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THE UNCONSTITUTIONALITY OF STATE REGULATION OF IMMIGRATION THROUGH CRIMINAL LAW

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ABSTRACT

The mirror-image theory of cooperative state enforcement of federal immigration law is a phenomenon—one of the most wildly successful legal ideas in decades. The mirror-image theory proposes that states can enact and enforce criminal immigration laws that are based on federal statutes. The theory that it is unobjectionable for a state to carry out federal policy is the basis of Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act—better known as SB 1070—and similar laws enacted in Alabama, Georgia, Indiana, and Utah. The same theory has provoked the introduction of bills in numerous other states and earlier but more narrowly focused

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immigration laws already in force in seven states. The mirror-image theory has succeeded not only in legislatures but also in the larger political culture: it has been embraced by dozens of U.S. senators and representatives, by policy groups, by private citizens, and by commentators including George Will, Sarah Palin, and the editors of the New York Post and the Washington Times.

The mirror-image theory is indeed appealing. But it is also fundamentally flawed. This Article, the first to subject the mirror-image theory to sustained scholarly scrutiny, demonstrates that the mirror-image theory fails to identify a legitimate source of state authority to legislate on immigration matters.

No one denies that Congress and the federal executive have exclusive authority over the substance and procedure of the admission, exclusion, and removal of noncitizens, documented and undocumented. This proposition was firmly established by a pair of Supreme Court decisions from 1876. The mirror-image theory does not challenge this deep-rooted idea head-on, but instead proposes that state legislative authority over immigration flows from federal cases and the provisions of the Immigration and Nationality Act that authorize states to assist in the enforcement of federal immigration law. Those sources, however, contemplate state assistance with enforcement only through arrests, and arrest authority does not imply the power to legislate or to prosecute. To the contrary, other provisions of the INA clarify that federal agencies have the exclusive power to make prosecutorial and administrative decisions after an arrest, as well as to create supplementary regulations.

The mirror-image theory rests on the erroneous premise that Congress has implicitly authorized state enforcement of federal immigration law. This Article argues that state enforcement would be unconstitutional even if it were explicitly authorized by Congress. First, the federal immigration power is exclusive and nondelegable. Second, criminal prosecution and immigration enforcement are executive powers that Congress cannot remove from the president and share with non-executive-branch officials. Finally, the Supreme Court has held that states cannot prosecute crimes that affect only the sovereign interests of the United States. Accordingly, state immigration prosecutions are irremediably unconstitutional.

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INTRODUCTION

The mirror-image theory of cooperative state enforcement of federal immigration law is one of the most consequential legal ideas in decades. The theory proposes that states can help carry out federal immigration policy by enacting and enforcing state laws that mirror federal statutes. The mirror-image theory provided the legal foundation for Arizona’s controversial and sweeping Support Our Law Enforcement and Safe Neighborhoods Act—better known as SB 1070¹—and copycat bills with similarly broad scopes have been

1. Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450 (codified in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, 41), *as amended by* Act of Apr. 30, 2010, ch. 211, 2010 Ariz. Sess. Laws 1070; *see also id.* § 1 (“The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona.”); Kirk Adams, Op-Ed., *The Truth Behind Arizona’s Immigration Law*, WASH. POST, May 28, 2010, at A23 (“[A]s signed, S.B. 1070 mirrors federal law by making it a state crime to be in this country illegally, as has been the case in federal statute for decades.”). A federal judge preliminarily enjoined some portions of SB

approved by the legislatures of other states²: Utah's law³ passed in March 2011, Georgia's⁴ and Indiana's⁵ in May 2011, and Alabama's⁶ in June 2011.⁷ Similar though more limited laws are already on the

1070, but the mirror-image provisions based on federal law were not enjoined. *United States v. Arizona*, 703 F. Supp. 2d 980, 1002–04 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011).

2. Bills patterned on SB 1070 include the Florida Immigration Enforcement Act of 2010, H.R. 1C, 2010 Leg., Spec. Sess. C (Fla. 2010); the In Support of Our Law Enforcement and Safe Neighborhoods Act, H.R. 8142, 2010 Gen. Assemb., Jan. Sess. (R.I. 2010); the Support Our Law Enforcement and Safe Neighborhoods Act, H.R. 3830, 2010 Leg., 86th Sess. (Minn. 2010); the Support Our Law Enforcement and Safe Neighborhoods Act, H.R. 2479, 2010 Gen. Assemb., Reg. Sess. (Pa. 2010); S. 1303, 60th Leg., 2d Reg. Sess. (Idaho 2010); and the Arkansas Taxpayer and Citizen Protection Act of 2009, H.R. 1093, 87th Gen. Assemb., Reg. Sess. (Ark. 2009). For an overview of these bills, see Anna Gorman, *Ariz. Law Is Just One of Many*, L.A. TIMES, July 17, 2010, at A1. For a discussion of the legal and political issues facing these copycat laws, see *SB 1070's Copycats See Trouble Now*, ARIZ. DAILY STAR (Jan. 29, 2011, 12:00 AM), http://azstarnet.com/article_e50bae95-abbf-5f1a-b7a0-6973f43261a5.html.

3. Illegal Immigration Enforcement Act, ch. 21, 2011 Ut. ALS 21 (Utah 2011) (LEXIS) (to be codified in scattered sections of UTAH CODE ANN. tits. 76, 77), *as amended by* Act of Mar. 15, 2011, ch. 18, 2011 Ut. ALS 18 (Utah) (LEXIS).

4. Illegal Immigration Reform and Enforcement Act of 2011, No. 252, 2011 Ga. ALS 252 (Ga.) (LEXIS) (to be codified in scattered sections of GA. CODE ANN. tits. 13, 16, 17, 35, 36, 42, 45, 50). This statute was enjoined in *Georgia Latino Alliance for Human Rights v. Deal*, No. 1:11-CV-1804-TWT, 2011 WL 2520752 (N.D. Ga. June 27, 2011).

5. Act of May 5, 2011, Pub. L. No. 171, 2011 Ind. ALS 171 (Ind.) (LEXIS) (to be codified in scattered sections of IND. CODE. tits. 4, 5, 6, 11, 12, 22, 34, 35). This statute was enjoined in *Buquer v. City of Indianapolis*, No. 1:11-cv-708-SEB-MJD, 2011 WL 2532935 (S.D. Ind. June 24, 2011).

6. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, Pub. Act No. 535, 2011 Al. ALS 535 (Ala. 2011) (LEXIS). This statute was partially enjoined in *United States v. Alabama*, No. 2:11-CV-2746-SLB, 2011 WL 4469941 (N.D. Ala. Sept. 28, 2011). It has generated substantial media attention. *See, e.g.*, Gigi Douban, *Police Knock Alabama's New Immigration Law*, MARKETPLACE (July 6, 2011), <http://marketplace.publicradio.org/display/web/2011/07/06/pm-resistance-shown-against-alabamas-immigration-law> (describing how Alabama sheriffs questioned the wisdom and enforceability of the tough immigration law in light of the sheriffs' good relations with immigrant workers, their limited police resources, and their other crime priorities); Eyder Peralta, *Friends and Foes Call Alabama's Immigration Law the Nation's Toughest*, THE TWO-WAY: NPR'S NEWS BLOG (June 10, 2011, 2:09 PM), <http://www.npr.org/blogs/thetwo-way/2011/06/10/137107117/friends-and-foes-call-alabamas-immigration-law-the-nations-toughest> ("I'm proud of the [Alabama] Legislature for working tirelessly to create the strongest immigration bill in the country." (quoting Alabama Governor Robert Bentley) (internal quotation mark omitted)).

7. In basic outline, SB 1070 does four things: it 1) creates new state-level immigration-related crimes, such as working in the state without authorization, ARIZ. REV. STAT. ANN. § 13-2928 (Supp. 2011), and failing to carry an immigration document, *id.* § 13-1509; 2) allows police to arrest those who are suspected of being removable from the United States, *id.* § 13-3883(A)(5); 3) requires police, under pain of lawsuit, to investigate the immigration status of those lawfully stopped, detained, or arrested if they are suspected of being in the state without authorization, *id.* § 11-1051(B); and 4) prohibits restrictions on the immigration-enforcement activities of public employees, *id.* § 11-1051(A). For a discussion of SB 1070, see generally

books in Arizona,⁸ Colorado,⁹ Florida,¹⁰ Oklahoma,¹¹ Missouri,¹² South Carolina,¹³ and Utah.¹⁴

Although the mirror-image theory is said to be a variant of the idea of cooperative enforcement, it is actually more like an evil twin. Cooperative enforcement is a familiar idea throughout our federal system and a pervasive concept in American criminal justice. Whether the subject is the environment, health and safety, business regulation, or crime, the essential premise of cooperative enforcement is that the federal and state governments are either affirmatively working together or working in tandem, and that they do so under either explicit federal authority or independent state authority. The recent immigration laws that legislatures justify under the mirror-image theory, however, do not reflect cooperation with the federal government. In fact, they reflect just the opposite: they are an explicit rejection of the federal government's objectives and means.

Nonetheless, the mirror-image theory is one of the few technical legal concepts to gain currency far beyond the legal academy and legislatures. Championed principally by then-Professor Kris Kobach,¹⁵ the idea that states can pass immigration laws based on

Gabriel J. Chin, Carissa Byrne Hessick, Toni Massaro & Marc L. Miller, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 (2010).

8. See ARIZ. REV. STAT. ANN. § 13-2319 (Supp. 2011) (making it a class 2, class 3, or class 4 felony to “intentionally engage in the smuggling of human beings for profit” and permitting peace officers to lawfully stop any motor-vehicle operator who they reasonably suspect to be violating any traffic law). This statute was upheld in *State v. Flores*, 188 P.3d 706 (Ariz. Ct. App. 2008).

9. COLO. REV. STAT. § 18-13-128 (2011) (making it a class 3 felony to smuggle immigrants for the purpose of assisting illegal entry into Colorado).

10. FLA. STAT. ANN. § 787.07 (West Supp. 2011) (making transporting an illegal immigrant into the United States a first-degree misdemeanor).

11. OKLA. STAT. tit. 21, § 446 (Supp. 2010) (barring both the transporting and concealing of illegal immigrants within the state of Oklahoma).

12. MO. ANN. STAT. § 577.675 (West 2011) (making it unlawful to knowingly transport an illegal alien in the state of Missouri for the purposes of human trafficking, drug trafficking, or prostitution).

13. S.C. CODE ANN. § 16-9-460 (Supp. 2010) (making it a felony punishable by fine or imprisonment to transport or shelter an illegal immigrant).

14. UTAH CODE ANN. § 76-10-2901 (LexisNexis Supp. 2011) (making it unlawful to transport or conceal an illegal immigrant with the intent to violate federal immigration law).

15. Professor Kobach previously worked as a lawyer for the U.S. Department of Justice and as a professor of law at the University of Missouri-Kansas City before his election as the secretary of state of Kansas in 2010.

federal standards¹⁶ has achieved astonishing acceptance in the general political culture, among columnists and commentators,¹⁷ on newspaper editorial boards,¹⁸ among U.S. senators and representatives,¹⁹ and in policy groups.²⁰ The idea has also succeeded

16. See Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155, 157–62 (2008) [hereinafter Kobach, *Attrition*] (describing how state laws may encourage self-deportation); Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do To Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 463–82 (2008) [hereinafter Kobach, *Reinforcing*] (outlining steps that states can take to affect immigration). An unsigned student note from 1954—a time when an author and journal could use the term “wetback” in the title of an article without irony or embarrassment—makes a similar argument. See Note, *Wetbacks: Can the States Act To Curb Illegal Entry?*, 6 STAN. L. REV. 287, 303–16 (1954) (arguing that state actions against illegal immigrants should be permissible).

17. See, e.g., George F. Will, Op-Ed., *A Law Arizona Can Live with*, WASH. POST, Apr. 28, 2010, at A21 (“Arizona’s law makes what is already a federal offense—being in the country illegally—a state offense. Some critics seem not to understand Arizona’s right to assert concurrent jurisdiction.”); John G. Browning, *Legally Speaking: Federal Preemption—But Only When It Suits Us*, SOUTHEAST TEX. REC. (July 20, 2010, 5:47 PM), <http://www.setexasrecord.com/arguments/228319-legally-speaking-federal-preemption---but-only-when-it-suits-us> (“First of all, Arizona’s S.B. 1070 . . . mirrors longstanding federal immigration law; it’s intended to complement, not contradict, immigration policy.”); *Hannity* (Fox News television program Apr. 27, 2010) (transcript available at <http://www.foxnews.com/story/0,2933,591654,00.html>) (“Because, again, this law in Arizona that has recently been signed, it essentially replicates, duplicates the federal law anyway. So I don’t know why Obama has a problem with that . . .” (quoting Sarah Palin)); Rush Limbaugh, *Judge Rips Guts out of AZ Law: It’s No Longer Illegal To Be Illegal*, THE RUSH LIMBAUGH SHOW (July 28, 2010), http://www.rushlimbaugh.com/daily/2010/07/28/judge_rips_guts_out_of_az_law_it_s_no_longer_illegal_to_be_illegal (“The Arizona law mirrors the federal law.”); David A. Patten, *Experts: ‘Ridiculous’ Lawsuit Won’t Nix Arizona Law on Illegals*, NEWSMAX.COM (July 6, 2010, 8:05 PM), <http://www.newsmax.com/Headline/arizona-lawsuit-illegals-obama/2010/07/06/id/363929> (“Arizona’s law is designed to help federal immigration authorities enforce their own laws against illegals—statutes that the feds have largely ignored. The Arizona law, S.B. 1070, was crafted carefully to mimic federal laws on the books precisely to avoid a lawsuit based on federal supremacy.”); Edward Sifuentes, *Three USD Professors Say Arizona Law Is Constitutional*, N. COUNTY TIMES (May 13, 2010, 7:44 PM), http://www.nctimes.com/news/local/sdcounty/article_9631a761-1a36-597b-8467-2173655b4465.html (“Professor Lawrence Alexander, who teaches constitutional law at USD, said that [the constitutional] argument would fail because the Arizona law does not conflict with federal immigration law.”). Although the mirror-image idea has been developed in the context of immigration law, there is no logical reason that it can apply only in the immigration field.

18. See, e.g., Editorial, *A Contemptible Suit*, N.Y. POST, July 8, 2010, at 24 (“Arizona’s statute, after all, essentially mirrors existing federal law”); Editorial, *Judicial Activism Against Arizona*, WASH. TIMES, July 29, 2010, at B02 (“However, the case at hand doesn’t deal with pre-emptive law but with parallel enforcement. Arizona’s law does not define who has broken immigration laws; it deals with what to do when police apprehend these criminals.”).

19. See, e.g., Brief of *Amici Curiae*, Members of the United States Congress Trent Franks et al. at 5, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-CV-01413-SRB), *aff’d*, 641 F.3d 339 (9th Cir. 2011) (“In encouraging cooperative enforcement of immigration law, Congress did not displace State and local enforcement activity.”); *id.* at 10

on a rhetorical and popular level, with ordinary citizens asking how the federal government can complain that its own laws are actually being enforced.²¹ Some parts of SB 1070 were preliminarily enjoined by the U.S. District Court for the District of Arizona in a decision that was later affirmed by a panel of the United States Court of Appeals for the Ninth Circuit. To some extent, however, the district court's decision can be read as an affirmation of the mirror-image theory because of the parts of the Arizona law it did not enjoin.²²

The mirror-image idea, however popular, represents a fundamental legal and policy shift. The idea that states can independently enforce federal and state *criminal* immigration provisions that deal directly with immigration is inconsistent with immigration jurisprudence, law, and policy. SB 1070 and its siblings offer states an entirely new level of autonomy and discretion. The creation of new state crimes allows states to prosecute aliens for

("Congress has continuously encouraged states to assist in enforcing federal immigration law. S.B. 1070 is consistent with that intent."); *Hannity* (Fox News television program July 23, 2010) (transcript available at <http://www.foxnews.com/story/0,2933,597704,00.html>) ("[W]e know that the law was written in order to mirror federal law and not to go expand beyond the limits of federal law." (quoting Congressman Steve King)).

20. See, e.g., Kris W. Kobach, *Defending Arizona*, NAT'L REV., June 7, 2010, at 31, 33 ("Indeed, S.B. 1070 is a mirror image of federal law. The documentation provisions of the Arizona law penalize precisely the same conduct that is already penalized under federal immigration law"); Steven A. Camarota, *Center for Immigration Studies on the New Arizona Immigration Law, SB1070*, CTR. FOR IMMIGRATION STUDIES (Apr. 29, 2010), <http://cis.org/Announcement/AZ-Immigration-SB1070> ("The law is designed to avoid the legal pitfall of 'pre-emption,' which means a state can't adopt laws that conflict with federal laws. By making what is a federal violation also a state violation, the Arizona law avoids this problem.").

21. P. Anderson, *Federal Government's Lawsuit Wrong*, ARIZ. REPUBLIC (July 7, 2010, 12:00 AM), <http://www.azcentral.com/arizonarepublic/opinions/articles/2010/07/07/20100707wedlets072.html> ("The federal government is suing the state of Arizona for passing a law that will enforce immigration laws the federal government passed but refuses to enforce. No wonder our federal government has such a low approval rating."); Jimmie R. Applegate, *Reader Offers More Perspective on Immigration Laws*, CHINOOK OBSERVER, July 6, 2010, http://www.chinookobserver.com/opinion/letter-reader-offers-more-perspective-on-immigration-laws/article_33449881-2188-5fa1-ac06-0cbafe7ed918.html ("SB 1070 is the mirror image of US federal law that unfortunately has not been enforced by federal officials.").

