

COMMENT

STATE CONSTITUTIONS AND PROGRESSIVE CRIMMIGRATION REFORM

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INTRODUCTION

The year 1969 marked a sea change for the U.S. Supreme Court. President Nixon’s appointment of conservative judge Warren E. Burger to replace Earl Warren as Chief Justice signified the end of a liberal era for the Court.¹ By 1972, Nixon had also appointed Justices Blackmun, Powell, and Rehnquist,² solidifying the Court’s rightward shift. Justice William J. Brennan, Jr., a stalwart liberal, responded to this conservative transformation by dissenting in more than three dozen decisions from 1971 to 1976.³ Convinced that the Court was no longer a reliable vehicle for progressive change, Justice Brennan sought to identify and champion an alternative means by which liberal-minded litigants could achieve their ends.⁴ Thus was the genesis of his celebrated 1977 article, *State Constitutions and the Protection of Individual Rights*,⁵ in which he scolded the Supreme Court for “condon[ing] both isolated and systematic violations of civil liberties”⁶ and beseeched state courts to “step into the breach” by broadly interpreting state

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¹ *Justices 1789 to Present*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/members_text.aspx [<https://perma.cc/C7BY-LJ9M>].

² *Id.*

³ Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1312–13 (2019) (book review).

⁴ See Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 422–23 (1996).

⁵ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

⁶ *Id.* at 503 (internal footnotes omitted).

constitutional provisions to protect litigants whose federal remedies may be foreclosed.⁷ “State constitutions, too, are a font of individual liberties,” Brennan noted.⁸ “With federal scrutiny diminished, state courts must respond by increasing their own.”⁹

Justice Brennan’s article “is one of the most influential law-journal articles ever published.”¹⁰ It has been hailed as “the starting point of the modern re-emphasis on state constitutions” and a “clarion call to state judges to wield their own bills of rights” for the protection of individual and civil rights.¹¹ Over the past four decades, many state courts have, in fits and starts, come to play the role of rights innovators – recognizing important rights and protections well before the U.S. Supreme Court does so, or extending rights beyond that Court’s baseline requirements.¹² Justice Brennan’s call to arms was well-heeded. Since the 1980s, individual and organizational litigators have appealed to state constitutional provisions to achieve significant progressive gains at the state level,¹³ notably on issues such as marriage equality,¹⁴ school funding,¹⁵ capital punishment,¹⁶ criminal procedure and search and seizure doctrine,¹⁷ legislative redistricting,¹⁸ and

⁷ *Id.* at 504.

⁸ *Id.* at 491.

⁹ *Id.* at 503.

¹⁰ John Dinan, *State Constitutional Amendments and American Constitutionalism*, 41 OKLA. CITY U. L. REV. 27, 27 (2016) (citing Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012)) (ranking Justice Brennan’s article in ninth place with 1,701 citations).

¹¹ Shepard, *supra* note 4, at 421–22 (quoting David Shuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1197 n.1 (1992) and Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1492 (1990)).

¹² Dinan, *supra* note 10, at 42.

¹³ *See id.* at 39–41.

¹⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), was preceded by a slow and steady march of state court decisions. *See, e.g.*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding that “barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”); *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (holding that same-sex couples are entitled under the Vermont Constitution “to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples.”).

¹⁵ *See* RANDY J. HOLLAND ET AL., *STATE CONSTITUTIONAL LAW* 585–634 (2d ed. 2016) (outlining fairly successful state-level school funding equality and adequacy litigation in the wake of *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), which held that education is not a fundamental right entitled to strict scrutiny under the U.S. Constitution and that wealth is not a suspect classification). *See also* JEFFREY S. SUTTON, 51 *IMPERFECT SOLUTIONS* 30 (2018) (“All told, roughly forty-four States by now have faced state-constitutional challenges to their systems of funding public schools. Plaintiffs have won twenty-seven of these challenges at some point and in the process compelled legislatures to adopt a host of additional reforms, many of which increased funding and closed equity gaps.”) (internal footnotes omitted).

¹⁶ *See, e.g.*, *State v. Gregory*, 427 P.3d 621, 627 (Wash. 2018) (declaring that the death penalty violates the Washington State Constitution); Brief for Petitioners at 15–16, *Cox v. Commonwealth*, 218 A.3d 384 (Pa. 2019) (Nos. 102 EM 2018 & 103 EM 2018) (submitting that the death penalty violates the Pennsylvania Constitution).

¹⁷ *See generally* HOLLAND ET AL., *supra* note 15, at 337–467 (discussing many categories of state-level protections for criminal suspects or defendants that exceed the federal “floor” of rights and requirements set by the U.S. Constitution).

¹⁸ *See, e.g.*, *League of Women Voters v. Commonwealth*, 178 A.3d 737, 737 (Pa. 2018) (striking down the 2011 Pennsylvania congressional district plan for partisan gerrymandering in violation of the constitution of the Commonwealth of Pennsylvania, and ordering state lawmakers to draw remedial maps in advance of the 2018 election

property rights.¹⁹ Federalism appeals now have purchase well beyond states-rights conservatives.

As this jurisprudence of state constitutional doctrine developed, a separate area of law was beginning to take shape: “cimmigration law,” or the criminalization of immigration law.²⁰ Juliet Stumpf, who coined the term, identifies the merger of criminal and immigration law as playing out in three main ways: “(1) the substance of immigration law increasingly overlaps, (2) immigration enforcement has come to resemble criminal law enforcement, and (3) the procedural aspects of prosecuting immigration violations have taken on many of the earmarks of criminal procedure.”²¹ More concretely, owing to a series of legislative and policy amendments during the 1980s and 1990s, several trends emerged: the number of migrants deported for having a criminal record multiplied because negative immigration consequences attach to an increasing number of crimes; the number of migrants in immigration detention multiplied because Congress expanded immigration officials’ ability and funding to detain non-citizens; and the number of migrants prosecuted for immigration-related crimes multiplied due to increasing reliance on criminal justice systems as a means of immigration control.²² These trends continue unabated.²³ As a striking example of the recent criminalization of immigration, “criminal activity appears to have affected the ability of more than three times as many people to live in the United States in 2013 than throughout most of the twentieth century combined.”²⁴

Despite the success of state-level efforts to address other issues of social importance in recent decades,²⁵ cimmigration law has not yet been examined through the lens of state constitutionalism. The paucity of scholarship on the intersection of these subjects is surprising, given that a popular view on the left of the political spectrum is that immigrant rights are civil rights,²⁶ and Justice Brennan envisioned civil rights as potentially needing extra protection during times, as now, when conservatism prevails at the federal level. To what extent can state constitutionalism serve as a vehicle for advancing a more progressive cimmigration agenda? Here, “state constitutionalism” signifies the use of direct democracy measures to amend state constitutions or create new state laws, as well as advocacy for expanded rights in state courts via appeals to state

cycle).

¹⁹ See Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez And Its Aftermath*, 94 VA. L. REV. 1963, 1984–85 (2008) (describing the variety of state legislation, state constitutional amendments, and state-court decisions limiting the eminent domain power in response to *Kelo v. City of New London*, 545 U.S. 469 (2005), which held that a city does not violate the Fifth Amendment’s taking clause if it obtains property through eminent domain and sells it to private developers in furtherance of an economic development plan).

²⁰ See Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime and Sovereign Power*, 56 AM. U. L. REV. 367, 376–380 (2006).

