Immigration — National Security — State Standing — United States v. Texas

Executive discretion in federal enforcement proceedings is, perhaps, a distinctly American legal tradition. In the eighteenth century, while private litigants dominated criminal actions in England, American fidelity to separation of powers created an executive monopoly over enforcement.[1] The very 1789 Judiciary Act[2] that recognized those learned executive agents "whose duty it shall be to prosecute" enshrined our three-tiered federal court system.[3] Last Term, the Supreme Court considered the interconnected history of executive discretion and federal jurisdiction in *United States v. Texas*,[4] a challenge to executive branch immigration nonenforcement. With repeated invocations of the history of executive discretion, the Court held that Texas and Louisiana lacked Article III standing to challenge a U.S. Department of Homeland Security (DHS) decision to pause removals of noncitizens.[5] Although the Court invoked the "history of enforcement discretion"[6] alongside its discussion of state standing, it did so while neglecting the unique history of immigration proceedings — particularly, the recent rise of state immigration enforcement.[7] The Court's conflicted reliance on historical practice in *Texas*, however, reflects the continued doctrinal fragmentation of standing under the Roberts Court.

On January 8, 2021, Texas and DHS executed an agreement recognizing the parties' shared interest in immigration enforcement.[8] Specifically, the agreement required Texas to "provide information and assistance to help DHS perform its border security, legal immigration, immigration enforcement, and national security missions in exchange for DHS's commitment to consult . . . and consider [Texas's] views" prior to making immigration policy decisions.[9] These decisions included changes in federal enforcement priorities, staffing, and procedure.[10] Indeed, the agreement noted with alarm that it would "be impossible to measure in money" the "irreparabl[e] damage[]" Texas would face

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[1] *See* Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 2 (2009).

[2] Ch. 20, 1 Stat. 73.

[3] § 1, 1 Stat. at 73; § 11, 1 Stat. at 78–79; § 35, 1 Stat. at 92–93.

[4] 143 S. Ct. 1964 (2023).

[5] *Id.* at 1970.

[6] *Id.* at 1974.

[7] *See* Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 614, 622–23 (2012). *See generally* H.R. REP. NO. 104-828 (1996) (Conf. Rep.) (discussing an amendment to federal immigration statutes that would empower the Attorney General to collaborate with local law enforcement on immigration enforcement).

[8] Agreement Between Department of Homeland Security & the State of Texas at 1, Texas v. United States, 515 F. Supp. 3d 627 (S.D. Tex. 2021) (No. 21-cv-00003).

[9] *Id.* at 2.

[10] *Id.*

from deviations in DHS policy.[11] On January 20, 2021, following the inauguration of President Joe Biden, DHS issued interim guidelines for immigration-related proceedings consistent with the new Administration's priorities.[12] Authored by then–Acting DHS Secretary David Pekoske, the guidelines paused removals of noncitizens for 100 days.[13]

On January 22, 2021, Texas sued the United States and Acting Secretary Pekoske in the Southern District of Texas.[14] Arguing the new guidelines violated its agreement with DHS, Texas carefully grounded its claim in "budgetary harms, including higher education and healthcare costs."[15] Based on these alleged costs, the district court determined that Texas had standing.[16] And on January 26, 2021, the district court vacated the guidelines and issued a temporary restraining order enjoining DHS from "executing a 100-day pause on . . . removal[s]."[17]

Thereafter, on September 30, 2021, DHS Secretary Alejandro Mayorkas issued a final memorandum codifying DHS's immigration enforcement policies, which prioritized terrorism and espionage-related removals.[18] Texas again filed suit in the Southern District of Texas, this time joined by Louisiana.[19] Again, the district court vacated the final guidelines.[20] DHS filed a motion to stay before the Fifth Circuit.[21] The Fifth Circuit denied the motion.[22] It held that the DHS memorandum constituted a final agency action — and one fatally flawed by the absence of notice and comment as required by the Administrative Procedure Act[23] (APA).[24] Further, it opined that DHS failed to demonstrate its likely success in light of the states' reliance.[25] On July 21, 2022, following a subsequent DHS application for stay before the Supreme Court, the Court denied the application and construed it as a petition

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[11] *See id.* at 5.

