

IMMIGRATION STRUCTURALISM: A RETURN TO FORM

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INTRODUCTION

At the heart of the “subfederal immigration revolution”¹ are two core questions. The first is *what* to do about our “broken” immigration system,² especially regarding an estimated eleven million individuals unlawfully present.³ This question ignites impassioned debates on civil liberties, the rule of law, the economy, foreign relations, and who “we” are (or wish to be) as a nation.⁴ For now, at least, the only common

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1. This moniker refers to the spate of state and local laws directed at unlawful immigrants in the past few years. For statistical accounts of the spike in state laws over the past five years, see *State Laws Related to Immigration and Immigrants*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/immig/state-laws-related-to-immigration-and-immigrants.aspx> (last updated Feb. 22, 2012) (reporting the introduction of more than 7000 state immigration-related bills and the passage of more than 1000 state laws and resolutions).

2. See Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 617 (2012) (noting “[t]he general view that the current U.S. immigration system is broken” as a contributing factor of the “enactment of a record number of state and local immigration laws”); see also Barack Obama, President, Remarks by the President on Comprehensive Immigration Reform (July 1, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform>) (calling for reforms of the “broken” U.S. immigration system).

3. See, e.g., Michael Hofer et al., Office of Immigration Statistics, Policy Directorate, Dep’t of Homeland Sec., *Estimates of the Unauthorized Immigration Population Residing in the United States: January 2011*, at 3 (2012) (providing statistical estimates). Estimates of the size of the undocumented population vary, in part because it requires the counting of a shadow population, but also due to competing conceptions of what it means to be illegally present.

4. For a sampling of competing viewpoints from multiple commentators, see *Special Feature: Immigration*, SCOTUSBLOG, <http://www.scotusblog.com/category/special-features/immigration> (last visited Feb. 27, 2013) (compiling posts from various authors on immigration);

denominator is that something should be done.⁵ This unsatisfying consensus invites the revolution's second core question: *which* institution of government, relative to others, has the power to do what.⁶ Although Congress has the lawmaking power, it has yet to meet the demand for immigration reform. Meanwhile, the Federal Executive has proven unable or unwilling to effectively enforce the statutory law currently in effect.⁷ Frustrated, and by default, states and localities increasingly have sought to “cooperate” in immigration enforcement through self-help measures.⁸ The federal administration, however, has generally rebuked these subfederal initiatives and has sought to enjoin them on preemption grounds.⁹ Our unelected judiciary has thus been tasked to sort it out, twice by the Supreme Court in as many years.¹⁰

see also, e.g., Stephen Legomsky, *The Making of United States Refugee Policy: Separation of Powers in the Post-Cold War Era*, 70 WASH. L. REV. 675, 675 (1995) [hereinafter Legomsky, *The Making of United States Refugee Policy*] (“[O]ur immigration policies quite literally define who we are as a people and what qualities we admire and disdain in others. Consequently, the formulation of immigration policy requires value judgments about the optimal size of our population, the composition of our society, and our general economic direction.”).

5. *See* Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2047 (2008).

6. In similar fashion, Hiroshi Motomura describes the dual questions identified here as “what” to do and “who” can do it. His approach to answering these questions, however, differs in several critical respects from mine. Most notably, he suggests approaching the question of “who” with consideration to the question of “what.” *See* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1728, 1738–46 (2010) [hereinafter Motomura, *The Rights of Others*]. But my own view is that these questions are legally distinct, should be treated that way, and that distortion of the former by the latter is a dangerous (even if principled) means to an end. For further discussion of these points, see *infra* Part IV.

7. *See* Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, SUP. CT. REV. (forthcoming) (manuscript at 25) [hereinafter Cox, *Enforcement Redundancy*] (suggesting that the Executive’s under-enforcement policies are due to both resource constraints and ideological preferences).

8. *See, e.g.,* Press Release, Speaker Hubbard Responds to Effort to Overturn New Immigration Law (July 8, 2011) (“If the federal government won’t enforce its own laws and protect Alabama, we must protect ourselves.”); Press Release, House Vote Sends Immigration Bill to Gov’s Desk, SOUTH CAROLINA STATEHOUSE BLOG (Jun. 21, 2011), <http://sc.statehouseblogs.com/2011/06/21/house-vote-sends-immigration-bill-to-gov%E2%80%99s-desk-press-release/> (“If Washington refuses to effectively support our law enforcement officers by enforcing immigration laws, it is left up to the states to stand up and do what is right.”).

9. *E.g.,* *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012); *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012); *see* Adam Cox & Eric Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1286–87 (2012) (noting the administration’s “nearly unprecedented step” of suing to enjoin the states on preemption grounds).

10. *See, e.g.,* *Arizona*, 132 S. Ct. at 2497 (addressing the United States Justice Department’s claim that Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act was preempted by federal law); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011)

This presages an unsettling irony. We may be trying to fix a broken immigration system with a broken government. If so, perhaps more critical attention should be directed at mending our institutional structure and political processes. This Article introduces a theory of “immigration structuralism” as part of a larger project toward those ends. The theory’s major premise, and contribution, is that we should consult both separation of powers and federalism norms in addressing the subfederal revolution’s core question of relative power.¹¹ This approach recognizes the important relationship between our structural dimensions and seeks to harness that relationship in politically reinforcing ways.¹²

Sensitivity to separation of powers is especially vital for assessing claims about the preemptive effect of executive enforcement policies. Approaches to preemption that sideline the distinction between executive policies and congressional statutes incentivize Congress to abdicate lawmaking to the Executive, the Executive to usurp Congress’s lawmaking role, or both. In turn, these aberrations in the lawmaking process undermine the political and procedural protections guaranteed to the states in the Constitution.¹³ My suggested approach, by contrast, draws a fundamental distinction between legislative and nonbinding executive action, such that only the former may trump subfederal law. As will be seen, this approach

(upholding the Ninth Circuit’s determination that Arizona’s Legal Arizona Workers Act of 2007 was not preempted by federal immigration law).

11. Cf. Cox, *Enforcement Redundancy*, *supra* note 7, (manuscript at 2) (observing that *Arizona v. United States* is as much about separation of powers as it is about federalism).

12. On the interdimensional relationship between separation of powers and federalism, my thinking is indebted to the influential work of Jessica Bulman-Pozen, *Federalism as a Safeguard of Separation-of-Powers*, 112 COLUM. L. REV. 459 (2012); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001) [hereinafter Clark, *Separation of Powers*]; Brandon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825 (2004); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008).

13. On the political and procedural safeguards, see, for example, Clark, *Separation of Powers*, *supra* note 12, at 1323–24 (“[F]ederal lawmaking procedures . . . preserve federalism both by making federal law more difficult to adopt, and by assigning lawmaking power solely to actors subject to the political safeguards of federalism.”); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546–58 (1954) (observing that “the national political process in the United States—and especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to” protecting the states against federal intrusion); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1362 (2001) [hereinafter Young, *Two Cheers*] (“Inertia and inefficiency are similar tools that play an important role in protecting state autonomy from federal incursions.”). See also *infra* notes 269–71 and accompanying text.

better safeguards both federalism and separation of powers.

To bring these themes into sharp relief, this Article draws from two recent examples. The first is the Executive's Deferred Action for Childhood Arrivals (DACA) program, introduced in the summer of 2012.¹⁴ Under the DACA program, unlawfully present immigrants who came to the United States at a young age and who meet other eligibility criteria may remain and lawfully work here for renewable two-year periods.¹⁵ DACA is now the target of a lawsuit by certain federal immigration agents seeking to enjoin the program on separation of powers grounds.¹⁶ In particular, the complaint alleges that DACA usurps the legislative function and otherwise violates the Executive's constitutional duty to "take Care that the Laws be faithfully executed."¹⁷ The federal administration has emphatically denied these charges, stressing that DACA does not make "Law" and is merely an expression of the Executive's constitutionally vested enforcement discretion.¹⁸

14. Memorandum for David Aguilar, Acting Comm'r, U.S. Customs and Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship and Immigration Servs., and John Morton, Dir., U.S. Immigration and Customs Enforcement, from Janet Napolitano, Sec'y of Homeland Sec., *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (Jun. 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [hereinafter DACA Memo].

15. *Id.*

16. Amended Complaint, *Crane v. Napolitano*, No. 3:12-cv-03247-O (N.D. Tex. Oct. 10, 2012). Mississippi joined as a plaintiff to the case, but the State's complaints were dismissed for lack of standing. *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 363710 (N.D. Tex. Jan. 24, 2013). In an interim opinion, the district court found that it was "likely" the remaining plaintiffs would be entitled to a preliminary injunction enjoining DACA based on the strength of their statutory and Administrative Procedure Act claims. *Crane v. Napolitano*, 2013 WL 1744422, No. 3:12-cv-03247-O (N.D. Tex. Apr. 23, 2013). But the court reserved making a final decision, pending further briefing from the parties. *Id.*

17. Amended Complaint, *Crane v. Napolitano*, *supra* note 16, at 18–20.

18. See DACA Memo, *supra* note 14, at 3 (noting that while the DACA memorandum does not confer any substantive rights or a path to citizenship, because that granting authority remains with Congress, the Executive Branch holds the power to set policy enforcing existing legislation); see also Defendant's Opposition to Plaintiff's Application for Preliminary Injunctive Relief, *Crane v. Napolitano*, No. 3:12-cv-03247-O (filed Dec. 19, 2012). The administration's legal position is backed by a letter of support authored by Hiroshi Motomura and signed by nearly 100 law professors. See Letter from Hiroshi Motomura, Professor, UCLA Sch. of Law, et al. to Barack Obama, President, Executive Authority to Grant Administrative Relief for DREAM Act Beneficiaries 1 (May 28, 2012), available at www.nilc.org/document.html?id=754 ("[T]here is clear executive authority for several forms of administrative relief for [The Development, Relief, and Education for Aliens Minors Act (Dream Act)] beneficiaries: deferred action, parole-in-place, and deferred enforced departure."). This letter was sent only days prior to DACA's unveiling and may have played a role in assuaging concerns, earlier expressed by the administration, that only Congress had the

My intention here is not to resolve this separation of powers issue.¹⁹ Rather, I use it only to provide context and contour for my theory of immigration structuralism. With that purpose in mind, I offer what I believe are unobjectionable yet critical observations about the DACA controversy.

First, along the horizontal dimension, a theoretical division of power exists between lawmaking and law execution.²⁰ Article I of the Constitution vests “all legislative” power in Congress,²¹ while Article II vests the “executive” power in the President.²² Second, in practice, identifying the point at which law execution crosses into lawmaking can be an elusive if not impossible task (especially in close cases, which DACA may be).²³ Third, courts are not institutionally well-positioned to police that constitutional line and are generally quick to

power to grant the relief requested. Cf. Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 472–73 (describing the administration’s earlier position on its lack of authority to grant DREAM Act-type relief absent congressional action); Lamar Smith, *Obama’s Amnesty for Illegal Immigrants is Against the Law*, CHRISTIAN SCIENCE MONITOR (June 15, 2012), <http://www.csmonitor.com/Commentary/Opinion/2012/0615/Lamar-Smith-Obama-amnesty> (quoting President Obama in an interview with Univision television on the subject, as stating that he could not “waive away the laws that Congress put in place” and that “the president doesn’t have the authority to simply ignore Congress and say, ‘[w]e’re not going to enforce the laws that you’ve passed’”).

19. For recent treatments of DACA’s separation of powers issues, see generally Lauren Gilbert, *Obama’s Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. (forthcoming 2013) [hereinafter Gilbert, *Obama’s Ruby Slippers*]; Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. (forthcoming 2014); David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade*, 122 YALE L.J. ONLINE 167 (2012); Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 93 B.U. L. REV. (forthcoming 2013); John Yoo & Robert Delahunty, *The Obama Administration, the DREAM Act and the Take Care Clause*, 91 TEX. L. REV. (forthcoming 2013).

20. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (invalidating the President’s executive order to seize and operate steel mills because it amounted to lawmaking, a power vested solely in Congress); see also *supra* notes 6, 18 and accompanying text.

21. U.S. CONST. art. I, § 1.

22. *Id.* art. II, § 1.

23. See Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681, 1702 (2008) [hereinafter Clark, *The Procedural Safeguards*] (“[T]here is no bright line, judicially administrable test for distinguishing (permissible) law execution from (impermissible) lawmaking.”). For an argument that DACA crosses the line, and is thus an impermissible exercise of executive power, see Yoo & Delahunty, *supra* note 19. For arguments to the contrary, see Gilbert, *Obama’s Ruby Slippers*, *supra* note 19, and Love & Garg, *supra* note 19. For an enlightened argument that DACA cannot be justified as an exercise of prosecutorial discretion, but is nevertheless sustainable as an act of presidential stewardship, see Margulies, *supra* note 19.

reject invitations to do so.²⁴ Accordingly, the theoretical question of whether the boundary between lawmaking and law execution has been crossed is generally resolved, if at all, through the political process alone.²⁵ Fourth—and getting closer to the project at hand—DACA implicates not only separation of powers but also federalism. Specifically, qualifying immigrants are afforded permission to remain in the United States and, by default, permission to reside in the states and cities of their choosing. Moreover, insofar as DACA beneficiaries are granted legal permission to work, this implicates traditional subfederal interests in labor and employment. Indeed, aroused by these localist concerns, Arizona quickly responded with a countermeasure to deny drivers licenses to DACA beneficiaries, thus undermining or neutralizing some of DACA’s putative purpose.²⁶ Other states have taken or threatened similar action.²⁷ Thus, the payoff question: can the Executive’s DACA initiative preempt conflicting subfederal policy?²⁸

24. Cf. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 492 (1999) (rejecting a claim of selective immigration prosecution and noting the particular difficulties with “invad[ing] a special province of the Executive” over its prosecutorial discretion); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (explaining that an agency’s decision not to prosecute or enforce the law is generally committed to the agency’s discretion); see also *INS v. Chadha*, 462 U.S. 919, 951 (1983) (noting that “when any branch acts, it is presumptively exercising the power the Constitution has delegated to it”).

25. See Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 114 (2000) (explaining that remedies for conflicts between congressional will and executive enforcement “lie more often in congressional oversight or the election booth than in the courthouse”).

26. Ariz. Exec. Order No. 2012-06 (Aug. 15, 2012) (directing state agencies to take necessary steps to “prevent [DACA] recipients from obtaining eligibility . . . for any . . . state identification, including a driver’s license”).

27. Mississippi, like Arizona, has declared DACA beneficiaries ineligible to receive drivers licenses. Miss. Exec. Order No. 1299 (Aug. 22, 2012). Last year, Michigan also took the position that it would not grant drivers licenses to DACA beneficiaries, but it has recently determined that it would. See Niraj Warikoo, *Michigan Secretary of State Does U-Turn; Will Grant Driver’s Licenses to Qualifying Immigrants*, DETROIT FREE PRESS, Feb. 1, 2013. Meanwhile, North Carolina has taken a middle-ground approach: granting drivers licenses to DACA beneficiaries, but which include the words “no lawful status” directly above the person’s name. See Martha Waggoner, *NC Abandons Pink Stripe on Immigrant Licenses*, ASSOCIATED PRESS (Mar. 21, 2013), <http://news.yahoo.com/nc-abandons-pink-stripes-immigrant-licenses-221544718.html>. Still, the vast majority of states have expressly indicated that they would grant drivers licenses to DACA beneficiaries. See *Are Individuals Granted Deferred Action Under the Deferred Action for Childhood Arrivals (DACA) Policy Eligible for Driver’s Licenses?*, NAT’L IMMIGRATION LAW CENTER, available at <http://www.nilc.org/dacadriverslicenses.html> (last updated Mar. 29, 2013).

28. The American Civil Liberties Union seems to think so, as reflected in its complaint against the Arizona licensing program. See *Complaint, Arizona Dream Act Coalition v. Brewer*, No. 2:12-cv-02546 (D. Az. Nov. 29, 2012) (arguing the Governor’s executive order denying driver’s licenses to DACA beneficiaries violates the Supremacy Clause); see also *Complaint,*

A second example was showcased in *Arizona v. United States*,²⁹ though, I submit, not fully resolved.³⁰ There, the federal administration claimed that its enforcement priorities preempted Arizona laws.³¹ More specifically, the proffered conflict was between executive policies that focus enforcement resources on targeted subclasses of unlawfully present immigrants and Arizona's arrest-and-report laws that target a generic and undifferentiated class of undocumented immigrants.³² The question again is presented: Can the Executive's enforcement priorities preempt conflicting subfederal initiatives?