²¹ *Id.* at 381. For a more recent and detailed overview of the basic contours of cimmigration law, see CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* 1–21 (2015).

²² GARCÍA HERNÁNDEZ, *supra* note 21, at 9.

²³ *See id.* at 9–15.

²⁴ *Id.* at 8 (referencing the fact that 70,956 people were removed for criminal convictions in the eight or nine decades preceding the mid-1980s, whereas the number of people removed for criminal convictions in 2013 was 216,810).

²⁵ *See supra* notes 13-19 and accompanying text.

²⁶ *See, e.g.,* Cecilia Chen & Robin Goldfaden, *Closing the Gap in Understanding Immigrant Rights as Civil Rights*, 47 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 169 (2013); Claire G. Gastanaga, *Immigrant Rights are Civil Rights*, ACLU OF VIRGINIA (Apr. 24, 2013, 8:53 AM), <https://acluva.org/en/news/immigrant-rights-are-civil-rights> [<https://perma.cc/SB24-S6F3>].

constitutional provisions.

This article proceeds in four main parts. Part I provides a basic overview of the history and evolution of “immigration federalism” and elaborates on how crimmigration law fits within that framework. It also identifies several obstacles to pursuing progressive crimmigration policy at the national level. Part II briefly discusses the development of “New Judicial Federalism” – the term frequently used to describe the revitalization of state constitutional law associated with Justice Brennan’s 1977 article – and then examines potential benefits of fighting for progressive change under that rubric. Part III identifies three policies that could advance rights-expansive crimmigration reform at the state level and suggests the mechanisms by which they might be achieved. Finally, Part IV identifies a number of challenges that may hinder pro-migrant advocates. Although activists on the left should continue to consider state constitutionalism as one avenue for change, its promise for crimmigration reform is likely limited.

I. THE DEVELOPMENT OF IMMIGRATION FEDERALISM AND CRIMMIGRATION

Responsibility for the regulation of immigration and immigrants has shifted between states and localities, on the one hand, and the federal government, on the other, throughout the history of the United States. From the colonial era until the end of the Civil War, colonies or states and localities primarily regulated immigration, although the federal government oversaw naturalization.²⁷ That arrangement shifted abruptly in 1875, when the Supreme Court decided, in the first of a series of cases,²⁸ that the conditions under which noncitizens could enter and remain in the United States was subject to the near-exclusive control of the federal government, due to its prerogative to regulate foreign policy.²⁹ For over 100 years, until the mid-1990s,³⁰ Congress essentially prohibited or severely limited subfederal entities from regulating the movement or presence of noncitizens within their borders.³¹ The federal government beat back any attempt by states to venture into this arena by appealing to the plenary power and equal protection doctrines, as well as constitutional or structural preemption.³²

Given the U.S. government’s century of uninterrupted dominance over most aspects of immigration law and alienage law, the recent reemergence of states and localities as significant players is an especially notable development.³³ This “new immigration federalism,” or simply

²⁷ Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2076, 2084 (2013).

²⁸ *Chy Lung v. Freeman*, 92 U.S. 275 (1875).

²⁹ See Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1558–59 (2008).

³⁰ See Clare Huntington, *The Constitutional Dimensions of Immigration Federalism*, 61 VAND. L. REV. 787, 799 (2008); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1365 (1999).

³¹ See Stumpf, *supra* note 29, at 1570–71; Gulasekaram & Ramakrishnan, *supra* note 27, at 2089.

³² See Stumpf, *supra* note 29, at 1581–82. Though still a relevant aspect of immigration federalism, this article will not address preemption considerations. For greater treatment of that topic, see GARCÍA HERNÁNDEZ, *supra* note 21, at 184–190.

³³ See Huntington, *supra* note 30, at 795–96; Motomura, *supra* note 30, at 1361, 1365. The distinction between immigration law and alienage law is that the former deals with the terms of admission and removal of noncitizens, while the latter governs the rights and obligations of noncitizens once they are inside of the country. Huntington, *supra* note

“immigration federalism,” is generally defined as a relationship in which states and localities operate under and respect federal immigration prerogatives, but concurrently play a substantial role in regulating noncitizens within their territories.³⁴

Though the significance and prevalence of new immigration federalism is undisputed – indeed, there has been a “veritable deluge” of subfederal legislation designed to regulate noncitizens in the past decade³⁵ – explanations for its rise to prominence are more contested. The justifications for increased state and local involvement in immigration-adjacent matters are important, in part, because they gesture to how subfederal entities rationalize crimmigration-related policies, for better or worse. Common rationales include, first and foremost, a widespread perception that the current federal immigration system is dysfunctional and unable to address unauthorized migration. Additional explanations include changing regional demographics, tightening state and local budgets, the increased political salience of unauthorized migration, and heightened national security concerns.³⁶ Regardless of the reasons, however, the import of new immigration federalism is that states and localities now unquestionably interact with a wide range of issues affecting migrants within their borders. For instance, subfederal entities implement federally-mandated programs, provide services required by the courts, oversee community integration of refugees and other migrants, and debate how to address immigration issues that arise in myriad policy arenas, such as public health and health care, employment, higher education, law enforcement, and social services.³⁷

Having established that “pure” immigration law mostly remains the province of the federal government but that states and localities now have substantial latitude to regulate migrants’ lives without treading on federal toes,³⁸ attempting to locate crimmigration law within this framework

30, at 795–96.

³⁴ See, e.g., Gulasekaram & Ramakrishnan, *supra* note 27, at 2076 (defining “the new immigration federalism” as the “recent resurgence of subfederal legislative activity” designed to “discover and discourage the presence of undocumented persons.”); Huntington, *supra* note 30, at 788, 795–96 (defining “immigration federalism” as “increased state and local involvement in immigration,” but not “pure” immigration law); Motomura, *supra* note 30, at 1361 (defining “immigration federalism” as the “role . . . states and localities play in making and implementing law and policy relating to immigration and migrants.”); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 66–67 (2007) (defining “immigration federalism” as “arrangements . . . in which the states operate under, and are obliged to respect, federal immigration policies and supervision.”).

³⁵ See Stumpf, *supra* note 29, at 1559. See also ANN MORSE & GILBERTO SORIA MENDOZA, NAT’L CONFERENCE OF STATE LEGISLATURES, IMMIGRATION REFORM AND STATE TRENDS, 22 LEGISBRIEF (Jan. 2014), <http://www.ncsl.org/LinkClick.aspx?fileticket=C-T1UinGn8Q%3d&tabid=27702&portalid=1> [<https://perma.cc/6AJX-JFAC>] (“The number of state immigration laws has steadily increased; since 2007, on average, 1,300 bills are introduced and 200 laws are passed each year.”); ANN MORSE, IMMIGRANT POLICY PROJECT: REPORT ON STATE IMMIGRATION LAWS, 2018, NAT’L CONFERENCE OF STATE LEGISLATURES (Jan. 2019), http://www.ncsl.org/Portals/1/Documents/immig/ImmigPolicy_2018_v04.pdf [<https://perma.cc/TST3-GT5V>] (reporting that, in 2018, “[l]awmakers in 44 states, the District of Columbia, and Puerto Rico enacted 175 laws” related to immigration”).

³⁶ See Huntington, *supra* note 30, at 805–806; Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 617 (2012). *But see* Gulasekaram & Ramakrishnan, *supra* note 27, at 2080–81 (discounting the demographic change rationale, based on a nationwide investigation of restrictionist subfederal immigration laws, and instead attributing such policies to partisanship and political entrepreneurship).