[12] U.S. DEP'T OF HOMELAND SEC., REVIEW OF AND INTERIM REVISION TO CIVIL IMMIGRATION ENFORCEMENT AND REMOVAL POLICIES AND PRIORITIES (2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [https://perma.cc/5J8N-HY46].

[13] *Id.* at 1.

[14] Complaint at 1, *Texas*, 515 F. Supp. 3d 627 (No. 21-cv-00003).

[15] *Id.* at 3.

[16] *Texas*, 515 F. Supp. 3d at 630, 636.

[17] *Id.* at 630.

[18] U.S. DEP'T OF HOMELAND SEC., GUIDELINES FOR THE ENFORCEMENT OF CIVIL IMMIGRATION LAW (2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [https://perma.cc/2AEV-AURX].

[19] Complaint at 4, Texas v. United States, 606 F. Supp. 3d 437 (S.D. Tex. 2022) (No. 21-cv-00016).

[20] *Texas*, 606 F. Supp. 3d at 450.

[21] Texas v. United States, 40 F.4th 205, 213 (5th Cir. 2022).

[22] *Id.*

[23] 5 U.S.C. §§ 551–559, 701–706.

[24] *Texas*, 40 F.4th at 221, 228–29.

[25] *Id.* at 228.

for certiorari before judgment.[26] The Court certified three questions including, specifically, whether the states possessed Article III standing to challenge DHS's guidelines.[27]

Writing for the majority, Justice Kavanaugh reversed the district court's judgment.[28] Joined by Chief Justice Roberts and Justices Sotomayor, Kagan, and Jackson, Justice Kavanaugh held that the states lacked Article III standing.[29] Indeed, for the majority, it was clear from the Court's prior jurisprudence and "longstanding historical practice" that the states' suit did not give rise to an injury "redressable by a federal court."[30] The Court's prevailing standing jurisprudence required at the "irreducible constitutional minimum" that a plaintiff plead — and, further, prove — elements missing in *Texas*.[31] To have standing, a plaintiff must face an injury that is: "(1) 'concrete and particularized,' (2) 'fairly traceable to the challenged action,' and (3) 'likely' to be 'redressed by a favorable decision.'"[32] This analysis of "the types of cases that Article III empowers federal courts to consider" critically implicated "history and tradition."[33] Justice Kavanaugh noted that executive branch decisions regarding whether or not to arrest or prosecute did not generally infringe upon interests that courts are bound to protect.[34] As such, Justice Kavanaugh grounded the opinion in the sensibility that federal courts are not the proper forum for such claims against the executive branch.[35] Justice Kavanaugh highlighted that other civic fora are available for litigants to inform executive branch policies — be it congressional oversight, Senate confirmations, or elections.[36]

Justice Kavanaugh also provided specific exceptions of where the *Texas* holding as to standing did not necessarily reach.[37] Among other areas, the holding did not extend to cases of selective prosecution under the Equal Protection Clause, where executive agents wholly abandon their duties to arrest or prosecute, and where an executive branch policy involves arrest or prosecution priorities and the recognition of legal benefits.[38]

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[26] United States v. Texas, 143 S. Ct. 51 (2022) (mem.) (granting certiorari).

[27] *Id.* The other questions certified by the Court included whether DHS's promulgated guidelines violated the APA and whether 8 U.S.C. § 1252(f)(1) prevented the entry of an order to "hold unlawful and set aside" the final guidelines under 5 U.S.C. § 706(2). *Id.*

[28] *Texas*, 143 S. Ct. at 1976.

[29] *Id.* at 1971, 1973.

[30] *Id.* at 1971.

[31] Dep't of Educ. v. Brown, 143 S. Ct. 2343, 2351 (2023) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

[32] *Texas*, 143 S. Ct. at 1989 (Alito, J., dissenting) (quoting *Lujan*, 504 U.S. at 560–61).