My short answer is that nonbinding executive enforcement policies cannot, and should not, preempt subfederal law. For reasons elaborated in more detail below, the Supremacy Clause's text, context, and drafting history all point toward limiting the types of preemptive federal laws to the Constitution, statutes, and Treaties.³³ By negative implication, executive enforcement policies—especially insofar as they lack the force of law—cannot provide a constitutional basis for preempting state law.

It is structurally paradoxical for the federal administration to simultaneously claim that its enforcement policies (1) are *not* "Law" for separation of powers purposes³⁴ (2) but *are* "Law" for preemption purposes.³⁵ To be clear, my purpose here is not to decry political hypocrisy. Rather, it is to repel the hypocrisy in constitutional terms.

One *Michigan v. Johnson*, No. 2:12-15551 (S.D. Ga. Dec. 19, 2012) (seeking to enjoin the Michigan Secretary of State policy of denying drivers licenses to DACA beneficiaries on preemption and other grounds). Recently, the United States District Court of Arizona held that Arizona's policy of denying drivers licenses to DACA beneficiaries was not preempted, dismissing the plaintiffs' claim. *Arizona Dream Act Coalition v. Brewer*, No. 2:12-cv-02546, 2013 WL 2128315 (D. Az. May 16, 2013) (dismissing the plaintiffs' claim but also holding that the plaintiffs' *equal protection* challenge to the policy had a likelihood of success).

29. 132 S. Ct. 2492 (2012).

30. For further discussion on this point, see *infra* notes 167–68 and accompanying text.

31. See, e.g., Brief for the United States at 22, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182) ("The framework that the Constitution and Congress has created does not permit the States to adopt their own immigration programs and policies or to set themselves up as rival decisionmakers based on disagreement with the focus and scope of federal enforcement."); see also *infra* notes 155–62 and accompanying text.

32. See *infra* notes 161–63 and accompanying text.

33. See Clark, *The Procedural Safeguards*, *supra* note 23, at 1711–12 (making this claim); see also *infra* notes 65–77 and accompanying text.

34. See U.S. CONST. art. I, § 7 (providing that a bill may become "Law" only after traversing the requirements of bicameralism and presentment); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952) (holding that the President has no inherent domestic lawmaking authority).

35. See U.S. CONST. art. VI, cl. 2 (providing that the "Laws" made pursuant to the Constitution shall be the "supreme law of the land").

Specifically, if the Executive's exercise of enforcement discretion crosses into lawmaking, then it is void under separation of powers principles and thus cannot qualify for preemption. On the other hand, if the Executive's prosecutorial discretion is not a form of lawmaking, then it falls beyond the Supremacy Clause's preemptive scope. To be more plain, the Executive cannot have it both ways: its enforcement discretion cannot simultaneously be Law and not be Law.³⁶

This structural paradox—like all good puzzles—begs to be solved. A spirited assault is thus expected, especially given the stakes and an already deeply invested audience. One “solution,” for example, might be to assign different meanings to Law for purposes of separation of powers, on the one hand, and for federalism on the other. This approach is not obviously wrong.³⁷ Immigration constitutional law is littered with peculiarities tied to foreign affairs and sovereignty.³⁸ Thus, it is at least conceivable that there should be exceptional treatment in the immigration context for what qualifies as preemptive under the Supremacy Clause, or for what qualifies as law for purposes of separation of powers.³⁹ Though this article confronts and rejects proposed solutions to the structural paradox, it does so somewhat reluctantly. Such forays only detract from my more central message: We *should not want* to unravel the paradox, because it safeguards basic structural values.

Part I of this Article briefly reviews our government structure, its component elements of separation of powers and federalism, their interrelatedness, and the liberty-securing values they serve. Part II offers an account of how separation of powers norms are seriously threatened in immigration and explains how these potential failings impact immigration federalism. Part III expounds upon the theory of

36. To be sure, the power of prosecutorial discretion is impliedly vested in the Executive. But the power of preemption is not. Thus, while the Executive can set enforcement policies, those policies cannot themselves provide a basis for preempting state law. *See infra* notes 69–77, 235–50 and accompanying text. Rather, in the face of a conflict, the federal and state law should operate concurrently, unless and until the latter is preempted by Congress.

37. *Cf. Cox, Enforcement Redundancy, supra* note 7, (manuscript at 22–26) (observing that the question of executive enforcement preemption hinges on competing conceptions of law, and that the Court's conception of *immigration* law to include executive enforcement is exceptional).

38. *See infra* notes 93–97, 129–34 and accompanying text.

39. Outside the immigration context, the Court has sent mixed signals. *Compare* *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401 (2003) (holding that a foreign affairs policy reflected in an executive agreement preempted state law), *with* *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 303 (1994) (rejecting the claim that nonbinding executive foreign-commerce policies preempted state law).

immigration structuralism. Among other things, it analyzes and contrasts two competing models for approaching the question of which government institution has the relative power to do what. The conventional model seems to treat potential failings along the horizontal separation of powers dimension as an inertial push for further concessions along the vertical federalism dimension. That approach seems doctrinally precarious. Under the alternative model that I propose, constitutional capitulations along one dimension should cause us to insist upon maintaining—if not invigorating—the prophylactic protections secured by the other. Stated otherwise, possible failings in our structural norms should counsel for reinvestment in first principles, not for their further abandonment.

Part IV anticipates some likely resistance to my approach. The principal objection may be that it puts too much hope in the Framers' original strategies for securing liberty. Stated differently, perhaps my approach improvidently elevates form over substance. As will be seen, this objection harkens to the political question of *what* to do about immigration. A great many view the subfederal restrictionist laws as unethical, impracticable, and distasteful—quite apart from a supporting portfolio of legal objections.⁴⁰ Seen in this light, I am certainly sensitive to arguments favoring substance over form. I also appreciate that answers to the constitutional question of *which*, can have practical implications for the political outcomes of *what*.

As I hope to demonstrate, however, a consequentialist approach to the question of *what* to do about immigration should not distort or substitute for the separate question of *which* institution has the power to do it. It is one thing to invest political faith in the federal government over the question of *what*; yet it is quite another to invest in judicial doctrines that serve to entrench an undifferentiated and exclusive federal power over the question of *which*.

Indeed, the push of many of my colleagues toward federal monopolization in the name of immigrant rights may prove self-defeating. To begin with, federal monopolization would hamstring

40. Several lawsuits have challenged subfederal laws not only on preemption grounds, but also based on alleged violations of Equal Protection rights, the First Amendment right to speech and association, and the Fourth Amendment right to be free from unreasonable searches and seizures. *See, e.g.*, *Hispanic Interest Coal. v. Bentley*, 691 F.3d 1236 (11th Cir. 2012); *Ga. Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317, 1321 (N.D. Ga. 2011); *Complaint, Valle del Sol v. Whiting*, No. CV 10-1061 (D. Ariz. May 17, 2012). *See also infra* notes 330–32 and accompanying text.

subfederal initiatives that afford *more* rights and protection than federal law requires.⁴¹ Of more pressing concern, however, the federal political branches have not yet settled on a solution to the immigration problem. If they do so unfavorably to immigrants—a not unlikely scenario given the current trends⁴²—what checks will remain? Certainly, the check will not come from the Judiciary, which has abdicated meaningful review of political choices concerning immigration under the infamous plenary doctrine.⁴³ Nor would the check come from subfederal governments, since a federal monopoly will leave states and localities nothing to offer.

I. SEPARATION OF POWERS, FEDERALISM, AND THEIR INTERRELATIONSHIP

Our government was formed in the shadow of failed experiences. The inefficiencies and collective-action problems beset under the Articles of Confederation called for empowering a centralized, federal, government.⁴⁴ At the same time, however, the despotism sustained under British rule cautioned for limiting government power.⁴⁵

41. For example, some subfederal governments provide welfare benefits that federal law does not require, allow day-labor centers for unauthorized workers, offer in-state tuition to unauthorized immigrants, grant them drivers licenses or other forms of identification, and resist cooperating with federal immigration enforcement. *See, e.g.*, Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 582–90 (2008) [hereinafter Rodriguez, *The Significance of the Local*] (discussing these protectionist programs).

42. *See infra* note 343 and accompanying text.

43. *See infra* notes 83, 88, 231 and accompanying text.

44. *See, e.g.*, Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 117 (2010) (“The solution [to failures stemming from the inability of the states to cooperate] lay with the establishment of a more comprehensive unit of government—a national government”); *see also* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 31 (1998) (explaining the Framers’ support for a “more vigorous national government that could protect property rights, promote commerce, establish credit by paying the public debt, and suppress insurrection”).

45. *See, e.g.*, ELY, *supra* note 44, at 26–31 (identifying colonial British rule as the impetus for the American revolutionaries’ emphasis on protection of property ownership in constitutional limits on government power); Rebecca Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1513–16 (1991) (raising James Madison’s warning that the accumulation of all governmental powers in one body is the very definition of tyranny); Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 13 (1994) (“It is an important truism that the framers were quite skeptical of broad executive authority, a notion that they associated with the tyrannical power of the King.”).

The Constitution's original strategy for repelling tyranny was structural: Power was dispersed horizontally among the federal branches (i.e., separation of powers) and vertically between the federal and state governments (i.e., federalism). In the Federalist Papers, James Madison famously professed that, together, these structural elements would net a "double security" for liberty.⁴⁶ In mind was a brand of liberty that advanced not only individual autonomy but also political choice.⁴⁷ Though the Bill of Rights was later directed at promoting these values, the structural division of power offered independent prophylactic security.⁴⁸ It was a strategy born of two related concerns: first, that incremental threats to liberty might prove too difficult to discern in individual cases; and second, that government power, once accumulated, might prove too difficult to counter.⁴⁹

Towards these ends, the Constitution divides and vests the federal power in three separate institutions: the legislative power in Congress (which is further subdivided into two houses);⁵⁰ the executive power in the President;⁵¹ and the judicial power in the courts.⁵² This division of federal power was designed to secure liberty, in part, by diffusing the political influence of private, self-regarding interests.⁵³ "A faction might come to dominate one branch, but it was unlikely to acquire power over all three."⁵⁴ To be sure, separating power horizontally was

46. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) (stating that "a double security arises to the rights of the people" because "[i]n the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments"). As Montesquieu wrote: "When the legislative and Executive power are united in the same person, or in the same body of magistrates, there can be no liberty." BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 151 (1748) (Prometheus ed., 2002).

47. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 135 (2001).

48. Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Cases*, 41 DUKE L.J. 449, 477 (1991) (discussing the purposes of prophylactic protections).

49. *Id.*; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) ("The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand.").

50. U.S. CONST. art. I, § 1.

51. *Id.* art. II, § 1.

52. *Id.* art. III, § 1.

53. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 434-36 (1987).

54. *Id.*

expected to result in some government inefficiency.⁵⁵ But the defeat of “a few good laws” was thought to be “amply compensated by the advantage of preventing a number of bad ones.”⁵⁶

Dividing power vertically between the federal and state governments similarly was intended to advance the political marketplace. Each level of government could be expected to compete for public loyalties “by conferring the freedom to choose from among various diverse regulatory regimes the one that best suits the individual’s preferences.”⁵⁷ States could garner popular loyalty not only from the substance of their laws, but also by affording the public more accessible outlets for political choice and participation in government.⁵⁸ As Roderick Hills explains, “federal regimes allow groups smaller than a national majority to satisfy their preferences for public goods, multiply opportunities for political participation, and diffuse power in a way to promote electoral competition.”⁵⁹ Again, though not necessarily efficient, the competition for political favor in the states provides a critical check against an otherwise unchallenged and potentially overreaching federal government.⁶⁰

55. THE FEDERALIST NO. 62, at 378 (James Madison) (acknowledging that “check[s] on legislation may in some instances be injurious as well as beneficial”).

56. THE FEDERALIST NO. 73, at 444 (Alexander Hamilton) (“The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.”).

57. Baker & Young, *supra* note 47, at 139; Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81, 100 (“[T]he Federalists understood and emphasized that influence through electoral politics presupposes that state governments would exist as alternative objects of loyalty to the national government.”).

58. THE FEDERALIST NO. 46 (James Madison) (noting that “a greater number of individuals will expect to rise” into state government); Young, *Two Cheers*, *supra* note 13, at 1369.

59. Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Sovereignty Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 856 n.152 (1998).

60. Young, *Two Cheers*, *supra* note 13, at 1369, 1358 n.42 (“States cannot function as checks on the power of the central government, or as laboratories of experimental regulation, if they lack the institutional ability to govern themselves in meaningful ways.”); *see also* New York v. United States, 505 U.S. 144, 181 (1992) (“[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.” (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“Perhaps the principal benefit of the federalist system is a check on abuses of government power.”); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1448–51 (1987) (“[F]ederalism enabled the American People to conquer government power by dividing it. Each government agency, state and national, would have incentives to win the principal’s affections by monitoring and challenging the other’s misdeeds.”).

Though the Constitution divides power both horizontally and vertically, the demarcation of precise boundaries admits of no easy solutions.⁶¹ In the separation of powers context, for example, the Court has recognized that a certain degree of policymaking inheres in executive action.⁶² And, in the federalism context, the Court has generally forgone trying to delineate spheres of federal and state exclusivity.⁶³ The flexibility inherent in this imprecision holds significance along both structural dimensions. Horizontally, it manifests as power sharing and grabbing that generate far more federal law than would otherwise exist. Vertically, the absence of bright constitutional lines tends to invite federal growth in regulatory fields that might otherwise be repelled by an enclave of state exclusivity.

The cumulative effect of a qualitatively expansive federal *power* and a quantitatively expansive federal *law* results in a significant increase in federal-state regulatory overlap. This phenomenon of modern government foists enormous pressure on the Supremacy Clause,⁶⁴ which is the Constitution's sorting device for the inevitable conflicts between federal and subfederal law.⁶⁵

61. THE FEDERALIST NO. 37 (James Madison) (“Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects.”).

62. See, e.g., *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 475 (2001) (acknowledging that a certain degree of lawmaking is inherent in executive action due to its discretionary nature).

63. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547–56 (1985) (explaining that the limits on Congress’s authority to directly regulate the states was mostly relegated to the political process); see also Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 507 (1995) (noting the “Court’s refusal to use state sovereignty to limit congressional powers”); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 514 (1987) (observing that the Court in *Garcia* “abandoned to the federal political process any effort to define the proper interpenetration of federal and state authority”).

64. David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1135 (2012) (“It is one thing for the Court to embrace a system of ‘concurrent federalism,’ which potentially pits federal law against state regulatory programs occupying the same field. It is quite another matter, however, when federal law displaces—rather than merely overlaps—state regulation.”).

65. See, e.g., Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2088 (2000) (explaining that the “Supremacy Clause only prescribed a constitutional choice of law rule, one that gives federal law precedence over [directly] conflicting state law” (alteration in original)).

Bradford Clark provides an important account of how the Supremacy Clause mutually reinforces the principles of separation of powers and federalism.⁶⁶ As bears repeating, the Supremacy Clause provides that the “Constitution,” “Laws . . . made in pursuance thereof,” and “Treaties . . . shall be the supreme law of the land.”⁶⁷ As Professor Clark highlights, the text of the Supremacy Clause discriminates as to the *types* of federal law that can preempt.⁶⁸ Of equal importance, both the drafting history and the constitutional structure suggest that the *procedures* for adopting these types of laws were to be the exclusive means for rendering them supreme.⁶⁹

More specifically, as used in the Supremacy Clause, “[t]his Constitution” refers to the original Constitution adopted in accordance with Article VII and to subsequent amendments adopted in accordance with Article V.⁷⁰ Meanwhile, the Clause’s reference to “the *Laws* of the United States . . . made in Pursuance [thereof]”

66. See generally Clark, *Separation of Powers*, *supra* note 12; Clark, *The Procedural Safeguards*, *supra* note 23.

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

68. *Id.*; Clark, *Separation of Powers*, *supra* note 12, at 1326.

69. See, e.g., Clark, *Separation of Powers*, *supra* note 12, at 1330–31 (analyzing the procedures for adopting these laws). To be sure, Professor Clark’s interpretation of the Supremacy Clause is not universally shared. For important critiques, see Thomas Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727 (2008); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731 (2010); Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567 (2008). In my estimation, however, the text, context, and drafting history of the Supremacy Clause strongly support Professor Clark’s understanding for reasons that he and others have expressed. See, e.g., Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1424–25 (2008); Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007) [hereinafter Clark, *Domesticating Sole Executive Agreements*]; Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CAL. L. REV. 699, 703 (2008) [hereinafter Clark, *Federal Lawmaking and the Role of Structure*]; Clark, *Separation of Powers*, *supra* note 12; see also Brandon P. Denning & Michael D. Ramsey, *supra* note 12; Young, *Executive Preemption*, *supra* note 12. In any event, to the extent that the Supremacy Clause may be interpreted to include unconventional forms of lawmaking, we might still prefer—on normative grounds—to limit what can qualify. Thus, for example, while we might make preemptive accommodations for federal common law, see, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), administrative regulations, see, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), and non-treaty executive agreements, see, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 416–17 (2003), we need not recognize *all* forms of federal action as having preemptive effect. Without canvassing all of the possibilities, this Article’s limited claim is that nonbinding executive enforcement policies constitutionally *cannot*—or, short of that, normatively *should* not—have preemptive effect. This is not to concede that other forms of unconventional lawmaking can or should have preemptive effect; it is just to place those issues beyond the scope of this Article. For additional discussion of these points, see also *infra* notes 242–47 and 261–63 and accompanying text.