³⁷ See generally MORSE & SORIA MENDOZA, *supra* note 35.

³⁸ See GARCÍA HERNÁNDEZ, *supra* note 21, at 1821.

complicates the picture by breaking down the apparent federal-subfederal dichotomy.³⁹ In fact, as Juliet Stumpf illustrates, the relationship is less dichotomy and more symbiosis:

As the criminalization of immigration law has expanded, state criminal law has become a central focus of federal immigration law. The criminal grounds for deportation do not distinguish between federal and state crimes. Because the states are the primary players in criminal law, therefore, state statutory definitions of crime play a major part in determining whether a federal deportability ground will apply to a conviction. . . . State legislatures and courts can often affect whether these deportability grounds apply by adjusting the scope of the definition or length of the sentence. At bottom, the very fabric of crimmigration law combines federal and state law: the warp is federally-defined immigration law, and the woof is state-defined criminal law.⁴⁰

Although states are not directly responsible for determining deportability grounds or removing individuals from the country, the content of their criminal codes and law enforcement policies can play an enormous role in limiting or expanding migrants' exposure to federal immigration enforcement authorities. Many states have played a direct role in increasing criminal deportations by legislating new crimes designed to target migrants, expanding courts' ability to order migrants detained as they await criminal proceedings, and structuring law enforcement and judicial processes to exacerbate the penalties migrants face for violations of immigration law.⁴¹

To display the extent to which federal-subfederal cooperation is often present within the framework of immigration federalism, and to highlight how activities at the subfederal level can place migrants in perilous immigration positions, two particular programs merit special attention. The implementation of the Secure Communities program beginning in 2008 created, in the words of a former U.S. Immigration and Customs Enforcement (ICE) Secretary, "a virtual ICE presence at every local jail."⁴² Essentially, any time a law enforcement officer processes fingerprints, they could be matched to both criminal and immigration records.⁴³ This infrastructure of shared records between all levels of law enforcement and immigration authorities means that minor police encounters, such as traffic stops, can lead to criminal and immigration background checks.⁴⁴ Although the Secure Communities Program was temporarily suspended and replaced by a different

³⁹ Indeed, Huntington asserts that "[t]he categories of immigration law and alienage law are not watertight. . . . and the two often overlap as a practical matter." *Supra* note 30, at 798.

⁴⁰ Stumpf, *supra* note 29, at 1593–94.

⁴¹ GARCÍA HERNÁNDEZ, *supra* note 21, at 180. *See also* Huntington, *supra* note 30, at 802–03 (describing subfederal lawmaking intended to target migrants and discourage their presence, such as laws and ordinances imposing civil sanctions for employing or renting out property to undocumented migrants and criminal sanctions for actions such as transporting undocumented migrants).

⁴² U.S. Immigration and Customs Enf't, Wake County Sheriff's Office First of 4 Sites in North Carolina to Receive Full Interoperability Technology to Help Identify Criminal Aliens (Nov. 12, 2008), <https://www.ice.gov/news/releases/wake-county-sheriffs-office-first-4-sites-north-carolina-receive-full-interoperability> [<https://perma.cc/WXK8-9559>].

⁴³ *See* GARCÍA HERNÁNDEZ, *supra* note 21, at 258–59.

⁴⁴ *Id.* at 259.

set of enforcement priorities in 2014 after facing much opposition,⁴⁵ President Trump reactivated the program in January 2017 via executive order.⁴⁶

The 287(g) Program goes a step beyond Secure Communities by explicitly empowering state and local law enforcement officers to enforce federal immigration law.⁴⁷ Once trained, law enforcement officers can effectively act as proxies for ICE agents, so long as their law enforcement agency has signed a Memorandum of Agreement with ICE.⁴⁸ As of July 2019, ICE had entered into agreements with seventy-nine law enforcement agencies in twenty-one states.⁴⁹ Once potentially removable individuals have been identified through the Secure Communities and/or 287(g) Programs, ICE can request advance notification of an individual's release from the local jail in order to ensure that such person is taken into ICE custody.⁵⁰

From the foregoing discussion, it may seem that neither federal nor state avenues hold promise for progressive crimmigration reform. By virtue of the existence of fifty states, however, as opposed to one national government, there is a greater chance for success in at least some of these many jurisdictions. Before turning to the reasons why states may, in fact, invite the attention of activists, it is worth pausing to consider the obstacles that exist to pursuing change at the federal level. Within the executive branch, which of course encompasses the President as well as immigration enforcement agencies housed in the Department of Homeland Security and the Department of Justice, it is safe to say that there has never been a worse time to pursue a progressive crimmigration-related agenda.⁵¹ The legislative branch, meanwhile, has long suffered from the perception – and, indeed, the reality, particularly when it comes to immigration reform – that it is hamstrung when it comes to tackling significant issues of public importance.⁵² Finally, the Trump administration has left a conservative imprint on the federal judiciary, not to mention the U.S. Supreme Court.⁵³ By filling vacancies – particularly at the circuit court level – at a faster rate than

⁴⁵ See *id.* at 259–60.

⁴⁶ *Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENF'T, <https://www.ice.gov/secure-communities#wcm-survey-target-id> [<https://perma.cc/2XNF-X8DC>] (last updated Mar. 20, 2018).

⁴⁷ GARCÍA HERNÁNDEZ, *supra* note 21, at 261.

⁴⁸ See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION AND CUSTOMS ENF'T, <https://www.ice.gov/287g> [<https://perma.cc/G9AJ-SYLY>] (last updated Oct. 4, 2019).

⁴⁹ *Id.*

⁵⁰ See GARCÍA HERNÁNDEZ, *supra* note 21, at 262–265.

⁵¹ See generally SARAH PIERCE ET AL., TRANSATLANTIC COUNCIL ON MIGRATION, U.S. IMMIGRATION POLICY UNDER TRUMP (July 2018), <https://www.migrationpolicy.org/sites/default/files/publications/TCMTrumpSpring2018-FINAL.pdf> [<https://perma.cc/9SSF-TU9D>] (describing President Trump's negative framing of immigration and describing his administration's actions, including enhanced immigration enforcement, reduction of humanitarian programs, increased vetting and obstacles for legal immigration, and the end of the DACA program).

⁵² See, e.g., Priscilla Alvarez, *Don't Bet on Comprehensive Immigration Reform in the New Congress*, THE ATLANTIC (Nov. 24, 2018), <https://www.theatlantic.com/politics/archive/2018/11/democrats-are-divided-immigration-reform/576457/> [<https://perma.cc/ZK4Y-X45V>]; Philip Elliott & Nash Jenkins, *Republicans in Congress Search for an Immigration Bill to End Border Crisis*, TIME (June 20, 2018), <http://time.com/5316742/donald-trump-immigration-bill-family-separation/> [<https://perma.cc/PJ4R-ZGQG>]; Tara Golshan, *Congress Failed to do Something on Immigration – Again. Here's Why.*, VOX (July 2, 2018, 9:30 AM), <https://www.vox.com/policy-and-politics/2018/7/2/17509726/congress-fail-immigration-again> [<https://perma.cc/H7KL-R32V>]. But see Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://nyti.ms/2GqmNnb> [<https://perma.cc/T5FS-X3U9>].