[33] *Id.* at 1977 (Gorsuch, J., concurring in the judgment) (quoting TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021)).

[34] *Id.* at 1971 (majority opinion).

[35] *Id.* at 1973.

[36] *Id.* at 1975.

[37] *Id.* at 1973–74.

[38] *Id.*

Justice Gorsuch concurred in the judgment.[39] For Justice Gorsuch, the issue was not whether the states had a cognizable injury, but rather whether the federal courts were capable of providing redress.[40] Notably, Justice Gorsuch took issue with the majority's characterization that the "States have not pointed to any 'historical practice' of courts ordering the Executive Branch to change its arrest or prosecution policies" in light of the costs he understood the states would face.[41] Justice Gorsuch critiqued the Court's cabined view of executive enforcement authority, which considered such authority to arise solely in instances involving "arrest[s] and prosecution[s]."[42] Such a framing, he argued, offered a more limited bailiwick than contemplated by Article II.[43] Indeed, he observed, the Constitution accords the President "a measure of discretion over the enforcement of *all* federal laws, not just those that can lead to arrest and prosecution."[44]

Justice Barrett concurred in the judgment.[45] She agreed that the States lacked standing but disagreed with the notion that the Court's prior precedent in *Linda R.S. v. Richard D.*[46] was sufficient to support the holding in *Texas*.[47] In *Linda R.S.*, after a mother sought to enjoin a district attorney from not enforcing a child support statute, the Court recognized that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[48] Justice Barrett argued that, instead of relying on *Linda R.S.*, *Texas* could have been readily resolved if the Court had considered whether it was "'likely,' as opposed to merely 'speculative,'" that any injury "will be 'redressed by a favorable decision.'"[49]

Justice Alito dissented.[50] Under the three-part test articulated by the Court in *Lujan v. Defenders of Wildlife*,[51] he believed that Texas had standing.[52] Justice Alito centered his inquiry on Congress's authority to control immigration.[53] Pursuant to this analysis, Justice Alito found that Texas easily demonstrated a concrete and particularized injury due to

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[39] *Id.* at 1976 (Gorsuch, J., concurring in the judgment). Justice Gorsuch was joined by Justices Thomas and Barrett.

[40] *Id.*

[41] *Id.* at 1977 (quoting *id.* at 1971 (majority opinion)).

[42] *Id.* (quoting *id.* at 1974 n.5 (majority opinion)).

[43] *Id.* (citing U.S. CONST. art II, § 1, cl. 1, § 3).

[44] *Id.*

[45] *Id.* at 1986 (Barrett, J., concurring in the judgment). Justice Barrett was joined by Justice Gorsuch.

[46] 410 U.S. 614 (1973).

[47] *Texas*, 143 S. Ct. at 1986–87 (Barrett, J., concurring in the judgment).

[48] *Id.* at 1986–87 (quoting *Linda R.S.*, 410 U.S. at 619).

[49] *Id.* at 1989 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992)); *see also* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013).

[50] *Texas*, 143 S. Ct. at 1989 (Alito, J., dissenting).

[51] 504 U.S. 555.

[52] *Texas*, 143 S. Ct. at 1989 (Alito, J., dissenting).

[53] *Id.* at 1990.

both the injury in fact and redressability.[54] Further, invoking a different view of historical practice than the majority, Justice Alito challenged the majority's "conception of Presidential authority" as "smack[ing] of the powers that English monarchs claimed prior to the 'Glorious Revolution' of 1688."[55] Citing early state constitutions that prohibited the suspension of laws, Justice Alito argued that the majority's decision in favor of executive enforcement discretion had been made without sufficient historical support.[56]