70. Clark, *Separation of Powers*, *supra* note 12, at 1332–33.

seemingly refers to “Laws” produced by the procedures set forth in Article I, Section 7.⁷¹ Under these procedures, a bill may “become a Law” only after traversing the bicameralism and presentment requirements.⁷² Finally, the Supremacy Clause’s reference to “Treaties” contemplates those made pursuant to the procedures set forth in Article II.⁷³ Specifically, the Treaty Clause provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.”⁷⁴

As Professor Clark highlights, each of the procedures for creating supreme law requires the assent of the Senate.⁷⁵ And this was no historical accident; the Senate was designed to represent the states at the national level.⁷⁶ Indeed, Professor Clark recounts, “the states agreed to the supremacy of federal law only on the condition that they or their representatives in the Senate would have the opportunity to veto any and all proposals capable of displacing state law.”⁷⁷

These insights factor heavily in the discussion that follows. An appreciation for the interdimensional relationship between separation of powers and federalism offers possibilities for safeguarding both. As further explored in Part III, insisting upon the Constitution’s prescribed methods for adopting supreme federal law reinforces the states’ political and procedural protection in the legislative process.⁷⁸

71. *Id.* at 1334. That the phrase “Laws . . . made in Pursuance [of the Constitution]” was most likely intended to refer to *statutes* is strongly supported by the drafting history. Before being revised by the Committee of Detail, the phrase in question read: “*The Acts of the Legislature* of the United States made in pursuance of this Constitution . . . shall be the Supreme law of the several States.” JAMES MADISON, NOTES ON THE CONSTITUTIONAL CONVENTION, reprinted in THE RECORDS OF THE FEDERAL CONVENTION OF 1787 183 (Max Farrand ed., rev. ed. 1937) (emphasis added).

72. U.S. CONST. art. I, § 7.

73. See Clark, *Separation of Powers*, *supra* note 12, at 1337–38.

74. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

75. Clark, *Separation of Powers*, *supra* note 12, at 1339.

76. *Id.*; see also Clark, *Federal Lawmaking and the Role of Structure*, *supra* note 69, at 703.

77. Clark, *Domesticating Sole Executive Agreements*, *supra* note 69, at 1601–02 (2007).

78. Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1609 (2000) (“[T]he ultimate political safeguard may be the procedural gauntlet that any legislative proposal must run and the concomitant difficulty of overcoming legislative inertia.”); Young, *Two Cheers*, *supra* note 13, at 1358 (“[A]lmost every separation of powers issue acquires federalism connotations as well: the more we shift government authority away from Congress to the federal Executive . . . the less meaningful the states’ representation in Congress becomes.”); see also Clark, *Separation of Powers*, *supra* note 12, at 1438–39.

In this way, separation of powers safeguards federalism.⁷⁹ At the same time, federalism can safeguard separation of powers.⁸⁰ Limiting the class of preemptive federal laws to those expressly contemplated in the Supremacy Clause puts pressure on the federal political branches to adhere to constitutionally prescribed lawmaking procedures—at least when the political branches intend for their policies to have preemptive effect. Moreover, when such lawmaking procedures are not followed, foreclosing the preemptive effect of such policies leaves room for dissenting subfederal action that can spur a congressional or judicial check upon executive action.

II. HORIZONTAL DOUBT AND THE VERTICAL RESPONSE

The foregoing discussion recounted how our Constitution prophylactically secures liberty by separating power both horizontally and vertically. It further provided an account of the interdimensional relationship between separation of powers and federalism. This Part now turns to a discussion of how horizontal separation of powers norms have been threatened or undermined in the immigration context. Section A directs particular attention to: (1) the Court’s abdication of any meaningful constitutional review of the federal political branches’ substantive immigration policies; (2) Congress’s vast conferral of policymaking power to the Executive; and (3) the Executive’s potential usurpation of Congress’s lawmaking function under the auspices of prosecutorial discretion and foreign affairs. Section B then explains how the latter two threats impact immigration federalism, as most recently expressed through the subfederal revolution. The failure of meaningful judicial review is less relevant to the subfederal response, but will be revisited in Part IV as a reason to worry about a federal monopoly over immigration enforcement.

79. See generally Clark, *Separation of Powers*, *supra* note 12 (elaborating on the political and procedural safeguards of federalism).

80. Jessica Bulman-Pozen has recently described how “cooperative federalism” schemes that delegate responsibility to states provide more opportunity for states to check executive action and inaction. Bulman-Pozen, *supra* note 12, at 462 (“By assigning states a role in executing federal law, Congress has—often unwittingly—empowered them to provide the sort of check on executive power that it is often unable, or unwilling, to provide directly.”); see also Heather K. Gerken & Jessica Bulman-Pozen, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (discussing how states use power conferred by the federal government as a mean of resisting federal policy). As developed in Part III, *infra*, my theory of immigration structuralism builds on that idea to explain how normalizing immigration preemption doctrine offers states similar space to promote separation of powers norms.

A. *Immigration Separation of Powers*

Federal immigration law is a renowned “oddity” where the “normal rules of constitutional law simply do not apply.”⁸¹ This constitutional exceptionalism may be ascribed to the amorphous origins of the federal immigration power. That power has been said to arise from any number of constitutional sources—some express, some implied—but often not tied to any one in particular.⁸² Federal immigration power has at times even been linked to extraconstitutional sovereignty norms.⁸³ Though it is now widely accepted that a federal immigration power exists, the power’s uncertain wellspring generates ripple effects for separation of powers (and also for federalism, though that is not this section’s immediate concern).

This section considers two aspects of immigration separation of powers: first, as between the political branches and the Court; second, as between the political branches themselves. The former has been the subject of extensive academic attention, and is thus well-rehearsed.⁸⁴ Less critical attention has focused on the latter, though momentum is

81. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 260 [hereinafter Legomsky, *Immigration Law*]; accord Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984).

82. See, e.g., *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (holding that federal authority over immigration derives from the constitutionally enumerated power to “establish [a] uniform Rule of Naturalization,” the Foreign Commerce Clause, and the more implicit authority over foreign affairs (alteration in original)); Adam B. Cox, Essay, Deference, Delegation, and Immigration Law, 74 U. CHI. L. REV. 1671, 1673 (2007) (remarking on the Court’s “ambiguous pronouncements about the source of federal immigration authority”); see also U.S. CONST. art. I, § 8, cl. 4.

83. See *Chae Chan Ping v. United States*, 130 U.S. 581, 603–04, 609 (1889) (holding that the doctrine of inherent sovereignty affords the federal government plenary authority over immigration); accord *Arizona v. United States*, 132 S. Ct. 2492, 2498 (noting that the federal immigration power rests, in part, on the government’s “power as sovereign to control and conduct relations with foreign nations”).

84. For a sampling of this voluminous body of work, see generally Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1868 (2007); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 6–7 (1998) [hereinafter Chin, *Segregation’s Last Stronghold*]; *Developments in the Law: Immigrant Rights & Immigration Enforcement*, 126 HARV. L. REV. 1565, 1584–92 (2013); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); Kevin R. Johnson, *Minorities, Immigrant and Otherwise*, 118 YALE L.J. POCKET PART 77 (2008); Legomsky, *Immigration Law*, *supra* note 81, at 255; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) [hereinafter Motomura, *Immigration Law After a Century of Plenary Power*]; Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1572 (2008).

quickly building.⁸⁵

1. Political vs. Judicial

The Court long ago eschewed any meaningful constitutional review of the political branches' substantive immigration policies.⁸⁶ Under the so-called "plenary doctrine," the Court has declared itself virtually powerless to review even those policies that facially classify by nationality, race, gender, or legitimacy.⁸⁷ Early expressions of the plenary doctrine suggested that the federal power to admit or expel immigrants admitted of no substantive constitutional limit.⁸⁸ That is, the federal immigration power was understood to be extraconstitutional, thereby unconstrained by the guarantees of liberty otherwise enshrined in the Bill of Rights.⁸⁹ More recently, however, the Court has retreated from this extraconstitutional reasoning. Instead, the plenary doctrine is now generally conceived as a species of the political question doctrine, triggered by concern over judicial meddling in foreign policy.⁹⁰ This separation of powers

85. For recent treatments of immigration separation of powers questions, see generally Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009); Gilbert, *Obama's Ruby Slippers*, *supra* note 19; Margulies, *supra* note 19; Cristina M. Rodriguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787 (2010) [hereinafter Rodriguez, *Constraint Through Delegation*]; Yoo & Delahunty, *supra* note 19. For an earlier treatment, see generally Legomsky, *The Making of United States Refugee Policy*, *supra* note 4.

86. See, e.g., Motomura, *Immigration Law After a Century of Plenary Power*, *supra* note 84, at 550–60 (describing the roots of the plenary power doctrine).

87. See generally *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (race); *Chae Chan Ping*, 130 U.S. 581 (race); *Fiallo v. Bell*, 430 U.S. 787 (1977) (gender and legitimacy); see also Legomsky, *The Making of United States Refugee Policy*, *supra* note 4, at 255 ("In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy.").

88. See generally *Fong Yue Ting*, 149 U.S. at 707; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Chae Chan Ping*, 130 U.S. at 603 (1889); see also Legomsky, *The Making of United States Refugee Policy*, *supra* note 4, at 274 ("One theory advanced in some of the plenary power cases, with varying degrees of explicitness, is that the power either to exclude or to deport aliens is inherent in sovereignty, and that Congress's exercise of that power is therefore immune from substantive constitutional constraints."); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1372 (1999) (explaining that "[t]he early plenary power cases established a pattern of discourse that conceptualized immigration control as a matter of national sovereignty").

89. See Legomsky, *Immigration Law*, *supra* note 81, at 257–58 (detailing the dimensions of Congress's plenary power over immigration).

90. See, e.g., *Negusie v. Holder*, 559 U.S. 511, 517 (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.'" (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988))); *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976) ("The reasons that preclude

conception yields a marginally less dangerous—but still sweeping—federal immigration power. It is marginally less dangerous because the Court seems willing to take a peek at the substance of federal immigration law.⁹¹ But the residuum of super-deference still produces irksome judicial countenancing of “official conduct that would never be tolerated against an ordinary backdrop.”⁹²

For generations now, the plenary doctrine has been widely assaulted as an anachronism with little descriptive or normative appeal.⁹³ To be sure, a conceptual and sometimes real relationship exists between immigration and foreign affairs. The connection derives from the effect that immigration decisions have on foreign nationals. Adverse immigration decisions carry the *potential* for international tension.⁹⁴ Even favorable immigration decisions carry the *potential* to undercut foreign policy—for example, by undermining bargaining positions in negotiations with countries whose nationals are affected.⁹⁵ Yet as several immigration scholars have explained, the harbinger of foreign repercussion is no reason for abandoning meaningful judicial review in the great bulk of cases where foreign policy is not actually implicated or seriously threatened.⁹⁶

judicial review of political questions also dictate a narrow standard of review of decisions made by Congress or the President in the area of immigration and naturalization.”).

91. See *Fiallo*, 430 U.S. at 792 (1977) (noting that the political judgments over immigration are “largely immune”—and, implicitly not completely immune—from judicial control (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953))).

92. Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1629 (1997) [hereinafter Spiro, *Learning to Live*]; see also *Mathews*, 426 U.S. at 79–80 (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”).

93. See T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 34 (1990) (“The immigration power should be brought within the fold of other congressional powers and subjected to the constitutional limits normally applied to those powers.”); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 57 (“Despite the plenary power doctrine’s authority, it has been assailed over the years by many academics and defended, I think, by none.”).

94. Legomsky, *Immigration Law*, *supra* note 81, at 262.

95. *Id.*; see also 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, 991–92 (2004) (describing how immigration policies can impact the United States’ relation with the immigrants’ home countries).

96. See Henkin, *supra* note 84, at 862 (describing *Chinese Exclusion* as an exception and “a relic of a different era”); Legomsky, *Immigration Law*, *supra* note 81, at 268 (realizing that “[o]nly in a few special instances do immigration cases realistically affect foreign policy”).

As Louis Henkin summarized, the plenary doctrine traces to an earlier era

in which constitutional restraints were deemed inapplicable to actions by the United States outside its territory; when orotund generalities about sovereignty and national security were a substitute for significant scrutiny of governmental action impinging on individual rights; [and] when the Bill of Rights had not yet become our national hallmark and the principle justification and preoccupation of judicial review.⁹⁷

Still, the plenary doctrine remains curiously persistent.

2. Congress vs. the Executive

In the immigration context, the Court has “long glossed over separation-of-powers questions” pertaining to the division of power among the political branches.⁹⁸ Although Congress is our traditional lawmaking branch, the Executive wields an enormous influence over immigration policy. This power sharing is attributable to (1) sporadic claims of inherent executive authority, (2) more so, to express congressional delegations of discretionary power, but (3) *mostly* to what Adam Cox and Cristina Rodriguez refer to as “de facto delegation.”⁹⁹ As they explain, Congress has de facto delegated immigration authority to the Executive in two ways. Most significantly, the Executive enjoys primary control over a very sizable unauthorized population due to the combination of Congress’s “stringent admissions conditions” and the Executive’s inability to effectively police the border.¹⁰⁰ Moreover, Congress has radically expanded the grounds by which lawfully admitted immigrants may be deported.¹⁰¹ The result is that approximately one-third of all noncitizens in the United States are removable at the Executive’s option.¹⁰² It is not clear whether Congress intends this result, though certainly it is within the realm of political possibility. De facto delegation—intended or not—allows Congress to exude publicly a tough position on immigration while simultaneously, and more subtly, passing the buck to the Executive.¹⁰³

97. Henkin, *supra* note 84, at 862.

98. Cox & Rodriguez, *supra* note 85, at 460.

99. *Id.* at 462, 511–14.

100. *Id.* at 463.

101. *Id.*

102. *Id.*

103. *Id.* at 529 (“Congress might accrue political benefits from making immigration law on

Emphatically, my objective here is not to insist that congressional delegation violates separation of powers. Nor do I mean to suggest that a court would or should probe deep enough to uncover a violation. Rather, my more modest suggestion is that congressional delegations to the Executive threaten separation of powers norms, insofar as these delegations represent a seismic transfer of immigration policymaking from Congress to the Executive. In turn, this shift threatens the very liberties that separation of powers was intended to secure.

As Professors Cox and Rodriguez explain, *de facto* delegation makes it *substantively* possible for the Executive to alter the immigration labor force, to permit removable immigrants with criminal convictions to remain in the country, and more.¹⁰⁴ Of equal concern here, *de facto* delegation *procedurally* enables the Executive to do so without resort to the legislative process—and, indeed, at times in contravention to Congress’s expressed will.¹⁰⁵ Moreover, Professors Cox and Rodriguez explain, the Executive’s immigration power is “asymmetrical” insofar as it “operates principally at the back end of the system, through the exercise of prosecutorial discretion with respect to whom to deport, rather than at the front end of the system, through decisions about whom to admit.”¹⁰⁶ This asymmetry “can lead to perverse consequences, particularly with respect to the management of unauthorized immigration,”¹⁰⁷ where opportunities for selective enforcement abound.¹⁰⁸

Of related concern, the accumulation of immigration power in the Executive renders the power more fickle and potentially more arbitrary. Executive immigration policy is subject to significant change with each new presidential inauguration.¹⁰⁹ Indeed, the political moment of a new presidency is not even necessary, as executive policy can change on a whim even within a President’s tenure. To be sure,

the books even harsher and bear few of the political costs associated with immigration enforcement efforts.”); cf. Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 733 (2005) (describing Congress’s use of symbolic legislation); William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 514 (2001) (noting the same potential in the criminal law context).

104. Cox & Rodriguez, *supra* note 85, at 464.

105. *Id.*

106. *Id.*

107. *Id.* at 464–65.

108. See Rodriguez, *Constraint Through Delegation*, *supra* note 85, at 1796 (criticizing the current immigration system’s “excessive prosecutorial discretion”).