22. See Michel Hethmon, *Arizona Can Prevail on Immigration Law*, CNN (July 30, 2010), http://articles.cnn.com/2010-07-30/opinion/hethmon.arizona.ruling_1_immigration-law-immigration-status-rampant-immigration ("Notably, [the district court judge] tossed [the] far-left theor[y] advanced by U.S. Attorney General Eric Holder . . . that the Arizona criminal 'mirror' statutes were a pre-empted 'regulation of immigration,' the theory used to sabotage California's Proposition 187 back in 1996."). In declining to enjoin particular provisions of the law, the court concluded that SB 1070 "does not attempt to prohibit entry into Arizona, but rather criminalizes specific conduct already prohibited by federal law." *Arizona*, 703 F. Supp. 2d at 1003 n.19. According to the court, the law "creates parallel state statutory provisions for conduct already prohibited by federal law." *Id.* at 1003.

offenses related to their status under state laws, without the permission or the cooperation of the federal government. Through this newfound power, states can create and carry out their own immigration-enforcement policies—using their own officers, proceeding in their own courts, and imposing their own punishments, including imprisonment in state prisons. The explicit purposes of SB 1070 and its copycats are to “make attrition through enforcement the public policy” of the state and to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”²³ As proponents of SB 1070 and its imitators often explain, their hope is that illegal immigrants will “self-deport.”²⁴

At first blush, the unconstitutionality of these laws seems nearly certain. As Part I explains, the Supreme Court has held that the “[p]ower to regulate immigration is unquestionably exclusively a federal power.”²⁵ That power is “vested solely in the Federal Government, rather than the States” and is “of a political character,”²⁶ leaving little room for innovation by other levels of government.

A plain reading of a long line of Supreme Court cases suggests that states have no intrinsic sovereign authority to impose criminal sanctions for what they regard as misconduct involving immigration, nor do they have the authority to induce the self-deportation of noncitizens they deem undesirable. No proponent of SB 1070 or any other cooperative-enforcement measure has claimed otherwise.²⁷ This is, therefore, not a classic states’ rights issue, in that Arizona and the other states do not claim inherent authority under the federal

23. Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, § 1, 2010 Ariz. Sess. Laws 450, 450.

24. *E.g.*, Kobach, *Attrition*, *supra* note 16, at 157–62.

25. *De Canas v. Bica*, 424 U.S. 351, 354 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 101, § 274A(h)(2), 100 Stat. 3359, 3368, *as recognized in* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011). This principle is discussed in detail in Part I.A, *infra*.

26. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976).

27. *See, e.g.*, Brief of *Amici Curiae*, Members of the United States Congress Trent Franks et al., *supra* note 19, at 10 (“Congress has plenary authority to regulate aliens.”); Proposed Brief of *Amici Curiae* Michigan et al. at 2, *Arizona*, 703 F. Supp. 2d 980 (No. 2:10-CV-01413-SRB) (“This Court must presume that S.B. 1070 is not preempted, unless (1) the statute constitutes a ‘regulation of immigration’” (quoting *De Canas*, 424 U.S. at 355)); Kobach, *Reinforcing*, *supra* note 16, at 464 (“[I]mmigration is a field in which the federal government enjoys plenary authority under Article I of the U.S. Constitution”).

Constitution²⁸—through the Tenth Amendment or otherwise²⁹—to regulate immigration and to decide who should be allowed to enter the country and who should be removed.

But proponents of SB 1070 and similar laws claim to have squared the circle. They claim that the mirror-image theory provides a legal basis for states to enact criminal laws addressing undocumented immigration³⁰ as a matter of cooperative enforcement.³¹ States may not regulate immigration under their own sovereign authority; nevertheless, the argument goes, so long as state laws are nearly identical to federal laws, states have the power to enact them.

As with many of the legal issues raised by SB 1070, the question of the legitimacy of state action in support of immigration is complicated. But the complexity of an issue does not mean that it has no definitive answer. A close analysis of the cases and authorities on which the mirror-image and cooperative-enforcement theories rest shows that the theories are neither based on existing law nor on a modest change, but rather represent a dramatic expansion of state authority that is inconsistent with existing constitutional doctrine.

Part I briefly reviews the constitutional text and other legal authority that recognizes exclusive federal control over immigration policy. Saying that federal control is exclusive does not on its own answer the question of whether states can play any role in immigration enforcement—they can and do—or whether states can

28. *But see* Petition for a Writ of Certiorari at 26, *Arizona v. United States*, No. 11-182 (U.S. Aug. 10, 2011) (“States enjoy plenary power and state law enforcement officers do not require authorization from the federal Congress.”).

29. In addition, unlike opponents of school desegregation, who rested their arguments on states’ rights, defenders of SB 1070’s legality contend that the law is consistent with the Constitution and with Supreme Court rulings, not that the states have no obligation to follow federal law as set out by the federal courts. For an account of another legal movement—not entirely unrelated—designed to expand state authority at the expense of the federal government, see Barak Y. Orbach, Kathleen S. Callahan & Lisa M. Lindemann, *Arming States’ Rights: Federalism, Private Lawmakers, and the Battering Ram Strategy*, 52 *ARIZ. L. REV.* 1161, 1171–83 (2010).

30. Kobach, *Reinforcing*, *supra* note 16, at 475.

31. *E.g.*, Defendants’ Response to Plaintiff’s Motion for Preliminary Injunction at 1, *Arizona*, 703 F. Supp. 2d 980 (No. 2:10-CV-01413-SRB) (“The Arizona Legislature enacted SB 1070 primarily to require that Arizona’s law enforcement officers cooperate in the enforcement of federal immigration laws and, pursuant to the State’s broad police powers, to establish state crimes that mirror existing federal laws.”); Proposed Brief of *Amici Curiae* Michigan et al., *supra* note 27, at 1 (“Like Arizona, the State of Michigan and the *amici* States have the power to concurrently enforce Federal immigration law . . .”).

enact laws incidentally impacting immigration policy—they can. But the recognition that immigration is one of the clearest areas of sole federal authority—along with other matters such as national security and the creation of a single currency³²—raises the question of whether states can identify either a federal foundation or some other constitutional authority for their immigration laws and policies.³³

Part II explores the cases and statutes on which the claim of authority for state cooperative enforcement rests. Although both federal case law and the Immigration and Nationality Act (INA)³⁴ recognize a state role in federal immigration enforcement, these authorities contemplate state cooperation with federal authorities and state authority to arrest—not independent state criminal prosecution, criminalization, or punishment.

The distinction between arrest on the one hand and criminalization and prosecution on the other is critical. Arrests leave discretionary decisions in the hands of the federal authorities. Even after an independent state decision to arrest, a suspect is handed over to federal authorities who decide how to proceed. Under the INA, federal authorities can still decide whether to proceed with a prosecution, use a civil remedy, or grant some form of relief or visa to which the noncitizen is entitled under the law. The *discretion* inherent in the federal immigration regime, and in federal criminal enforcement more generally—the power to charge or not, to decide what to charge, and to choose whether to pursue civil or administrative measures—is as much a part of the *law* of immigration as the relevant statutory text.

States are free to support federal *civil* policies in various ways, including hearing federal claims in state courts and passing complementary civil laws. In the *criminal* context, the rule is reversed. By Supreme Court decision and under federal statutes dating back to

32. U.S. CONST. art. I, § 8, cls. 11–16 (authorizing Congress “[t]o declare War,” maintain and govern land and naval forces, and “provide for calling forth the Militia”); *id.* art. I, § 8, cls. 5–6 (providing Congress with the authority to “coin Money, regulate the Value thereof,” and “provide for the Punishment of counterfeiting” such money).

33. *Compare* Egelhoff v. Egelhoff, 532 U.S. 141, 151 (2001) (noting “a presumption against pre-emption in areas of traditional state regulation”), *with* Buckman Co. v. Plaintiffs’ Legal Comm., 531 U.S. 341, 347 (2001) (“Policing fraud against federal agencies is hardly ‘a field which the States have traditionally occupied’ such as to warrant a presumption against finding federal pre-emption of a state-law cause of action.” (citation omitted) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).

34. Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2006).

the Judiciary Act of 1789,³⁵ federal crimes may be tried only in federal courts.

Part III explores whether states could pass their own immigration laws if expressly authorized by Congress. Although states can unquestionably do a great deal to aid federal immigration enforcement, Congress has no power to delegate regulatory authority in areas within its exclusive jurisdiction. Further, Congress has no power to delegate the president's duty to carry out the laws to state officers who are wholly outside of presidential control. Accordingly, even if Congress invited the states to legislate in the immigration sphere, the resulting state laws would still be unconstitutional.

I. THE FEDERAL POWER TO REGULATE IMMIGRATION

States interested in legislating in the immigration sphere face a complex set of legal difficulties. Traditionally, regulation of immigration has been a matter reserved for the federal government. Yet not all state laws that affect immigration or immigrants are automatically unconstitutional. Instead, the Supreme Court has examined whether a given state law is aimed at a legitimate state interest or whether it intends to regulate immigration itself. If a state law is aimed at a legitimate state interest, the Court will examine whether the law interferes or conflicts with federal measures and is, therefore, preempted or unconstitutional.

According to its proponents, the principle of cooperative enforcement of federal immigration law gives states room to legislate within this constitutional structure.³⁶ Cooperative enforcement is a method for “state legislators to stem the flow of illegal immigration into their respective jurisdictions.”³⁷ In an article that serves as a playbook for legislators seeking to persuade undocumented citizens to self-deport, Kobach explains:

35. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

36. See, e.g., Kris W. Kobach, Op-Ed., *Why Arizona Drew a Line*, N.Y. TIMES, Apr. 29, 2010, at A31 (“While it is true that Washington holds primary authority in immigration, the Supreme Court since 1976 has recognized that states may enact laws to discourage illegal immigration without being pre-empted by federal law.”); Julia Preston, *A Professor Fights Illegal Immigration One Court at a Time*, N.Y. TIMES, July 21, 2009, at A10 (“To rigidly separate local government from federal government when we think about immigration enforcement is not only legally incorrect, it’s also bad policy” (quoting Kobach) (internal quotation marks omitted)).

37. Kobach, *Reinforcing*, *supra* note 16, at 463.

The premise is a straightforward one—the way to solve America’s illegal immigration problem is to make it more difficult for unauthorized aliens to work illegally in the United States, while incrementally stepping up the enforcement of other laws discouraging illegal immigration. The result is that many illegal aliens self-deport.³⁸

Kobach frankly recognizes that “state statutes must be carefully drafted to avoid federal preemption.”³⁹ Even within this cooperative-enforcement scheme, “[t]he federal crimes that are most suited to duplication at the state level are alien smuggling and alien harboring.”⁴⁰ Statutes that establish those crimes impose felony penalties on any person who, “knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law,” either

transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law; [or]

conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation⁴¹

From a criminal-law perspective, this transportation provision is recognizable as imposing accomplice liability.⁴² The law on first read appears to be designed to suppress a particular act—transportation “in furtherance” of the coming, entering, or remaining of noncitizens in violation of the law. Similarly, the provision that prohibits concealment, harboring, or shielding also punishes misprision of the

38. *Id.* at 472.

39. *Id.* at 464.

40. *Id.* at 475.

41. 8 U.S.C. § 1324(a)(1)(A)(ii)–(iii) (2006).

42. *See* 18 U.S.C. § 2(a) (2006) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”); *cf.* MODEL PENAL CODE § 2.06(3) (1985) (“A person is an accomplice of another person in the commission of an offense if: (a) with the purpose of promoting or facilitating the commission of the offense, he . . . (ii) aids or agrees or attempts to aid such other person in planning or committing it.”); 2 WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 13.2 (2d ed. 2003) (describing the doctrine of accomplice liability).

primary wrong of transportation⁴³ and imposes accomplice or accessorial⁴⁴ liability.⁴⁵

A. Federal Supremacy over Immigration

The Constitution makes the creation of state immigration crimes a tricky proposition. Laws dealing with noncitizens are traditionally divided into two branches. The first is immigration law, which addresses which noncitizens can come to the United States and which must stay out or leave. More specifically, immigration law defines the procedures for admission and exclusion at the border, as well as the procedure for removal—also known as deportation—from the interior of the United States. The second branch is alienage law, which describes the rights and burdens of noncitizens residing in the United States. Although states have some authority with regard to alienage law,⁴⁶ they face a daunting burden when attempting to regulate immigration. That is to say, as a rule of thumb, states have

43. 18 U.S.C. § 4 (“Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same . . . shall be fined . . . or imprisoned not more than three years, or both.”).

44. *Id.* § 3 (“Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.”).

45. Under the views of some courts, a person being transported may be liable for the substantive offense of transportation as a conspirator or accomplice. *See, e.g.,* *State v. Flores*, 188 P.3d 706, 709 (Ariz. Ct. App. 2008) (finding a Mexican citizen guilty of solicitation to commit human smuggling because he “solicited another person to smuggle him into the United States, which would [have included] travel within Arizona”); *State v. Barragan-Sierra*, 196 P.3d 879, 885 (Ariz. Ct. App. 2008) (“The language of the conspiracy and human smuggling statutes in effect at the time of Appellant’s offense . . . plainly allow[s] the person smuggled to be convicted of conspiracy to commit human smuggling.”).

46. State “classifications based on alienage,” the Court has said, “are inherently suspect and subject to close judicial scrutiny.” *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (invalidating an Arizona law that restricted legal aliens’ access to benefits). Thus, lawful permanent residents and other noncitizens allowed into the United States by law cannot be denied most rights. *See, e.g., In re Griffiths*, 413 U.S. 717, 729 (1973) (holding that preventing noncitizens from taking the bar exam violates equal protection). State authority is broader, however, in areas related to core political functions. For example, states can deny even legally admitted noncitizens the right to be peace officers, *Cabell v. Chavez-Salido*, 454 U.S. 432, 445–47 (1982), or school teachers, *Ambach v. Norwick*, 441 U.S. 68, 80–81 (1979). Older case law, now controversial in the state courts, holds that lawful aliens may be prohibited from owning firearms. *See generally* Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891 (2007) (reviewing the restrictions on noncitizens’ right to bear arms due to equal protection norms and the federal foreign-affairs power).

some limited direct power to regulate *immigrants*, but no direct power to regulate *immigration*.⁴⁷

Federal control over immigration is granted by the Constitution's provisions that explicitly authorize Congress to regulate interstate commerce,⁴⁸ to establish "an uniform Rule of Naturalization,"⁴⁹ and to conduct foreign affairs.⁵⁰ Because noncitizens, by definition, come from other countries, the Court has recognized that their treatment implicates foreign affairs, which is also an exclusively federal political power.⁵¹ Accordingly, as a general rule, "federal power over aliens is

47. The coherence of the current regime is not without critics. *See, e.g.*, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 792 (2008) ("[T]he constitutional mandate for federal exclusivity over pure immigration law is far more contestable than the traditional debate would suggest."). Few, however, dispute its existence at a basic level. For an examination of the preemption of state criminal immigration laws, *see, for example*, Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 984–86 (1995); Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 29–39 (2007); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27; Mark S. Grube, Note, *Preemption of Local Regulations Beyond Lozano v. City of Hazleton: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391 (2010); and Ben Meade, Note, *Interstate Instability: Why Colorado's Alien Smuggling Statute Is Preempted by Federal Immigration Laws*, 79 U. COLO. L. REV. 237 (2008). Note, however, that the Arizona Court of Appeals has upheld one of the state's mirror-image immigration laws. *See supra* note 8.

48. U.S. CONST. art. I, § 8, cl. 3; *The Head Money Cases*, 112 U.S. 580, 599 (1884) ("Congress [has] the power to pass a law regulating immigration as a part of commerce of this country with foreign nations . . .").

49. U.S. CONST. art. I, § 8, cl. 4. The power is also recognized by implication in Article V, which prohibited, until 1808, amendment of the provision of Article I that denies Congress the authority to prohibit the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit," *id.* art. I, § 9, cl. 1. That is, but for the prohibition before 1808, Congress may prohibit the migration or importation of certain persons.

50. *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations"); *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (holding that federal authority to regulate the status of aliens arises out of the constitutional power to regulate commerce with foreign nations, the broad authority over foreign affairs, and the power to establish a uniform rule of naturalization). Because the foreign-affairs power is at least partly in the hands of the president, some authority exists for the notion that the president has some inherent power in the immigration context. *See infra* Part III.B.

51. *See, e.g.*, *Negusie v. Holder*, 129 S. Ct. 1159, 1164 (2009) ("Judicial deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations.' The Attorney General's decision . . . 'may affect our relations with [the alien's native] country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.'" (alteration in original) (citation omitted) (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999))); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("Our cases 'have long recognized the power to

exclusive and supreme in matters of their deportation and entry into the United States.”⁵²

In addition to the fact that regulating immigration is an important federal power, the states are largely disabled in the field. The familiar and fundamental frameworks for assessing conflicts between federal and state power are the Supremacy Clause of the Constitution⁵³ and the corresponding doctrine of preemption. Preemption of state law comes in three forms: field preemption, whereby federal authority implicitly occupies an entire area; express congressional preemption by statute; and conflict preemption, which occurs when state and federal laws impose conflicting duties, especially when those conflicts are irreconcilable.⁵⁴

The long history of federal authority over naturalization and immigration, along with the history of federal authority over foreign affairs,⁵⁵ provides a strong basis for a finding of field or conflict preemption with regard to the regulation of *immigration*. The foundational immigration cases were decided in 1876. *Henderson v. Mayor of New York*⁵⁶ and *Chy Lung v. Freeman*⁵⁷ invalidated the state immigration regimes of California, Louisiana, and New York that operated before passage of the first general federal immigration

expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.” (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (“The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.” (citations omitted)).

52. *State v. Camargo*, 537 P.2d 920, 922 (Ariz. 1975).

53. Article VI, Clause 2 of the U.S. Constitution provides as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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

54. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (plurality opinion).

55. The Constitution grants the federal government the power to “establish an uniform Rule of Naturalization,” U.S. CONST. art. I, § 8, cl. 4, and to “regulate Commerce with foreign Nations,” *id.* art. I, § 8, cl. 3.

56. *Henderson v. Mayor of New York*, 92 U.S. 259 (1876).