Although *Texas* is characterized by discussions of the history of enforcement discretion and separation of powers, the opinion lacks a coherent vision of how historical practice informs federal jurisdiction. Across Justices Kavanaugh's, Gorsuch's, and Alito's opinions, distinct views of the role of history emerge.[57] A close examination of the historical backdrop of enforcement discretion, however, illustrates the ample connective tissue between the jurisdiction of federal courts and executive discretion to bring arrests or initiate prosecutions.[58] Though the history of prosecutorial enforcement may readily lend itself to reasoning through the scope of federal jurisdiction, the history of immigration enforcement does not.[59] By focusing on the history of prosecutorial discretion rather than the history of immigration enforcement, the Court failed to appreciate two distinct trends that characterize the history of immigration-related enforcement action: First, immigration proceedings reflect a tension between federal enforcement and nonfederal enforcement.[60] Second, and arguably more importantly, the history of immigration-related proceedings is characterized by a recent shift in criminalization.[61]

While advancing the executive branch primacy over arrests and prosecutions, the majority relied, without elaboration, on the "deeply rooted history of enforcement discretion in American law."[62] Further elaboration is merited. The origins of this executive authority in

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[54] *Id.* at 1989.

[55] *Id.* at 2002.

[56] *Id.* at 2003–04 (citing Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1534–35 (2012)).

[57] *See id.* at 1970 (majority opinion); *id.* at 1977 (Gorsuch, J., concurring in the judgment); *id* at 2002 (Alito, J., dissenting).

[58] *See, e.g.*, Krauss, *supra* note 1, at 2–3; U.S. CONST. art II, § 1, cl. 1.

[59] *See generally* Jeremiah Jaggers et al., *The Devolution of U.S. Immigration Policy: An Examination of the History and Future of Immigration Policy*, 13 J. POL'Y PRAC. 3 (2014).

[60] *See* Chacón, *supra* note 7, at 618. In *Henderson v. Mayor of New York*, 92 U.S. 259 (1875), for example, the Supreme Court required congressional authorization for immigration controls. *See id.* at 274.

[61] *See* Chacón, *supra* note 7, at 621.

[62] *Texas*, 143 S. Ct. at 1974; *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 695 (1952) (Vinson, C.J., dissenting); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992).

America are distinct from other common law traditions.[63] Accordingly, the distinct role of executive enforcement coincides with the separation of powers: the executive branch's authority precludes the justiciability of its enforcement decisions.[64] Principally, executive authority over enforcement decisions flows from Article II's Vesting Clause.[65] The spirit of the Vesting Clause echoed throughout early debates over the jurisdiction of federal courts. In *Federalist No. 78*, for example, Alexander Hamilton wrote that the judiciary would be dependent on the Executive for enforcement of its decisions.[66] Such framing reflected a key belief that the well-ordered government needed to centralize enforcement in the Executive.[67]

As is clear, the early origins of prosecutorial authority were coterminous with the expression of the jurisdiction of federal courts.[68] On August 5, 1790, the House of Representatives requested Attorney General Edmund Randolph prepare a report on "such matters relative to the administration of justice, under the authority of the United States as may require to be remedied."[69] Attorney General Randolph's report noted that the Attorney General's "whole duty . . . shall be to prosecute in such district all delinquents for crimes and offences cognizable under the authority of the United States."[70] As to this authority, Attorney General Randolph recognized the overlapping issues of federal jurisdiction and prosecutorial authority. For the Attorney General to well execute his prosecutorial authority, Attorney General Randolph recognized the importance of federal jurisdiction: "If crimes and offenses be punishable by that authority alone, against which they are committed; those created by the Constitution, or by Congress, result to the federal judiciary only."[71] As another government official at the time recognized, it was of "great importance" and an "absolute necessity" for federal prosecutors to prosecute federal crimes in federal courts so that the federal government could be "respected and obeyed."[72] With "a reluctance and distrust of his own judgment,"[73] Attorney General Randolph proposed

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[63] *See generally* John H. Langbein, *The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors*, 58 CAMBRIDGE L.J. 314 (1999) (noting that, in England, private prosecutions initiated by crime victims remained the dominant form of redress).

[64] *See Texas*, 143 S. Ct. at 1971.

[65] U.S. CONST. art II, § 1, cl. 1.

[66] FED. JUD. CTR., 1 DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY 37 (Bruce A. Ragsdale ed., 2013) (summarizing THE FEDERALIST NO. 78 (Alexander Hamilton)).