109. Cox & Rodriguez, *supra* note 85, at 464.

movements in policy are to be expected and sometimes encouraged. But here I draw a critical distinction between policy shifts generated through the constitutionally prescribed lawmaking process, on the one hand, and policy shifts occasioned though unilateral executive (in)action, on the other. Because nonbinding executive policymaking is generally less deliberative and transparent than the legislative process,¹¹⁰ it is also potentially more arbitrary and dangerous.

Of course, the foregoing separation of powers concerns may simply be beside the point if there is no constitutionally ordained division of immigration power among the political branches. That is, perhaps there are no constitutional limits on what Congress can delegate or on what the Executive may claim for itself. Such is not unthinkable given the wisps of extraconstitutionality in the Court's foundational immigration cases.¹¹¹ The notion of immigration separation of powers immunity, however, is wildly incompatible with the Court's seminal decision in *INS v. Chadha*.¹¹² There, the Court held that an immigration statute containing a legislative veto violated separation of powers because it circumvented the Constitution's "finely wrought" bicameralism and presentment requirements.¹¹³ Thus, at minimum, the Court's earlier musings of an extraconstitutional immigration power seem to have no purchase on the federal

110. See, e.g., *Loving v. United States*, 517 U.S. 748, 757–58 (1996) ("Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking."); Rodriguez, *Constraint Through Delegation*, *supra* note 85, at 1801, 1804 (discussing the lack of executive transparency in prosecutorial discretion as compared to legislative action). The Obama Administration's DACA program may be an exception. Both the unveiling and administration of the program have been remarkably transparent. See Eric Posner, *The Imperial President of Arizona*, SLATE (June 26, 2012, 12:04 PM) (noting the transparency around DACA's unveiling). What is notably less transparent, however, is the *motivation* for the program—in particular, whether and to what extent it owes to political preference or resource constraints. The President himself sent very mixed messages when he announced the DACA program. See The White House, Office of the Press Secretary, Remarks by the President on Immigration (June 15, 2012), *available at* <http://whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration> (referring to the program, at times, as the "right thing to do" for a class of undocumented immigrants who in fairness do not deserve to be deported, and later noting the administration's desire to "focus . . . immigration enforcement resources in the right places"). Apart from President Obama's own statements, the program's timing around the 2012 presidential election suggests that politics was a motivating factor. Plus, given the resources necessary to implement the program, it is not clear that government time, money, and energy are being conserved.

111. See *supra* note 88 and accompanying text.

112. 462 U.S. 919 (1983). See Cox & Rodriguez, *supra* note 85, at 477–78 (discussing *Chadha's* implications for separation of powers norms in the immigration context).

113. *Chadha*, 462 U.S. at 951 ("[T]he prescription for legislative action in Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.").

lawmaking process.

Still, to say that separation of powers principles generally apply to immigration lawmaking does not necessarily foreclose the need for special treatment when foreign affairs are implicated.¹¹⁴ Nor does it resolve whether conventional separation of powers norms have been upset in the ways I have suggested above. Before turning to the complicating variable of foreign affairs, I begin here with conventional domestic norms: specifically, in regards to congressionally delegated power and the executive authority of prosecutorial discretion.

a. The Delegation Defense

Despite Article I's vesting of "all" legislative power in Congress, the Court has long held that Congress may delegate policymaking to the Executive Branch so long as the statute provides an "intelligible principle" to sufficiently guide the exercise of discretion.¹¹⁵ It thus may be argued that delegations clearing this threshold raise no separation of powers concerns. However, as every student of administrative law quickly comes to learn, the so-called "nondelegation" doctrine is a misnomer.¹¹⁶ Virtually nothing fails the intelligible principle test, leaving the breadth of Congress's delegations virtually unchecked.¹¹⁷ Accordingly, reliance on the nondelegation doctrine as a sweeping defense of the structural concerns raised above rings hollow: The

114. See, e.g., Pham, *supra* note 95, at 264 ("[E]ven 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.").

115. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (formulating the intelligible principle test); see also *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001) (applying the intelligible principle test); *Mistretta v. United States*, 488 U.S. 361, 374–75, 379 (1989) (same).

116. That the nondelegation doctrine is notoriously underenforced is a point made by many. See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 517 (2003) (describing how the Court's lax intelligible principle standard has rendered this limit on administrative discretion essentially meaningless); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 338 (2002) (noting that "the ban on unacceptable delegations is a judicially underenforced norm").

117. See, e.g., *Whitman*, 531 U.S. at 474–75 ("[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting))); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1241 (1994); Merrill, *supra* note 69, at 2099 (remarking on the "judicial attitude of great deference in determining whether any particular statute confers too much discretion" and observing that the "nondelegation doctrine, while still formally considered part of our structural Constitution, is effectively unenforceable").

underenforced nondelegation norm is *itself* a slippage of separation of powers.

In any event, even where express congressional delegations justify executive policymaking, de facto delegations raise very different concerns. In such cases, the Executive operates outside of Congress's written law. Any suggestion that Congress legislatively graces such action—in wink-and-nod fashion—might be descriptively accurate. To endorse the practice, however, would be constitutionally nihilistic. After all, “[w]hat would the enactment of statutory law *mean*, if Congress also consciously enabled and encouraged the Executive *not* to enforce it?”¹¹⁸

b. The Inherency Defense

Apart from justifications tied to congressional delegation, it may be argued that separation of powers norms are not threatened, insofar as the Executive enjoys inherent immigration authority under the Article II auspices of prosecutorial discretion and foreign affairs.¹¹⁹ But, as explained below, these powers do not save all executive immigration action from doubt.

i. Prosecutorial Discretion

Prosecutorial discretion in the immigration context cuts broadly.¹²⁰ It is conventionally understood to encompass “decisions about which offenses or populations to target; whom to stop, interrogate, and arrest; whether to detain or to release a noncitizen; whether to initiate removal proceedings; whether to execute a removal order; and various other decisions.”¹²¹ Notwithstanding the well-settled

118. Yoo & Delahunty, *supra* note 19, (manuscript at 55); cf. Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540–41 (1983) (discussing the public interest in upholding legislative compromises).

119. Cf. Cox & Rodriguez, *supra* note 85, at 474–76, 492–501 (discussing the inherency rationale for executive immigration policy); see also Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 611 (2005–2006) (noting that “[t]he executive enjoys its customary authority not to pursue [immigration] enforcement”).

120. See Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010) (demonstrating how prosecutorial discretion with respect to immigration law can be exercised in a broad variety of ways); see also Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1842 (2010–2011) [hereinafter Motomura, *The Discretion that Matters*] (highlighting that prosecutorial discretion is oftentimes misused as a “loose synonym” for enforcement discretion more generally).

121. Wadhia, *supra* note 120, at 244; see also Motomura, *Immigration Outside the Law*, *supra* note 5, at 2047 (discussing the discretionary nature of immigration enforcement);

foundation of the Executive's immigration enforcement discretion, important conceptual limits remain.

At one spectral pole, it is uncontroverted that the Executive can make prosecutorial decisions in individual cases in any of the above-referenced categories, as resources or case-specific equities demand.¹²² At the other spectral pole, however, the conventional (though perhaps not universal) understanding is that the Executive cannot exercise prosecutorial discretion to make Law in contravention of congressional will.¹²³ That much, at least, seems clear from the constitutional command that the President “take Care that the Laws be faithfully executed,” as well as from the exacting prescription for lawmaking in Article I, Section 7.¹²⁴ Between these outer poles lies a

Neuman, *Discretionary Deportation*, *supra* note 119, at 611 (same).

122. See Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 257 (2005) (reviewing HAROLD J. KRENT, *PRESIDENTIAL POWERS* (2005)) (“[T]he president is to carry out his duties the best he can given the constraints of time, resources, and funding. When he does this, he fulfills his constitutional obligations.”); Wadhia, *supra* note 120, at 244–45 (referring to resource constraints and humanitarian concerns as a “two-fold” justification for prosecutorial discretion); Yoo & Delahunty, *supra* note 19, (manuscript at 48) (“Obviously the President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so.”); *id.* (manuscript at 45) (recognizing that “[b]reach of the Executive’s enforcement duty might also be excused based on equitable considerations in an individual case (or a small set of cases)”); see also Love & Garg, *supra* note 19, (manuscript at 19) (noting that it would be illogical to hold the President responsible for inaction that is due to congressional underfunding); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 670 (1985) (stating that the Executive has the appropriate discretion “to set enforcement priorities and allocate resources to those problems . . . that seem most severe”).

123. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring); see also Love & Garg, *supra* note 19, (manuscript at 4–6) (arguing that presidential inaction, via prosecutorial discretion or otherwise, can upset separation of powers when such inaction is in derogation of statutory command); Margulies, *supra* note 19, (manuscript at 4) (arguing that, under Justice Jackson’s schematic in *Youngstown*, DACA cannot be justified as a lawful exercise of prosecutorial discretion); Sunstein, *Reviewing Agency Inaction*, *supra* note 122, at 670 (noting conceptual distinction between exercising discretion to account for resource constraints, on the one hand, and “refusing to carry out obligations that Congress has imposed on the Executive, on the other”); cf. Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 711 (1996–1997) (“The most basic problems of discretion are thus how to define and restrain its abuse without destroying its non-rule-like character, while maintaining its legitimacy within the legal community.”).

124. See Sunstein, *Reviewing Agency Action*, *supra* note 122, at 670 (“Although there will be difficult intermediate cases, the ‘take Care’ clause does not authorize the executive to fail to enforce those laws of which it disapproves.”); Yoo & Delahunty, *supra* note 19, (manuscript at *passim*) (offering contextual and historical support for understanding the “Take Care” Clause as an executive duty); see also *Youngstown*, 343 U.S. at 587–88 (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”); Denning & Ramsey, *supra* note 12, at 827 (“A central tenet of separation-of-powers is that the executive is not a lawmaker.”).

sizable grey area that both hosts and obscures the conceptual line between permissible and impermissible exercises of prosecutorial discretion. Within that grey area—and not always evident on which side of the line—are *systemic* executive polices about how to treat different classes of immigrants or categories of offenses.

It is well beyond my ambition here to develop a comprehensive model to calibrate exactly when prosecutorial discretion breaches the conceptual divide between law execution and lawmaking. (The promise of such a model would likely fail of its own ambition in any event). Still, there may be use here in sketching some intuitive guides.¹²⁵ First, the more broadly or generally a systemic policy applies, the more it takes on the hue of law. The second variable is motivation. More specifically, if the systemic policy owes to a lack of resources, that should factor heavily in favor of permissible discretion. The Executive, after all, may only be expected to enforce the law using the resources legislatively made available. By contrast, if systemic prosecutorial inaction is driven by the Executive's political or ideological preference, it tends to feel and act more like law.

As I began with, this approach is far from complete and hardly satisfying. The variable of scope is necessarily relativistic; i.e., how broad is too broad? Similarly, most exercises of systemic prosecutorial discretion are partly motivated by both resource constraints and reasons of policy, yielding often impenetrable questions of relative degree. More fundamentally, however, even if the Executive *could* accurately and objectively articulate its motivations, it would be naïve to expect a transparent self-assessment in close cases when it matters most. Indeed, what makes prosecutorial discretion so potentially arbitrary is that there is no legal requirement for transparency.¹²⁶

Thus, we are left with an admittedly imperfect framework for discerning the boundaries of permissible enforcement discretion. But the lack of precision is part of the point. My ambition here is only to establish that: (1) there is a conceptual line between using prosecutorial discretion for law execution and lawmaking; (2) certain

125. For other recent attempts, see generally Love & Garg, *supra* note 19, (manuscript at 14–15); Yoo & Delahunty, *supra* note 19.

126. See Strauss, *supra* note 69, at 112 (“[T]he executive is not obliged to express reasons for its choices either to enforce against one person rather than another, or to emphasize one law over another in its allocation of governmental resources.”); Sunstein, *supra* note 122, at 673 (stating that the exercise of prosecutorial discretion “will often be unaccompanied by a record that a court might examine”).

exercises of prosecutorial discretion come closer to that line than others, and indeed, some may cross it; (3) we will not usually know when that line has been crossed; and (4) we should not expect courts to tell us when it has occurred.¹²⁷ In short, without denying the Executive's power of prosecutorial discretion, I wish to emphasize only that the power's existence does not resolve residual uncertainties surrounding all of its uses—especially when those uses are systemic. This residual uncertainty, in turn, will become relevant again later in assessing how federalism norms might accommodate any such failings.¹²⁸

ii. Foreign Affairs

The President's constitutionally recognized role in foreign affairs offers yet another basis for inherent executive power over immigration.¹²⁹ That there is a conceptual nexus between immigration and foreign affairs, however, says nothing about the Executive's authority to make immigration *law*.

The Constitution divides the foreign affairs power, and the bulk of it is vested in Congress.¹³⁰ As pertains to immigration, Congress is vested with the power to establish a “uniform rule of Naturalization,” to regulate foreign commerce, to provide for the common defense, to prohibit the migration and importation of persons, and to make all laws necessary and proper for carrying out those powers.¹³¹ Meanwhile, the Constitution is mostly silent as to the Executive foreign affairs power. The President has the power to make Treaties, but only with the advice and consent of the Senate.¹³² Any executive

127. See Love & Garg, *supra* note 19, (manuscript at 26–30) (observing that existing doctrine and prudential concerns hamstring courts' ability to serve as a meaningful check against presidential inaction); Strauss, *supra* note 69, at 112; cf. Sunstein, *Reviewing Agency Action*, *supra* note 115, at 669–70 (observing that “[r]eluctance to review inaction has traditionally been based in part on a set of considerations counseling against judicial usurpation of the executive function,” but asserting that “if judicial involvement is based on a statutory violation by the executive, review promotes rather than undermines the separation of powers, for it helps to prevent the executive branch from ignoring congressional directives”).

128. See *infra* notes 272–87 and accompanying text.

129. See Gabriel J. Chin, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 264 n.50 (2011) (“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.”).

130. Sarah H. Cleveland, Crosby and the *One Voice Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 984–85 (2001).

131. U.S. CONST. art. I, §§ 8, 18.

132. *Id.* art. II, § 2.

foreign affairs lawmaking authority must thus derive from elsewhere.

Though not expressly enumerated, it is well-settled that the Article II executive power encompasses many significant foreign affairs functions, most notably developing foreign policy, communicating with foreign nations, and making non-treaty international agreements. But to the extent that these functions derive from the Article II “*executive*” power, “there is little basis for saying that it includes *lawmaking* power.”¹³³ Moreover, nothing in the Constitution suggests that the Executive’s shaping of foreign policy may be to the exclusion of Congress. Much less is there a constitutional suggestion that, in matters involving immigration, the Executive can supplant Congress’s will.¹³⁴

* * *

The foregoing discussion identified some potential failings in immigration separation of powers. Again, I do not insist upon any violations. Nor do I expect the courts to so find. Rather, my objectives in highlighting the potential failings are threefold. First, potential breakdown between the political branches offers descriptive context for the subfederal immigration revolution, discussed immediately below (Part II.B). Second, the potential failings along structuralism’s horizontal dimension offer normative thrust to a model that favors “compensating adjustments”¹³⁵ along the vertical dimension (Part

133. Denning & Ramsey, *supra* note 12, at 912.

134. See Cox & Rodriguez, *supra* note 85, at 475 (explaining that executive action without congressional authorization is “in tension with conventional understandings of the separation of powers”); cf. Mary Fan, *Rebellious State Crimmigration Enforcement and the Foreign Affairs Power*, 89 WASH. U. L. REV. 1269, 1273 (2012) (noting that whatever the Executive’s role in foreign affairs, it is “subject to the vicissitudes of Congress”).

135. The idea of compensating adjustments is not new, and takes a number of forms. For discussions and applications, see, for example, Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 135 (describing how moderate changes in circumstance are used to justify increases in the scope of federal power); Peter McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 2 (1994) (describing compensating adjustments as a “form of constitutional damage control”); Cass R. Sunstein, *Constitutionalism After The New Deal*, 101 HARV. L. REV. 421, 421 (1987) (advocating “the commitment to checks and balances through a system of coordinated review of agency action”); Adrian Vermeule, *Hume’s Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421, 422 (2003) (discussing the “second-best idea of compensating adjustments”); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1748–62 (2005) [hereinafter Young, *Making Federalism*] (discussing compensating adjustments and the judicial role in structural cases); see also Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 389 (1997) (discussing the “debilitating indeterminacy problems that compensating adjustments raise”); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2065–67 (2009) (critiquing compensating approaches).

III).¹³⁶ Third, the potential separation of powers failings caution against surrendering to the federal government an immigration monopoly, given the political branches' spotty record on civil liberties in the immigration context and a Court unabashedly willing to defer (Part IV).