⁵³ See Kevin Schaul & Kevin Uhrmacher, *How Trump is Shifting the Most Important Courts in the Country*,

any of his recent predecessors, with judges whose median age is 49 years old, the Trump administration has left its mark on the federal judiciary for a generation to come.⁵⁴

Facing indifference or hostility at the federal level, advocates seeking change to benefit noncitizens with and without criminal records should focus their energies elsewhere. Writing after President Trump's appointment of Justices Gorsuch and Kavanaugh to the Supreme Court, Goodwin Liu, an Associate Justice of the California Supreme Court, underscored the point: "Justice Brennan's 1977 paean to judicial federalism had particular resonance in light of the changing composition and increasingly conservative tilt of the U.S. Supreme Court. We may be at a similar moment today."⁵⁵ As if in response, after Justice Kavanaugh's confirmation affirmed that the Court's majority would lean conservative, liberal lawyers reassessed their arsenal of strategies.⁵⁶ Among other tactics, some organizational litigators have decided to focus more on state legislatures and courts, as well as on means of advocacy at the state and local government levels apart from the judiciary.⁵⁷ More than forty years after Justice Brennan set the wheels of the New Judicial Federalism in motion, there is once again renewed interest in and anticipation of independent state constitutional interpretation.⁵⁸

II. NEW JUDICIAL FEDERALISM AND STATE CONSTITUTIONS AS A POTENTIAL AVENUE FOR CHANGE

At the heart of New Judicial Federalism is the idea that state courts, through independent interpretation of state constitutional clauses, can salvage and protect individual rights neglected or encroached upon in federal jurisprudence.⁵⁹ But what exactly is meant by independent interpretation of state constitutional clauses? The answer lies in the fact that many rights recognized in the colonies and states during the seventeenth and eighteenth centuries served as a template for the rights recognized in the Bill of Rights to the U.S. Constitution.⁶⁰ State court judges may, for example, appeal to their state constitution's unique history and distinct clauses to vindicate rights on unique grounds, whether or not those rights are federally recognized.⁶¹ State-level judges may also exceed the minimalist "floor" of rights in federal constitutional jurisprudence to impose additional or independent rights and obligations grounded in the state constitution.⁶² Yet for a variety of

WASHINGTON POST (Sep. 4, 2018), <https://www.washingtonpost.com/graphics/2018/politics/trump-federal-judges/> [<https://perma.cc/8DQR-U7UD>].

⁵⁴ *Id.*

⁵⁵ Goodwin Liu, *supra* note 3.

⁵⁶ See Amanda Terkel, *With Brett Kavanaugh on the Supreme Court, Liberal Lawyers Shift Strategies*, HUFFINGTON POST (Oct. 29, 2018, 5:45 AM), https://www.huffpost.com/entry/supreme-court-liberal-lawyers-brett-kavanaugh_n_5bd22542e4b055bc948a0161?guccounter=1 [<https://perma.cc/4TXA-NWL8>].

⁵⁷ *Id.*

⁵⁸ See Seth F. Kreimer, *Still Living After Fifty Years: A Census of Judicial Review under The Pennsylvania Constitution of 1968*, 71 RUTGERS L. REV. 287, 290–91 (2018).

⁵⁹ *Id.*

⁶⁰ See Joseph Blocher, *What State Constitutional Law Can Tell Us About the Federal Constitution*, 115 PENN. STATE L. REV. 1035, 1036 (2010).

⁶¹ See *infra* text accompanying notes 82–88.

⁶² See Blocher, *supra* note 60, at 1037; Thomas M. Hardiman, *New Judicial Federalism and the Pennsylvania Experience: Reflections on the Edmunds Decision*, 47 DUQ. L. REV. 503, 505–06 (2009); Kreimer, *supra* note 58, at 305.

reasons,⁶³ for most of this country's history, federal constitutional law predominated, while independent interpretation of states' constitutional guarantees languished.⁶⁴ It was not until Justice Brennan's entreaties that state courts began to respond to the Burger Court's rights retrenchments by safeguarding individual rights through state constitutionalism.⁶⁵ "In time," explains Judge Thomas Hardiman, "state courts began experimenting with new federalism with increasing confidence; between 1870 and 1989, approximately 600 published opinions interpreted state constitutions more expansively than the United States Constitution."⁶⁶

Any hesitance willing states may once have had to "step into the breach" identified by Justice Brennan has long since dissipated.⁶⁷ Still, advocates hoping to pursue progressive crimmigration policies – or for the purposes of this section, any liberal policy goals – via state constitutionalism, ought to consider the advantages and disadvantages of such a strategy, separate and apart from a decision to concurrently pursue or forgo federal remedies. So, why state constitutions? As a preliminary matter, it is useful to distinguish the state constitutions, categorically, from the federal constitution and from state statutes. The U.S. Constitution is a document that is intentionally "negative," in that it mainly imposes limits on governmental action.⁶⁸ State constitutions, on the other hand, impose both "negative" limitations and "positive" obligations on the state government,⁶⁹ a feature which could potentially lend more footholds for protecting or expanding individual rights.⁷⁰ In regard to the distinction between state constitutions and state statutes, constitutions represent the pinnacle of a state's legal authority.⁷¹ Addressing a subject in the constitution, instead of a statute, may more effectively protect that interest against encroachment by other branches of government and will nullify any inconsistent legislation.⁷²

Beyond these advantages of form and positioning, scholars of state constitutionalism have identified several other reasons to recommend utilizing state constitutions as a conduit for reform-minded, rights-expansive litigators. Firstly, lawyers who default to raising solely federal claims practice at their peril: to overlook state or local laws is to potentially miss out on a second bite at the apple when it comes to protecting their clients' rights and interests.⁷³ Second, it is far easier to amend state constitutions than the U.S. Constitution. The U.S. Constitution has only been amended

⁶³ See Blocher, *supra* note 60, at 1036–37 (identifying, as reasons for the relegation of state constitutional rights, the decline of state identity and the rise of incorporation doctrine).

⁶⁴ *Id.*

⁶⁵ See Hardiman, *supra* note 62, at 505–06.

⁶⁶ *Id.* at 505.

⁶⁷ See *id.* at 506 ("Today, the power of the states to interpret their constitutions to offer broader protection of individual rights than that required by the United States Constitution is undisputed.").

⁶⁸ See SUTTON, *supra* note 15, at 34–35.

⁶⁹ *Id.*

⁷⁰ See, e.g., Dinan, *supra* note 10, at 36 (comparing federal constitutional amendments unfavorably to state constitutional amendments, which are "a regular vehicle for expanding or clarifying rights").

⁷¹ Jack Stark, *A Practical Guide to Drafting State Constitutional Provisions*, 73 TEMPLE L. REV. 1061, 1064 (2000) (internal citations omitted).