[67] *Id.*

[68] Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78; § 35, 1 Stat. 73, 92.

[69] FED. JUD. CTR., *supra* note 66, at 67 (quoting EDMUND RANDOLPH, REPORT OF THE ATTORNEY-GENERAL TO THE HOUSE OF REPRESENTATIVES 3 (1790)).

[70] RANDOLPH, *supra* note 69, at 28.

[71] *Id.* at 5.

[72] Representative Robert Goodloe Harper, Speech to His Constituents (Feb. 26, 1801), *in* FED. JUD. CTR., *supra* note 66, at 105–06.

[73] RANDOLPH, *supra* note 69, at 5.

eliminating Supreme Court review of state decisions.[74] These approaches were soon reflected in the exercise of the Court's jurisdiction. By 1801, with the passage of the new Judiciary Act,[75] the separation of powers closely entwined the scope of executive enforcement authority and federal judiciary authority in a prosecutorial context.[76] In particular, federal courts gained jurisdiction of federal criminal cases.[77]

Although the federal government currently has the ultimate authority over immigration enforcement, nonfederal entities have also been intimately involved in this effort.[78] State control over immigration only shifted at the turn of the twentieth century with the profusion of new federal laws.[79] In 1875, for example, Congress passed "the first restrictive federal immigration law."[80] Over the next fifty years, Congress went on to pass numerous federal laws concerning immigration.[81] Soon, judicial opinions reiterating the power of the Federal Executive followed. In the 1889 *Chinese Exclusion Case*,[82] for example, the Court stated that the "power of exclusion of foreigners . . . belong[ed] to the government of the United States."[83] Analogously, in *Nishimura Ekiu v. United States*,[84] the Court upheld an executive act that supported

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74 FED. JUD. CTR., *supra* note 66, at 67; *see* RANDOLPH, *supra* note 69, at 5–7.

75 Ch. 4, 2 Stat. 89.

76 *See, e.g.*, Harper, *supra* note 72, at 105–06; Judiciary Act of 1801 § 37, 2 Stat. at 99–100 ("[T]here shall be appointed for each of the districts hereby established, a person learned in the law, to act as attorney for the United States . . . which attorney shall take an oath or affirmation for the faithful performance of the duties of his office, and shall prosecute . . . ."); § 11 (on the subject of the jurisdiction of the courts).

77 Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 ("[T]he district courts shall have, exclusively of the courts of the several States, cognizance of all crime and offences that shall be cognizable under the authority of the United States . . . ." (footnote omitted)); Judiciary Act of 1801 § 11 ("[T]he said circuit courts respectively shall have cognizance of all crimes and offences cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; and also of all cases in law or equity, arising under the constitution and laws of the United States . . . .").

78 *See* Chacón, *supra* note 7, at 618–19.

79 *See id.* at 618.

80 *Id.* (citing Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974)).

81 *See* D'Vera Cohn, *How U.S. Immigration Laws and Rules Have Changed Through History*, PEW RSCH. CTR. (Sept. 30, 2015) https://www.pewresearch.org/short-reads/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history [https://perma.cc/8QWD-8S4P]; *see also, e.g.*, Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943); Passenger Act of 1882, ch. 374, 22 Stat. 186 (repealed 1983); Alien Contract Labor Law of 1885, ch. 164, 23 Stat. 332 (repealed 1952); Payson Act of 1887, ch. 340, 24 Stat. 476 (codified at 48 U.S.C. §§ 1501–1507); Immigration Act of 1891, ch. 551, 26 Stat. 1084 (current version at 8 U.S.C. § 1552); Geary Act, ch. 60, 27 Stat. 25 (1892) (repealed 1943); Immigration Act of 1903, ch. 1012, 32 Stat. 1213 (repealed 1917); Immigration Act of 1917, ch. 29, 39 Stat. 874 (current version at 8 U.S.C. § 1552); Jones-Shafroth Act, ch. 145, 39 Stat. 951 (1917) (current version in scattered sections of 48 U.S.C.); Emergency Immigration Act, ch. 8, 42 Stat. 5 (1921) (repealed 1952); Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 1952); Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924) (repealed 1952); Passport Act, ch. 772, 44 Stat. 887 (1926) (current version at 22 U.S.C. §§ 211a, 214a, 217a).