B. The Subfederal Immigration Revolution

Part I described the theoretical relationship between separation of powers and federalism. This section provides a complementing practical account; more specifically, it describes how perceived failings in immigration separation of powers have factored into an unprecedented subfederal response.¹³⁷

To be sure, a number of different theories have been proffered to explain the subfederal revolution: some tie it to changing demographic and economic conditions; others to racial bias; and still others to opportunistic politicking.¹³⁸ But, whatever the causal mix, the subfederal immigration revolution is undoubtedly connected to—and principally targeted at—our sizable unlawful population.¹³⁹ And, as described above, that population is largely the product of underenforced immigration laws.

136. Of course, we might also seek to directly attend to the separation of powers issues by drawing sharp(er) distinctions between congressional and executive functions. *See generally* Yoo & Delahunty, *supra* note 19. But, as explained above and further below, it is both too difficult and unlikely that the Court will do so. As explained in Part III, preemption doctrine offers a means for *indirectly* compensating for potential horizontal failings in a less judicially intrusive way.

137. *See generally* Keith Aoki & John Shuford, *Welcome to Amerizona—Immigrants Out!: Assessing “Dystopian Dreams” and “Usable Futures” of Immigration Reform, and Considering Whether “Immigration Regionalism” is an Idea Whose Time has Come*, 38 FORDHAM URB. L.J. 1 (2010) (discussing the unprecedented nature of subfederal immigration activity); Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1674–75 (2011) (“Immigration law is undergoing an unprecedented upheaval.”).

138. *See, e.g.*, Kristina M. Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants’ Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, 14 HARV. LATINO L. REV. 1, 2 (2011) (attributing the subfederal response to racism and xenophobia, particularly against Latinos); Johnson, *Immigration and Civil Rights*, *supra* note 2, at 617 (attributing subfederal movement to changing demographics and racial bias); Rodriguez, *The Significance of the Local*, *supra* note 41, at 594 (describing new migration patterns).

139. *See* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 798 (2008).

The perception that the Executive is either unwilling or unable to enforce the law has led to subfederal concerns for the rule of law.¹⁴⁰ More pragmatically, there are many who fear that lapses in rule-of-law norms will self-perpetuate to generate even more unlawful migration. As David Martin observes, “frustration with visible lawbreaking leads states and local governments to experiment with harsh measures meant to discourage illegal migration.”¹⁴¹

Fiscal concerns are also generally cited by states and localities as a motivating force of restrictionist reforms. The costs of unauthorized immigration are spread unevenly both regionally and vertically among levels of government.¹⁴² Unauthorized immigration imposes costs on public security, transportation, and other local services.¹⁴³ Subfederal governments also must foot the bill for the primary and secondary education of undocumented children, emergency medical care, and the incarceration of undocumented immigrants who commit crimes in their jurisdictions.¹⁴⁴ This is not to deny some economic advantage from unlawful immigration.¹⁴⁵ However, as Peter Schuck explains, a “fiscal mismatch” occurs because most tax revenues generated by legal and illegal immigrants flow to the federal government while almost all of the costs are born at the subfederal

140. See, e.g., Appellants’ Opening Brief at 12, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645) (explaining that Arizona Senate Bill 1070 was enacted against federal “non-enforcement of the federal immigration laws” and the Department of Homeland Security’s alleged “inability (or unwillingness) to enforce the federal immigration laws effectively”); see also Kris Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT’L L. 155, 156–57 (2007) (“Due to ICE’s inadequate manpower, illegal aliens know that the probability of actually encountering federal immigration enforcement officers is very low. In this environment, the rule of law has eroded persistently and pervasively.”).

141. David Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 525, 551 (2007).

142. Huntington, *supra* note 139, at 805; Schuck, *Taking Immigration Federalism Seriously*, *supra* note 93, at 79.

143. Schuck, *supra* note 93, at 79–80.

144. *Id.*

145. For one analysis of the economic benefits of immigration, see Executive Office of the President, Counsel of Economic Advisers, *Immigration’s Economic Impact*, Jun. 20, 2007, available at http://georgewbush-whitehouse.archives.gov/cea/cea_immigration_062007.html (finding that “immigrants not only fuel the Nation’s economic growth, but also have an overall positive effect on the income of native-born workers”). For an account of the economic effects of unlawful immigration, see Gordon H. Hanson, *The Economics and Policy of Illegal Immigration in the United States* (Migration Policy Inst. 2009), available at www.migrationpolicy.org/pubs/Hanson-Dec09.pdf (stating that “despite its faults, illegal immigration has been hugely beneficial to many US employers, often providing benefits that the current legal immigration system does not”).

level.¹⁴⁶ Moreover, the fiscal burdens are not spread equally throughout the nation. Some regions and localities are impacted more than others depending on border proximity, national migration patterns, and regional enforcement priorities.¹⁴⁷

The perception (or fear) that the federal government may be intentionally leveraging the fiscal mismatch only adds fuel to the fire. Subfederal initiatives to recoup costs from the federal government have come up short both politically and judicially.¹⁴⁸ Thus, when efforts at comprehensive immigration reform stalled in Congress about five years ago, subfederal governments rallied to pass regulations that increased enforcement and restricted benefits to unauthorized immigrants.¹⁴⁹

Behind these restrictionist measures is a philosophy of “attrition through enforcement.”¹⁵⁰ The idea is that unlawful immigrants will “self-deport” as the “risks of detention or involuntary removal go up, and the probability of being able to obtain unauthorized employment goes down.”¹⁵¹ The subfederal restrictionist movement is also the platform for two politically-backed messages: the first is an

146. PETER SCHUCK, *UNDERSTANDING AMERICA: THE ANATOMY OF AN EXCEPTIONAL NATION* 350 (2009); *see also* Huntington, *supra* note 139, at 805 (examining the uneven distribution of costs among levels of government).

147. Cunningham-Parmeter, *supra* note 137, at 1708 (noting that the fiscal mismatch “harms some states more than others”).

148. *See* California v. United States, 104 F.3d 1086, 1094 (9th Cir. 1997) (holding that California has no enforceable right to federal reimbursement for the costs involved in incarcerating illegal aliens); Texas v. United States, 106 F.3d 661, 665 (5th Cir. 1997) (finding claims “seeking federal reimbursement [for immigration-related expenses] to be nonjusticiable and lacking in merit”); New Jersey v. United States, 91 F.3d 463, 469 (3d Cir. 1996) (denying New Jersey reimbursement for expenses incurred by the state for educating illegal immigrants); Padavan v. United States, 82 F.3d 23, 28 (2d Cir. 1996) (characterizing as “baseless” New York’s claims that the Federal Government forced the State to incur costs for incarcerating illegal aliens); Chiles v. United States, 69 F.3d 1094, 1097 (11th Cir. 1995) (concluding that Florida’s claims alleging unconstitutional federal coercion with respect to costs associated with illegal aliens to be “nonjusticiable political questions”).

149. For statistical accounts, *see State Laws Related to Immigration and Immigrants*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/immig/state-laws-related-to-immigration-and-immigrants.aspx> (last updated Feb. 22, 2012) (reporting the introduction of more than 7000 state immigration-related bills and the passage of more than 1000 state laws and resolutions); *see also* Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 (2010) (offering more descriptive accounts); Scott A. Gray, Note, *Federalism’s Tug of War: Alabama’s Immigration Law and the Scope of State Power in Immigration*, 64 ALA. L. REV. 155 (2012) (same).

150. *See, e.g.*, S. B. 1070, 50th Leg., 2d Reg. Sess. (Ariz. 2012) (“The legislature declares that the intent of this act is to make attrition through enforcement the public policy . . . to discourage and deter the unlawful entry and presence of aliens . . .”); *see generally* Kobach, *supra* note 140.

151. Kobach, *supra* note 140, at 156.

unwelcoming message directed at unlawful immigrants; the second is a contingently welcoming message directed at the federal government—*fix the problem or we will*.¹⁵²

III. IMMIGRATION STRUCTURALISM

For now, at least, not much has been accomplished at the federal level to fix the problem of unlawful immigration.¹⁵³ At the same time, the federal administration has judicially lobbied to preserve a federal monopoly over immigration enforcement.¹⁵⁴ More specifically, the administration has taken the extraordinary measure of suing to enjoin subfederal restrictionist measures on preemption grounds, arguing that these initiatives are preempted by congressional statutes and/or executive enforcement policies.

The disjunctive “or” was typified in several of the administration’s challenges to Arizona’s S.B. 1070, heard by the Supreme Court in *Arizona v. United States*. More specifically:

- Section 3 of S.B. 1070 makes unlawful the “willful failure to complete or carry an alien registration document . . . in violation of” federal registration laws.¹⁵⁵ The administration argued that this section was field preempted, in part, because the State cannot “claim the right to punish aliens who are not registered but who the Executive Branch has decided not to prosecute based on important

152. See, e.g., Press Release, Speaker Hubbard Responds to Effort to Overturn New Immigration Law (July 8, 2011) (“If the federal government won’t enforce its own laws and protect Alabama, we must protect ourselves.”); Press Release, SC on the Brink of Passing Arizona-Style Illegal Immigration Law (June 21, 2011) (“If Washington refuses to effectively support our law enforcement officers by enforcing immigration laws, it is left up to the states to stand up and do what is right.”).

153. Though deportation levels are reportedly at an all-time high, the 400,000 or so per year that are removed is but a very small fraction of the unlawfully present population. See Dep’t of Homeland Sec., Immigration and Customs Enforcement, Annual Report, Immigration Enforcement Actions: 2011 (Sept. 2012) (providing deportation statistics). It also bears noting that the removal statistics may be inflated as compared to prior years due to variances in the way removals have been counted. See Steven Dinan, *Deportation Statistics Said to be Inflated*, WASH. TIMES (Aug. 23, 2012), <http://www.washingtontimes.com/news/2012/aug/23/deportation-statistics-said-to-be-inflated/>.

154. See, e.g., Brief of Amici Curiae State of Michigan et al. in Support of Defendants-Appellants at 6, *Arizona v. United States*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645) [hereinafter Brief for Michigan] (deploring the Executive Branch’s challenge to Arizona Senate Bill 1070 as seeking to prolong a “regulatory scheme whereby the Executive branch may continue to selectively enforce—or selectively not enforce—the laws enacted by Congress”).

155. ARIZ. REV. STAT. ANN. § 11-1509(A) (West 2013); see also 8 U.S.C.A. §§ 1304(e), 1306(a) (West 2013) (federal registration laws incorporated by reference).

considerations consistent with the INA.”¹⁵⁶ The Court agreed. Though principally focused on Congress’s intent, the Court also endorsed the administration’s enforcement argument, stating that, were Section 3 “to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials . . . determine that prosecution would frustrate federal policies.”¹⁵⁷

- Section 6 of S.B. 1070 provides that a state officer, “without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States.”¹⁵⁸ The federal administration argued that this section was obstacle preempted, in part because it “empowers state and local officers to pursue and detain a person . . . without regard to federal priorities or even specific federal enforcement determinations.”¹⁵⁹ Again, the Court agreed, explaining that the state law “could be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case,” thus “allow[ing] the State to achieve its own immigration policy.”¹⁶⁰
- Section 2(B) of S.B. 1070 requires state officers to make a “reasonable attempt . . . to determine the immigration status” of any person they stop, detain, or arrest on some other non-immigration related basis if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.”¹⁶¹ The administration argued that Section 2(B) was preempted because in every instance it “‘stands as an obstacle to the accomplishment’ of the federal requirement of cooperation and the full effectuation of the enforcement judgment and discretion Congress has vested in the

156. Brief for the United States, *supra* note 31, at 15.

157. *Arizona*, 132 S. Ct. at 2503.

158. ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (West 2013).

159. Brief for the United States, *supra* note 31, at 53.

160. *Arizona*, 132 S. Ct. at 2506.

161. ARIZ. REV. STAT. ANN. § 11-1051(B) (West 2013).

Executive Branch under the INA.”¹⁶² “By insisting indiscriminately on enforcement in all cases,” the administration claimed, Section 2(B) forbids subfederal officers from “adhering to the enforcement judgments and discretion of the federal Executive Branch.”¹⁶³ This time, however, the Court was not convinced.¹⁶⁴ Though the court recognized that Section 2(B) “does not allow state officers to consider federal enforcement priorities in deciding whether to contact ICE about someone they have detained,” this was of little significance since Congress statutorily “encouraged the sharing of information about possible immigration violations.”¹⁶⁵

Of course, there is no dispute that congressional statutes preempt subfederal laws when a sufficient conflict exists. Congress may also statutorily preempt the field of immigration enforcement, should Congress deem it appropriate to do so.¹⁶⁶ But, as I argue in this Part, the very availability of these legislative outlets cautions against allowing nonbinding executive policies to create preemptive conflicts that otherwise may not exist. As reflected above, the *Arizona* Court sent mixed messages on this score and did so without sensitivity to separation of powers norms.¹⁶⁷ The Court’s jurisprudence outside of

162. Brief for the United States, *supra* note 31, at 50 (citations omitted) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also id.* at 16 (stating that the administration welcomes subfederal assistance, “provided that they work ‘cooperat[ively]’ with federal officers toward the goals and priorities set by the Executive Branch, as Congress has specified in the INA itself” (alteration in original) (quoting 8 U.S.C. § 1357(g)(10)(B) (2006))).

163. *Id.*

164. *See generally* David Martin, *Reading Arizona*, 98 VA. L. REV. 41 (2012) (noting a potential inconsistency in the Court’s treatment of the administration’s enforcement-preemption argument). For thoughtful attempts to reconcile the Court’s potentially inconsistent holdings in *Arizona*, *see id.*; Cox, *Enforcement Redundancy*, *supra* note 7, (manuscript at 29–30).

165. *Arizona*, 132 S. Ct. at 2496; *see also* 8 U.S.C.A. § 1644 (West 2013) (instructing that “no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [ICE] information regarding the immigration status, lawful or unlawful, of an alien in the United States.”).

166. Of course, it will not always be clear whether Congress intends exclusive federal enforcement. Still, it can be inferred based on the same tools that courts normally look to in discerning Congress’s intent—e.g., statutory text, context, and legislative history (for those so inclined). *Cf.* *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 352 (2001) (holding that “clear evidence” exists to support the idea that Congress intended for the Medical Devices Amendment to be “enforced exclusively by the Federal Government”); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (reasoning that in order to determine whether or not Congress intends to have exclusive enforcement power over a federal statute, courts must look to the “statute as a whole and identif[y] its purpose and intended effects”).

167. At times the *Arizona* Court stressed *Congress’s* intent, and at other times the

the immigration context suggests a similar ambivalence or inattention to whether nonbinding executive policies can preempt state law.¹⁶⁸ Unsettled questions thus persist over which government institution has the relative power to do what. In addressing that question, this Part argues in favor of an interdimensional approach that utilizes preemption doctrine to directly safeguard federalism and to indirectly safeguard separation of powers.¹⁶⁹

A. Safeguarding Federalism

For better or worse, Congress has not directly responded to the subfederal restrictionist initiatives at the center of the debate. In a recent account, Pratheepan Gulasekaram and Karthick Ramakrishnan attributed this failing mostly to the work of a minority coalition actively seeking to block legislation reform for the very purpose of justifying and normalizing subfederal self-help measures.¹⁷⁰

administration's enforcement priorities. *See supra* notes 155–60 and accompanying text. Justice Alito, in his concurring and dissenting opinion in *Arizona*, rightly distinguished between Congress's and the Executive's policies—making plain that only the former could have preemptive effect. The *Arizona* majority opinion, however, seemed to place little if any weight on this distinction. Posner, *supra* note 110 (observing that the *Arizona* majority found certain provisions of S.B. 1070 preempted, not because it conflicts with federal law, but because it “conflicts with the president's policy”).

168. Compare *Buckman*, 531 U.S. 341 (holding that state-law fraud-on-the-FDA claims were conflict preempted by the Federal Food, Drug, and Cosmetic Act, owing in part to the disruption that such claims would have on the federal administration's enforcement of the Act), with *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994) (rejecting claim that nonbinding executive foreign-commerce policies preempted state law). Since *Buckman* was cited approvingly in *Arizona*, *see Arizona*, 132 S. Ct. at 2502–03, it is worth pausing to consider *Buckman*'s relevance to immigration enforcement preemption. As an initial matter, *Buckman* did not raise or address the type of separation of powers concerns at play in the immigration preemption context because there was no finding that the agency was underenforcing fraud on the agency, much less on a systemic scale. *See generally Buckman*, 531 U.S. 341. In any event, the *Buckman* Court seemed to vacillate between two views. At times the Court stressed how the statutory scheme preempted the state cause of action. *See, e.g., id.* at 352 (finding “clear evidence that Congress intended” that the statutory scheme be “enforced exclusively by the Federal Government” (emphasis added)). At other times, however, the Court suggested that preemption obtained because the state cause of action conflicted with the administration's “responsibility to police fraud consistently with [its] judgment and objectives.” *Id.* at 350. Undoubtedly, both views played a role in the Court's decision. Still, it is unclear whether the finding of conflict with the administration's enforcement discretion would have been sufficient to trigger preemption without also finding that Congress “clearly” intended that discretion to be exclusive. *Id.* at 352.