⁷² *Id.*

⁷³ See Jeffrey S. Sutton, *Why Teach – And Why Study – State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 172 (2009). See also Brennan, *supra* note 5, at 502 (1977) ("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.").

twenty-seven times – the first ten in 1791 – while “the fifty current state constitutions have been amended 7,481 times for an average of nearly 150 amendments per state.”⁷⁴ Thirdly, on matters arising solely under state law and constitution, the decisions of state supreme courts are final and binding, unable to be reviewed or overturned by any federal court.⁷⁵

Fourth, it is often easier to win in state courts than federal courts, in part because the hurdles of standing and justiciability are comparatively lower at the state level,⁷⁶ and in part because a state court may be more willing to engage with thorny legal and equitable complexities than a federal court, which may need to fashion a more one-size-fits-all solution.⁷⁷ Compared to the U.S. Supreme Court in particular, which must announce rights and remedies for the entire nation, it is easier for state supreme courts to venture into the proverbial thicket and define constitutional rights or craft remedies for the citizens of their state alone.⁷⁸ As a corollary, state judges may feel relatively less constrained than federal ones because the narrower scope makes it easier to correct a poorly reasoned or mistaken constitutional decision.⁷⁹

Fifth, state courts can consider local conditions, culture, geography, or other considerations that federal courts, practically, cannot.⁸⁰ Such considerations play into interpreting state constitutional rights as well as designing remedies that are responsive to circumstances on the ground or that can be tailored to address the litigants’ specific needs.⁸¹ Sixth, and on a related note, state judges can consider the unique textual guarantees and rich histories of their state constitutional provisions.⁸² When comparing state versus federal constitutions, all state constitutions have (1) “parallel” provisions – ones with matching federal counterparts, (2) “congruent” provisions – ones that “govern issues and embody norms that are also addressed by the federal constitution but utilize distinctive wording and often have distinctive history”, and (3) “skew” provisions, which have no federal counterpart.⁸³ The latter category provides lawyers and state court judges the chance to vindicate rights that do not exist at the federal level.⁸⁴ Examples of skew provisions include single-subject clauses, uniform-law clauses, right-to-remedies clauses, right to privacy, and provisions granting workers’ rights and environmental rights.⁸⁵ Despite the obvious advocacy opportunity presented by skew provisions, however, parallel and congruent provisions also hold out the promise of independent interpretation, because state judges can examine those provisions’ state-specific

⁷⁴ Dinan, *supra* note 10, at 30.

⁷⁵ See Brennan, *supra* note 5, at 501.

⁷⁶ *Id.*

⁷⁷ Sutton, *supra* note 73, at 174. See also Liu, *supra* note 3, at 1322 (observing, in reference to school funding litigation and Fourth Amendment doctrine, that “[p]roblems with a high level of practical complexity may not be amenable to national solutions or, if resolved by a national court, may result in a federalism discount that dilutes the underlying right.”).

⁷⁸ See Sutton, *supra* note 73, at 173.

⁷⁹ *Id.* at 174.

⁸⁰ *Id.* at 173–74.

⁸¹ See *id.*

⁸² See Goodwin Liu, *State Constitutions and the Protections of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1338 (2017).

⁸³ See Kreimer, *supra* note 58, at 317–18.

⁸⁴ See Sutton, *supra* note 73, at 176.

⁸⁵ *Id.*; Liu, *supra* note 3, at 1327–28.

history and doctrine to shape its contours differently from federal counterparts.⁸⁶ For example, attorneys who practice criminal law in Pennsylvania appeal to that Commonwealth's robust tradition of interpreting protections regarding search and seizure and criminal trials more broadly than analogous federal provisions,⁸⁷ and several state supreme courts have found the death penalty unconstitutional based on differently-worded 'cruel and unusual' or due process provisions.⁸⁸

Finally, utilizing state constitutionalism to advance progressive reforms can facilitate the development of federal law, with states taking the lead as rights innovators.⁸⁹ As prominent constitutional scholar Erwin Chemerinsky observes, "There are many examples where state courts interpreting state constitutions preceded and arguably led to the greater recognition of rights under the United States Constitution," citing, for example, the California Supreme Court's decision overturning an anti-miscegenation law based on its state constitution's equal protection clause, more than twenty years before *Loving v. Virginia*.⁹⁰ Litigating issues in state courts allows wary federal and Supreme Court justices to observe the development of doctrines and tests coming out of state constitutional courts, and once an accumulation of state decisions convinces the Supreme Court justices to take up an issue, they can pick and choose from among emerging options.⁹¹ Some scholars even view this strategy as preferable to first petitioning at the federal level, because devolution to states might "ensure, for better or worse, that the national government does not enact legislation reflecting extremes at either end of the political spectrum."⁹² This perspective is sometimes called the "steam valve" theory because, the reasoning goes, more extreme sentiments that find purchase at the state level will diminish interest by parties to seek national legislation or court decisions.⁹³

Despite the apparent benefits of using the state courts as a primary forum for change, some scholars still see the strategy as inherently limiting for advancing individual liberties and civil rights. The chance of succeeding in all or even most states is slim, making state constitutional law, in the eyes of Chemerinsky, a distant second-best strategy when compared to advocacy under the U.S. Constitution.⁹⁴ Yet Chemerinsky acknowledges that some state-level success is better than nothing if otherwise faced with failure at the Supreme Court,⁹⁵ and that is the very situation in which progressive crimmigration-reform advocates find themselves. Given this reality, Part IV considers

⁸⁶ See Brennan, *supra* note 5, at 500 ("Other examples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased."); Liu, *supra* note 82, at 1314–15, 1338; Liu, *supra* note 3, at 1328.

⁸⁷ See Kreimer, *supra* note 58, at 322.

⁸⁸ See *State v. Gregory*, 427 P.3d 621, 627 (Wash. 2018); Liu, *supra* note 3, at 1329 (noting Connecticut's jurisprudence in this area).

⁸⁹ See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). See also Sutton, *supra* note 73, at 176.

⁹⁰ Erwin Chemerinsky, *Essay: Two Cheers for State Constitutional Law*, 62 STANFORD L. REV. 1695, 1703 (2010).

⁹¹ See Liu, *supra* note 3, at 1323; See Sutton, *supra* note 73, at 177.

⁹² Huntington, *supra* note 30, at 831–32.

⁹³ See Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1627 (1997). See also Liu, *supra* note 3, at 1314.

⁹⁴ See Chemerinsky, *supra* note 90, at 1696–1700.

⁹⁵ *Id.* at 1700.

three policies that lawyers and activists could push for at the state level, and reviews mechanisms for doing so.

III. ADVANCING PROGRESSIVE CRIMMIGRATION POLICY

As discussed above,⁹⁶ states and localities do not directly control a noncitizen's entry, exit, or conditions of stay, but they do have discretion to determine the content of their criminal codes and set law enforcement policy. This area of subfederal control provides a natural opening for advocates of progressive crimmigration reform. Three issues that have gained growing traction in the states, and which would greatly benefit noncitizens by preventing contact with the criminal justice system, are marijuana legalization, "sanctuary" policies, and driver's license policies. This Part will address each in turn, before providing an overview of the mechanisms of change afforded by state constitutions.

The Controlled Substances Act still classifies marijuana as a Schedule I drug, making it a federal offense to possess, buy, or sell marijuana.⁹⁷ In states, however, the picture is radically different. No longer just a leftist and libertarian crusade, an increasing number of states are embracing marijuana-related reforms in the criminal justice system. Since the mid-1990s, a total of thirty-three states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands have approved comprehensive medical marijuana programs,⁹⁸ while a total of eleven states and the District of Columbia have legalized small amounts of marijuana for adult recreational use.⁹⁹ An additional twenty-six states and the District of Columbia have decriminalized small amounts of marijuana.¹⁰⁰ Decriminalization can take several forms, but "this generally means certain small, personal-consumption amounts are [made] a civil or local infraction, not a state crime []or are [made] a lowest misdemeanor with no possibility of jail time[]." ¹⁰¹

Reforming how marijuana is legally classified and policed has been an important objective within the social justice community that has steadily gained support over the years, especially as public awareness has grown around the disproportionate policing of Black and brown bodies.¹⁰² Given that many noncitizens are people of color, they have not been exempt from the racial and social impacts of marijuana criminalization and enforcement.¹⁰³ Importantly, activists should be aware that, although decriminalization is undoubtedly better than nothing, there are several

⁹⁶ See Part II.