82 130 U.S. 581 (1889).

83 *Id.* at 609.

84 142 U.S. 651 (1892).

Congress's exclusionary immigration policy.[85] Indeed, the Court concluded that the sovereign had authority over "the bringing of persons into the ports of the United States."[86] More explicitly, in *Fong Yue Ting v. United States*,[87] the Court reiterated the federal nature of enforcement: "For local interests the several States of the Union exist, but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."[88]

Further, the immigration enforcement landscape has been profoundly shaped by laws from the last thirty years.[89] These laws have shifted the enforcement of criminal immigration laws to state and local authorities, resulting in nonenforcement in equal parts with enforcement.[90] Legislation issued in 1988, 1994, and 1996 resulted in harsh immigration-related penalties accompanying criminal offenses.[91] The Anti-Drug Abuse Act of 1988,[92] for example, aimed to facilitate the deportation of individuals involved with drug trafficking yet soon expanded to apply broadly to other offenses.[93] By 1996, the uniqueness of immigration enforcement was further entrenched through the introduction of expedited federal removal procedures.[94] Indeed, as one scholar notes, "immigration law has been absorbing the theories, methods, perceptions, and priorities associated with criminal enforcement while explicitly rejecting the procedural ingredients of criminal adjudication."[95] In turn, these novel procedural frameworks have resulted in the mobilization of state and local authorities.[96] The hybrid nature of immigration law — straddling federal, state, and local enforcement — has triggered nonenforcement.[97]

A strict view of the "history" of immigration enforcement therefore holds grave consequences. Adopting a strict approach militates toward the opposite conclusion than the one reached by the majority in *Texas*

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[85] *Id.* at 664.

[86] *Id.* at 659.

[87] 149 U.S. 698 (1893).

[88] *Id.* at 706 (quoting *The Chinese Exclusion Case*, 130 U.S. at 606).

[89] *See* Chacón, *supra* note 7, at 631.

[90] *See* Katherine Beckett & Heather Evans, *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*, 49 LAW & SOC'Y REV. 241, 241 (2015); *see also* Chacón, *supra* note 7, at 619 (discussing Hines v. Davidowitz, 312 U.S. 52 (1941)). In *Hines v. Davidowitz*, 312 U.S. 52 (1941), the Court found that the federal government's interest in immigration preempted a state law despite the fact that the law did not conflict with any federal regulation. *Id.* at 66–67.

[91] Chacón, *supra* note 7, at 616 n.13.

[92] Pub. L. No. 100–690, 102 Stat. 4181 (codified as amended in scattered sections of the U.S. Code).

[93] Mathew Coleman & Austin Kocher, *Detention, Deportation, Devolution and Immigrant Incapacitation in the US, Post 9/11*, 177 GEOGRAPHICAL J. 228, 230 (2011).

[94] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.).

[95] Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 469 (2007).

[96] *See* Beckett & Evans, *supra* note 90, at 241–42.

[97] *Id.* at 243.

through the history of executive discretion. While deference toward federal enforcement arises from the history of executive discretion, a recognition of state and local interest emerges from the distinct history of immigration enforcement.[98] The decision reached in *Texas*, however, rings consistent with the continued doctrinal fragmentation of standing before the Roberts Court.[99] Indeed, *Texas* evinced this trend when considered alongside *Linda R.S.* and *Town of Castle Rock v. Gonzales*[100] — two cases involving nonenforcement in a nonimmigration context — and *Clapper v. Amnesty International USA*[101] and *TransUnion LLC v. Ramirez*[102] — two cases involving national security interests.

