersey Supreme Court solidified noncitizens' right to immigration advice before entering criminal pleas in 2009, before the U.S. Supreme Court issued the *Padilla* decision in 2010.²⁷⁷ Perhaps this is not surprising given the New Jersey Supreme Court's leadership in state constitutional jurisprudence over decades. In *Nuñez-Valdéz*, the New Jersey Supreme Court once again firmly rejected the notion that state courts must follow the U.S. Supreme Court's constitutional interpretation in lockstep.²⁷⁸ Almost one year before the *Padilla* decision, it recognized that the New Jersey Constitution's guarantee of effective assistance of counsel in criminal matters includes the right to receive correct advice about the immigration consequences of pleas:

We turn next to assess whether defendant met his burden of proving that he was deprived of his state constitutional right to effective assistance of counsel. We elect to decide this case under our state constitution because we recognize that a federal remedy may depend on whether deportation is a penal or collateral consequence. As noted above, our analysis does not depend on whether deportation is a penal consequence. Rather, the issue is whether it is ineffective assistance of counsel for counsel to provide misleading, material information that results in an uninformed plea, and whether that occurred here.²⁷⁹

The New Jersey Supreme Court chose to rely on the New Jersey Constitution, notwithstanding its constitutional provision was essentially identical to the Sixth Amendment and that the U.S. Supreme Court was expected to issue its own decision within the year. The New Jersey Supreme Court was aware that the U.S. Supreme Court had never previously found a Sixth Amendment violation for non-penal "collateral consequences" arising from a conviction.²⁸⁰ But, the court was not afraid to forge its own state constitutional precedent.

As in New Jersey, state constitutions proved important when litigation arose around the nation to determine the precise scope of defense counsel's *Padilla* obligations. In 2016, the Supreme Judicial Court of Massachusetts in *Commonwealth v. Sylvain* concluded "that under art. 12 of the Massachusetts Declaration of Rights, defense counsel has a duty to provide noncitizen defendants

²⁷⁶ See *supra* note 62 and accompanying text.

²⁷⁷ See *State v. Nuñez-Valdéz*, 975 A.2d 418, 419 (N.J. 2009); *cf. Padilla*, 559 U.S. at 374–75 (announcing its decision in 2010).

²⁷⁸ *Nuñez-Valdéz*, 975 A.2d at 424 n.2; see cases cited *supra* note 97.

²⁷⁹ *Nuñez-Valdéz*, 975 A.2d at 424 (footnotes omitted).

²⁸⁰ *Id.* at 424 n.2.

with accurate advice regarding the deportation consequences of pleading guilty or being convicted at trial and that this right also applies retroactively to cases on collateral review.”²⁸¹ Therefore, going beyond the *Padilla* decision, the Supreme Judicial Court of Massachusetts held that under the state constitution, noncitizen defendants were entitled to proper immigration advice before plea *and* before trial. In contrast to the U.S. Supreme Court in *Chaidez v. United States*, it also held, based on the state constitution, that those rights applied retroactively.²⁸²

Unlike Massachusetts, many state courts did not find independent state constitutional bases for *Padilla* retroactivity. Notably, in *Miller v. State*, the Court of Appeals of Maryland, the highest court of the state, directly rejected the idea and in doing so reiterated, “After *Strickland* was decided, moreover, we flatly stated that, ‘[t]here is no distinction between the right to counsel guaranteed by the Sixth Amendment and Art. 21 of the Maryland Declaration of Rights . . .’ and had not wavered from that position prior to Miller’s guilty plea.”²⁸³ The Maryland Court of Appeals found no daylight between its Declaration of Rights and the Sixth Amendment. Even though other state high courts regularly held that identical language need not result in identical interpretation, the Maryland Court of Appeals followed the U.S. Supreme Court in lockstep.