⁹⁷ State Medical Marijuana Laws, NAT'L CONFERENCE OF STATE LEGISLATURES (Oct. 16, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/7PU3-KDBA>].

⁹⁸ *Id.*

⁹⁹ Marijuana Overview, NAT'L CONFERENCE OF STATE LEGISLATURES (Oct. 17, 2019), <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> [<https://perma.cc/CFA4-8TZ8>].

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See Jordan Cummings, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 U.C.L.A. L. REV. 510, 516 (2015); Trip Gabriel, *Legalizing Marijuana With a Focus on Social Justice, United 2020 Democrats*, N.Y. TIMES (Mar. 17, 2019), <https://www.nytimes.com/2019/03/17/us/politics/marijuana-legalize-democrats.html> [<https://perma.cc/6ZJV-HUKK>].

¹⁰³ See Cummings, *supra* note 102, at 516.

worrying consequences from a crimmigration perspective.¹⁰⁴ For lawful permanent residents (LPRs), a marijuana offense with a very minimal criminal sanction can have disastrous immigration consequences.¹⁰⁵ In short, because individuals in most jurisdictions are not entitled to a public defender unless jail time is at stake, LPRs who live in jurisdictions where low-level marijuana offenses are punished with fines, probation, or drug treatment can unwittingly resolve their cases – without the assistance of public defenders to warn of potential immigration consequences – in a way that counts as a conviction under federal immigration law, possibly leading to deportation.¹⁰⁶ Therefore, marijuana legalization is the far better policy aim to protect certain noncitizens from deportability, although subfederal legalization, of course, cannot protect individuals charged by the federal government.¹⁰⁷

Another progressive reform that helps reduce migrants' contact with the criminal justice system, thereby reducing the likelihood that they may face deportation based on criminal grounds, is implementing limited cooperation policies, or "sanctuary" policies, as they are more popularly known. Though there is no standard definition for limited cooperation policies, they are migrant-inclusionary policies with the aim of shielding noncitizens from immigration law enforcement.¹⁰⁸ For instance, subfederal law enforcement agencies can decline to enter into 287(g) agreements with ICE or limit the length of immigration detainers.¹⁰⁹ Law enforcement officers can also choose to limit investigative cooperation and exercise discretion in policing, such as intentionally not asking about citizenship status or not sharing that information with ICE.¹¹⁰ Due to the diverse array of policy options available and the ever-shifting landscape of immigration enforcement, it is hard to pin down accurate numbers. As of April 2019, ten states and the District of Columbia have implemented some limited cooperation measures, while ten states actively require subfederal entities to help enforce federal immigration laws.¹¹¹ Depending on the political inclinations of the state or municipality, the numerous forms of limited cooperation policies provide many opportunities for pro-migrant activism.

Finally, states can join the growing push to issue drivers' licenses to residents regardless of immigration status. As of December 2019, fifteen states, the District of Columbia, and Puerto Rico issue licenses to applicants who provide certain identity-confirming documents, but they do not require proof of legal residence.¹¹² Providing drivers' licenses to qualified residents, regardless of citizenship status, can greatly reduce the fear and consequences surrounding a traffic stop,

¹⁰⁴ See *id.* at 515–17.

¹⁰⁵ *Id.* at 515–16.

¹⁰⁶ See *id.* at 516–17, 529. Cunnings acknowledges the "personal use" exception under the Immigration and Nationality Act's criminal deportability grounds, but notes that those who have committed more than one marijuana-related offense are ineligible for such exception, and that "it is often not difficult for the government to prove that a conviction does not fit into the personal use exception" *Id.* at 533.

¹⁰⁷ See *id.* at 524–25.

¹⁰⁸ See GARCÍA HERNÁNDEZ, *supra* note 21, at 270.

¹⁰⁹ See Ann Morse et al., *Sanctuary Policy FAQ*, NAT'L CONFERENCE OF STATE LEGISLATURES (June 20, 2019), <http://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx> [<https://perma.cc/47LR-T7AX>].

¹¹⁰ See *id.*

¹¹¹ *Id.*

¹¹² See STATE LAWS PROVIDING ACCESS TO DRIVER'S LICENSES OR CARDS, REGARDLESS OF IMMIGRATION STATUS, NAT'L IMMIGRATION LAW CTR. (Dec. 2019), <https://www.nilc.org/wp-content/uploads/2015/11/drivers-license-access-table.pdf> [<https://perma.cc/ZA89-HR6K>].

dreaded by so many undocumented people who must drive to work, particularly in areas with limited public transportation options.¹¹³ Minor traffic infractions or fender benders, which pose little more than an inconvenience or financial hardship for U.S. citizens, can have devastating consequences for those driving without licenses due to their inability to prove legal residence.¹¹⁴ As stated by one New York state police chief, “If there was a valid licensed driver driving the vehicle . . . there would [be] no need to call Border Patrol to confirm the ID of the driver.”¹¹⁵

Though an ICE spokesperson claimed in 2017 that the agency does not keep statistics on traffic stops that have led to detention,¹¹⁶ a 2010 *New York Times* article stated that, according to Department of Homeland Security figures, “at least 30,000 undocumented immigrants who were stopped for common traffic violations in the last three years . . . ended up in deportation proceedings,” and that “the numbers [we]re rapidly increasing.”¹¹⁷ That same 2010 article estimated that 4.5 million undocumented individuals were driving regularly in the United States.¹¹⁸ Most would not have possessed drivers’ licenses, since at that time “[o]nly three states . . . issue[d] licenses [to applicants] without proof of legal residence.”¹¹⁹ Proponents of driver’s license campaigns often tout the public safety and fiscal benefits of issuing licenses to undocumented residents,¹²⁰ but the number of undocumented drivers that stand to benefit from license-expansion laws should, by itself, be enough to appeal to activists concerned about crimmigration consequences.

Once advocates have identified realistic opportunities for state- or local-level reform, the question becomes how to enshrine those policies in law. This article aims to examine the extent to which “state constitutionalism,” broadly construed, can assist the fight for progressive crimmigration reform. Vis-à-vis state judiciaries, individual or organizational litigators with an appropriate case can argue for particular interpretations of rights and obligations in state constitutional clauses, though more research needs to be done into clauses that could support the types of reforms sought by crimmigration advocates. Campaigns to implement “sanctuary” policies can sometimes be achieved by appealing to executive figures, such as governors or mayors, in a way that bypasses any consideration of state constitutionalism. State legislatures, of course, can pass all three types of reforms described above, though state constitutionalism is not directly implicated except that legislation facing legal challenge could, perhaps, be upheld by reliance on state constitutional provisions. When it comes to state legislatures and opportunities for direct

¹¹³ See Liz Robbins, *Driving While Undocumented, and Facing the Risks*, N.Y. TIMES (July 18, 2017), <https://nyti.ms/2vwXCvK> [<https://perma.cc/R6NN-J6FW>].