Texas largely mirrors the outcome, but not the analysis, raised in cases involving prosecutorial discretion. Notably, in both *Linda R.S.* and *Castle Rock*, the Supreme Court recognized the import of prosecutorial discretion but did so with varying invocations of history. In *Linda R.S.*, the Court noted that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."[103] Rather than relying on history, the *Linda R.S.* Court located prosecutorial discretion in the "nexus between the vindication of [appellant's] interest and the enforcement of the State's criminal laws."[104] In *Castle Rock*, the mother of three murdered little girls sued enforcement agents from the town of Castle Rock who failed to take action after being notified that her ex-husband had taken her daughters in violation of a temporary restraining order.[105] The Court reversed the Tenth Circuit's decision in support of the mother, reasoning that the Colorado Legislature had not "mandated" police action in its guidance regarding the temporary restraining order.[106] The Court recognized that the "deep-rooted nature of law-enforcement discretion," however, was sufficiently displaced by a quasi clear statement rule.[107]

The full expression of *Texas*'s relevance within the Court's standing jurisprudence emerges when also considered alongside the Court's standing cases involving national security. Indeed, in the majority opinion, Justice Kavanaugh recognized the national security import of the Court's consideration in *Texas*: "[T]he Executive's enforcement

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98 *See id.*

99 *See generally* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061 (2015).

100 545 U.S. 748 (2005).

101 568 U.S. 398 (2013).

102 141 S. Ct. 2190 (2021).

103 Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973).

104 *Id.*

105 *Castle Rock*, 545 U.S. at 751, 753.

106 *Id.* at 763, 769.

107 *Id.* at 761 (citing Chicago v. Morales, 527 U.S. 41 (1999)).

discretion implicates not only 'normal domestic law enforcement priorities' but also 'foreign-policy objectives.'"[108]

Professor Richard Fallon has identified the particular fragmentation of the Roberts Court's standing doctrine in a national security context.[109] As he notes, such cases involve "making national security concerns relevant to standing inquiries."[110] In *Clapper*, for example, a group of plaintiffs sought a judicial invalidation of an amendment to the Foreign Intelligence Surveillance Act of 1978.[111] The Court ultimately found the plaintiffs lacked standing, owing to the lack of a concrete and particularized injury faced by the plaintiffs.[112] Indeed, echoing the deference to executive discretion in *Texas*, the Court noted it was "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment."[113] This approach was also recognized in *TransUnion*, where the provision of information from the Department of Treasury's Office of Foreign Assets Control — a financial intelligence and enforcement division — failed to rise to the level of a concrete injury for a class of plaintiffs that received subsequent negative credit reports.[114] These two cases reflect that where national security interests are at stake, litigants face a de facto added burden due to the difficulties of demonstrating an injury.[115] The full significance of *Texas*, therefore, appears to be in broadening the "national security" interest to encompass cases involving more generalized grants of prosecutorial discretion or executive authority — thereby broadening the fissures in the Roberts Court's standing doctrine.

The Supreme Court has oft recognized that a case "begins and ends with standing."[116] No less in *Texas*, where the historic origins of executive discretion over prosecutions and arrests shaped the Court's standing analysis as to separation of powers.[117] Yet a close examination of the history of immigration enforcement reveals a different trend. Indeed, by eliding the distinction between prosecutorial enforcement and immigration enforcement, the Court expanded the fissures in its standing doctrine. And as these fissures persist, they reveal their own distinctly American legal tradition.

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[108] *Texas*, 143 S. Ct. at 1971–72 (quoting Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 490–91 (1999)).

[109] *See* Fallon, *supra* note 99, at 1077–79.

[110] *Id.* at 1078.

[111] 50 U.S.C. §§ 1801–1812, 1821–1862, 1871–1885c; Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401 (2013).

[112] *Clapper*, 568 U.S. at 402.

[113] *Id.* at 413.

[114] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200 (2021).

[115] *See* Fallon, *supra* note 99, at 1079.

[116] Dep't of Educ. v. Brown, 143 S. Ct. 2343, 2351 (2023) (quoting Carney v. Adams, 141 S. Ct. 493, 498 (2020)).

[117] *See Texas*, 143 S. Ct. at 1971.