That other state courts did not establish independent state constitutional bases for *Padilla*-type matters is not surprising. As noted earlier, some state courts do not readily consider or articulate state constitutional reasoning in their opinions.²⁸⁴ That the New Jersey and Massachusetts courts relied on their state constitutions is also not surprising. These two courts are known leaders in state constitutionalism.²⁸⁵ However, it is still important that advocates in these and other states continue to make state constitutional arguments. Only then will the full potential of state

²⁸¹ *Commonwealth v. Sylvain*, 995 N.E.2d 760, 762 (Mass. 2013).

²⁸² See *Chaidez v. United States*, 568 U.S. 342, 344 (2013) (holding that the rule in *Padilla* does not have retroactive effect, meaning defendants who were not properly informed of immigration consequences by defense counsel prior to *Padilla* could not seek relief); cf. *Sylvain*, 995 N.E.2d at 762 (“[T]his right also applies retroactively to cases on collateral review.”).

²⁸³ *Miller v. State*, 77 A.3d 1030, 1044 (Md. 2013) (alteration in original) (citations omitted).

²⁸⁴ See discussion *supra* Section I.B.1.d; see also Gardner, *supra* note 78, at 781 (“Just as striking as the infrequency of state constitutional decisions, and undoubtedly one of its causes, is what can only be characterized as a general unwillingness among state supreme courts to engage in any kind of analysis of the state constitution at all.”).

²⁸⁵ See Robert F. Williams, *The Evolution of State and Federal Constitutional Rights in New Jersey*, 69 RUTGERS U. L. REV. 1417, 1428 (2017) (“New Jersey has been a leader in this reemergence of state constitutional law.”); Stephen Henderson, *The Search and Seizure Law of State Constitutions*, STATE CT. REP. (May 23, 2024), <https://statecourtreport.org/our-work/analysis-opinion/search-and-seizure-law-state-constitutions> [<https://perma.cc/A9QN-ZYKF>] (“Massachusetts is on the front lines of a movement toward independent state constitutional rights.”).

constitutional protection be realized. Along the way, perhaps other courts may follow suit to find state constitutional bases for expanding immigrants' rights.

Given the intensive enforcement measures employed in the second Trump Administration, numerous issues at the intersection of immigration and criminal law are likely to be litigated in state and federal court.²⁸⁶ As these cases percolate, advocates must be attuned to the potential state constitutional arguments. In one of the only articles examining state constitutions and immigrants' rights, *State Constitutions and Progressive Crimmigration Reform*, Valerie Snow outlines three concrete state constitutional reforms that could ameliorate the immigration consequences of the crimmigration system: (1) marijuana legalization, (2) driver's licenses for undocumented individuals, and (3) sanctuary policies limiting cooperation with the federal government.²⁸⁷

Constitutional reform in these areas would certainly benefit noncitizens because they would have less contact with the criminal legal system. If noncitizens do not face arrest for lack of driver's licenses, or for low-level marijuana offenses, they would be less likely to become ensnared in the immigration enforcement system.²⁸⁸ Snow is certainly correct that embedding these policies in state constitutions would benefit immigrants. However, as she also notes, these reforms do not necessarily go to the heart of the question "why state constitutions?" since legislation in these areas could also lead to a similar result.²⁸⁹ Broad constitutional provisions enshrining values and state courts using their authority to interpret parallel and congruent constitutional provisions to positively impact noncitizens provide critical opportunities for positive impact.²⁹⁰ State constitutional jurisprudence around effective assistance of counsel, sentencing, or search and seizure, for example, could be the transformative crimmigration areas worth watching in the coming years.

²⁸⁶ See Press Release, ACLU, Immigrants' Rights Advocates Sue Trump Administration Over Fast-Track Deportation Policy (Jan. 22, 2025, at 16:10 PT), <https://www.aclu.org/press-releases/immigrants-rights-advocates-sue-trump-administration-over-fast-track-deportation-policy> [<https://perma.cc/T88F-U4VU>]; *Portland Joins Sanctuary City Lawsuit Against Trump Administration*, PORTLAND.GOV (Feb. 7, 2025, at 11:00 PT), <https://www.portland.gov/hello/news/2025/2/7/portland-joins-sanctuary-city-lawsuit-against-trump-administration> [<https://perma.cc/34BJ-MHWV>]; Max Matza, *Minnesota Sues Trump Administration to Block Immigration Agents Deployment*, BBC NEWS (Jan. 13, 2026), <https://www.bbc.com/news/articles/c394xywlj8jo> [<https://perma.cc/67HR-B2DG>].