57. *Chy Lung v. Freeman*, 92 U.S. 275 (1876).

laws.⁵⁸ The statutes at issue required masters of vessels to post bonds or pay fees when landing passengers. These funds were designed “to protect . . . cities and towns from the expense of supporting persons who are paupers or diseased, or helpless women and children, coming from foreign countries.”⁵⁹

In finding the laws invalid, the Court made it clear that the problem with state immigration regulation was not simply that such regulation was preempted by federal law, but was instead something more fundamental. The *Henderson* Court recognized that there might be “a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the State, and its legislation be valid so long as it interferes with no act of Congress, or treaty of the United States.”⁶⁰ But some matters, the Court stated, are “of such a nature as to require exclusive legislation by Congress.”⁶¹

According to the *Henderson* Court’s reasoning, immigration “belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments,”⁶² and which therefore “must of necessity be national in its character.”⁶³ As the Court explained, “The laws which govern the right to land passengers in the United States . . . ought to be the same in New York, Boston, New Orleans, and San Francisco.”⁶⁴ Accordingly, “if there be a class of laws which may be valid when passed by the States until the same ground is occupied by a treaty or an act of Congress, this statute is not of that class.”⁶⁵

In addition, the *Henderson* Court rejected the claim that the challenged immigration rules were within the police power of the state. Although the Court recognized that the states had a police power, it nevertheless asserted that

no definition of it, and no urgency for its use, can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.

58. See generally Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993) (reviewing immigration law in the United States before the passage of a general federal immigration law).

59. *Henderson*, 92 U.S. at 268.

60. *Id.* at 272.

61. *Id.* at 273.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

....

. . . [W]henver the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States.⁶⁶

In *Chy Lung v. Freeman*, the Court emphasized at greater length the foreign-policy and national-security dangers presented by allowing the states to have a discretionary enforcement role in the area of immigration. *Chy Lung* dealt with a California statute aimed at restricting Chinese immigration, a significant domestic and international political issue at the time. The Court recognized that “a silly, an obstinate, or a wicked [state immigration] commissioner may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend”;⁶⁷ “if citizens of our own government were treated by any foreign nation as subjects of the Emperor of China have been actually treated under this law, no administration could withstand the call for a demand on such government for redress.”⁶⁸ The Court was concerned that if California “should get into a difficulty which would lead to war, or to suspension of intercourse,” not just California but “all the Union” would suffer.⁶⁹ The Court concluded that Congress “has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.”⁷⁰

66. *Id.* at 271–72.

67. *Chy Lung v. Freeman*, 92 U.S. 275, 279 (1876).

68. *Id.*

69. *Id.*

70. *Id.* at 280. Other state actions with foreign-policy implications have met a similar judicial reception. In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Court invalidated an Oregon probate law that made the right of an overseas heir to inherit property dependent on the property laws of that heir’s nation. *Id.* at 430–31. The Court held that a state law is not invalid simply because it has “some incidental or indirect effect in foreign countries.” *Id.* at 434 (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)) (internal quotation marks omitted). Nevertheless, it found excessive “state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government”—unacceptable. *Id.* at 436. “As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the ‘cold war,’ and the like are the real desiderata. Yet they of course are matters for the Federal Government, not for local probate courts.” *Id.* at 437–38 (footnote omitted); see also *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434, 454 (1979)

Chy Lung and *Henderson* established a jurisprudential framework under which, as the Court later put it, “[c]ontrol over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere.”⁷¹ This framework has three critical features. First, states’ inability to pass immigration legislation comes from a lack of authority, not mere preemption by conflicting federal law. Second, the police power of the states does not extend to regulating immigration. Third, both the establishment of substantive immigration laws and the responsibility “for the manner of their execution, belong[] solely to the national government.”⁷²

These two decisions are so strong that, for more than 130 years, few scholars or state legislatures, and virtually no courts, imagined that states could develop their own immigration policies.⁷³ Indeed, *Chy Lung* and *Henderson* were decided *before* the first general federal immigration laws.⁷⁴ That is, even when the federal

(invalidating a state tax on foreign containers as an impermissible local regulation of foreign commerce and rejecting the argument “that a State is free to impose demonstrable burdens on commerce, so long as Congress has not pre-empted the field by affirmative regulation”); *Japan Line*, 441 U.S. at 457 (“The problems to which appellees refer are problems that admit only of a federal remedy. They do not admit of a unilateral solution by a State.”).

71. *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977); *see also* *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 101, § 274A(h)(2), 100 Stat. 3359, 3368, *as recognized in* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011); *cf.* *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 964 (9th Cir. 2010) (“Courts have consistently struck down state laws which purport to regulate an area of traditional state competence, but in fact, affect foreign affairs.”).

72. *Chy Lung*, 92 U.S. at 280.

73. *See, e.g.*, *Arrowsmith v. Voorhies*, 55 F.2d 310, 311–12 (E.D. Mich. 1931) (invalidating a Michigan law that limited the employment of “[u]ndesirable aliens,” as defined by federal law, “because it [sought] to usurp the power of government, exclusively vested by the Constitution in Congress, over the control of aliens and immigration”); *Purdy & Fitzpatrick v. State*, 456 P.2d 645, 653 n.17 (Cal. 1969) (invalidating a statute that prohibited the employment of noncitizens on public works and clarifying that “[t]o argue that the California statute [could] to [that] extent control federal immigration decisions . . . defie[d] the constitutional grant of exclusive congressional power to regulate immigration”); *Ex parte Ah Cue*, 35 P. 556, 557 (Cal. 1894) (“Congress . . . has prescribed the terms upon which the Chinese now here shall be permitted to remain within the United States; and it is beyond the power of the state to impose any further conditions.”).

74. *See generally* *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010) (“The Nation’s first 100 years was ‘a period of unimpeded immigration.’ . . . It was not until 1875 that Congress first passed a statute barring convicts and prostitutes from entering the country, Act of Mar. 3, 1875, ch. 141, 18 Stat. 477.” (quoting CHARLES GORDON & HARRY N. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* § 1.2a, at 5 (1959))); Neuman, *supra* note 58 (noting that no

government did not regulate immigration *at all*, the states were still prevented from doing so. Although the history of state-level anti-immigrant sentiment precedes and postdates *Chy Lung* and *Henderson*, for most of that history, states avoided even the implicit claim that they could craft their own general immigration law or enforce federal immigration law in state courts.

B. State Regulation of Immigrants, Not Immigration

Despite states' inability to regulate immigration, the Supreme Court has consistently left room for some state action in the treatment of undocumented noncitizens. The Court's cases in this area primarily address state responses aimed either at controlling undesirable conduct by noncitizens or at protecting state activities and functions, rather than responses aimed at regulating either noncitizens' presence in the state or the process of immigration itself.

In *De Canas v. Bica*,⁷⁵ the Supreme Court held that California could prohibit employers from hiring noncitizens who were not authorized to work under federal law when employment would have "an adverse effect on lawful resident workers."⁷⁶ Congress overruled this specific holding by passing the Immigration Reform and Control Act of 1986,⁷⁷ which expressly preempts most civil and criminal state laws related to the employment of noncitizens.⁷⁸ But the general point from *De Canas* remains valid: not "every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* preempted."⁷⁹

comprehensive federal immigration legislation existed before 1875, although states had passed their own regulations).

75. *De Canas v. Bica*, 424 U.S. 351 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 101, § 274A(h)(2), 100 Stat. 3359, 3368, *as recognized in* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011).

76. *Id.* at 352, 365.

77. Immigration Reform and Control Act of 1986, 100 Stat. 3359 (codified as amended in scattered sections of 7, 8, 18, 20, 29, 42 U.S.C.).

78. *Id.* sec. 101, § 274A(h)(2). In addition, no cases have interpreted the California law since the Supreme Court's decision. Therefore, it is unclear whether the decision operated as an across-the-board employment ban or left open employment opportunities for which there was little demand by employees authorized to work in the United States.

79. *De Canas*, 424 U.S. at 355. The Equal Protection Clause also imposes some limits on state power to regulate immigrants. In the 1976 decision in *Mathews v. Diaz*, 426 U.S. 67 (1976), the Court held that the *federal government* could deny benefits to classes of noncitizens, *id.* at 69, even though it had decided in 1971 in *Graham v. Richardson*, 403 U.S. 365 (1971), that *states* could not, *id.* at 382. The *Mathews* Court explained that the statute in *Graham*

The decisive question is whether a particular measure is “a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”⁸⁰ Because the California law was designed to “strengthen its economy by adopting federal standards,”⁸¹ the Court held that it was valid. Although the Court emphasized that the “[p]ower to regulate immigration is unquestionably exclusively a federal power,”⁸² the mere fact that a state law “has some purely speculative and indirect impact on immigration” does not make it “a constitutionally proscribed regulation of immigration.”⁸³

Additional important language comes from *Plyler v. Doe*,⁸⁴ a 1982 decision. In that case, the Court held that undocumented noncitizens were not a suspect class,⁸⁵ but that states nonetheless could not deny public education to undocumented K–12 students as a

encroach[ed] upon the exclusive federal power over the entrance and residence of aliens. Of course, the latter ground of decision actually supports our holding today that it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens.

Mathews, 426 U.S. at 84.

80. *De Canas*, 424 U.S. at 355.

81. *Id.*

82. *Id.* at 354.

83. *Id.* at 355–56. The Court noted that another California court had “said that ‘the section [wa]s not aimed at immigration control or regulation but [sought] to aid California residents in obtaining jobs’” *Id.* at 354 n.3 (omission in original) (quoting *Dolores Canning Co. v. Howard*, 115 Cal. Rptr. 435, 442 (Ct. App. 1974)). Discounting speculative effects is not an immigration-specific principle; in other areas, the Court has said that remote, speculative, indirect, and incidental effects on federal authority or constitutional rights do not invalidate state law. *See, e.g.*, *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 395–96 (1983) (reaching a similar conclusion with respect to interstate commerce); *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 787 (1980) (holding that although federal decertification of a nursing home affected residents, it was “an indirect and incidental result of the Government’s enforcement action [and did] not amount to a deprivation of any interest in life, liberty, or property”); *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 43 (1934) (stating that even if a state tax on a product diminished federal revenues, “the effect of it upon appellant would be so remote, speculative and indirect as to afford appellant no basis for invoking the powers of a court of equity”).

84. *Plyler v. Doe*, 457 U.S. 202 (1982).

85. *Id.* at 223; *see also Mathews*, 426 U.S. at 80 (“[T]he fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all aliens*. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests.”).

means of discouraging undocumented immigration.⁸⁶ *Plyler* did not formally impact state power to regulate immigration because the Court specifically reserved the claim that the state law was preempted⁸⁷ and instead decided the case on equal protection grounds. Nevertheless, the decision contained interesting dicta, which, in isolation, can be read to support the mirror-image theory.

The *Plyler* Court noted that “undocumented status, coupled with some articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens.”⁸⁸ Texas, the state whose statute was being challenged, claimed that it could “protect itself from an influx of illegal immigrants.”⁸⁹ The Court agreed that a state “might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population.”⁹⁰ Although it maintained that a state “has no direct interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government,” the Court recognized that “unchecked unlawful migration might impair the State’s economy generally, or the State’s ability to provide some important service.”⁹¹ Accordingly, “[d]espite the exclusive federal control of this Nation’s borders,” the Court refused to “conclude that the States are without any power to deter the influx of persons entering the United States against federal law” when those “numbers might have a discernable impact on traditional state concerns.”⁹² The Court concluded: “As we recognized in *De Canas v. Bica*, the States do have some authority to

86. *Plyler*, 457 U.S. at 230 (“If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.”).

87. *Id.* at 210 n.8.

88. *Id.* at 226.

89. *Id.* at 228.

90. *Id.*

91. *Id.* at 228 n.23.

92. *Id.* (citing *De Canas v. Bica*, 424 U.S. 351, 354–56 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 101, § 274A(h)(2), 100 Stat. 3359, 3368, *as recognized in* *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011)). Of course, the multiple layers of conditionality in the Court’s dicta hardly offered a recipe for state action. Professor Mark Tushnet’s reading of the drafting history of the majority decision is that to convince Justice Powell to join the majority, the decision invoked many considerations without being clear as to which, if any, were controlling. Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1862–73 (1995) (book review).

act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.”⁹³

These points did not suffice to enable the *Plyler* defendants to exclude noncitizen children from free public education, as the Court found no evidence that “illegal entrants impose[d] any significant burden on the State’s economy” or that “any illegal immigrants c[a]me to this country . . . in order to avail themselves of a free education.”⁹⁴ Nevertheless, the Court’s discussion suggested that in other contexts, some state authority to regulate immigrants might exist. For example, *Plyler* indicated that states may respond to “sudden shifts in population,” such as an “urgent demographic or economic problem,”⁹⁵ by denying benefits that might encourage undocumented immigration, so long as the states’ responses are consistent with federal law.⁹⁶ The decision also suggested that states may exercise emergency powers in emergency situations—and the INA contains a provision to just that effect.⁹⁷

But *Plyler* recognized state authority to act only in relation to traditional state interests and with respect to the state’s own activities and concerns—for example, the provision of benefits and services. It did not suggest that states may directly regulate the immigration or removal of undocumented noncitizens. Although *Plyler* involved individuals who were not authorized to be in the United States under federal law, the Court explained that “the State has no direct interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government.”⁹⁸

Chief Justice Burger, joined by Justices White, Rehnquist, and O’Connor, dissented because he concluded that Texas could deny noncitizens access to public schools. Even so, the dissenting opinion agreed that “[a] state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved

93. *Plyler*, 457 U.S. at 225 (citation omitted).

94. *Id.* at 228.

95. *Id.*

96. *See, e.g.*, 8 U.S.C. §§ 1601–1646 (2006) (limiting local, state, and federal benefits to certain classes of noncitizens); *State v. Cosio*, 858 P.2d 621, 629 (Alaska 1993) (concluding that undocumented noncitizens are not entitled to a dividend from the Alaska Permanent Fund).

97. 8 U.S.C. § 1103(a)(10) (2006) (“[If a] mass influx of aliens . . . presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer . . . to perform or exercise any of the powers . . . conferred . . . by this chapter . . . upon officers or employees of the Service.”).

98. *Plyler*, 457 U.S. at 228 n.23.

exclusively to Congress and the Executive.”⁹⁹ *De Canas* and *Plyler*, then, are properly understood as cases involving alienage, not immigration, and as allowing some state regulation affecting immigrants, but not the direct regulation of immigration itself.

Plyler and *De Canas* also make clear that regulation of undocumented noncitizens can constitute “regulation of immigration.” Arguably, the prohibition of the “regulation of immigration” might refer only to the *creation* of substantive standards for admission and exclusion, not to the application of federal standards. The better interpretation, however, is that the *De Canas* definition of a “regulation of immigration” as “a determination of who should or should not be admitted into the country” includes both the establishment of substantive standards and their administration—the actual process of admitting, excluding, or removing noncitizens.¹⁰⁰ As the Supreme Court explained in *Chy Lung*, in the immigration context, the national government has exclusive “responsibility for the character of those regulations, and for the manner of their execution.”¹⁰¹

Therefore, even scrupulously applying federal standards, New Mexico, for example, could not establish its own border-inspection stations or exclude those it regarded as inadmissible.¹⁰² For the same reason, North Dakota could not establish its own immigration tribunals and order the deportation of undocumented people from the interior of the United States, even if the tribunals carefully applied federal standards.¹⁰³ The federal government has exclusive

99. *Id.* at 242 n.1 (Burger, C.J., dissenting).

100. See *State v. Patel*, 770 P.2d 390, 393 (Ariz. Ct. App. 1989) (“Congress has occupied the field of immigration law, excluding state control over deportation proceedings.”).

101. *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876).

102. See Tom Gerety, *Children in the Labyrinth: The Complexities of Plyler v. Doe*, 44 U. PITT. L. REV. 379, 384–85 (1983) (arguing that a state-run immigration program would be unconstitutional even if it mirrored federal regulations).

103. This point is made by the cases that hold that deportation cannot be imposed as part of a criminal sentence. See, e.g., *United States v. Abushaar*, 761 F.2d 954, 960 (3d Cir. 1985) (“[A]liens may be deported only in accordance with the carefully designed federal statutory and regulatory scheme. . . . Congress has enacted laws governing the admission, expulsion, and deportation of aliens. Those laws delegate authority to order deportation to the Attorney General and not to the judiciary. *Nowhere in this detailed statutory scheme is there a provision for a court to deport aliens sua sponte.*” (emphasis added) (citations omitted) (quoting *United States v. Castillo-Burgos*, 501 F.2d 217, 219–20 (9th Cir. 1974), *abrogated by* *United States v. Rubio-Villareal*, 967 F.2d 294 (9th Cir. 1992) (en banc)); *State v. Rattray*, No. 85708, 2005 WL 2388271, at *2 (Ohio Ct. App. Sept. 29, 2005) (“[A]s the State concedes, the court had no jurisdiction to impose lifetime deportation. An order of deportation is a matter within the sole

authority not only to establish the standards for the admission and exclusion of immigrants, but also to apply and enforce them.¹⁰⁴

In addition, deportation by any other name is still deportation. State deterrence that aims to encourage undocumented noncitizens to self-deport to another state or nation confuses a status—potentially deportable alien—with a remedy—deportation. To be sure, states may make themselves as unattractive to noncitizens as federal law allows by, for example, cooperating with federal immigration authorities, both civil and criminal, and denying noncitizens state-administered benefits to the maximum extent permitted by the U.S. Code and the Constitution. In addition, states likely have the power to enact criminal laws that affect only undocumented noncitizens, so long as those laws are rational, are within traditional state power, seek a permissible goal, and are consistent with federal classifications. Under this framework, state laws prohibiting the possession of firearms by undocumented noncitizens are likely constitutional.¹⁰⁵

But states cannot impose criminal restrictions that are so broadly applicable and onerous that they are tantamount to deportation. For example, offering noncitizens a choice between prison and voluntary deportation is equivalent to deportation.¹⁰⁶ State laws deterring the

jurisdiction of the federal authorities.”); *State v. Arviso*, 993 P.2d 894, 898 (Utah Ct. App. 1999) (holding that the lower court “trespassed into forbidden [Immigration and Naturalization Service (INS)] territory, violating the Supremacy Clause,” when it conditioned a suspended sentence on the defendant’s not returning to the United States).