169. These ideas are also applicable beyond the immigration context, but immigration is my principal focus here.

170. *See generally* Pratheepan Gulasekaram & Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, N.Y.U. L. REV. (forthcoming Dec. 2013) [hereinafter Gulasekaram & Ramakrishnan, *A Reappraisal*]; Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431 (2013) [hereinafter

Be that as it may, Congress has not enacted any *ex post* laws that expressly preempt or save the subfederal regulations at issue.¹⁷¹ In seeking to resolve the putative federal-state conflicts, courts are thus guessing at what Congress may have intended in pre-existing federal statutes.¹⁷² To be sure, this juristic exercise is not unique to immigration; courts are often tasked with reading the tea leaves of Congress's preemptive intent (and a usually fictitious one at that).¹⁷³ The plaguing question, however, is whether special substantive or methodological rules apply—or should apply—in the immigration preemption context. Though the Court has sent mixed signals, the general call from the academy seems to resound in favor of special preemption rules.¹⁷⁴ But, as I argue here, we should insist instead on normalizing the analysis.¹⁷⁵ Special rules in favor of immigration preemption unnecessarily and improvidently threaten the liberty-enhancing values of federalism. This concern is only exacerbated by

Ramakrishnan & Gulasekeram, *The Importance of the Political*].

171. Cf. *Arizona*, 132 S. Ct. at 2501–02 (“[T]here is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision.”).

172. See, e.g., *Arizona*, 132 S. Ct. at 2492; *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).

173. See Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 256 [hereinafter Young, *The Ordinary Diet*] (“[F]requent ambiguities in Congress’s preemptive intent afford the courts an opportunity to be more than just a mouthpiece for federal authority.”); see also Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 277 (2000) (describing judicial attempts at identifying preemptive intent as “imaginative reconstruction”).

174. For a non-exhaustive sampling, see Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579, 580–81 (2009) (arguing that state and local governments should not regulate immigration); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT’L L. 217, 219–20 (1994) (resisting the claim that states should have a greater role than they currently do in regulating immigration); Pham, *supra* note 95, at 967 (arguing “that the immigration power is an exclusively federal power that must be exercised uniformly”); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 500 (2001) [hereinafter Wishnie, *Laboratories of Bigotry*] (arguing that “Congress’s 1996 effort to devolve its federal immigration power is constitutionally impermissible”). For a minority but growing academic position in favor of normalizing immigration federalism, see generally Huntington, *supra* note 139 (challenging the constitutional mandate of federal exclusivity over immigration); Rodriguez, *The Significance of the Local*, *supra* note 41, at 571 (arguing that “immigration regulation should be included in the list of quintessentially state interests”); Schuck, *Taking Immigration Federalism Seriously*, *supra* note 93 (making the case for a more robust role for states, in certain areas of immigration policy); Peter J. Spiro, *In an Era of Demi-Sovereignities*, 35 VA. J. INT’L L. 121 (1994) [hereinafter Spiro, *Demi-Sovereignities*] (arguing that the presumption of federal control over immigration no longer prevails).

175. For related projects in normalizing immigration federalism, see, for example, Rodriguez, *The Significance of the Local*, *supra* note 41; Huntington, *supra* note 139.

the potential failings in separation of powers outlined in Part II.

As Ernest Young explains, “the enumerated limits of Congress’s powers now play an extremely limited role in preserving the federal balance.”¹⁷⁶ Congress is generally free to regulate almost all aspects of daily life, resulting in a federalist system predominantly characterized by concurrent federal-state jurisdiction.¹⁷⁷ The Supremacy Clause is the principal instrument for managing that regulatory overlap, where the federalism inquiry shifts from what “Congress *can* do” to what “Congress *has* done.”¹⁷⁸ Enormous structural pressure thus comes to bear on preemption doctrine. The less forgiving the doctrine is for conflicts, the more states are squeezed of regulatory autonomy. In turn, as the states’ autonomy deflates, so too does their capacity to check and counterbalance federal action. Because preemption doctrine may be federalism’s last viable stronghold,¹⁷⁹ Professor Young suggests approaching preemption questions in “ways that cohere with the broader concerns of constitutional federalism doctrine.”¹⁸⁰

These ideas translate in important ways for the ongoing subfederal immigration revolution. Insofar as the Court’s federalism doctrine has relegated state protection to the federal lawmaking process, it becomes all the more “critical that the Court fashion meaningful limits [1] on the preemptive scope of the legislation that Congress does enact and [2] on the ability of nonlegislative federal actors to extend that scope.”¹⁸¹ Yet, in the immigration context, precisely the opposite threatens to take hold: Federal statutes are

176. Young, *The Ordinary Diet*, *supra* note 173, at 306.

177. William W. Buzbee, *Federalism Floors, Ceilings, and the Benefits of Federalism’s Institutional Diversity*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION* 98, 101 (William W. Buzbee ed., 2008) (“Congress has repeatedly chosen to create regulatory schemes that call on a role for federal, state, and sometimes even local governments.”); Robert Schapiro, *From Dualism To Polyphony*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION* 33, 41 (William W. Buzbee ed., 2008) (“Since 1937, overlapping state and federal regulation has become the norm, for many, if not most, subjects.”).

178. Young, *The Ordinary Diet*, *supra* note 173, at 321; *see also* Young, *Executive Preemption*, *supra* note 12, at 873 (“Preemption doctrine is a particularly important vehicle for promoting balance between national and state authority.”).

179. Young, *The Ordinary Diet*, *supra* note 173, at 306; *see also* Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 513 (2010) (“[P]reemption may be the most important issue for modern federalism theory because it reallocates regulatory authority between the national and state governments.”).

180. Young, *The Ordinary Diet*, *supra* note 173, at 306.

181. *Id.* at 280.

expansively read to preempt state law, while nonlegislative executive policies are recognized as a conflict-generating preemptive source. Though this Article is mostly focused on executive preemption, the discussion below detours to contextualize that issue within immigration preemption doctrine more generally.

1. Federal Exclusivity Principle

It is now quite settled that the immigration power is exclusively federal. Yet nothing in the Constitution expressly says so.¹⁸² Indeed, our country's first hundred years was characterized by state (*not* federal) immigration regulation.¹⁸³ It was not until the close of the Nineteenth Century that federal exclusivity began to take hold in the field.¹⁸⁴ Still—and critically—the exclusivity of the federal immigration power is definitionally contingent under existing Court precedent. Specifically, the Court has narrowly defined “immigration” laws to encompass regulations governing the admission and expulsion of noncitizens.¹⁸⁵ Meanwhile, beyond those regulatory categories, federal and subfederal governments share concurrent authority over matters of “alienage,”¹⁸⁶ which are residually defined as laws that touch upon noncitizens but do not amount to “immigration.”¹⁸⁷ Alienage laws are generally directed at the rights and burdens of noncitizens within the country's interior. Common examples include

182. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 81–83 (2002) (noting that “[t]he constitutional text does not expressly address authority to regulate immigration”); Huntington, *supra* note 139, at 812 (outlining the *implied* sources of the constitutional power); Rodriguez, *The Significance of the Local*, *supra* note 41, at 611 (“Nowhere in the Constitution is the federal government explicitly given exclusive power over immigration.”).

183. See, e.g., Gerald L. Neuman, *The Lost Century of American Immigration Law*, 93 COLUM. L. REV. 1833 (1993) [hereinafter Neuman, *The Lost Century*] (investigating pre-1875 immigration regulation).

184. See *id.* at 1886–93 (discussing the emergence of federal exclusivity in the field of immigration).

185. See, e.g., *Galvan v. Press*, 347 U.S. 522, 531 (1954) (“Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . .”); *Truax v. Raich*, 239 U.S. 33, 42 (1915) (“The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government.” (citations omitted)); see also *DeCanas v. Bica*, 424 U.S. 351, 355 (1976) (defining immigration law per se as “a determination of who should or should not be admitted into the country”).

186. See, e.g., Huntington, *supra* note 139, at 799 (“[S]tates and localities have some authority to enact alienage laws . . .”).

187. See, e.g., Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration through Criminal Law*, 61 DUKE L.J. 251, 259–61, 263–64, 269 (2012) (defining “alienage” in opposition to “immigration”).

noncitizens' eligibility for social welfare programs and selected occupations, limitations on noncitizens' ability to own land, and noncitizen tax liabilities.¹⁸⁸

The conceptual divide between “immigration” and “alienage” laws generates two levels of sorting, both central to preemption. The first sorting involves the placement of subfederal regulations into the “immigration” or “alienage” bucket. Those falling in the former are thought to be constitutionally (or, “structurally”) preempted under the exclusivity principle.¹⁸⁹ Meanwhile, those falling in the alienage bucket are subject to the more conventional conflict-sorting work of the preemption doctrine.¹⁹⁰ Notorious complications attend both sorting functions.

In regard to structural preemption, the conceptual divide between immigration and alienage laws is obscured in application. As explained by Cristina Rodriguez, “alienage classifications shade into immigration controls” insofar as subfederal policies that “dole out relatively negative or positive treatment” to noncitizens can influence migration decisions both nationally and subnationally.¹⁹¹ As similarly articulated by Adam Cox, “every rule that imposes duties on noncitizens . . . potentially influences noncitizens' decisions about whether to enter or depart the United States . . . and potentially influences the way in which resident noncitizens live.”¹⁹² Many of the subfederal revolutionary laws at issue highlight this tension: Restrictionist laws embodying the “attrition-through-enforcement” philosophy are purposefully designed to encourage the self-deportation of unauthorized immigrants; meanwhile, subfederal protectionist laws that provide sanctuary and benefits to immigrants offer a sense of welcome.¹⁹³ Thus, though potentially dispositive,

188. See Legomsky, *Immigration Law*, *supra* note 81, at 256 (describing alienage laws); see generally A. PETER MUTHARIKA, *THE ALIEN UNDER AMERICAN LAW* (1981) (2 vols.).

189. See Huntington, *supra* note 139, at 813–14 (discussing structural preemption).

190. Chin & Miller, *supra* note 187, at 261.

191. Rodriguez, *The Significance of the Local*, *supra* note 41, at 618.

192. Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 343 (2008).

193. See Rodriguez, *The Significance of the Local*, *supra* note 41, at 618; see also Anil Kalhan, *Immigration Enforcement and Federalism After Sept. 11, 2001*, in *IMMIGRATION, INTEGRATION, AND SECURITY: AMERICA AND EUROPE IN COMPARATIVE PERSPECTIVE* 181, 183 (Ariane Chebel d'Appollonia & Simon Reich eds., 2008) (observing that “non-U.S. citizens are seeking and finding protection in state capitols and city halls” and that “[i]n some instances they are finding greater concern for rights and liberties in these locales than they have in Washington”).

characterizing subfederal regulations as either “immigration” or “alienage” is frustrated by the very nature of the inquiry and by the inescapable truth that subfederal regulations are usually a bit of both.¹⁹⁴

For regulations directed at unlawful immigrants, the Supreme Court has generally resolved doubts over this threshold sorting function in favor of the states.¹⁹⁵ For example, in the landmark case *DeCanas v. Bica*,¹⁹⁶ the Court upheld a California state law that criminalized the hiring of unauthorized immigrants.¹⁹⁷ Though the Court noted that the “power to regulate immigration is unquestionably” an exclusive federal power, it also explained that a state law’s “purely speculative and indirect impact on immigration” does not render it “a constitutionally proscribed regulation of immigration.”¹⁹⁸ And, more recently in *Arizona and Chamber of Commerce v. Whiting*,¹⁹⁹ the Court functionally reinforced this principle when it treated Arizona’s restrictionist regulations as alienage laws notwithstanding the incidental migration effects these laws likely have on noncitizens.²⁰⁰ Indeed, the Court in *Arizona* approached S.B. 1070 as alienage law notwithstanding the bill’s legislatively expressed intent to make self-deportation the “public policy of all state and local government agencies in Arizona.”²⁰¹

194. See Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1053–57 (1994) (“[T]o characterize the law [as either immigration or alienage] is to beg the question”); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT’L L. 201, 203 (1994) (arguing that a distinction between immigration law and alienage law is “more formal than real” because of the overlap in practice).

195. For subfederal regulations impacting *lawfully* present immigrants, the Court seems to be far less deferential to states—so much so that it is probably fair to imply a presumption against the states. See *Toll v. Moreno*, 458 U.S. 1, 10–11 (1982) (finding preemption and holding invalid the University of Maryland’s policy of denying in-state status to non-immigrant aliens who hold valid G-4 visas); *Graham v. Richardson*, 403 U.S. 365, 376–80 (1971) (holding that state policies that deny welfare benefits to lawfully present resident aliens encroach on exclusive federal power over the entrance and residence of aliens); *Traux v. Raich*, 239 U.S. 33, 37 (1915) (finding an Arizona statute imposing limits on the employment of lawful residents to be preempted by federal law).

196. 424 U.S. 351 (1975).

197. See generally *id.*

198. *Id.* at 355–56.

199. 131 S. Ct. 1968 (2011).

200. See generally *Arizona v. United States*, 132 S. Ct. 2492 (2012); *Whiting*, 131 S. Ct. 1968.

201. S.B. 1070, § 1, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (“The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona.”).

2. Curbing the Shadow of Federal Exclusivity

To the extent that subfederal laws are sorted into the alienage bucket, the next sorting function determines whether—in the zone of concurrent federal-state jurisdiction—subfederal laws are trumped or displaced by conflicting federal law. This sorting provides an opportunity for conventional applications of the preemption doctrine. Yet here, the exclusivity principle continues to cast a shadow.²⁰²

A strong commitment to federal exclusivity over immigration leads to heavy doses of skepticism toward any subfederal restrictionist measure relating to noncitizens.²⁰³ That is because, as noted, almost all such laws impact migration decisions at some level.²⁰⁴ This skepticism, in turn, has led some courts and commentators to “place a thumb on the scale in favor of preemption.”²⁰⁵ The shadow of exclusivity also makes obstacle and field preemption more capacious.²⁰⁶ Further, the exclusivity principle tends to obscure the

202. See Chin & Miller, *supra* note 187, at 259–60, 274–76; Huntington, *supra* note 139, at 792 (“[C]oncluding that the Constitution precludes state and local authority over pure immigration law casts a long shadow on any state or local conduct concerning immigration, even conduct that falls short of pure immigration law.”); Rodriguez, *The Significance of the Local*, *supra* note 41, at 62. This shadowing effect was typified most recently in *United States v. Alabama*, 691 F.3d 1269, 1294 (11th Cir. 2012) (characterizing Alabama as seeking to exercise “expulsion power” through a provision of its immigration law). Kerry Abrams also suggests that this dynamic was at play in *Arizona* in a way that allowed the Court to avoid “the thorny question of the scope of the Executive’s power in the immigration context.” See Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 606 (2013).

203. See Huntington, *supra* note 139, at 826 (“If we think authority over pure immigration law is structurally committed to the federal government alone, then we are deeply skeptical of any state and local conduct related to immigration and aliens . . .”).

204. See *supra* note 191 and accompanying text.

205. See Rodriguez, *The Significance of the Local*, *supra* note 41, at 621 (noting, but arguing against, that approach). For thumb-on-the-scale approaches, see, for example, Ingrid v. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1783–84 (2011) (arguing that Arizona is functionally regulating immigration law and policy); Fan, *supra* note 134, at 1273, 1275, 1277; Hiroshi Motomura, *The Discretion that Matters*, *supra* note 120, at 1858 (“For the purpose of preemption analysis, it is essential to recognize that the practical consequences of a state or local decision to arrest a potentially removable noncitizen is the making of immigration law itself.”); see also Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, NOMOS LIV: LIBERTY (forthcoming) (manuscript at 34) (on file with the author) [hereinafter Young, *The Puzzling Persistence*] (noting that the Court in *Arizona* “stressed ordinary preemption principles, not doctrines of federal exclusivity, although it does seem fair to say that the Court applied those doctrines with a pro-preemption thumb on the scale”).

206. See Rodriguez, *The Significance of the Local*, *supra* note 41, at 621 (“Because it has become so enmeshed in the courts’ doctrinal rhetoric, exclusivity has given rise to very strong versions of obstacle and field preemption according to which states are not regarded as having meaningful interests in controlling immigration.”); see also *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012) (holding that three sections of S.B. 1070 were likely preempted). *But cf.*

Supremacy Clause’s limiting prescriptions. Many—including the federal administration—suggest that the Executive’s enforcement discretion can itself suffice to preempt state law or may otherwise shape *ex post* the preemptive scope of congressional enactments.²⁰⁷ The cumulative effect is (1) a type of presumption in favor of preemption; (2) a Court less tolerant of federal-state conflict; and (3) an expansion of the types of conflicts (to wit, nonbinding executive policies) that will count toward preemption.