²⁸⁷ Valerie L. Snow, Comment, *State Constitutions and Progressive Crimmigration Reform*, 23 U. PA. J.L. & SOC. CHANGE 251, 262 (2020).

²⁸⁸ *Id.* at 262–64.

²⁸⁹ *Id.* at 259.

²⁹⁰ *Id.* at 258–62. Snow also recognizes the importance of other manifestations of state constitutionalism and acknowledges that the addition of provisions regarding licenses are pragmatic alternatives. *Id.* at 264–65.

CONCLUSION

In the current anti-immigrant climate, it is helpful to remember that 2027 will mark 50 years since Justice Brennan's influential article on state constitutions.²⁹¹ Its message still resonates today. Know the intricacies of your state constitution. Raise state constitutional arguments.

Even if it is not possible to pass immigrant-protective provisions, broad provisions that speak to positive rights for all—citizens and noncitizens alike—may be effective tools for immigrant advocates. New York's mandate that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state"²⁹² already significantly benefitted immigrants in New York seeking ongoing medical care. Washington State's dictate that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders"²⁹³ may provide critical support if rights to public education for noncitizen children are stripped in the future. These broad-based provisions give advocates powerful ammunition against attempts to remove access to public health care and education for noncitizens.

Introducing the kinds of narrow policy provisions that state constitutions are known for would certainly be helpful too. State constitutions could enshrine rights to driver's licenses, to local voting, or to professional licenses for undocumented residents. However, in addition to these measures, it is important to remember the broad values already embedded in some state constitutions and already relied on in some pivotal state cases. They may prove more potent—in part because they already exist.

Beyond the provisions discussed in this Article, there are many other aspects of state constitutions and state constitutionalism worthy of future study for their potential impacts on noncitizen rights and on immigration federalism generally. With new anti-immigrant legislation recently passed in Alabama, it is worth asking the question, what role might this welcoming provision in the Alabama Constitution play as the federalism and constitutional questions percolate: "immigration shall be encouraged, emigration shall not be prohibited, and no citizen shall be exiled"?²⁹⁴ The Alabama example involves a unique state constitutional provision that has no federal analogue. However, even when state

²⁹¹ See Brennan, *supra* note 1, at 489.

²⁹² N.Y. CONST. art. XVII, § 1.

²⁹³ WASH. CONST. art. IX, § 1.

²⁹⁴ ALA. CONST. art. I, § 30. Ultimately, litigation in federal court and a Supreme Court ruling stopped most aspects of the law from going into effect. See Bill Chappell, *Alabama Agrees to Permanently Gut Immigration Law*, NPR (Oct. 29, 2013, at 17:56 ET), www.npr.org/sections/thetwo-way/2013/10/29/241685794/alabama-agrees-to-permanently-gut-immigration-law [<https://perma.cc/8ZBL-FJE5>].

constitutional provisions mirror the U.S. Constitution, advocates should push for independent interpretation by state courts, particularly when federal precedent is unhelpful.

In short, bring cases in state courts, rely on state constitutions, and argue that state courts should move away from lockstepping and from misplaced plenary power deference. While this will not work in all states, in select states perhaps a richer state constitutional jurisprudence will develop. Moreover: “A Declaration of Independence of state constitutional interpretation does not signify a revolution or a rebellion, or even a rejection of the U.S. Supreme Court. Rather it is a part of the design of the system, and a natural result of its growth and maturity.”²⁹⁵ Simply put, this is the federalist system in action.

The next four years will be challenging for noncitizens. There is no easy response to the surge in federal and state-based anti-immigrant measures that has already begun. However, in the face of powerful anti-immigrant headwinds, and following Justice Brennan’s sage advice, it is imperative to consider what insights and opportunities may be found in state constitutions.

²⁹⁵ Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 HASTINGS CONST. L. Q. 115, 143 (2022).