104. *See, e.g.*, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (“Congress may in broad terms authorize the executive to exercise the power, *e.g.*, as was done here, for the best interests of the country during a time of national emergency. Executive officers may be entrusted with the duty of specifying the procedures for carrying out the congressional intent.”); *see also* 8 U.S.C. § 1229a(a)(3) (2006) (“[A] proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.”).

105. *See, e.g.*, 18 U.S.C. § 922(g)(5)(A) (2006) (prohibiting undocumented noncitizens from carrying firearms); ARIZ. REV. STAT. ANN. § 13-3101(A)(7)(e) (Supp. 2011) (defining an undocumented alien as a prohibited possessor of a firearm); *cf. Cubas v. Martinez*, 819 N.Y.S.2d 10, 24 (App. Div. 2006) (holding that identity procedures that deny driver’s licenses to undocumented aliens are constitutional).

106. This point is made in sentencing cases that hold that states have no power to impose deportation even by agreement as a condition of probation. *See, e.g.*, *People v. Antonio-Antimo*, 29 P.3d 298, 302–03 (Colo. 2000) (en banc) (finding that Colorado should not have ordered the deportation of the defendant because such authority lies exclusively with the INS); *Torros v. State*, 415 So. 2d 908, 908 (Fla. Dist. Ct. App. 1982) (per curiam) (“[D]eportation is a federal matter. The trial court thus had no authority to order [the defendants’] deportation, and the provision therefor must be stricken.” (citation omitted)); *Sanchez v. State*, 508 S.E.2d 185, 187 (Ga. Ct. App. 1998) (“Ordering a defendant to leave the country as a condition of probation

entrance or compelling the departure of noncitizens by threat of criminal prosecution constitute a “regulation of immigration” and are therefore beyond state power. Restrictions so severe that they practically compel departure are also equivalent to deportation.¹⁰⁷ Thus, a law making it a criminal offense for a noncitizen to use a public street or sidewalk, to drink state-regulated water, or to breathe state-regulated air would be tantamount to criminalizing the

constitutes an order of deportation.” (citing *United States v. Abushaar*, 761 F.2d 954, 959–61 (3d Cir. 1985)); *Rojas v. State*, 450 A.2d 490, 492 (Md. Ct. Spec. App. 1982) (holding an order not to oppose deportation invalid and finding it “clear that the federal government has exclusive authority over deportation proceedings”); *State v. Pando*, 921 P.2d 1285, 1286–88 (N.M. Ct. App. 1996) (reversing the trial court’s decision, which required the defendant to leave and remain outside the United States); *Hernandez v. State*, 613 S.W.2d 287, 289–90 (Tex. Crim. App. 1980) (“[T]he conditions of probation that ordered appellant to remain in the Republic of Mexico and not to re-enter the United States without prior written consent of the court are void.”). *But see* *State v. Martinez*, 925 P.2d 832, 833 (Idaho 1996) (holding that it is not improper for a district court to order that a sentence be suspended if the INS acts to deport the defendant).

107. In *Truax v. Raich*, 239 U.S. 33 (1915), the Court invalidated an Arizona law denying legal aliens the right to work in many jobs. *Id.* at 35, 43. The Court held that this law violated the Fourteenth Amendment and also interfered with the “authority to control immigration—to admit or exclude aliens”—that “is vested solely in the Federal Government.” *Id.* at 42. According to the Court,

The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted . . . would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And . . . the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress . . . would be segregated in such of the States as chose to offer hospitality.

Id. Of course, *Truax* involved lawfully admitted noncitizens, but that fact does not undermine the conclusion that the “practical result” of state laws spurring self-deportation is departure from the state or United States. The statute upheld in *De Canas v. Bica* did not clearly adopt a different rule for undocumented noncitizens: it did not prohibit employment of undocumented people entirely, and it applied only “if such employment would have an adverse effect on lawful resident workers.” *De Canas v. Bica*, 424 U.S. 351, 352 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 101, § 274A(h)(2), 100 Stat. 3359, 3368, *as recognized in* *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011).

If federal immigration authority is understood as a branch of the interstate- or foreign-commerce power, then a state policy, enforced through criminal law, to drive out undocumented noncitizens would also seem to be a direct regulation. Of course, the threat of prosecution can burden interstate commerce. *Morgan v. Virginia*, 328 U.S. 373, 376–77 (1946). Encouraging noncitizens to self-deport to other states or foreign countries seems to be a direct regulation of immigration because it is intended to have effects beyond any given state’s borders. *Cf.* *Healy v. Beer Inst.*, 491 U.S. 324, 332 (1989) (“[A] state law that has the ‘practical effect’ of regulating commerce occurring wholly outside that State’s borders is invalid under the Commerce Clause.”); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (“New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there.”).

noncitizen's mere presence in the state.¹⁰⁸ Such laws are problematic even if the targeted noncitizens fit the substantive standards for removal under the INA.

This analysis suggests a problem with SB 1070 and other mirror-image adoptions of the federal smuggling¹⁰⁹ and harboring¹¹⁰ laws. Two general readings of the statutes are available. First, they could apply only to conduct that furthers an unlawful presence, in the sense of either actively smuggling someone across the U.S. border to a destination in the interior or actively evading immigration-law enforcement.¹¹¹ If so, then the statutes seem to constitute direct regulations of the process of immigration itself. In many circumstances, these statutes would make immigration to or through a particular state a criminal offense under state law.¹¹² That kind of regulation is unproblematic when imposed by the national government, but it is not within state authority.¹¹³

108. See *Lozano v. City of Hazleton*, 620 F.3d 170, 220–21 (3d Cir. 2010) (“We recognize, of course, that Hazleton’s housing provisions neither control actual physical entry into the City, nor physically expel persons from it. Nonetheless, ‘[i]n essence,’ that is precisely what they attempt to do. ‘It is difficult to conceive of a more effective method’ of ensuring that persons do not enter or remain in a locality than by precluding their ability to live in it.” (alteration in original) (citation omitted) (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 160, 164 (1989))), *vacated mem.*, 131 S. Ct. 2958 (2011); *State v. Barros-Batistele*, No. 05-CR-1474, slip op. at 4 (N.H. Dist. Ct. Aug. 12, 2005) (“[T]he criminal trespass charges against the defendants are unconstitutional attempts to regulate in the area of enforcement of immigration violations, an area where Congress must be deemed to have regulated with such civil sanctions and criminal penalties as it feels are sufficient.”).

109. See *supra* note 41 and accompanying text.

110. See *supra* note 41 and accompanying text.

111. Furthering the unlawful presence is a textual requirement of the smuggling statute. 8 U.S.C. § 1324(a)(1)(A)(ii) (2006). The statutory language “shields from detection” requires knowing evasion, and the word “conceals” strongly implies it. The “harboring” provision is more ambiguous, but many courts have read in a requirement of intent to help evade detection by law enforcement. *E.g.*, *United States v. Belevin-Ramales*, 458 F. Supp. 2d 409, 411 (E.D. Ky. 2006).

112. The statute criminalizes transporting a noncitizen in a vehicle. That the liability is placed on the transporter does not make it any less a regulation of immigration; many cases invalidating state immigration laws were brought on behalf of transportation companies. See, *e.g.*, *New York v. Compagnie Générale Transatlantique*, 107 U.S. 59, 59 (1883); *Henderson v. Mayor of New York*, 92 U.S. 259, 260–61 (1876). It is also no less a regulation of immigration simply because it does not cover all forms of immigration. That is, it would be a regulation of immigration if Minnesota or New Mexico undertook to deport from the interior or exclude at the border only those undocumented noncitizens traveling in vehicles and in groups of two or more.

113. That is, states may pass legislation within their authority, such as statutes denying undocumented noncitizens public benefits, as permitted by federal law, because they advance a legitimate state end and do not themselves amount to a regulation of immigration, even if their

An alternative, broader reading would be that many kinds of ordinary daily activities violate the statute.¹¹⁴ For example, driving an undocumented noncitizen to the doctor or grocery store could be characterized as furthering that noncitizen's unlawful presence. In a sense, even allowing the noncitizen inside a store or hospital makes it more difficult for law-enforcement officers to see the noncitizen, and could, therefore, be construed as concealing, harboring, and shielding the noncitizen from detection. Making everyday interactions with undocumented people a crime, particularly interactions necessary to sustain life, effectively forces noncitizens to choose between deportation and severe physical deprivation. If this broad reading of the statutes is correct,¹¹⁵ then they constitute a regulation of immigration because they require undocumented individuals either to leave or to face great suffering and perhaps even criminal liability.¹¹⁶

If a state criminal law that prohibits entrance or mandates departure, either directly or only practically, constitutes a regulation of immigration, then it is not within inherent state authority, and some source of federal authority is necessary to sustain it. This much may be consistent with the argument put forward by the supporters of

practical, indirect effect is to encourage self-deportation to some degree. But states may not directly regulate immigration—say, by making it a crime, directly or indirectly, to be in the state—even if they hope that the regulation will serve legitimate state ends like reducing crime or saving state funds.

114. For an excellent discussion of the various “harboring” precedents, see generally Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 GEO. IMMIGR. L.J. 147 (2010). Of course, if states have the constitutional power to enact state laws dealing with immigration, then their own courts can independently enforce and interpret them. See *Ga. Latino Alliance for Human Rights v. Deal*, No. 1:11-CV-1804-TWT, 2011 WL 2520752, at *1, *13 (N.D. Ga. June 27, 2011) (preliminarily enjoining the Georgia immigration law passed in the wake of SB 1070, in part because of a concern that “Georgia judges [would] interpret [the law’s] provisions, unconstrained by . . . federal precedent”).

115. In the case of SB 1070 itself, a broad reading is supported by the text of the law, which exempts Child Protective Services workers acting in the course of their duties, along with certain ambulance attendants and emergency medical technicians “transporting or moving an alien in this state pursuant to title 36, chapter 21.1,” a provision that deals with the licensing of ambulance companies. Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, sec. 5, § 13-2929(C), 2010 Ariz. Sess. Laws 450, 457 (codified at ARIZ. REV. STAT. ANN. § 13-2929(E) (Supp. 2011)), as amended by Act of Apr. 30, 2010, ch. 211, § 6, 2010 Ariz. Sess. Laws 1070, 1078–79; ARIZ. REV. STAT. ANN. §§ 36-2201 to -2264 (2009 & Supp. 2011). This language implies that the exception would not apply, say, to a neighbor—or, theoretically, a police officer—who is not an EMT or ambulance attendant and who does not work for a licensed ambulance company if that person transports an undocumented noncitizen to the hospital. That such a person would be guilty of the offense illustrates the sheer breadth of the law’s scope.

116. Arizona accomplice-liability principles make a person who is being smuggled by someone else liable for human smuggling. See *supra* note 45 and accompanying text.

the cooperative-enforcement idea: they contend that state laws such as SB 1070 are indeed authorized by federal case law and legislation. Whether this argument is correct is addressed in the next Part.

II. THE DOCTRINAL FOUNDATIONS OF COOPERATIVE ENFORCEMENT

States, according to proponents of cooperative enforcement, have clear authority under federal law to pass laws mirroring federal immigration crimes. As then-Professor Kobach explains,

State governments possess the authority to criminalize particular conduct concerning illegal immigration, provided that they do so in a way that mirrors the terms of federal law. In this way, state governments can utilize state and local law enforcement agencies to enforce these state crimes, thereby reinforcing the efforts of federal law enforcement agencies.¹¹⁷

The mirror-image theory, then, suggests that state enactments borrow authority from federal law: “As long as such state statutes mirror federal statutory language and defer to the federal government’s determination of the legal status of any alien in question, they will be on secure constitutional footing.”¹¹⁸ Kobach does not claim, however, that states have inherent sovereign authority to regulate immigration; rather, in his view, “the states are only permitted to act in ways that are in harmony with federal law and consistent with congressional objectives.”¹¹⁹

This authority comes from cases from the Ninth Circuit:

Such concurrent enforcement is clearly within a state’s authority. As the Ninth Circuit [in *Gonzales v. City of Peoria*¹²⁰] opined: “Where state enforcement activities do not impair federal regulatory interests *concurrent enforcement activity is authorized.*” Where “[f]ederal and local enforcement have identical purposes,” preemption does not occur.¹²¹

117. Kobach, *Reinforcing*, *supra* note 16, at 475.

118. *Id.* at 476.

119. *Id.* at 483; *see also supra* note 27.

120. *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983), *overruled on other grounds by* *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999).

121. Kobach, *Reinforcing*, *supra* note 16, at 475 (second alteration in original) (footnote omitted) (quoting *Gonzales*, 722 F.2d at 474).

Quoting the Second Circuit's 1928 opinion in *Marsh v. United States*,¹²² Kobach continues: "In the words of Judge Learned Hand, 'it would be unreasonable to suppose that [the federal government's] purpose was to deny itself any help that the states may allow.'"¹²³ Kobach thus takes a critical and faulty logical leap. Because *enforcement* of federal law and policy by states is authorized, he argues, so too is state legislation—so long as the state statutes are mirror images of federal provisions.

For two reasons, this argument does not reach as far as Kobach suggests. First, the case law Kobach cites does not support his claim. *Gonzales* and *Marsh* allowed state assistance to federal authorities through *arrests*,¹²⁴ not through *legislation* or *prosecution*. The power to assist through arrest does not imply the power to legislate or to prosecute, because arrests leave crucial decisionmaking power in the hands of the federal government, which is free to choose among the criminal, civil, and administrative sanctions and remedies authorized by the INA.

Second, the argument does not account for the structure of the INA, which expressly invites certain forms of state assistance, but only forms—like information sharing and arrests—that leave the application of the INA to federal authorities. The state assistance contemplated by the INA dovetails with other provisions that grant federal agencies administrative and prosecutorial discretion in particular cases, as well as supplementary lawmaking powers through the promulgation of regulations.

122. *Marsh v. United States*, 29 F.2d 172 (2d Cir. 1928).

123. Kobach, *Reinforcing*, *supra* note 16, at 475 (alteration in original) (quoting *Marsh*, 29 F.2d at 174).

124. *Marsh* upheld the "universal practice of police officers in New York to arrest for federal crimes." *Marsh*, 29 F.2d at 173. *Gonzales* upheld the authority of local police to arrest. *Gonzales*, 722 F.2d at 477. Professor Michael Wishnie contends that even arrests by local authorities are generally not authorized by the INA. Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1093 (2004). Similarly, Professor Huyen Pham argues that local immigration enforcement through arrest is inherently unconstitutional as nonuniform. Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 995–96 (2004). This Article assumes arguing that *Gonzales* and *Marsh* are good law to show that *even if* these cases are valid, the mirror-image doctrine is unsound. If the powerful reasoning in the work of Professors Wishnie and Pham were to prevail as a matter of doctrine, then there would be additional reasons for the invalidity of these forms of state regulation.

A. *The Power To Arrest Versus the Power To Legislate*

Based on *Gonzales* and *Marsh*, which allowed states to assist by arresting for federal crimes, then-Professor Kobach contends that states may also adopt federal crimes as part of state law.¹²⁵ But the power to arrest does not necessarily imply the power to legislate. As the institution of citizen's arrest makes clear, the authority to arrest and the authority to criminalize are separate and distinct powers.¹²⁶

For example, local police are authorized by federal statute to arrest deserters from active-duty service in the U.S. military.¹²⁷ This fact does not, however, imply that states and localities are invited to establish rules for the military discipline of active-duty troops or to try them in state courts.¹²⁸ In the context of interpreting Article III, the Supreme Court has held that the power to arrest is different from the power to prosecute, try, and convict. In *Robertson v. Baldwin*,¹²⁹ the Court held that, notwithstanding the Article III requirement that cases or controversies be decided in courts created by Congress, state courts and officers could perform preliminary matters such as arrest. The requirements of Article III apply "only to the trial and determination of 'cases' in courts of record"; preliminary functions "such, for instance, as the power . . . to arrest" and related duties "incidental to the judicial power rather than a part of the judicial power itself" can be delegated to state courts.¹³⁰

Marsh explicitly recognized the distinction between the power to arrest and the power to try. Judge Hand explained that New York "is concerned with the apprehension of offenders against laws of the

125. Kobach, *Reinforcing*, *supra* note 16, at 475.

126. That is, although private citizens are often allowed to make arrests for crimes, that fact does not suggest that individual private citizens can create their own crimes and prosecute people under them.

127. 10 U.S.C. § 808 (2006) ("Any civil officer having authority to apprehend offenders under the laws of the United States or of a State . . . may summarily apprehend a deserter from the armed forces and deliver him into the custody of those forces.").

128. See U.S. CONST. art. I, § 8, cl. 14 (granting Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces"); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 17 (1820) ("Over the national militia, the State governments never had, or could have, jurisdiction. None such is conferred by the constitution of the United States; consequently, none such can exist."); *United States v. Contreras*, 69 M.J. 120, 121 n.4 (C.A.A.F. 2010) (noting that courts-martial have exclusive jurisdiction over "purely military offenses" under Rule for Courts-Martial 201(d)(1)).

129. *Robertson v. Baldwin*, 165 U.S. 275 (1897).

130. *Id.* at 279.

United States, valid within her borders, though they cannot be prosecuted in her own courts.”¹³¹

The difference between jurisdiction to arrest and jurisdiction to legislate or try is illustrated by the rule that an arrest alone is insufficient to trigger the Sixth Amendment right to counsel, because an arrest alone does not constitute the commencement of adversary proceedings.¹³² As a practical matter, prosecution is declined after many arrests.¹³³ That is, an arrest is not the same as a prosecution, and many arrests never lead to prosecution.¹³⁴ In addition, the function of an arrest is to bring a defendant before a court.¹³⁵ Accordingly, although the Constitution requires that arrests be based on probable cause, it does not require that arrests be carried out in any particular place, or by any particular officer, jurisdiction, agency, or level of government. Delegating arrest authority to the police of another

131. *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928).