For those that favor a subfederal immigration role, one possible doctrinal response to the shadowing effect of the exclusivity principle is to eviscerate exclusivity itself.²⁰⁸ That is, for any number of related reasons, we might simply take a sledgehammer to the exclusivity canon. First, the Constitution does not obviously require federal exclusivity; indeed, both the federal and state levels of government acted otherwise for the first century of our history.²⁰⁹ Second, the exclusivity principle was conceived in an era when there was a “perceived need to have a single, strong sovereign manage foreign affairs.”²¹⁰ But as Peter Spiro and others have argued, the foreign affairs rationale for exclusivity is a historically contingent artifact with far less purchase today.²¹¹ Third, exclusivity is not functionally

Whiting, 131 S. Ct. at 1985 (upholding LAWA, and noting that “implied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives” (citations omitted) (internal quotation marks omitted)).

207. See, e.g., Chin & Miller, *supra* note 187, at 260; Fan, *supra* note 134, at 1272–73; Pham, *supra* note 95, at 967–68.

208. See Rodriguez, *The Significance of the Local*, *supra* note 41, at 572–73 (“Federal exclusivity was neither a matter of original practice, nor is it specified in the Constitution.”); see also Huntington, *supra* note 139, at 794 (“Although conventional wisdom embraces a structural preemption view of federal immigration authority, the text of the Constitution, the institutions created by the Constitution, and historical practice all support a statutory preemption view.”); Spiro, *Demi-Sovereignities*, *supra* note 174, at 155 (arguing that exclusivity is no longer necessary in a world where subfederal actors are gaining increased recognition).

209. Rodriguez, *The Significance of the Local*, *supra* note 41, at 572, 611.

210. *Id.* at 572.

211. See, e.g., Spiro, *Demi-Sovereignities*, *supra* note 174, at 134 (“To the extent that foreign relations no longer remains an exclusive federal responsibility, the states should be afforded substantially greater latitude to deal with illegal immigration as a local problem.”); *id.* at 171 (“Subfederal activity in the area [of immigration], however, is no longer likely to compromise national interests.”); Young, *The Puzzling Persistence*, *supra* note 205, at 44 (“The persistent nostalgia for exclusive zones of national power over areas like foreign affairs or immigration, then, remains puzzling.”). For similar expressions not addressed directly at immigration, see, for example, Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1674 (1997) (“To the extent that central governments are unable or unwilling to redress local needs and interests, state and local governments have been doing so unilaterally in both the economic and political realms.”); Julian Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2414 (2006) (describing “an emerging system of gubernatorial foreign policy characterized

necessary.²¹² Canada and Germany, for example, allow their respective subnational units to control certain aspects of immigration.²¹³ Fourth, our existing regulatory landscape eschews federal exclusivity: Congress increasingly devolves immigration-related authority to subfederal governments and subfederal governments increasingly regulate the affairs of noncitizens.²¹⁴ Finally—and most critically—abandoning the exclusivity principle would not absolve the federal government of its primacy in immigration. Congress can always trump or displace subfederal law as it deems appropriate to do so.²¹⁵

In my estimation, this is a formidable assault that well serves the ultimate objective of safeguarding federalism. But completely discarding the exclusivity principle may be unnecessarily ambitious. In the words of the Court, exclusive federal control over immigration “has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.”²¹⁶ My approach here is thus more tailored and modest: it honors the principle of exclusivity but limits its gravitational reach. The reasons outlined above for abolishing exclusivity work equally well for this more limited purpose, without upsetting foundational precedent.

by governors exercising independent decision-making power over matters affecting the foreign policy of the entire United States”); *see also, e.g.*, Brian Hocking, *Introduction to FOREIGN RELATIONS AND FEDERAL STATES* 1, 3 (Brian Hocking ed., 1993) (“The notion of a hierarchy of political authority, with central government acting as the effective gatekeeper between national communities and their international environment, is outdated” because of “changes in the domestic and international environments.”).

212. *See* Huntington, *supra* note 139, at 816 (“[T]he institutional structure of the Constitution does not require federal exclusivity, as a functional matter.”).

213. Neuman, *The Lost Century*, *supra* note 183, at 1840 n.34 (observing that federal exclusivity “is neither natural nor inevitable in United States federalism or in federalism generally, as illustrated by Canada and Germany, where federal sub-units still have immigration responsibilities”); Spiro, *Demi-Sovereignities*, *supra* note 174, at 122 (arguing that federal exclusivity “is not a structural necessity” for the purposes of foreign relations).

214. Stumpf, *supra* note 84, at 1600–13 (discussing how congressional devolution to states has loosened the federal grip on exclusivity); *see also* Rodriguez, *The Significance of the Local*, *supra* note 41, at 610 (asserting that the contemporary practice of states undermines the notion of federal exclusivity).

215. Huntington, *supra* note 139, at 792; Rodriguez, *The Significance of the Local*, *supra* note 41, at 572, 620; Spiro, *Demi-Sovereignities*, *supra* note 174, at 123.

216. *Galvan v. Press*, 347 U.S. 522, 531 (1954).

a. Presumption in Favor of Preemption?

As noted, one shadowing effect of the exclusivity principle is that it might place a thumb on the scale in favor of preemption when Congress's intent is unspecified or ambiguous.²¹⁷ This approach finds theoretical support in the idea that Congress legislates against the backdrop of exclusivity, and thus presumptively intends to displace subfederal law in the absence of countervailing evidence.²¹⁸ As Viet Dinh explains, “[t]he background context against which Congress legislates may change in ways that make federal displacement of state law not an extraordinary but an expected action.”²¹⁹

In the immigration context, however, the exclusivity principle is both empirically and normatively suspect as a background legislative convention. First, as noted, Congress has increasingly devolved power to the states to cooperate in immigration enforcement²²⁰ and to make localized decisions about welfare rights and benefits.²²¹ Moreover, Congress has increasingly incorporated state crime and punishment as grounds for excluding and deporting noncitizens.²²² This legislative behavior undermines any empirical claim that Congress believes (or intends) that the power to regulate immigrants is invariably federal.

217. See Rodriguez, *The Significance of the Local*, *supra* note 41, at 621 (“[T]he availability of constitutional preemption, and its statutory corollary of field preemption, leads courts to define conflict between state and federal laws broadly and to put a thumb on the scale in favor of preemption.”).

218. *Id.* at 623; see also Ramakrishnan & Gulasekaram, *The Importance of the Political*, *supra* note 170, at 1442 (“[I]n the case of immigration policy, the status quo of legislative inaction is not the same as having a blank policy slate on immigration.”).

219. Dinh, *supra* note 65, at 2101.

220. See 8 U.S.C.A. § 1357(g) (West 2013) (specifying immigration enforcement functions that may be delegated to subfederal officials).

221. See Balanced Budget Act of 1997, Pub. L. No. 105-33, §§ 5301-04, 5306, 5562-63, 111 Stat. 251 (1997); see also Stumpf, *supra* note 84, at 1586 (discussing the devolution of “federal power to the states to deny benefits to immigrants”).

222. See Stumpf, *supra* note 84, at 1593 (explaining how “state statutory definitions of crime play a major part in determining whether a federal deportability ground will apply to a conviction”). For some of the federal law’s expansion of crime-related grounds for deportation, see Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277-78 (codified as amended at 8 U.S.C. § 1101(a)(43) (2000)) (expanding “aggravated felony” to include certain non-violent crimes); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320-22 (codified as amended at 8 U.S.C. § 1101(a)(43) (2000)) (expanding “aggravated felony” definition to include certain lesser crimes); Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048 (codified as amended at 8 U.S.C. § 1101(a)(43) (2000)) (amending definition of “aggravated felony” to include a “crime of violence”); Anti-Drug Abuse Act of 1988 (Drug Kingpin Act), Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469-70 (codified as amended at 8 U.S.C. § 1101(a)(43) (2000)) (defining “aggravated felony” deportation grounds to include crimes of murder, drug trafficking, and firearms trafficking).

In any event, it is quite beside the point whether Congress actually legislates with the exclusivity principle in mind, or even whether for normative reasons we should presume Congress to be doing so. An affirmative answer to either suggestion would only establish that Congress intends to preempt state *immigration* laws—i.e., laws concerning the admission and expulsion of noncitizens—which is the outer limit of the Court’s exclusivity principle.²²³ As a background legislative convention, therefore, the exclusivity principle should do no additional work beyond what it affords during the first sorting function of structural preemption.

Both empirically and normatively, it would seem that if any interpretive canon is to apply in the zone of concurrent jurisdiction it should be the conventional presumption *against* preemption—a judicially described “cornerstone” of federalism in effect during the enactment periods of the immigration statutes at issue.²²⁴ The effect of the anti-preemption presumption resolves doubts about Congress’s intent in favor of the states, thus placing a greater burden on Congress to actually decide issues of preemption.²²⁵ Though not speaking to immigration in particular, Professor Clark argues that the canon’s effect of channeling preemption decisions to Congress—and away from the courts—is consistent with, if not required by, the Supremacy Clause.²²⁶ Roderick Hills also defends the canon on normative grounds, explaining how the anti-preemption presumption serves to effectuate “an open and vigorous [preemption] debate on the floor of

223. See *supra* notes 185–87 and accompanying text (discussing the scope of the exclusivity principle).

224. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (noting that there is a presumption against federal preemption of state laws unless “that was the clear and manifest purpose of Congress” (citations omitted)); see also *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (describing the presumption as a “cornerstone[] of our pre-emption jurisprudence”). *But cf.* *Dinh*, *supra* note 65, at 2096 (arguing that the “constitutional text, structure, and history does not support the application of the [presumption] in all contexts”); Nelson, *supra* note 173, at 291 (noting that it would be improper for courts to apply an “artificial presumption against preemption” to constrain “federal statutory provisions that plainly do manifest an inten[t] to supplant state law” (alteration in original) (internal quotation marks omitted)).

225. See, e.g., Young, *The Ordinary Diet*, *supra* note 173, at 275 (describing the presumption against preemption as a “thumb on the scale representing the value of state autonomy”); see also Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 *YALE L.J.* 2, 36 (2008) (describing how clear-statement rules enforce constitutional values by increasing the enactment costs of particular types of legislation).

226. See Clark, *Separation of Powers*, *supra* note 12, at 1427–29 (claiming that the clear-statement requirement essentially requires Congress to decide preemption questions).

Congress.”²²⁷ William Eskridge favors the presumption because it offsets delegation pathologies generated by the cumbersome legislative process.²²⁸ Meanwhile, Professor Young endorses the anti-preemption presumption as a “compensating adjustment” for federalism, to help offset the Court’s general reluctance to police or limit the bounds of federal power.²²⁹

My theory of immigration structuralism builds on these ideas to explain why the anti-preemption presumption should apply in the immigration context (or, at least why a presumption in favor of preemption should not). In particular, the anti-preemption presumption offers a type of compensating adjustment not only for federalism, but also for potential failings along the separation of powers dimension. As explained in Part II, the Executive’s capacious policymaking discretion over the sizable undocumented immigrant population arises from Congress’s de facto delegation.²³⁰ It is a phenomenon of immigration governance that is virtually immune from judicial policing under existing separation of powers doctrine.²³¹ And, indeed, there may be much to fear from an overly meddlesome court on this horizontal power-sharing issue.²³² Thus, rather than insist upon direct separation of powers judicial review, we might seek refuge in an anti-preemption presumption, which operates vertically to help maintain a check on federal overreaching. A presumption in favor of preemption, by contrast, makes preemption of subfederal law too easy. Given the judicial concessions already made on separation of powers issues (most notably, the nondelegation doctrine) and on federalism (most notably, the demise of dual federalism and the enumerated powers doctrine), it seems dangerous to invite further

227. Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 28 (2007) [hereinafter Hills, *Against Preemption*].

228. William Eskridge, Jr., *Vetogates*, *Chevron*, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1470–71 (2008).

229. Ernest A. Young, *Making Federalism*, *supra* note 135, at 1848–50.

230. *See supra* notes 99–118 and accompanying text (discussing immigration separation of powers as between Congress and the Executive).

231. *Cf. Cox & Rodriguez*, *supra* note 85, at 538 (“[D]isciplining prosecutorial discretion through the courts is extremely difficult. Add to this general difficulty the plenary power tradition and courts’ general reluctance to step into anything connected to foreign affairs, and this sort of correction seems even less likely.”); *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489–92 (1999) (rejecting a claim of selective immigration prosecution and noting the particular difficulties with “inwad[ing] a special province of the Executive” over its prosecutorial discretion).

232. *Cf. Heckler v. Chaney*, 420 U.S. 821, 831–32 (1985) (explaining how the courts are ill-equipped to discern inappropriate uses of prosecutorial discretion).

recessions for preemption, which may be federalism's most promising salvage.

Outwardly, at least, the Court has rejected the bait for a presumption in favor of immigration preemption. In *Arizona*, for example, the Court affirmatively noted that it would not assume that “the historic police powers of the States’ [were] superseded ‘unless that was the clear and manifest purpose of Congress.’”²³³ Of course, the doctrinal dissonance surrounding the anti-preemption presumption is well-recognized: When it comes to applying the canon, what the Court says is not necessarily (or even usually) what the Court does.²³⁴ Even if that is the case, there remains some conceptual distance to travel between an underenforced presumption against preemption, on the one hand, and a presumption in favor of preemption, on the other. The anti-preemption presumption, although underenforced, offers some conceptual drag, and acts as a reminder that Congress is the primary institution for making preemption decisions.

b. Executive Immigration “Law”?

The shadowing effect of federal exclusivity also leads to fundamental misconceptions about the Executive's authority to preempt state law. Two related ideas feed the confusion. The first idea conceives of federal enforcement discretion as the yin to the legislative yang—together inextricably forming our operational “immigration law.” Under this view, “the discretion inherent in the federal immigration scheme . . . is as much a part of the law of immigration as the relevant statutory text.”²³⁵ This idea was reflected

233. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); see also *DeCanas v. Bica* 424 U.S. 351, 357 (1976) (requiring a showing that Congress had a “clear and manifest purpose” to preempt state regulation). In *Whiting*, the Court did not expressly mention the presumption against preemption, but concluded that petitioners had not met their burden of meeting the “high threshold” necessary for implied conflict preemption. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1980 (2011).

234. See, e.g., S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 733 (1991) (describing the Court's approach to the presumption as “fickle”); Thomas W. Merrill, *supra* note 69, at 741 (remarking that “the presumption against preemption is honored as much in the breach as in observance”). Indeed, in *Arizona*, Justice Alito criticized the majority's failure to give expression to the anti-preemption presumption in its treatment of Section 5(C) of S.B. 1070. *Arizona*, 132 S. Ct. at 2530 (Alito, J., concurring in part and dissenting in part).

235. Chin & Miller, *supra* note 187, at 260; see also Fan, *supra* note 134, at 1272 (“Executive enforcement policy play[s] a crucial role in shaping the law in reality.”); Motomura, *Immigration*

in *Arizona*, where the Court noted that a “principal feature of the removal system is the broad discretion exercised by immigration officials.”²³⁶ The second idea stresses federal exclusivity over foreign affairs, in which the Executive’s enforcement decisions are thought to play an essential part.²³⁷ This idea also found expression in *Arizona*, where the Court noted that the “dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation’s foreign policy.”²³⁸

Although these expressions harbor elements of truth, neither supports an executive power to preempt subfederal law. Understanding why requires appreciation for the critical distinctions drawn in the Supremacy Clause. Apart from the Constitution itself, only “Laws” made pursuant thereof and “Treaties” can preempt state law.²³⁹

Nonbinding executive enforcement policies do not neatly qualify as “Laws,” much less are they made “in pursuance of” the Constitution. That the phrase “Laws . . . made in pursuance [of the Constitution]” was intended to refer to *statutes* seems abundantly clear not only from the context in which the phrase appears, but also from its drafting history. Before being revised by the Committee of Detail, the phrase in question read: “*The Acts of the Legislature* of the United States made in pursuance of this Constitution . . . shall be the Supreme law of the several States.”²⁴⁰ Absent any indication to the contrary, there is no reason to believe that the change from “Acts of

Outside the Law, *supra* note 5, at 2064 (“[D]iscretion seems unusually important in immigration law, because unlawful immigrant activity enjoys acceptance in many circles, and because rates of investigation, detection, apprehension, and prosecution are extremely low.”).