¹¹⁴ *Id.* See also Julia Preston & Robert Gebeloff, *Some Unlicensed Drivers Risk More Than a Fine*, N.Y. TIMES (Dec. 9, 2010), <https://nyti.ms/2ngCenA> [<https://perma.cc/HT2U-LUXR>] (“The crash led Ms. Valencia, an illegal immigrant who did not have a valid driver’s license, to 12 days in detention and the start of deportation proceedings – after 17 years of living in Georgia.”).

¹¹⁵ Robbins, *supra* note 113.

¹¹⁶ *Id.*

¹¹⁷ Preston & Gebeloff, *supra* note 114.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See, e.g., Robbins, *supra* note 113. Robbins cites a California report finding that the number of hit-and-run accidents decreased by 4,000 in the year after the state began issuing drivers’ licenses for undocumented residents, despite the presence of 600,000 newly licensed undocumented drivers on the road. A nonpartisan think tank report also found that implementing such a law in New York state could bring in \$57 million in taxes and fees, Robbins notes.

democracy, however, state constitutions do offer tools to aid in the fight.

State constitutions often specify three methods of amendment: ballot measures, amendments introduced by the legislature and ratified by the voters, and constitutional conventions.¹²¹ Given that the constitutional convention is an increasingly rare, if not extinct, method of amending state constitutions,¹²² lobbying the legislature for constitutional amendments or engaging in ballot measure campaigns holds more promise. Ballot measures are proposals, placed on the ballot for a yes or no vote, to enact or repeal laws or constitutional amendments.¹²³ Historically, they have been “the catalyst of many significant public policy changes including women’s suffrage, labor laws, and gay marriage.”¹²⁴ “[B]allot measure[s] can be . . . separated into two categories: referendums and initiatives.”¹²⁵ Referendums ask voters to accept or reject a state constitutional amendment or, in some states, a piece of legislation – in both cases, the legislature controls what goes on the ballot.¹²⁶ Initiatives originate with the public and can either be placed directly on the ballot (a “direct initiative”)¹²⁷ or placed on the ballot after approval by the relevant legislature (an “indirect initiative”).¹²⁸

In light of a divided federal Congress and the conservative composition of the executive and judicial branches, some left-leaning political organizations now see state ballot measures as more important than ever in the fight for progressive policy change.¹²⁹ The success of many progressive ballot measures in the 2018 midterm elections, even in some conservative states and cities, provide support for this position.¹³⁰ Of most interest for crimmigration-reform advocates, voters approved progressive criminal justice ballot measures in Florida, Louisiana, Colorado, Washington, and Michigan (which became the first Midwestern state to legalize recreational marijuana),¹³¹ and Oregonians rejected an effort to repeal an existing “sanctuary” law.¹³² Though this is encouraging news, activists should also note the recent history of ballot measures related to

¹²¹ See Stark, *supra* note 71, at 1076.

¹²² See John J. Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to Their Passage*, 71 MONT. L. REV. 395, 396 (2010) (“For many years, constitutional conventions were called regularly; however, in recent years they have become increasingly rare. . . . the 40-year period from 1971 to 2010 has produced only 13 conventions (and none after 1992).”).

¹²³ Tanya M. Larrabee, *Vote “No” on Criminal Justice Ballot Measures*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 207, 209 (2016).

¹²⁴ *Id.* at 208.

¹²⁵ *Id.* at 209.

¹²⁶ *Id.* at 210.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See, e.g., Press Release, Justine Sarver, Executive Director, The Ballot Initiative Strategy Center, *Ballot Measures Will Play a Key Role in the Progressive Resistance* (Jan. 19, 2017), <http://ballot.org/press-release/ballot-measures-will-play-key-role-progressive-resistance/> [<https://perma.cc/3TMY-2EFE>].

¹³⁰ Sarah Holder, Kriston Capps, Laura Bliss, Brentin Mock, Nicole Javorsky & Nicole Flatow, *On Ballot Measures, A Progressive Sweep*, CITYLAB (Nov. 7, 2018), <https://www.citylab.com/life/2018/11/ballot-measures-progressive-sweep/574942/> [<https://perma.cc/653X-WLH6>].

¹³¹ See Udi Ofer, *The 2018 Midterm Elections Were a Big Win for Criminal Justice Reform Ballot Initiatives*, ACLU (Nov. 7, 2018), <https://www.aclu.org/blog/smart-justice/2018-midterm-elections-were-big-win-criminal-justice-reform-ballot-initiatives> [<https://perma.cc/W8VH-AKE3>].

¹³² See Holder et al., *On Ballot Measures, A Progressive Sweep*, *supra* note 130.

criminal justice and immigration. Immigration-related ballot measures are few and far between and tend to be rights-restrictive, while law enforcement-related ballot measures are far more common and cover many different topics – but the most consistent theme in the past decade has been laws or constitutional amendments to increase victims’ rights.¹³³ The types of ballot measures that gain public support may not align with those sought by advocates of crimmigration reform.

IV. OBSTACLES IN THE PATH OF REFORM

There are at least four types of challenges hindering the use of state constitutionalism for progressive crimmigration change. First, public opinion about immigration, crime, and who “deserves” to live or remain in the United States is one hurdle. Few people outside of particular legal and policy circles are motivated to understand the ins-and-outs of federal immigration law and how it interacts with crime and drug laws to affect noncitizens in ways that are, at times, wildly disproportionate and punitive.¹³⁴ Reports of children ripped from their mothers’ arms by the Trump Administration’s 2018 family separation policy rightly produced immediate public backlash and outcry,¹³⁵ but the American public appears less sympathetic to migrants in other circumstances, particularly those with criminal records.¹³⁶

Second, just as those on the left can use state constitutionalism and lawmaking as a vehicle for reform, so, too, can those on the right. One systematic investigation of restrictionist immigration-related laws passed at the state and local level found partisanship was a highly salient factor: “Restrictive state and local immigration laws [were] largely the product of interested policy advocates who promote[d] such laws in politically receptive jurisdictions, regardless of the demographic concerns facing that jurisdiction.”¹³⁷ Another empirical study found that, between 2005 and 2009, states and localities enacted 118 laws relating to the use of criminal law enforcement tools to target immigration, but only thirty had a positive impact on migrants.¹³⁸ With Republicans

¹³³ According to Ballotpedia, in the 2010 to 2020 election cycles there were seven immigration-related ballot measures across five states. Of the seven, only two were rights-expansive. Of the five ballot measures in the 2010-2018 election cycles, three of them passed, including just one progressive measure for in-state college tuition for undocumented residents. See *Immigration on the Ballot*, BALLOTPEDIA, https://ballotpedia.org/Immigration_on_the_ballot#By_year [<https://perma.cc/BG4K-FHA3>] (last visited April 22, 2020). By contrast, in the 2010 to 2020 election cycles there were fifty-six law enforcement-related ballot measures across twenty-six states. The topics were wide-ranging, but the most numerous appeared to be state constitution amendment proposals to increase the rights of victims of crime. See *Law Enforcement on the Ballot*, BALLOTPEDIA, https://ballotpedia.org/Law_enforcement_on_the_ballot#By_year [<https://perma.cc/VW9Q-WHSE>] (last visited April 22, 2020).

¹³⁴ See generally Cunnings, *supra* note 102, and Robbins, *supra* note 113, for illustrative examples of laws working together to produce disproportionately punitive outcomes for noncitizens.