132. *See Rothgery v. Gillespie Cnty.*, 128 S. Ct. 2578, 2592 (2008) (“[A] criminal defendant’s initial appearance before a judicial officer . . . marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”).

133. *See, e.g., Michael Edmund O’Neill, Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1444–45 (2004) (describing prosecutorial trends from 1994 to 2000).

134. For practical purposes, a state or local arrest may lead to immigration consequences even if federal criminal prosecution is declined. *See Hiroshi Motomura, The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1845 (2011) (“The high likelihood of a removal proceeding diminishes any tempering of arrest patterns because of a decision not to prosecute criminally.”). But this remains a choice for federal authorities and, as a legal matter, does not amount to a delegation or transfer of decisionmaking authority any more than would a federal policy of investigating complaints from private parties that particular individuals or workers were undocumented or removable.

135. Even if an arrest is unlawful, a criminal case may proceed. *E.g., United States v. Alvarez-Machain*, 504 U.S. 655, 670 (1992) (“The fact of respondent’s forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States.”); *New York v. Harris*, 495 U.S. 14, 19–21 (1990) (concluding that although a home arrest without a warrant was illegal, the subsequent custody was legal and that, therefore, otherwise-admissible statements could be used at trial).

jurisdiction is now routine.¹³⁶ The same cannot be said for legislation or prosecution.¹³⁷

As an institutional matter, after arrest by the police, a different official—the prosecutor—determines what charges, if any, are to be filed. Ideally, well-trained police will present well-prepared cases to prosecution agencies that are consistent with their prosecution policies. But prosecutors make charging decisions in most jurisdictions, including in federal courts. Therefore, an arrest does not have the potential to interfere with federal authority in the same way that a prosecution does. For all of these reasons, the authority to arrest does not imply the authority to legislate or to try.

B. Power and Discretion in the INA

The mirror-image theory is, in part, an argument about what Congress has done: that Congress has in fact invited state help in enforcing immigration law. This proposition is true to some extent, but, as this Section explains, the INA invites only specific forms of state assistance with federal programs; it does not invite states to pass their own laws or to enforce those laws at their discretion in their own courts. In addition, the structure of the INA provides not only for criminal penalties and deportation, but also for various forms of temporary and permanent relief for people who could be subject to deportation or prosecution. It assigns specific federal agencies to carry out these provisions. This detailed and discretionary structure leaves little room for the claim that Congress has, sub silentio, invited states to come up with their own methods of driving out undocumented noncitizens.

1. *State Assistance to Federal Authorities in the INA.* Proponents of the mirror-image theory note that, in a variety of ways, the INA seeks help from the states in enforcing civil and criminal immigration

136. That is, the police in any state may make arrests based on a warrant from any state through the National Crime Information Center's warrant system. See U.S. CONST. art. IV, § 2, cl. 2 (requiring states to deliver upon demand any individual charged with a crime in another state); *National Crime Information Center*, FBI, <http://www.fbi.gov/about-us/cjis/ncic> (last visited Oct. 7, 2011) (describing the National Crime Information Center—"an electronic clearinghouse of crime data that can be tapped into by virtually every criminal justice agency nationwide"). This practice, however, does not imply that legislatures in every state can pass laws regulating conduct in any state.

137. See, e.g., U.S. CONST. amend. VI (noting that trials are to be "by an impartial jury of the State and district wherein the crime shall have been committed").

law.¹³⁸ The most significant example is found in INA § 287(g), which provides for the training of local law-enforcement officers and gives them the power of federal immigration agents, pursuant to a written agreement between the agency and the federal government.¹³⁹ While remaining in their regular jobs, under § 287(g), state and local officers participate in the “investigation, apprehension, or detention” of aliens who are removable under the INA.¹⁴⁰

Section 287(g) does not, however, contemplate that local law-enforcement agencies have the power to establish their own policies or even to enforce federal law at their discretion. The INA provides that “an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.”¹⁴¹ Thus, § 287(g) officers work for the federal immigration authorities, under their direction and control.

Several other provisions of federal law give local law-enforcement agencies authority independent of § 287(g), but there too the authority is exclusively to assist the federal government, not to make policy or independent decisions about enforcement. The provision creating the § 287(g) program provides that an agreement is not required for local law enforcement:

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.¹⁴²

138. Defendants’ Response to Plaintiff’s Motion for Preliminary Injunction, *supra* note 31, at 3–7 (discussing congressional enactments intended to “encourage cooperation between federal, state, and local law enforcement officers regarding violations of federal immigration laws”); Brief of *Amici Curiae*, Members of the United States Congress Trent Franks et al., *supra* note 19, at 5 (“Congress has passed numerous acts that welcome state involvement in immigration control.”).

139. 8 U.S.C. § 1357(g)(1) (2006). Notwithstanding this law’s U.S. Code citation, it is often referred to by its INA section number: 287(g).

140. *Id.*

141. *Id.* § 1357(g)(3); *see also id.* § 1357(g)(5) (providing that § 287(g) agreements must identify a federal supervisor).

142. *Id.* § 1357(g)(10).

Thus, the INA authorizes the free sharing of information in § 287(g)(10)(A),¹⁴³ and it allows local police to “cooperate with the Attorney General” in § 287(g)(10)(B). Another section allows for the arrests of noncitizens who are in the United States unlawfully and who reentered after having been convicted of a felony.¹⁴⁴ The INA grants local police access to federal immigration stations for the purpose of enforcing state law.¹⁴⁵ But the INA contains no invitation to draft laws, complementary or otherwise, nor does it even imply that mere arrests can be made other than in cooperation with the attorney general.¹⁴⁶

143. It does so in two other provisions as well. Section 1644 of title 8 of the U.S. Code provides:

Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

8 U.S.C. § 1644 (2006). Section 1373 of title 8 is similar. *See id.* § 1373(a) (using language nearly identical to that found in § 1644 to provide that no federal, state, or local government entity shall restrict any other government entity or official from exchanging information regarding the immigration status of an alien with the Immigration and Naturalization Service); *id.* § 1373(b) (using nearly identical language to provide that no person or agency shall prohibit a federal, state, or local government agency from exchanging information regarding an individual’s immigration status with the Immigration and Naturalization Service; from maintaining such information; or from exchanging such information with any other federal, state, or local government entity).

144. *See id.* § 1252c (authorizing state and local law-enforcement officials to “arrest and detain” “any individual” who “is an alien illegally present in the United States” and who “has previously been convicted of a felony in the United States and deported or left in the United States after such conviction”).

145. *See id.* § 1358 (requiring the officers in charge of various immigration stations to admit local law-enforcement officials to those stations and providing that the jurisdiction of local law-enforcement officials shall extend to those stations). Another provision authorizes federal payments to states for housing immigration detainees. *See id.* § 1103(a)(11)(A) (authorizing payments for “necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by the Service pursuant to Federal law under an agreement with a State or political subdivision of a State”).

146. The idea of state cooperation with federal authorities is also reflected in *Marsh* and *Gonzales*. In *Gonzales*, the court noted that there was “a letter from the United States Attorney for the District of Arizona . . . advis[ing] . . . that officers who, in the course of their normal duties, encountered undocumented aliens suspected of illegal entry, could temporarily detain them while contacting the Border Patrol.” *Gonzales v. City of Peoria*, 722 F.2d 468, 473–74 (9th Cir. 1983), *overruled on other grounds by* *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999). At the time of *Marsh*, federal authorities were known to specifically request help from the law-enforcement agency involved, *Gambino v. United States*, 275 U.S. 310, 315 n.2 (1927) (“[T]he Federal Prohibition Director in New York City announced that he would call upon the Superintendent of State Troopers . . . to aid in arresting violators of the National Prohibition Act.”), particularly when dealing with crimes like the one in that case—a Prohibition offense, over which “[t]he Eighteenth Amendment gave concurrent jurisdiction to the states.” *Marsh v.*

2. *Federal Authority in the INA.* Federal law contemplates that states will be involved in enforcing federal immigration law, but only by providing information and working cooperatively under the supervision of federal enforcement authorities. In contrast to the limited state role, the INA explicitly gives federal authorities broad administrative and prosecutorial discretion, along with the power to supplement the statute itself through regulations. The primary point here is not that the INA takes away from the states any authority they might have had in the absence of federal legislation, but that the INA is not a source of state policy discretion or legislative authority, except in the very limited ways it expressly provides.

The INA, at the time it was originally enacted in 1952, was a “comprehensive recodification of all federal immigration and naturalization laws,”¹⁴⁷ civil and criminal. It regulates the procedural and substantive aspects of admission, exclusion, and removal of noncitizens, as well as their naturalization.¹⁴⁸ It also includes civil and criminal penalties for particular conduct.

Consistent with the background principle of constitutional law that immigration is primarily a federal responsibility, Congress has assigned its enforcement to federal authorities:

The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers¹⁴⁹

United States, 29 F.2d 172, 174 (2d Cir. 1928). In sum, the laws enacted by Congress do not imply authorization for independent state statutory regulation of immigration or any action other than in cooperation with the United States.

147. *United States v. Sanchez-Vargas*, 878 F.2d 1163, 1169 (9th Cir. 1989).

148. *See Galvez-Maldonado ex rel. Flores v. Meese*, 934 F.2d 991, 999 (9th Cir. 1990) (noting that Congress, in passing the INA, intended “to enact a comprehensive, revised immigration, naturalization, and nationality code” (quoting H.R. REP. NO. 82-1365, at 1 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1653) (internal quotation marks omitted)), *vacated and superseded on reh’g*, 942 F.2d 1352 (9th Cir. 1991) (en banc), *rev’d sub nom. Reno v. Flores*, 507 U.S. 292 (1993).

149. 8 U.S.C. § 1103(a)(1). Before the September 11 attacks, Congress charged the Department of Justice with the immigration-related functions now assigned to the Department of Homeland Security. *See generally* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441–78, 116 Stat. 2135, 2192–2212 (detailing the reassignment of such functions).

Specified federal agencies, but no others, can enact regulations.¹⁵⁰ And, as Justice Scalia explained in a 2009 concurrence, “It is to agency officials . . . that Congress has given discretion to choose among permissible interpretations of the statute.”¹⁵¹

For many kinds of conduct—including conduct that might trigger federal criminal immigration statutes—federal law authorizes several possible responses and the specific actors who can effect those responses. At the broadest level, federal law assigns responsibility for deciding which judicial penalties to seek. Congress has reserved “the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested . . . to officers of the Department of Justice, under the direction of the Attorney General.”¹⁵² This general power to choose between acting and not acting, and among pursuing criminal charges; civil sanctions; administrative remedies, such as voluntary deportation or removal; or some combination thereof, is also an inherent and explicit part of the structure of the INA.

Take, for example, an undocumented person who has entered the United States by surreptitiously crossing the border into Arizona. That person will have committed the most common immigration crime: entering the United States “at any time or place other than as designated by immigration officers” in violation of 8 U.S.C. § 1325(a)(1).¹⁵³ But § 1325 specifically provides for an alternative civil penalty of between \$50 and \$250, “in addition to, and not in lieu of, any criminal or other civil penalties that may be imposed.”¹⁵⁴ That is, although neither is required, the statute itself recognizes that there could be a mix of civil penalties and criminal penalties imposed at the discretion of federal immigration officers.

The problem of discretion is even more profound in an administrative regime like the INA. Under the INA, the Department of Homeland Security and the Department of Justice have a range of options when dealing with a particular undocumented person, including criminal prosecution under 8 U.S.C. § 1325(a)(1). The

150. See, e.g., *id.* § 1103(a)(3) (authorizing the secretary of homeland security to “establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter”); *id.* § 1103(g)(2) (authorizing the attorney general to “establish such regulations . . . as [he] determines to be necessary for carrying out this section”).

151. *Negusie v. Holder*, 129 S. Ct. 1159, 1170 (2009) (Scalia, J., concurring).

152. 28 U.S.C. § 516 (2006).

153. 8 U.S.C. § 1325(a).

154. *Id.* § 1325(b).

individual could also be formally removed from the United States¹⁵⁵ or could be allowed to depart voluntarily.¹⁵⁶ Each of these options has substantially different legal consequences.

The INA authorizes benefits as well as sanctions. For example, federal law creates opportunities for an undocumented person to remain in the United States temporarily or permanently. Through the “deferred action” program, a noncitizen, based on compelling circumstances, may be allowed to stay and work in the United States.¹⁵⁷ Noncitizens may have the right to remain in the United States because of a threat in their home country.¹⁵⁸ A noncitizen may also be entitled to some other form of temporary or permanent relief, such as “registry”¹⁵⁹ or a T visa, both of which are available, at the discretion of the secretary of homeland security, to individuals who have been trafficked and to certain relatives of those individuals.¹⁶⁰

The agencies have elaborate administrative regimes to evaluate and consider claims. These include immigration judges and the Board of Immigration Appeals, both of which are part of the Justice Department. No serious argument exists that states can administer most of this regime; they cannot, for example, grant registry or a voluntary departure under the INA even if a particular noncitizen would otherwise be eligible under the statute.¹⁶¹ The fact that states

155. *See id.* § 1182(a)(6)(A)(i) (“An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.”).

156. *See id.* § 1229c(a)(1) (“The Attorney General may permit an alien voluntarily to depart the United States at the alien’s own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings . . .”).

157. *See* 8 C.F.R. § 274a.12(c)(14) (2011) (authorizing deferred action, “an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment”).

158. *See* 8 U.S.C. § 1158 (outlining the requirements and procedures for gaining asylum); *id.* § 1231(b)(3) (providing, subject to certain exceptions, that the attorney general may not remove an alien to a given country if the attorney general determines that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, or identification with a certain social group or political opinion).

159. *See id.* § 1259 (authorizing the attorney general to make a “record of lawful admission for permanent residence” for an alien who entered the United States before January 1, 1972, has resided in the United States continuously since entry, has good moral character, is not ineligible for citizenship, and has not participated in terrorist activities).

160. *See id.* § 1101(a)(15)(T) (excepting from the statutory definition of “immigrant” an alien who is determined to have been the victim of trafficking).

161. Indeed, the idea that local authorities could grant asylum is so outlandish that it was made the punchline of a joke in a television show. *See* “Barney Miller” *Asylum* (TV episode

are unquestionably disabled from applying most of the provisions of the INA is solid evidence that they have no power to administer any of it, except as it expressly provides.¹⁶²

Courts are hesitant to interfere with federal administrative decisions even when they disagree with an agency's action; indeed, the Court has acknowledged that "[t]he fact that [it] might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter."¹⁶³ It would thus be odd to allow states more power than courts to overrule decisions made by the agencies assigned by Congress to make them. To the contrary, on several occasions, the Court has halted state efforts to assume the power to prosecute under federal statutes.¹⁶⁴ Prosecution by states in cases in which federal immigration authorities would not have prosecuted "presents a serious danger of conflict with the administration of the federal program" and runs the risk of "hampering . . . uniform enforcement of [the federal government's] program by sporadic local prosecutions."¹⁶⁵

In addition, the Supreme Court has acknowledged the risk that local prosecution will be based on impermissible or inappropriate considerations. In its 1890 decision in *In re Loney*,¹⁶⁶ for example, the Court observed that state prosecution of alleged wrongs occurring in federal tribunals could lead to "prosecution and punishment in the courts of the State upon a charge of perjury, preferred by a

1977), IMDB, <http://www.imdb.com/title/tt0518996> (last visited Oct. 7, 2011) (discussing a 1977 episode of the TV show *Barney Miller* entitled *Asylum*, in which Wojo, a New York police detective, "prematurely grants asylum to a Russian defector").

162. Cf. *Plyler v. Doe*, 457 U.S. 202, 226 (1982) ("[T]here is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen.").

163. *CBS, Inc. v. FCC*, 453 U.S. 367, 394 (1981) (quoting *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946)) (internal quotation marks omitted); see also, e.g., *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) ("[T]his Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.").

164. See *supra* Part II.A.

165. *Pennsylvania v. Nelson*, 350 U.S. 497, 505 (1956). Of course, the United States could sue a state each time a state prosecution or other immigration action interfered with federal choices. See, e.g., *Hunt v. United States*, 278 U.S. 96, 100-01 (1928) (upholding an injunction against the enforcement of Arizona game laws in a national park when those laws interfered with the regulatory authority of park officials).

166. *In re Loney*, 134 U.S. 372 (1890).

disappointed suitor or contestant, or instigated by local passion or prejudice.”¹⁶⁷

In the 1956 decision in *Pennsylvania v. Nelson*,¹⁶⁸ one reason the Supreme Court found that a state sedition act was preempted by federal sedition law was that

indictment . . . can be initiated upon an information made by a private individual. The opportunity thus present for the indulgence of personal spite and hatred or for furthering some selfish advantage or ambition need only be mentioned to be appreciated. . . . It is important that punitive sanctions for sedition *against the United States* be such as have been promulgated by the central governmental authority and administered under the supervision and review of that authority’s judiciary.¹⁶⁹

Further militating against the assumption of implied state criminal authority in immigration cases is the near certainty that such efforts will be motivated by *disagreement* with federal enforcement policy.¹⁷⁰ If state efforts were actually aimed at supporting federal authority, then separate state charges, trials, or punishments would make little sense. Because state officers can arrest suspected violators for federal immigration crimes, they already have the power to deliver offenders to the federal government. And from a fiscal perspective, the state has an excellent financial reason to do so: prosecution and incarceration would be paid for by the federal government. Arizona and other states have previously sued the United States for reimbursement of the cost of housing

167. *Id.* at 375.

168. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

169. *Id.* at 507–08 (quoting *Commonwealth v. Nelson*, 104 A.2d 133, 141 (Pa. 1954)); *cf.* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) (“The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion. Accordingly, even when Congress has made it clear by statute that a rule applies to purely domestic conduct, we are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly.”).

170. In *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), Justice Scalia voted to reverse a contempt conviction because private attorneys had been appointed to prosecute the contempt instead of the U.S. Attorney’s Office: “The very argument given for permitting a court to appoint an attorney to prosecute contempts—that the United States Attorney might exercise his prosecutorial discretion not to pursue the contemnners—makes clear that that is the result required.” *Id.* at 825 (Scalia, J., concurring in the judgment).

undocumented prisoners, demonstrating that states are not eager to incur these expenses.¹⁷¹

It seems likely that a state would assume the costs of prosecution and punishment itself not because it sincerely wanted to help the federal government, but rather because the United States was not targeting the noncitizens whom the state expected to prosecute under its new immigration laws.¹⁷² No one can plausibly claim that the INA—a statute granting federal administrative agencies the authority and discretion to choose the disposition of particular cases—was actually intended, *sub silentio*, to grant states the authority to overrule agency decisions.

In sum, the INA approves a range of responses to undocumented immigrants discovered in the United States, and it directs the Department of Homeland Security and the Department of Justice to carry them out at their discretion. Although a state wishing to enforce immigration law in its own way may share some of the goals of national immigration policy, the criminal, civil, or administrative structure created by Congress contains no hint that states are authorized to develop independent state policy; after all, “[t]he fact of a common end hardly neutralizes conflicting means.”¹⁷³

Finally, if what states have already done is any evidence, state immigration policies will vary widely. Although proponents of the mirror-image theory claim that state enactments mirror federal law, the state statutes are not, in fact, the same as the federal versions. For example, of the eight state statutes similar to 8 U.S.C. § 1324(a),¹⁷⁴

171. *See California v. United States*, 104 F.3d 1086, 1093–94 (9th Cir. 1997) (rejecting California’s claim that the attorney general had violated 8 U.S.C. § 1365 (1994) by refusing to reimburse the state for the costs of incarcerating illegal aliens and noting that the attorney general’s decision was committed to agency discretion by law and was thus not subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (2006)); *Arizona v. United States*, 104 F.3d 1095, 1096 (9th Cir. 1997) (adopting reasoning from *California v. United States* to affirm the district court’s judgment).

172. Immigration and Customs Enforcement establishes formal enforcement priorities. In 2011, for example, the agency determined that first priority for deportation went to “[a]liens who pose a danger to national security or a risk to public safety,” second priority went to “[r]ecent illegal entrants,” and third went to “[a]liens who are fugitives or otherwise obstruct immigration controls.” Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Employees of U.S. Immigration & Customs Enforcement 1–3 (Mar. 2, 2011), available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

173. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 379 (2000).

174. *See supra* notes 1–14.

none is identical to the federal provision—nor, for that matter, to any of its siblings.¹⁷⁵

C. *The Special Problem of State Criminal Immigration Policy*

The decision in Arizona to enforce state immigration law through criminal sanctions is so out of keeping with longstanding authority that its criminal oddness has been overlooked. But it is nevertheless important to step back and recognize that there is no history or tradition of states' enforcing federal criminal claims in state court.

In the civil context, the Supreme Court has “consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.”¹⁷⁶ Indeed, the Court has held that the Supremacy Clause sometimes requires state courts to hear federal civil causes of action.¹⁷⁷ This policy is ancient: in the Judiciary Act of 1789, the first Congress provided that “the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law” involving the United States as a plaintiff, as well as several of the other familiar categories.¹⁷⁸

The presumption is reversed, however, with respect to federal crimes. Again, the authority is foundational: the Judiciary Act of 1789 established the general rule that federal courts “shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the

175. When the Supreme Court, based on the need for a uniform national policy, invalidated a state law prohibiting sedition against the United States, it noted that “[s]hould the States be permitted to exercise a concurrent jurisdiction in this area, federal enforcement would encounter . . . the added conflict engendered by different criteria of substantive offenses.” *Pennsylvania v. Nelson*, 350 U.S. 497, 509 (1956).

176. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). See generally Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011) (surveying the different features of state enforcement of federal law and attempting to explicate the respects in which enforcing federal laws might allow states to wield power that is at once narrower and broader than traditional regulatory mechanisms).

177. See, e.g., *Haywood v. Drown*, 129 S. Ct. 2108, 2117–18 (2009) (holding that a state statute divesting state courts of authority to hear claims under 42 U.S.C. § 1983 (2006) was unconstitutional under the Supremacy Clause); *Testa v. Katt*, 330 U.S. 386, 392–93 (1947) (holding that state courts, granted jurisdiction by Congress over the Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23 (expired 1947), including the treble-damages provision, could not decline to entertain a claim brought under the Act).

178. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79.

United States.”¹⁷⁹ The policy was later enshrined in 18 U.S.C. § 3231, which provides, “The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.” Accordingly, in the criminal context, Congress generally neither wants nor allows the help of the states in prosecuting federal crimes.

Although § 3231 recognizes the possibility of concurrent jurisdiction—providing that “[n]othing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof”—it is not a grant of power for states to enact criminal laws related to federal criminal statutes.¹⁸⁰ As the Supreme Court noted in 1903, this section “was intended to leave with the state court, unimpaired, the same jurisdiction over the act that it would have had if Congress had not passed an act on the subject.”¹⁸¹ That an identical or similar federal crime is on the books does not necessarily prevent “the State from prosecuting where the same act constitutes both a federal offense and a state offense under the police power.”¹⁸² For example, in *Fox v. Ohio*,¹⁸³ the Court held that states have the authority to prohibit *passing* counterfeit currency, even though the national government had exclusive jurisdiction over counterfeiting itself. According to the Court, state legislative action in that area is justified because fraudulent transactions can have damaging local effects.¹⁸⁴ Thus, the Court later indicated that the question of whether a state has the power to criminalize turns on whether the subject matter is “within the scope [of the state’s] police powers.”¹⁸⁵

179. *Id.* § 9.

180. *Nelson*, 350 U.S. at 501 n.10 (invalidating a state sedition law and stating that “[t]here was no intention to resolve particular supersession questions by the Section”).

181. *Sexton v. California*, 189 U.S. 319, 324–25 (1903).

182. *Nelson*, 350 U.S. at 500.

183. *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847).

184. *Id.* at 434 (“The punishment of a cheat or a misdemeanour practised within the State, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties . . .”). Similarly, a state may address a breach of the peace even if it occurs in connection with a federally regulated activity. *See, e.g., Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 139 (1957) (upholding a state injunction insofar as it prohibited acts of violence by union members on strike, even though such activities fall within the domain of the National Labor Relations Board).

185. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963). In this case, the Court concluded that the regulation of food for sale is “traditionally regarded as properly within the scope of state superintendence.” *Id.* at 144.

A substantial range of exclusive federal criminal jurisdiction may seem startling given the historical state primacy in criminal law¹⁸⁶ and the tradition of concurrent criminal enforcement. Indeed, the increasing overlap of federal and state law—often characterized as the “federalization of criminal law”—has been driven primarily by the creation of new federal crimes and policies.¹⁸⁷ The existence of dual and independent federal and state criminal power over identical acts has been highlighted for more than fifty years by double-jeopardy cases that have recognized the states and the United States as “dual sovereigns.”¹⁸⁸

In recent decades, decisions recognizing exclusive state criminal jurisdiction have been more prominent in the Court than decisions recognizing exclusive federal criminal jurisdiction.¹⁸⁹ For example, in *United States v. Morrison*,¹⁹⁰ the Court struck down part of the Violence Against Women Act of 1994,¹⁹¹ which had extended federal jurisdiction to civil actions for violent assaults against women,

186. See, e.g., *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 96 (1964) (White, J., concurring) (“[T]he States still bear primary responsibility . . . for the administration of the criminal law; most crimes . . . are matters of local concern; federal preemption of areas of crime control traditionally reserved to the States has been relatively unknown and this area [may] be at the core of the continuing viability of the States in our federal system.”); *Barbier v. Connolly*, 113 U.S. 27, 31 (1885) (discussing “the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity”).

187. E.g., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, ABA, THE FEDERALIZATION OF CRIMINAL LAW 5–16 (1998) (discussing the growth of the federal criminal-justice system and the effects of that growth); Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996).

188. E.g., *Abbate v. United States*, 359 U.S. 187, 194 (1959) (“We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.” (omission in original) (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922)) (internal quotation mark omitted)).

189. See, e.g., *United States v. Lopez*, 514 U.S. 549, 551 (1995) (invalidating part of the Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844–45 (current version at 18 U.S.C. § 922(q) (2006)); see also *United States v. Dorsey*, 418 F.3d 1038, 1046 (9th Cir. 2005) (upholding a revised version of the statute that requires the firearm to have traveled in interstate commerce).

190. *United States v. Morrison*, 529 U.S. 598 (2000).

191. Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902–55 (codified as amended in scattered sections of 8, 16, 18, 28, 42 U.S.C.), *invalidated in part* by *United States v. Morrison*, 529 U.S. 598 (2000).

because of an insufficient federal interest.¹⁹² But the Court in *Morrison* contemplated the possibility of exclusive federal authority no less than that of exclusive state jurisdiction, holding that “[t]he Constitution requires a distinction between what is truly national and what is truly local.”¹⁹³

The Supreme Court has long recognized that both dual and concurrent sovereignty require states to have some basis for their authority and that neither theory applies in areas of exclusive federal jurisdiction. According to the Court, these theories “will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction. . . . [They have] no application where one of the governments has exclusive jurisdiction of the subject-matter and therefore the exclusive power to punish.”¹⁹⁴ Because there are a number of truly national interests, there are a number of areas of exclusive federal jurisdiction created by the Constitution,¹⁹⁵ by statute,¹⁹⁶ and by case law.¹⁹⁷ These include jurisdiction over Indian reservations,¹⁹⁸ military facilities,¹⁹⁹ national

192. *Morrison*, 529 U.S. at 618 (“[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”).

193. *Id.* at 617–18; *see also* *United States v. Comstock*, 130 S. Ct. 1949, 1982 (2010) (Thomas, J., dissenting) (“[T]he duty to protect citizens from violent crime, including acts of sexual violence, belongs solely to the States.”).

194. *S. Ry. v. R.R. Comm’n*, 236 U.S. 439, 445–46 (1915).

195. *E.g.*, U.S. CONST. art. I, § 8, cl. 17 (granting Congress the power to enact “exclusive Legislation” for the erection of forts, dockyards, and other “needful Buildings”); *see also* *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 617–18 (1842) (“[F]or if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere . . .”).

196. *E.g.*, *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538 (9th Cir. 1995) (enjoining state enforcement of state laws on tribal land because of a statute that provided that “[t]he United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws” (quoting 18 U.S.C. § 1166(d) (1994))).

197. *E.g.*, *Pennsylvania v. Nelson*, 350 U.S. 497, 509 (1956) (invalidating a state sedition law); *Hines v. Davidowitz*, 312 U.S. 52, 73–74 (1941) (invalidating a state alien-registration law).

198. *E.g.*, *Solem v. Bartlett*, 465 U.S. 463, 466 (1984) (affirming a grant of habeas corpus to a tribal member prosecuted by South Dakota for conduct within exclusive federal and tribal jurisdiction).

199. *E.g.*, *State v. Smith*, 400 S.E.2d 405, 407 (N.C. 1991) (dismissing the defendant’s charges and explaining that the state court lacked jurisdiction over a murder committed by a civilian at Camp Lejeune, because “[i]n criminal cases dealing with this problem the federal courts have said the jurisdiction of the United States is exclusive” (citing *United States v. Unzeuta*, 281 U.S. 138 (1930))).

banks,²⁰⁰ and national parks.²⁰¹ Exclusive federal criminal jurisdiction, then, is not particularly anomalous.

III. COULD CONGRESS AUTHORIZE STATE ENFORCEMENT OF FEDERAL CRIMINAL LAW?

This is not the first time in American legal history that state attempts to regulate immigration have been judicially rebuffed. On several occasions, however, the political forces demanding state regulation have subsequently moved Congress to respond by passing federal immigration statutes. For example, after courts invalidated state efforts to regulate Chinese immigration in the 1870s, Congress passed the Chinese Exclusion Act of 1882.²⁰² And after a federal court enjoined California's efforts to regulate undocumented immigration in the 1990s, Congress expressly authorized local police to cooperate with federal enforcement efforts.²⁰³

200. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 14 (2007) (“[Th]e legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States.’ Congress did not intend, we explained, ‘to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation. . . . [C]onfusion would necessarily result from control possessed and exercised by two independent authorities.’” (alterations and omission in original) (citations omitted) (quoting *Easton v. Iowa*, 188 U.S. 220, 229, 231–32 (1903)). *Easton v. Iowa*, 188 U.S. 220 (1903), held that a generally applicable state banking statute prohibiting the taking of deposits while insolvent could not be applied to a national bank. *Id.* at 239.

201. *E.g.*, *Bowen v. Johnston*, 306 U.S. 19, 30 (1939) (holding that because Chickamauga and Chattahoochee National Park in the State of Georgia is within the exclusive jurisdiction of the United States, “violations of law occurring on the ceded lands are enforceable only by the proper authorities of the United States”).

202. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).

203. In 1995, a U.S. district court enjoined many provisions of California's Proposition 187, which involved state police officers in federal immigration enforcement. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 764 (C.D. Cal. 1995). In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8, 42 U.S.C.), a statute that contained many provisions dealing with noncitizens, including § 434, which allowed communication between state and local officials and the Immigration and Naturalization Service. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, div. C, § 133, 110 Stat. 3009-546, 3009-563, added INA § 287(g), 8 U.S.C. § 1357(g) (2006), which allowed for the deputizing of local officers and other cooperation between state authorities and federal immigration officials. IIRIRA also made federal immigration law more enforcement-oriented. *See* Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 *GEO. IMMIGR. L.J.* 611, 637–39 (2003) (describing “the enactment of . . . the IIRIRA in . . . September of 1996” and its “emphasis . . . on enhancing immigration law enforcement”). Many scholars note the relationship between the failure of Proposition 187 and the enactment of federal legislation allowing state action. *See*,

Accordingly, it is at least possible that Congress will respond to state concerns about immigration by explicitly authorizing states to adopt complementary immigration statutes. In other words, Congress might actually do what supporters of state immigration enforcement erroneously claim Congress has already done. This Part proposes that Congress could not constitutionally pass such legislation because Congress cannot delegate its exclusive legislative authority, nor can it authorize states to carry out federal executive powers.

A. *State Legislative Power To Enact Criminal Immigration Laws*

One aspect of the problem is the states' authority to enact immigration laws. The relevant question is whether states could, with the permission of Congress, enact criminal legislation that would be litigated in their own courts if the field would otherwise fall within exclusive federal jurisdiction. In the celebrated 1816 decision *Martin v. Hunter's Lessee*,²⁰⁴ the Supreme Court observed that "[n]o part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals."²⁰⁵ The literal truth of this dictum is debated.²⁰⁶ Surely Congress can draw lines, even in favor of the states, delimiting the authority of the state and national governments in areas of shared responsibility. But *Martin* correctly indicated that Congress may not delegate legislative authority over matters that the Constitution identifies as exclusively federal.

First, a contrary rule would make it possible for Congress to repudiate the Constitution by mere statute without going through the amendment process prescribed in Article V. If, for example, Congress could validly authorize states to decide, at their discretion, who is to be admitted or excluded, who may be naturalized, and what the relevant procedure is—or, for that matter, if Congress could provide

e.g., Raquel E. Aldana, *Introduction: The Subordination and Anti-Subordination Story of the U.S. Immigrant Experience in the 21st Century*, 7 NEV. L.J. 713, 719 (2007) ("[T]he failure of Proposition 187 became the impetus for Congress' passage of the PRWORA."); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1590–91 (2008) ("After the courts enjoined California's Proposition 187, the state turned to Congress to push for similar federal legislation."). See generally Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011) (discussing the mobilizing effects of litigation failure).

204. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

205. *Id.* at 337.

206. See generally Michael G. Collins, *The Federal Courts, the First Congress, and the Non-Settlement of 1789*, 91 VA. L. REV. 1515, 1519–20 (2005) (describing the debate regarding the allocation of Article III business to non-Article III tribunals).

that the states could make treaties or declare war—then the constitutional structure would be dramatically changed. Indeed, in *De Canas*, the Court referred to “a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve.”²⁰⁷ The Court seemed to conclude, albeit in dicta, that if a state action were a regulation of immigration, it would be unconstitutional even with the permission of Congress.

A number of holdings suggest that Congress cannot delegate its exclusive powers. In the 1920 decision in *Knickerbocker Ice v. Stewart*,²⁰⁸ the Court held that Congress could not make state workers’ compensation laws applicable within the exclusive admiralty and maritime jurisdiction of Congress. The Court reasoned that Congress’s power

to legislate concerning rights and liabilities within the maritime jurisdiction . . . arises from the Constitution The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

. . . The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the States to do so as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant.

Congress cannot transfer its legislative authority to the States—by nature this is non-delegable.²⁰⁹

207. *De Canas v. Bica*, 424 U.S. 351, 356 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 101, § 274A(h)(2), 100 Stat. 3359, 3368, *as recognized in* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011).

208. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

209. *Id.* at 164 (citation omitted). Justice Holmes dissented for himself and three others, but the coalition agreed with the majority on the general point: “I assume that Congress could not delegate to state legislatures the simple power to decide what the law of the United States should be in that district.” *Id.* at 169 (Holmes, J., dissenting).