¹³⁵ See, e.g., Editorial Board, *The Trump Administration’s Season of Covert Cruelty Toward Children*, WASHINGTON POST (Jan. 19, 2019), https://wapo.st/2FIWuXo?tid=ss_tw&utm_term=.16ca34480867 [<https://perma.cc/LV9N-8WPD>].

¹³⁶ See Frances Bernat, *Immigration and Crime*, OXFORD RES. ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE, (Aug. 28, 2019), <https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-93> [<https://perma.cc/BU8C-GYL7>] (reviewing public opinion literature on Americans’ perceptions about immigrants and crime, and noting that “[d]espite recent research that shows the lack of a direct connection between immigration and increases in crime, the American public still believes that immigrants are dangerous.”).

¹³⁷ Gulasekaram & Ramakrishnan, *supra* note 27, at 2080–81.

¹³⁸ GARCÍA HERNÁNDEZ, *supra* note 21, at 180 (citing Huyen Pham & Pham Hoang Van, *Measuring the*

in control of fifty-nine percent of state legislatures¹³⁹ and fifty-two percent of governor seats,¹⁴⁰ the trends for lawmaking in many states do not appear especially favorable for progressive activists.

Second, state court judges may not be willing to accept arguments for independent, rights-expansive interpretations of state constitutional provisions. With parallel provisions in particular, whose wording is exactly mirrored in the U.S. Constitution, state court judges frequently err on the side of a lockstep approach, meaning state constitutional analysis “begins and ends with consideration of the U.S. Supreme Court’s interpretation of the textual provision at issue.”¹⁴¹ Of greater concern, judges who face electoral accountability – as is the case in thirty-eight states – appear less willing than their life-tenured counterparts to recognize new rights.¹⁴² State supreme court justices have, on more than several occasions, lost their seats because of rulings viewed as progressive.¹⁴³ By way of example, in 2010, none of the seven states that had recognized some form of marriage equality used contested judicial elections.¹⁴⁴

Lastly, there are a variety of challenges related to effectively using ballot measures for reform. The most significant concern involves the so-called “tyranny of the majority” and subordination of “minority” populations.¹⁴⁵ Examples abound: Proposition 8 in California, overturning the California Supreme Court’s ruling that created a right to marriage equality¹⁴⁶ and anti-immigrant ballot measures in Arizona’s 2006 election cycle, all of which passed,¹⁴⁷ are notable, among others.¹⁴⁸ Another major issue surrounding ballot measures is that public education can be enormously expensive, and many ballot measure campaigns receive financial support from a handful of public and private interest groups that can shape the narratives surrounding the measures’ consequences.¹⁴⁹ Often, this politicized arrangement results in sound-bite messaging that flattens

Climate for Immigrants: A State-By-State Analysis, in STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY 21, 30 tbl. 1.1 (Carissa Byrne Hessick & Gabriel J. Chin eds. 2014)).

¹³⁹ *State Partisan Composition*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 20, 2020), <http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx> [<https://perma.cc/H5VR-LQ4D>].

¹⁴⁰ *Partisan Composition of Governors*, BALLOTPEdia, https://ballotpedia.org/Partisan_composition_of_governors [<https://perma.cc/BWH8-TG5F>] (last visited April 22, 2020).

¹⁴¹ Lawrence Friedman, *The Constitutional Value of Dialogue and The New Judicial Federalism*, 28 *Hastings Const. L. Q.* 93, 102 (2000).

¹⁴² See Chemerinsky, *supra* note 90, at 1699.

¹⁴³ See *id.*; see also, e.g., Lee Rood, *Justices Ousted over Gay Marriage Ruling Worry about Politics*, DES MOINES REGISTER (Oct. 29, 2016), <https://www.desmoinesregister.com/story/news/2016/10/29/justices-ousted-over-gay-marriage-ruling-worry-politics-affecting-bench/92786554/> [<https://perma.cc/XC95-ZJDD>] (interviewing the three Iowa Supreme Court justices who were ousted from the bench on a retention election, after ruling in 2009 that a state law limiting marriage to opposite-sex couples violated the state constitution’s equal protection clause).

¹⁴⁴ Chemerinsky, *supra* note 90, at 1699.

¹⁴⁵ See *id.* at 1702; Larrabee, *supra* note 123, at 224.

¹⁴⁶ See Chemerinsky, *supra* note 90, at 1701.

¹⁴⁷ See Larrabee, *supra* note 123, at 224.

¹⁴⁸ See, e.g., Daniel R. Gordon, *The State Constitutionalism of Social Exclusion and Subordination: Stepping Back in Florida*, 69 *TEMP. L. REV.* 1041, 1041–42 (1996) (tying the proposal of five anti-immigrant petitions for the 1996 Florida ballot to previous efforts to wield the state constitution as a means of social exclusion and subordination of racial minorities).

¹⁴⁹ See Larrabee, *supra* note 123, at 207.

any complexities, and may confuse rather than educate voters.¹⁵⁰ One scholar argues that criminal justice measures should not go through the initiative process because the stakes are too high, the rights of a minority group are at risk, and the legal issues at play are extremely complex.¹⁵¹

On the more practical side, voters who are motivated enough to submit a petition as part of the initiative process may find drafting legislation or constitutional provisions exceedingly difficult and complicated.¹⁵² This can mean that only professional drafters – usually lawyers – have practical access to the metaphorical levers of the initiative process.¹⁵³ Lastly, ballot measures that do successfully pass are frequent targets of legal challenges.¹⁵⁴ Citizen-initiated laws are also often stymied by tactics of unhappy legislators who respond with “counter-proposals, post-enactment amendments, delays in funding, delays in implementation, and in some cases, outright repeal.”¹⁵⁵ Advocates must carefully consider how these challenges stack up against the potential advantages of using state constitutionalism as a vehicle to pursue progressive crimmigration reform.

V. CONCLUSION

With President Trump in the White House, a divided Congress, and a U.S. Supreme Court that all but ensures a consistently conservative majority, activists on the left must look elsewhere if they are to see any forward motion. Witnessing a similar shift in the mid-1970s, Justice Brennan sought to turn liberal litigators’ attentions to their state courts and state constitutions. A generation of lawyers heeded that call, setting into motion the New Judicial Federalism to vindicate individual and civil rights by appealing to the unique texts and histories of their state constitutions. Crimmigration, a phenomenon and an area of law that was nascent as the New Judicial Federalism began gaining traction, has yet to be seriously considered as a matter that might benefit from state constitutionalism. Pursuing state measures is certainly not a hopeless path for crimmigration activists to tread, but there are significant challenges that may thwart meaningful, widespread progress. As with any fight for social justice issue, advocates seeking progressive crimmigration changes should look for as many avenues for change as possible – keeping the arrow of state constitutionalism in the quiver.

¹⁵⁰ *Id.* at 220–24.

¹⁵¹ *See generally, id.*

¹⁵² *See id.* at 212–13, although the author notes that to ameliorate this circumstance, ten states offer optional drafting assistance to citizens writing initiative petitions. *See also* Stark, *supra* note 71, at 1092.

¹⁵³ *See* Stark, *supra* note 71.

¹⁵⁴ Larrabee, *supra* note 123, at 216.

¹⁵⁵ Todd Donovan, *Direct Democracy as “Super Precedent”?: Political Constraints of Citizen-Initiated Laws*, 43 WILLAMETTE L. REV. 191, 194 (2007).