Although *Knickerbocker Ice* is nearly a century old and the nondelegation doctrine is in some disrepute, when applied to exclusive powers, the decision still stands for a vital principle. For example, in *Clinton v. City of New York*,²¹⁰ the line-item-veto case, the six-Justice majority explained that Congress could not delegate “lawmaking authority, or its functional equivalent, to the President”;²¹¹ “[t]he fact that Congress intended such a result is of no moment.”²¹²

Justice Scalia’s dissent on this issue, joined by Justices Breyer and O’Connor, emphasized that the problem was technical; instead of authorizing the president to “veto” a line item in a budget bill, Congress could instead have simply made spending the funds discretionary on the part of the president, an almost certainly constitutional method of achieving the same result.²¹³ But it is doubtful that even the dissenters would have allowed the delegation of an exclusive federal power to the states. In his dissent, Justice Scalia noted that when congressional authorization “is allowed to go too far, it usurps the nondelegable function of Congress and violates the separation of powers.”²¹⁴ Justice Breyer acknowledged that the statute “skirts a constitutional edge,” but he concluded that it remained within that edge because

[t]he means chosen do not amount literally to the enactment, repeal, or amendment of a law. . . . Those means do not violate any basic separation-of-powers principle. They do not improperly shift the constitutionally foreseen balance of power from Congress to the

210. *Clinton v. City of New York*, 524 U.S. 417 (1998).

211. *Id.* at 448.

212. *Id.* at 445–46; *see also id.* at 452 (Kennedy, J., concurring) (“That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. Abdication of responsibility is not part of the constitutional design.” (citations omitted)).

213. *Id.* at 468–69 (Scalia, J., concurring in part and dissenting in part) (“The short of the matter is this: Had the . . . Act authorized the President to ‘decline to spend’ any item of spending contained in [a congressional budget], there is not the slightest doubt that authorization would have been constitutional.”); *see also id.* at 488 (Breyer, J., dissenting) (“Congress has frequently delegated the President the authority to spend, or not to spend, particular sums of money.”).

214. *Id.* at 465 (Scalia, J., concurring in part and dissenting in part).

President. Nor, since they comply with separation-of-powers principles, do they threaten the liberties of individual citizens.²¹⁵

Thus, the Supreme Court has recognized that some powers of Congress are nondelegable.

B. Presidential Authority over Federal Criminal Prosecutions

Regardless of any connection to the immigration context, a congressional decision to allow state officers to execute federal law would create a serious constitutional question. The problem is exacerbated in the immigration context, in which—because of the connection between immigration enforcement, national security, and foreign policy—presidential authority is particularly important.

1. *Executive Authority To Execute the Laws.* It would very likely be unconstitutional for state prosecutors to prosecute violations of federal criminal law.²¹⁶ A federal criminal prosecution is “an exercise of the sovereign power of the United States.”²¹⁷ This is particularly so because prosecutorial authority is not mechanical or rote; it includes the affirmative power to charge, discretion as to what offenses to charge, and the negative power to not charge even if probable cause exists. In a case rejecting the prosecution of a federal defendant for

215. *Id.* at 496 (Breyer, J., dissenting). In this context, it is worth noting the many ways in which the Constitution deems treatment of noncitizens to be an exclusively federal matter or at least one in which the federal government should be an available decisionmaker. These include Article I, Section 8, Clause 4, giving Congress the power “[t]o establish an uniform Rule of Naturalization”; Article III, Section 2, Clause 2, giving the Supreme Court original jurisdiction “[i]n all Cases affecting Ambassadors, other public Ministers and Consuls”; Article III, Section 2, Clause 1, creating federal jurisdiction in cases “between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects”; and the Fourteenth Amendment’s guarantee of due process and equal protection to “persons” (not, say, citizens), which was done to ensure that noncitizens were included within its protection, *see Runyon v. McCrary*, 427 U.S. 160, 195–202 (1976) (White, J., dissenting) (discussing the Reconstruction-era history of civil rights laws); John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 *ASIAN L.J.* 55, 55 (1996) (describing how the historic perception of Asian Americans as “intrinsically foreign and unassimilable” influenced the post-Reconstruction civil rights laws). The Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, is another indicator of the Constitution’s fear of local prejudice on the part of the states. Also, the list of foreign-policy actions forbidden to the states or forbidden without the permission of Congress, *id.* art. I, § 10, illustrates the limitations on state authority in this area.

216. *See* Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 *VA. L. REV.* 243, 247–51 (2011) (arguing that it would be unconstitutional to allow state prosecutors to prosecute federal crimes).

217. *United States v. Providence Journal Co.*, 485 U.S. 693, 700 (1988).

the felony of “using a communication facility” when the defendant had used a cell phone to commit the underlying crime—a misdemeanor purchase of cocaine—the Supreme Court noted that “Congress legislates against a background assumption of prosecutorial discretion.”²¹⁸ The power to prosecute is the power to make policy.²¹⁹

Substantial authority exists for the proposition that the power to execute federal laws cannot be delegated to individuals entirely outside the presidential chain of command. *Printz v. United States*²²⁰ made this clear after the Court held that part of the Brady Handgun Violence Prevention Act²²¹ was unconstitutional because it delegated discretionary enforcement authority to local law-enforcement agencies: “The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, ‘shall take Care that the Laws be faithfully executed.’”²²² The Court held that the Brady Act “effectively transfer[red] this responsibility to thousands of [Chief Law Enforcement Officers] in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove).”²²³

Printz is controversial, but its application to the immigration context is consistent with decisions that won wider support on the Court. For example, *Morrison v. Olson*²²⁴ upheld the appointment of

218. *Abuelhawa v. United States*, 129 S. Ct. 2102, 2107 n.3 (2009); *see also* *Gonzales v. Oregon*, 546 U.S. 243, 296 (2006) (Scalia, J., dissenting) (recognizing “the policy goals and competing enforcement priorities that attend any exercise of prosecutorial discretion”).

219. *See* Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 475 (1996) (“Whenever Congress resorts to general statutory language . . . it necessarily transfers lawmaking responsibility to courts (or prosecutors).”). This is equally true in the context of immigration. *See, e.g.*, Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2060–65 (2008) (discussing the discretionary nature of enforcing immigration laws).

220. *Printz v. United States*, 521 U.S. 898 (1997).

221. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, tit. I, 107 Stat. 1536, 1536–44 (1993).

222. *Printz*, 521 U.S. at 922 (quoting U.S. CONST. art. II, § 3).

223. *Id.*

224. *Morrison v. Olson*, 487 U.S. 654 (1988). Justice Scalia dissented because he did not believe that it was “for [the Court] to determine . . . how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are.” *Id.* at 709 (Scalia, J., dissenting). Justice Scalia drove home the power of his point by using the powers of Congress as another example:

Is it conceivable that if Congress passed a statute depriving itself of less than full and entire control over some insignificant area of legislation, we would inquire whether

an independent counsel who was somewhat insulated from presidential control, because the president retained the ability to remove the counsel for good cause. The power of removal, although circumscribed, led the Court to conclude that the structure was “not a case in which the power to remove an executive official [had] been completely stripped from the President, thus providing no means for the President to ensure the ‘faithful execution’ of the laws.”²²⁵

In the 2010 decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,²²⁶ a five-Justice majority held that the tenure provisions governing the Public Company Accounting Oversight Board (PCAOB), a subsidiary agency of the Securities and Exchange Commission (SEC), were unconstitutional because PCAOB commissioners could only be removed for good cause by the SEC.²²⁷ The dissenters did not deny that some presidential control was required; rather, they argued that given the president’s influence over the SEC, and further, given the SEC’s statutory control over the PCAOB, “as a practical matter, the President’s control over the Board should prove sufficient as well.”²²⁸

In contrast to the chains of command analyzed in *Morrison v. Olson* and *Free Enterprise Fund*, the president has absolutely no legal or practical ability to influence the conduct of state prosecutors. State prosecutors are neither appointed nor supervised by the president, nor can they be removed by the president.²²⁹ State prosecutors,

the matter was “*so central* to the functioning of the Legislative Branch” as really to require complete control, or whether the statute gives Congress “*sufficient* control over the surrogate legislator to ensure that Congress is able to perform its constitutionally assigned duties”? Of course we would have none of that. Once we determined that a purely legislative power was at issue we would require it to be exercised, wholly and entirely, by Congress.

Id.

225. *Id.* at 692 (majority opinion).

226. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).

227. *Id.* at 3153 (“The Act before us . . . not only protects [PCAOB] Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the [SEC] Commissioners—none of whom is subject to the President’s direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.”).

228. *Id.* at 3173 (Breyer, J., dissenting).

229. For an example of state criminal independence from the federal executive, see *Medellin v. Texas*, 128 S. Ct. 1346 (2008), which held that the president has no authority to interfere with executions achieved in violation of a U.S. treaty. *Id.* at 1353.

therefore, almost certainly cannot exercise federal executive authority.²³⁰

The Department of Justice has an existing statutory mechanism for making state prosecutors special assistant U.S. attorneys.²³¹ Under this scheme, states may choose to hire and pay assistant district attorneys and volunteer them to work on federal cases, and the Department of Justice can accept whatever prosecutorial resources the states wish to provide.²³² The United States is likely to decline such an offer only if it does not want the help. So, for example, the United States is likely to decline the offer of prosecutorial support from state prosecutors if it has a policy reason for not bringing more immigration prosecutions, rather than mere resource constraints. A state interested in immigration prosecution is likely to turn down the opportunity to support federal immigration enforcement only if, for some reason, it does not want to follow the directions of the president, the attorney general, and the officers appointed under them. An end run around this mechanism, either by Congress or a state, would seem to be aimed at undermining federal executive discretion.

2. *Executive Authority over Immigration.* There is no question that the president is entitled to execute federal immigration law just like all other federal laws. When, in the mid-1990s, Arizona and other

230. To the extent that the text of § 287(g) agreements limits the power of ICE to terminate the agreements themselves and to the extent that the agreements' operation has in fact reflected local, rather than federal, prosecution priorities, *Free Enterprise Fund* calls their constitutionality into question. See RANDY CAPP, MARC ROSENBLUM, CRISTINA RODRÍGUEZ & MUZAFFAR CHISHTI, DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 1–4 (2011), available at <http://www.migrationpolicy.org/pubs/287g-divergence.pdf> (assessing the “implementation, enforcement outcomes, costs, and community impacts of the 287(g) program”).

231. See 28 U.S.C. § 543 (2006) (“Special attorneys. (a) The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires. (b) Each attorney appointed under this section is subject to removal by the Attorney General.”); U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-11.242 (rev. ed. 1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam (describing the appointment process in more detail).

232. See, e.g., Press Release, U.S. Attorney’s Office for the W. Dist. of Mo., Seven Gang Members Indicted for Crack Cocaine Conspiracy (Feb. 10, 2011), available at <http://www.justice.gov/usao/mow/news2011/bifford.ind.html> (“Under a partnership with the Jackson County Prosecutor’s Office, a full-time Special Assistant U.S. Attorney has been designated to focus on prosecuting gang-related crimes in federal court. ‘We are utilizing a federal grant in order to make one of our assistant prosecutors available to prosecute gang-related cases in federal court,’ said Jackson County Prosecutor Jim Kanatzar.”).

states sued the United States demanding that it more aggressively enforce immigration laws, the Ninth Circuit rejected the claim. It held, borrowing words from the Supreme Court, that “[a]n agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”²³³

Indeed, this general principle applies with special force to immigration. For example, in *United States ex rel. Knauff v. Shaughnessy*,²³⁴ the Court explained, “The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.”²³⁵ Similarly, in *Hampton v. Mow Sun Wong*,²³⁶ the Supreme Court invalidated a U.S. Civil Service Commission regulation excluding lawful permanent residents from federal civil service: “[A]ssuming . . . that the national interests identified by [the Commission] would adequately support an explicit determination by Congress or the President to exclude all noncitizens from the federal service, we conclude that those interests cannot provide an acceptable rationalization for such a determination by the Civil Service Commission.”²³⁷ Although technically a due-process decision, the Court was clearly concerned about excessive delegation.²³⁸

233. *California v. United States*, 104 F.3d 1086, 1094 (9th Cir. 1997) (alteration in original) (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)) (internal quotation marks omitted). Arizona’s suit was rejected for the same reason. *Id.* at 1089 n.1; *Arizona v. United States*, 104 F.3d 1095, 1096 (9th Cir. 1997). See generally Motomura, *supra* note 219, at 2060–65 (discussing the role of discretion in immigration law); Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611 (2006) (same); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010) (same).

234. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

235. *Id.* at 542.

236. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

237. *Id.* at 116.

238. *Id.* (“Since these residents were admitted as a result of decisions made by the Congress and the President, implemented by the [INS] acting under the Attorney General of the United States, due process requires that the decision to impose that deprivation of an important liberty be made either at a comparable level of government or, if it is to be permitted to be made by the Civil Service Commission, that it be justified by reasons which are properly the concern of that agency.” (footnote omitted)); cf. THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1246–60 (6th ed. 2008) (discussing the PRWORA, which “gave states new authority to decide eligibility for jointly funded federal-state programs . . . and for state-funded public benefits”).

Professors Adam Cox and Cristina Rodríguez explain that the *Knauff* view has not been the Court's only approach; sometimes the Court seems to consider the regulation of immigration to be an ordinary congressional power.²³⁹ Nevertheless, even assuming that the president may not contradict or defy a particular congressional direction, the Court understands that administration of the immigration laws implicates foreign policy and national security in ways in which other executive decisions might not.²⁴⁰

Thus, in *Reno v. American-Arab Anti-Discrimination Committee*,²⁴¹ the Court rejected a claim of selective prosecution in the immigration context. The Court explained the particular difficulties with "invad[ing] a special province of the Executive—its prosecutorial discretion" in the immigration context.²⁴² As the Court acknowledged, simply inquiring into the executive's reasons for prosecution could cause harm:

What will be involved in deportation cases is not merely the disclosure of normal domestic law enforcement priorities and techniques, but often the disclosure of foreign-policy objectives and (as in this case) foreign-intelligence products and techniques. The Executive should not have to disclose its 'real' reasons . . . and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.²⁴³

Accordingly, if Congress authorized states to regulate immigration by passing and carrying out their own laws, or by carrying out existing federal laws, it would not only be delegating power assigned by the Constitution to the president, but it would also be impermissibly invading the areas of foreign affairs and national security.

239. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 476–78 (2009).

240. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005) ("To infer an absolute rule of acceptance where Congress has not clearly set it forth would run counter to our customary policy of deference to the President in matters of foreign affairs. Removal decisions, including the selection of a removed alien's destination, 'may implicate our relations with foreign powers' and require consideration of 'changing political and economic circumstances.'" (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976))).

241. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

242. *Id.* at 489.

243. *Id.* at 490–91.

C. Sovereign Interests of the United States

In the 1879 decision in *Tennessee v. Davis*,²⁴⁴ the Supreme Court stated that “there can be no criminal prosecution initiated in any State court for that which is merely an offence against the general government.”²⁴⁵ This concept is derived from a line of cases holding that states cannot prosecute, even under generally applicable criminal statutes, offenses affecting only the sovereign interests of the United States.

The Court has frequently characterized deportation and other aspects of immigration as sovereign federal powers.²⁴⁶ Over fifty years ago, the Court stated that this principle was too deeply established to be reconsidered: “[T]hat the formulation of [policies pertaining to the entry of aliens and their right to remain here] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.”²⁴⁷ Because immigration—both entry and departure— involves human beings crossing a national border, it seems to constitute “commerce with foreign nations, confided by the Constitution to the exclusive control of Congress.”²⁴⁸ Thus, only Congress can create crimes involving the admission, exclusion, and removal of noncitizens.

The concept of exclusive jurisdiction is inconsistent with the idea that it can be ceded involuntarily or implicitly when another

244. *Tennessee v. Davis*, 100 U.S. 257 (1879).

245. *Id.* at 262. *Davis* is discussed in Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WISC. L. REV. 39, 96–97. *Cf.* *United States v. Frade*, 709 F.2d 1387, 1402 (11th Cir. 1983) (holding that the president does not have the power to create immigration law by executive order and stating that “[t]his is especially true when the power is exercised in the imposition of a criminal sanction upon persons in the United States, a matter normally within the congressional domain”).

246. *E.g.*, *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (“[C]ontrol over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature.”); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 456 (1977) (recognizing the “power over immigration” as one of the “sovereign powers that are inherently in the exclusive domain of the Federal Government and critical to its very existence”); *Trop v. Dulles*, 356 U.S. 86, 98 (1958) (plurality opinion) (“[T]his Court has in the past sustained deportation as an exercise of the sovereign’s power to determine the conditions upon which an alien may reside in this country.”); *Tiaco v. Forbes*, 228 U.S. 549, 556 (1913) (“[S]overeign states [such as the United States] have inherent power to deport aliens . . .”).

247. *Galvan v. Press*, 347 U.S. 522, 531 (1954); *see also* *Miller v. Albright*, 523 U.S. 420, 455–56 (1998) (Scalia, J., concurring in the judgment) (quoting the same passage from *Galvan*).

248. *New York v. Compagnie Générale Transatlantique*, 107 U.S. 59, 60 (1883).

jurisdiction wants to help. In *Puerto Rico v. Koedel*,²⁴⁹ the First Circuit held that the Commonwealth of Puerto Rico had not acquired de facto concurrent jurisdiction over a public portion of a military base that was under de jure exclusive federal jurisdiction through local cooperation and use. The majority explained, “[W]e are aware of no theory, and neither the appellee nor the district court has cited any, under which exclusive jurisdiction can be implicitly transformed into concurrent jurisdiction through actions other than legislative intervention.”²⁵⁰

States prosecuting within exclusive federal, tribal, or military jurisdictions—or, for that matter, the federal government or tribes prosecuting within exclusive state jurisdiction—might indeed be “reinforcing the efforts” of the “law enforcement agencies”²⁵¹ with exclusive jurisdiction. It may be that the government entity without jurisdiction would act with “identical purposes”²⁵² to those of the government with exclusive jurisdiction. But throughout Supreme Court and lower state and federal court decisions, no court has inquired into whether the body with no authority was acting congenially or otherwise.

Exclusive jurisdiction is exclusive because the Constitution makes it so. “The test . . . is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control.”²⁵³ As the Court explained in 1884 in the *Head Money Cases*,²⁵⁴ using language that could easily have been written in 2011,

This court has decided distinctly and frequently . . . that [the power to regulate immigration] does not belong to the States. That decision did not rest in any case on the ground that the State and its people were not deeply interested in the existence and enforcement of such

249. *Puerto Rico v. Koedel*, 927 F.2d 662 (1st Cir. 1991).

250. *Id.* at 666. The court further cited *Fort Leavenworth Railroad v. Lowe*, 114 U.S. 525 (1885), which quoted and followed the rule of a New York case that had held that “the rights of sovereignty [are] not to be taken away by implication.” *Id.* at 538 (citing *People v. Godfrey*, 17 Johns. 225 (N.Y. Sup. Ct. 1819)).

251. *Kobach, Reinforcing*, *supra* note 16, at 475.

252. *Id.* (quoting *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983), *overruled on other grounds* by *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999)) (internal quotation mark omitted).

253. *S. Ry. v. R.R. Comm’n*, 236 U.S. 439, 448 (1915).

254. *The Head Money Cases*, 112 U.S. 580 (1884).

laws, and were not capable of enforcing them if they had the power to enact them; but on the ground that the Constitution, in the division of powers which it declares between the States and the general government, has conferred this power on the latter to the exclusion of the former.²⁵⁵

Federal criminal jurisdiction may be exclusive even when substantive state law applies through the Assimilative Crimes Act (ACA).²⁵⁶ If states were to help enforce federal criminal law in any setting, the jurisdiction that falls within the ACA would seem to be the most appropriate, because states are experts in interpreting and applying their own law. But, as the Arizona Supreme Court explained in affirming a grant of habeas corpus, although “[b]y enactment of the [ACA,] . . . Congress expressly adopted the criminal laws of the States[.]” nonetheless, “federal jurisdiction over offenses, either felonies or misdemeanors, committed by an Indian in Indian country is exclusive and not concurrent with state jurisdiction.”²⁵⁷

The Supreme Court has directly ruled that states may not criminalize conduct within the exclusive criminal authority of the federal government. The principle from *Tennessee v. Davis* that “there can be no criminal prosecution initiated in any State court for that which is merely an offense against the general government”²⁵⁸ applies even under a generally applicable state criminal law.²⁵⁹ In the

255. *Id.* at 591.

256. Assimilative Crimes Act, 18 U.S.C. § 13 (2006). Section 13(a) of title 18 of the U.S. Code provides that conduct that

would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place [of federal jurisdiction] is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Id. § 13(a). But such “statutes, of course, do not confer any regulatory or enforcement jurisdiction on the States.” *Rice v. Rehner*, 463 U.S. 713, 742 n.5 (1983) (Blackmun, J., dissenting); *see, e.g., Harbin v. State*, 581 So. 2d 1263, 1266 (Ala. Crim. App. 1991) (holding that although a local officer could “make an arrest on [reservation territory,] . . . an escape from the custody of an arrest which occurred on the [reservation] is a federal offense which must be prosecuted in federal court and not in state court”); *State v. Allan*, 607 P.2d 426, 434 (Idaho 1980) (“To allow the state of Idaho to assert criminal jurisdiction over a person of substantial Quinault Indian blood, duly enrolled in that tribe, who has not been shown to have taken any steps to achieve emancipation . . . would be to encroach . . . on the domain of federal law.”); *Arquette v. Schneckloth*, 351 P.2d 921, 925 (Wash. 1960) (en banc) (“[J]urisdiction over crimes committed by Indians in Indian country . . . remain[s] in the federal courts.”).

257. *In re Denetclaw*, 320 P.2d 697, 700 (Ariz. 1958) (affirming a grant of habeas corpus).

258. *Tennessee v. Davis*, 100 U.S. 257, 262 (1879).

259. Of course, many things, like robbery of a federally chartered bank, will be within the state’s police power as breaches of the peace or the like.

1890 decision in *In re Loney*, the Court held that, although allegedly perjured statements had occurred before a Virginia notary in that state, Virginia could not prosecute under its own perjury statute because the statements had been made for use in a federal forum:

A witness who gives his testimony . . . in a case pending in a court or other judicial tribunal of the United States . . . is accountable for the truth of his testimony to the United States only; and perjury committed in so testifying is an offence against the public justice of the United States and within the exclusive jurisdiction of the courts of the United States; and cannot, therefore, be punished in the courts of Virginia under . . . her statutes²⁶⁰

As a U.S. district judge explained in 1875, even if a prosecution is nominally based on a state statute, “the state courts cannot hold criminal jurisdiction over offences exclusively existing as offences against the United States; for every criminal prosecution must charge the crime to have been committed against the sovereign whose courts sit in judgment upon the offender, and whose authority can pardon him.”²⁶¹ Justice Bradley, while riding circuit, affirmed: “It would be a manifest incongruity for one sovereignty to punish a person for an offense committed against the laws of another sovereignty.”²⁶²

These ideas continue to appear in modern cases. In 1975, the Arizona Court of Appeals held that Arizona’s perjury statute could not be used to prosecute an alleged false statement that had been made in federal court. The court explained, “If there is to be any prosecution for the alleged wrongful acts set out in these counts, such prosecution must come from Federal authorities.”²⁶³

The California Court of Appeals applied this same principle in 2008 to an immigration offense. In *People v. Hassan*,²⁶⁴ the defendant was convicted under a California fraud statute for providing false documents to the Bureau of Immigration and Customs Enforcement (ICE) “in connection with a federal immigration investigation.”²⁶⁵ The court noted that “[s]everal federal laws potentially criminalize the presentation of false or fraudulent documents in connection with

260. *In re Loney*, 134 U.S. 372, 375 (1890).

261. *Ex parte Bridges*, 4 F. Cas. 98, 100–01 (N.D. Ga.) (No. 1862), *aff’d*, 4 F. Cas. 98 (C.C.N.D. Ga. 1875) (No. 1862).

262. *Ex parte Bridges*, 4 F. Cas. 98, 105 (C.C.N.D. Ga. 1875) (No. 1862).

263. *State v. Warren*, 539 P.2d 184, 186 (Ariz. Ct. App. 1975).

264. *People v. Hassan*, 86 Cal. Rptr. 3d 314 (Ct. App. 2008).

265. *Id.* at 323.

[such an] investigation.”²⁶⁶ The court reversed the conviction, holding that state law was inapplicable:

That avoids a construction in which the federal criminal law is simply enforced by the state law. Because the documents appellant provided I.C.E. were produced pursuant to the laws of the United States which was the sole source of authorization for the I.C.E. investigation, the integrity of the federal proceeding is protected by the federal law.²⁶⁷

Of course, states have jurisdiction over many of the things that noncitizens do, including conduct that may be coincidentally related to immigration. It is conceivable that, in connection with any given episode of transporting noncitizens, an individual might commit other criminal offenses, such as kidnapping, extortion, assault, or rape. Those offenses would ordinarily fall within state jurisdiction even if they happened to involve noncitizens.

But states do not have a direct regulatory interest in immigration, even when it involves undocumented noncitizens. The critical question with respect to a state statute modeled after federal law is whether states have the power to affect immigration somewhat less directly, by punishing those who transport immigrants and are thus accomplices, or by punishing those who misprision the crime by concealing immigrants. Some situations exist in which the auxiliary regulation serves an independent purpose, as in the case of statutes that prohibit eluding police in a motor vehicle: the chase presents a public safety risk even if the driver is not guilty of the offense that led to the attempted stop. But the federal transportation and concealing

266. *Id.* (citing 8 U.S.C. § 1324c (2006); 18 U.S.C. § 1546 (2006)); *see also* 8 U.S.C. § 1324c (declaring it unlawful to “forge . . . any document for the purpose of satisfying a requirement of [the INA]”); 18 U.S.C. § 1546 (punishing “[w]hoever knowingly forges” an immigration document “for the purpose of satisfying a requirement” under the INA).

267. *Id.* at 323–24; *cf.* *Van Stuyvesant v. Conway*, No. 03 Civ. 3856(LAK), 2007 WL 2584775, at *17 (S.D.N.Y. Sept. 7, 2007) (noting—in the course of holding that the state had jurisdiction over charges of larceny, fraud, and impersonating an attorney, even though the charges involved deception of people involved in immigration proceedings—that “it appears that Petitioner is confusing immigration law matters, over which the federal government retains exclusive jurisdiction, for the crimes he was convicted of in this case, all of which were crimes under New York State law”); *People v. Bilus*, 804 N.Y.S.2d 670, 674 (Dist. Ct. 2005) (holding that the New York crime of obstructing governmental administration does not apply to the obstruction of federal employees); *People v. Arvio*, 321 N.Y.S.2d 382, 386 (J. Ct. 1971) (holding that the New York crime of obstructing governmental administration could not be premised on interference with the federal Selective Service System and stating that “[i]t is clear that Congress intended the federal courts exclusively to take jurisdiction of violations of the act and [that] on this ground the informations must be dismissed”).

statutes do not seem to address interests other than regulating undocumented immigration. Accordingly, state copies seem to be impermissibly concerned with the same end as federal immigration provisions.

The Court's 1821 decision in *Cohens v. Virginia*²⁶⁸ suggests that the inability to punish a direct offense dictates an inability to punish aiders and abettors, accomplices, and accessories: "It is clear, that Congress cannot punish felonies generally; and, of consequence, cannot punish misprision of felony"²⁶⁹ except in the particular areas in which the United States has jurisdiction to punish both. Applying *Cohens* to other examples of exclusive federal jurisdiction seems to lead to the same result for two reasons, one principled and one practical.

The principled reason is that the wrong remains solely against the laws of the United States, not against those of any individual state. The Constitution prohibits states from criminalizing, variously, sedition against the United States,²⁷⁰ the taking of deposits by national banks with more liabilities than assets,²⁷¹ or disciplinary misconduct within the U.S. military.²⁷² The question, then, is whether states are also prohibited from criminalizing, say, transportation for the purposes of doing those things. Because the reason for states' inability to regulate is constitutional—the wrongs are solely within the jurisdiction of the United States—states should be likewise disabled from prosecuting accomplices, conspirators, and aiders and abettors. The point is not, say, that people have a right to commit or to help commit sedition against the United States; sedition remains a crime.²⁷³ It is only that, whether the defendant is prosecuted as a principal or as an accomplice, the legal interest is solely that of the United States.

The practical reason is that the exception would swallow the rule. If states were allowed to pass criminal laws in areas of exclusive federal jurisdiction on any theory other than that of the principal

268. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

269. *Id.* at 428.

270. *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956).

271. *Easton v. Iowa*, 188 U.S. 220, 230–31 (1903).

272. U.S. CONST. art. I, § 8, cl. 16; *see also* 10 U.S.C. § 889 (2006) ("Any person subject to this chapter who behaves with disrespect toward his superior commissioned officer shall be punished as a court-martial may direct."). For a discussion of exclusive military jurisdiction of purely military offenses, *see supra* note 128 and accompanying text.

273. 18 U.S.C. § 2384 (2006).

acting alone, any limitation on state authority would be practically eliminated. For example, even a sole principal will often have engaged in transportation for purposes of facilitating an act of disrespect of a superior officer by driving to the base. In addition, because accessorial liability is a universal part of criminal law, either by general or by special statute, exclusive power in a particular area must include exclusivity with respect to its normal incidents. Exclusive jurisdiction cannot have such an easy and broad loophole.

The police power is not implicated by state efforts to regulate immigration through criminal law other than by regulating areas of exclusively federal interest.²⁷⁴ Imagine lawfully admitted immigrants traveling by automobile from Albuquerque, New Mexico, to Dallas, Texas; in Dallas, they plan to buy food and rent lodging. The driver is licensed, the car is registered, and traffic laws are obeyed. The car is free of drugs, weapons, and other contraband; the occupants commit no breach of the peace. Texas could not criminalize the presence or travel of those people based on lack of citizenship; not only would such a state crime be inconsistent with federal immigration law, but the occupants have engaged in no acts or omissions within the police power of the state to regulate.

Changing the hypothetical to make the individuals undocumented does not alter the absence of a basis for regulation under the police power, apart from the impermissible desire to regulate immigration itself. And again, as Chief Justice Burger explained in *Plyler*, “A state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive.”²⁷⁵ To be sure, the *Plyler* majority acknowledged that it could be relevant that the children were undocumented: “The State may borrow the federal classification. But to justify its use as a criterion for its own discriminatory policy, the State must demonstrate that the classification is reasonably adapted to ‘the purposes for which the state desires to use it.’”²⁷⁶

274. Of course, other crimes could be committed while transporting an undocumented noncitizen, but that speculative possibility is not enough to warrant state regulation any more than the possibility of additional crimes outside a statute in any other area of exclusive federal jurisdiction. In any event, if there are any crimes that actually fall within the police power, individuals who commit those crimes can be charged without regulating immigration itself.

275. *Plyler v. Doe*, 457 U.S. 202, 242 n.1 (1982) (Burger, C.J., dissenting).

276. *Id.* at 226 (majority opinion) (emphasis omitted) (quoting *Oyama v. California*, 332 U.S. 633, 664–65 (1948) (Murphy, J., concurring)).

To criminalize the otherwise-lawful transportation of otherwise-law-abiding people, the state must pinpoint precisely how undocumented status is related to a legitimate state interest other than the desire to regulate immigration.²⁷⁷ In the absence of any permissible end other than keeping undocumented people out, the police power justifies such regulation only if it permits states to regulate immigration directly. A premise of the mirror-image theory, consistent with existing law, is that the police power does not.

In sum, centuries of federal statutes and case law—and the nature of the Constitution and sovereignty itself—instruct the states and the national government to enact and prosecute only those crimes that lie within their sovereign authority. That one government enacts a law within its exclusive jurisdiction does not enlarge the constitutional authority of the other.²⁷⁸

CONCLUSION

Why has American law generally rejected the proposition that states have the power to prosecute federal crimes in state courts?²⁷⁹

277. Of course, a state may wish to regulate national banks, active-duty military personnel, or immigration for ends within the police power, such as improving its economy. But a legitimate end cannot justify the impermissible means of invading an exclusive federal power. For example, ill-disciplined members of the U.S. Air Force could make it less likely that a particular base would get a particular assignment that could be of great economic interest to the civilian population. But even to protect its economy, a state may not impose its own version of military discipline on these federal servicemen, nor may it more vigorously enforce provisions of the Uniform Code of Military Justice than the military chooses to.

278. Several Justices have passionately contended that even the government's giving up power is irrelevant to the constitutional question. Justice Thomas has explained that it does not matter whether *amici* States welcome federal support, particularly financial, for the detention of "sexually dangerous persons": "Congress' power . . . is fixed by the Constitution; it does not expand merely to suit the States' policy preferences, or to allow State officials to avoid difficult choices regarding the allocation of state funds." *United States v. Comstock*, 130 S. Ct. 1949, 1982 (2010) (Thomas, J., dissenting).

Similarly, in *Zschernig v. Miller*, Justice Stewart argued that the acquiescence of the solicitor general to a state's exercise of the foreign-affairs power is irrelevant:

We deal here with the basic allocation of power between the States and the Nation. Resolution of so fundamental a constitutional issue cannot vary . . . with the shifting winds at the State Department. . . . [T]he fact remains that the conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several States.

Id. at 443 (Stewart, J., concurring).

279. See generally Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 8–12 (1996) (describing the constitutional limitations that prevent states from prosecuting federal crimes); Charles Warren, *Federal*

Early in the nation's history, the answer to this question turned in part on the battles between federalists, who wanted more expansive federal courts with more sweeping jurisdiction, and antifederalists, who wanted to cabin federal power generally and supported the use of state courts to try federal as well as state claims.²⁸⁰ Although the allocation of powers between the federal government and the states remains a vital topic, the theory and practice of federalism has increasingly come to recognize the "polyphony" of overlapping and intertwined power and action on many topics.²⁸¹

Modern federalism theorists have spent relatively little time focusing on the criminal law. The leading article on the question of whether federal crimes should be enforceable in the states continues to be an article written in 1925 by Professor Charles Warren.²⁸² Yet the new initiative to increase state enforcement of immigration-related laws, and, in particular, the claim that states have the authority to do so in support of federal law, has brought these more general questions to the fore.

Setting immigration law and policy remains a uniquely national power. Although many immigration laws have passed under the bridge since 1876, the central holdings of *Henderson* and *Chy Lung* remain fully relevant today. The federal government can, and does, work with the states. Authorizing states to assist with immigration enforcement under the supervision of federal authorities may be good or bad immigration policy. It may be nationally consistent or inconsistent. But the decision to make such an authorization is a choice that stems from, and that should be left within, federal control.

None of this is to say that states are entirely prohibited from regulating noncitizens. Indeed, they have some authority to do so as long as they do not attempt to regulate immigration itself. Inevitably, this distinction will lead to close questions. But even when regulating immigrants and not immigration, states must rely solely on their own

Criminal Laws and the State Courts, 38 HARV. L. REV. 545 (1925) (reviewing the nineteenth-century experience with vesting some federal criminal jurisdiction in state courts).

280. For a discussion of the historical development of federal criminal jurisdiction, see Kurland, *supra* note 279, at 61–82.

281. See generally ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009) (arguing that polyphonic federalism is more efficient, democratic, and protective of liberties than other forms).

282. See *supra* note 279 and accompanying text. For a more recent take on the same issue, see Collins & Nash, *supra* note 216.

regulatory justifications and their own sovereign interests, both of which will be tested for consistency with federal authority.

Under the prevailing legal doctrine, the criminal provisions of SB 1070 and similar provisions in other states cannot stand on the mirror-image theory. Nor could they stand if the State of Arizona tried to prosecute federal laws directly in state courts. These new state crimes would be valid only if the states could persuade the Supreme Court that states have the inherent authority to regulate immigration with respect to undocumented noncitizens. Such an outcome would be a dramatic reversal of the Court's immigration jurisprudence establishing federal power over immigration as supreme, which so far has proved invulnerable.