236. *Arizona*, 132 S. Ct. at 2499.

237. *See* Fan, *supra* note 134, at 1272 (“Executive discretion balances sensitive foreign affairs considerations that the constitutional structure entrusts to the national executive.”); *see also* Zschernig v. Miller, 389 U.S. 429, 432 (1968) (explaining that the federal government has exclusive power over foreign affairs); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–21 (1936) (discussing the President’s role in foreign affairs); Pham, *supra* note 95, at 968 (“[T]he immigration power must be exercised uniformly because of the need for the nation to speak with one voice on foreign policy matters.”); *cf.* Stumpf, *supra* note 84, at 1565 (“When courts perceive the subnational effort as a regulation of foreign policy, the space for local regulation narrows.”).

238. *Arizona*, 132 S. Ct. at 2499.

239. U.S. CONST. art. VI.

240. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 183 (Max Farrand ed., 2d. ed. 1937) (emphasis added).

the Legislature” to “Laws” was anything other than stylistic.²⁴¹

To be sure, as both Peter Strauss and Thomas Merrill propose, we might capitalize on the Committee’s drafting edit to accommodate more liberal interpretations of what qualifies as “Laws . . . made in pursuance [of the Constitution].”²⁴² But, as even they concede, doing so would have to be for functional reasons²⁴³ that in my estimation (and maybe even theirs) are not justified for nonbinding executive policies.²⁴⁴ It is a truism that the Framers did not foresee our modern government, and for that reason we might rightly be skeptical of committing ourselves to their original intent. Still, however, we should resist a reductionist approach that would include *all* federal action within the scope of the Supremacy Clause simply because the Court, for functional reasons, has deemed it appropriate to include *some* types of unconventional lawmaking within the Clause’s ambit.²⁴⁵

Perhaps a stronger case for executive preemption could be made if the enforcement policies at issue were more Law-like; that is, if they were binding in the way that Laws are.²⁴⁶ In other contexts, the Court—albeit without any real analysis—has recognized the preemptive effect of agency regulations that have the “force of law.”²⁴⁷

241. Clark, *Separation of Powers*, *supra* note 12, at 1354–55.

242. Merrill, *supra* note 69, at 761–64 (favoring a functional interpretation of the Supremacy Clause that would allow for administrative preemption under certain limited circumstances, that would seem to exclude nonbinding executive action); Strauss, *The Perils of Theory*, *supra* note 69, at 1574 (“Whatever the drafters’ theoretical expectations may have been . . . the passage of time has overcome them.”).

243. Merrill, *supra* note 69, at 762; Strauss, *The Perils of Theory*, *supra* note 69, at 1597–99.

244. I also do not think that administrative regulations should qualify for preemptive effect, *see* Rubenstein, *supra* note 64, at 1190–91 (rejecting the view that Congress can delegate supremacy as a matter of Constitutional Law and challenging the notion that administrative supremacy is functionally necessary or desirable), but my focus here on nonbinding executive policies is more narrow.

245. *Cf.* Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 2010–12 (2008) (arguing in favor of the preemptive effect of *binding* administrative rules that have traversed the notice-and-comment process and that are subject to careful judicial review); Merrill, *supra* note 69, at 761–64 (favoring a functional interpretation of the Supremacy Clause that would allow for administrative preemption under certain limited circumstances, which would seem to exclude nonbinding executive action).

246. *Cf.* Merrill, *supra* note 69, at 763 (“Laws,” as the term is used in the Supremacy Clause, “must refer, at a minimum, to explicit or implicit rules that *bind* the future exercise[s] of government authority.” (emphasis added)).

247. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 864–65 (2000) (holding that the Federal Motor Vehicle Safety Standard promulgated by the Department of Transportation preempted state tort action); City of New York v. FCC, 486 U.S. 57, 65 (1988) (holding that the FCC’s technical standards preempted any state standards); Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 159 (1982) (“Thus, we conclude that the [Federal Home Loan Bank]

The Executive's enforcement priorities, however, do not fit even this modified version of preemption.²⁴⁸ In fact, the Executive has ardently disclaimed that its enforcement policies have binding effect.²⁴⁹ The reason is plain: The administration does not wish to invite or entertain legal challenges when it departs from its general priorities in individual cases.

Of course, the administration's position that subfederal governments are legally bound, but that the federal government is not cuts sharply against the grain of a nation built on law. Indeed, the Supremacy Clause works to prevent this very asymmetry through the structural paradox I introduced earlier: executive enforcement policies cannot both be Laws and not be Laws at the same time.²⁵⁰ By constitutional design, this protects states by affording them an opportunity to shape or block any Laws through the legislative process before they may become preemptively binding.

Emphatically, none of this is to deny the Executive authority to *set* enforcement policies. The Executive may enforce or underenforce

Board's due-on-sale regulation was meant to pre-empt conflicting state limitations . . ."); *see also* Merrill, *supra* note 69, at 764 ("[I]f Congress has delegated authority to an agency to act with the force of law, and if the agency has exercised this delegated power by taking action intended to have the force of law, then the agency edict can serve as a source of preemption."). *But cf.* Young, *Executive Preemption*, *supra* note 12, at 871–75 (challenging administrative preemption on constitutional grounds); Rubenstein, *supra* note 64, at 1129–31 (same, and offering a normative defense of a system without "delegated supremacy").

248. *Arizona Dream Act Coalition v. Brewer*, No. 2:12-cv-02546, 2013 WL 2128315, at *7 (D. Az. May 16, 2013) (holding that DACA does not have the "force of law," and thus cannot have preemptive effect).

249. *See, e.g.*, Memorandum from John Morton, Dir., ICE, to All Field Office Dirs. et al., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>. The June 2011 memorandum of ICE Director John Morton, for example, contains the following "Disclaimer":

As there is no right to the favorable exercise of discretion by the agency, nothing in this memorandum should be construed to prohibit the apprehension, detention, or removal of any alien unlawfully in the United States or to limit the legal authority of ICE or any of its personnel to enforce federal immigration law. Similarly, this memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

Id.; *see also* DACA Memo, *supra* note 14 (making a similar disclaimer); *Arizona Dream Act*, 2013 WL 2128315, at *7 (observing that the Department of Homeland Security's disclaimer in the DACA Memo undermined the plaintiffs' claim that the Memo could have preemptive effect).

250. *See* discussion *supra* note 36.

congressional laws to whatever degree tolerated by the “Take Care” Clause and the political process. In this limited sense, executive enforcement policies may be understood to be immigration law (lower case “l”). But, without having traversed the legislative (or even the administrative rulemaking) process, in no proper sense may these policies be understood to be “Laws” (capital “L”) “made in pursuance [of the Constitution].”

Nor does the foregoing deny *Congress’s* authority to preempt the field of immigration enforcement. The critical question, however, is whether Congress has done so—and, relatedly, whether enough circumstantial evidence exists to support such a sweeping conclusion by the Judiciary.²⁵¹ To be sure, Congress has delegated enforcement and discretionary authority to the Department of Homeland Security (DHS).²⁵² But these conferrals say nothing about displacing the state police power.²⁵³ Indeed, Congress’s delegation of enforcement roles to both public and private non-federal actors belies the notion that Congress intends immigration enforcement to be exclusively federal.²⁵⁴ Moreover, simply because Congress underfunds

251. *Cf. Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (stating that federal regulation of a particular field “should not be presumed to preempt state enforcement activity ‘in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained’” (quoting *DeCanas v. Bica*, 424 U.S. 351, 356 (1976))); *see also* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 748–52 (2011) (addressing the potential federalism values served by subfederal enforcement of federal law).

252. *See generally* 8 U.S.C.A. § 1357 (West 2013).

253. The Department of Justice (DOJ) has taken different positions on whether states have inherent authority over immigration enforcement. For a time, DOJ maintained that local police may arrest for criminal immigration violations but not civil immigration violations. *See* Memorandum Op. from Teresa Wynn Roseborough, Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice for the U.S. Att’y, S. Dist. of Cal. (Feb. 5, 1996), *available at* <http://www.usdoj.gov/olc/immstopo1a.htm>. But in a 2002 memorandum from the Office of Legal Counsel, it found that local police officers have “inherent authority” to arrest for both civil and criminal immigration violations. *See* Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to the U.S. Att’y Gen., Regarding Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations 1–4, 13 (Apr. 3, 2002), *available at* <http://www.aclu.org/FilesPDFs/ACF27DA.pdf>. For one critique of the 2002 opinion, which has not been superseded, *see generally* Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1095 (2004) (“The Attorney General’s conclusion makes little sense, and contradicts not only well-settled canons of statutory interpretation, but also the specific legislative history of these provisions.”).

254. *See Cox & Posner, supra* note 9, at 1287–88 (discussing the role of employers, families, and state agents in monitoring and enforcing immigration law); *see also* MICHAEL JOHN GARCIA & KATE M. MANUEL, CONG. RESEARCH SERV., RL 41423, AUTHORITY OF STATE AND LOCAL POLICE TO ENFORCE FEDERAL IMMIGRATION LAW 3–9 (2012) (canvassing Congress’s statutory delegations of enforcement authority to state and local police). *But cf.*

enforcement of the immigration law²⁵⁵ does not mean that Congress intends federal enforcement to be exclusive of the states. The opposite inference might just as easily be drawn—i.e., that Congress hopes and expects subfederal governments to play a gap-filling role. Similarly, to the extent that Congress instructs the Executive to prioritize how *federal* appropriations are spent,²⁵⁶ this does not itself suggest—much less require—federal enforcement exclusivity. To be clear, Congress *might* intend exclusive federal enforcement. But, to safeguard federalism, care is needed before rushing to the conclusion that Congress so intends.²⁵⁷ And for now, at least, the Court does not seem to believe that Congress intended to preempt the field of immigration enforcement.²⁵⁸

The Executive’s role in foreign affairs complicates the analysis but does not change the result. As noted above, the Executive has an undeniable yet somewhat ambiguous constitutional role in foreign affairs.²⁵⁹ The fundamental question, however, is not *what* power the Executive has to speak for the country. Rather, the question is *which* executive expressions of foreign policy can preempt state law.²⁶⁰

DeCanas, 424 U.S. at 361–62 (explaining that a federal statute that recognized *some* role for states in employment relationships involving undocumented immigrants was evidence that Congress did not intend to occupy the field of immigration employment).

255. “Underfunded” in the sense that the appropriations come *nowhere near* what it would take to fully enforce the law. This is not to deny the incredible sums of money that have been appropriated for enforcement. See DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 2–3 (2013), available at www.migrationpolicy.org/pubs/enforcementpillars.pdf (providing funding statistics). That these funds fall woefully short, however, only highlights the enormity of what full-enforcement would entail.

256. See, e.g., Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. D, tit. II, 125 Stat. 786 (directing DHS to “prioritize the identification and removal of aliens convicted of a crime by the severity of that crime”); accord Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, tit. II, 123 Stat. 2142.

257. Cf. *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (stating that federal regulation of a particular field “should not be presumed to preempt state enforcement activity “in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained” (quoting *DeCanas*, 424 U.S. at 356).

258. If the Court believed that Congress intended to oust subfederal enforcement through field preemption, there would have been no need for the Court to consider in *Arizona* whether state arrest measures undermined or conflicted with federal enforcement priorities.

259. See *supra* notes 82–83 and accompanying text (explaining executive control over immigration stems from its constitutionally enumerated power over foreign affairs).

260. Cf. Clark, *Domesticating Sole Executive Agreements*, *supra* note 69, at 1660 (“[A]s a practical matter, the President may make sole executive agreements The Constitution, however, does not require courts to recognize such agreements as ‘the supreme Law of the Land.’”); Denning & Ramsey, *supra* note 12, at 829 (“It is, of course, uncontroversial that ordinarily state laws and policies must give way to the foreign affairs objectives of the national

The negative inference from the Supremacy Clause is that “Treaties” are the only foreign commitments that can preempt state law.²⁶¹ And, as Professor Clark has highlighted, the context and drafting history of the Supremacy Clause strongly supports that interpretation.²⁶² Still, the Court’s precedent has been more generous—at least when the President is involved. More specifically, the Court has held that formalized executive agreements with foreign nations can preempt state law under certain limited circumstances.²⁶³ Of course, however, DHS enforcement policies—even if blessed by the President—are of a very different ilk. To begin with, DHS policies are not ordained with a stamp of national commitment to foreign countries. Moreover, whereas executive agreements necessarily implicate foreign affairs, immigration enforcement policies only sometimes will, leaving difficult evidentiary questions about what will prove a sufficient conflict with foreign policy and how deeply a court should probe to discover it. Thus, as Patrick Charles argues, “[a]bsent a treaty or international agreement stating express foreign policy objectives, executive policy preferences alone are insufficient to preempt state and local immigration laws.”²⁶⁴

Quite apart from the foregoing, the mantra that the country speak with “one voice” in foreign affairs obscures that the federal political branches are already speaking with two voices: that of Congress and the Executive.²⁶⁵ Although an undifferentiated federal government

government. . . . The critical question, though, is how these overriding federal goals are developed and identified.”).

261. See Denning & Ramsey, *supra* note 12, at 907 (“By setting forth specific allocations of preemptive power, the Constitution contains a strong negative implication that it does not contain additional allocations of preemptive power *sub silentio*.”); see also *id.* at 843 (“The inclusion of treaties . . . in the Supremacy Clause shows the extent to which the Constitution’s framers focused upon state interference in foreign affairs under the Articles [of Confederation].”).

262. See Clark, *Separation of Powers*, *supra* note 12, at 1337–39 (noting that the negative implication of the Supremacy Clause is that the Constitution, federal laws, and treaties are the exclusive grounds for displacing state law).

263. See, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 416 (2003) (“Generally, then, valid executive agreements are fit to preempt state law, just as treaties are . . .”).

264. Patrick J. Charles, *Recentring Foreign Affairs Preemption in Arizona v. United States: Federal Plenary Power, the Spheres of Government, and the Constitutionality of S.B. 1070*, 60 CLEV. ST. L. REV. 133, 157 (2012).

265. See Cleveland, Crosby and the ‘One-Voice’ Myth in U.S. Foreign Relations, *supra* note 130, at 985 (noting that “[i]t is clear that the Framers guaranteed, as a matter of constitutional design, that the United States would not ‘speak with one voice’ in foreign relations,” given the Constitution’s division of the foreign affairs power among the three federal branches); accord Alex Glashauser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, 41 (2005).

clearly trumps the states in foreign affairs, as between the federal political branches, Congress generally trumps the President (and certainly trumps DHS).²⁶⁶ Thus, subfederal laws that send a strong message of unwelcome to unlawfully present immigrants will at least be consistent with Congress's foreign affairs position with respect to this class of aliens (provided, of course, that such subfederal laws do not otherwise violate protected civil liberties).²⁶⁷ As Professor Spiro suggests, "state measures against undocumented aliens would almost by definition seem not only consistent with ultimate federal control of immigration . . . but also in furtherance of its execution to the extent that such measures may encourage unlawful aliens to repatriate."²⁶⁸ Again, this is not to deny federal eminence over the states in foreign affairs. Rather, my point is only to distinguish the character of nonbinding enforcement policies from other, more formalized, federal instruments (such as statutes, administrative regulations, treaties, and certain executive agreements).

Endorsing the preemptive effect of unilateral executive action would cripple the political and procedural safeguards of federalism because states would lose their best (and perhaps only) opportunity to block preemptive laws.²⁶⁹ Of course, Congress may be able to override unilateral executive policies *ex post*. This ordering, however, significantly transfers the political burden. Given the many "vetogates" in the legislative process, it takes considerably more votes to pass a law than to block one.²⁷⁰ The inertial resistance of the federal legislative process, however, was structurally intended to inure to the states, not the Executive.²⁷¹

266. Charles, *supra* note 264, at 157 ("[I]t is Congress's purposes and objectives that are the benchmark from which courts must adjudicate foreign affairs preemption."); see also Cox & Rodriguez, *supra* note 85, at 475; Yoo & Delahunty, *supra* note 19, (manuscript at 57) ("Although immigration straddles domestic and foreign policy, Congress, not the President, has the controlling authority in that area.")

267. Cf. Brief for Michigan, *supra* note 154, at 8 ("[A] State enforcing Congress's intent too well cannot violate Congress's intent.")

268. Spiro, *Demi-Sovereignities*, *supra* note 174, at 148.

269. See Denning & Ramsey, *supra* note 12, at 925 (making the same claim in the context of foreign affairs preemption).

270. See generally Eskridge, *supra* note 228, at 1444–48. Each of the vetogates present an opportunity for opponents of the measure to kill (or maim) a bill. *Id.* For general discussions on vetogates, see also William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528–33 (1992); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 716–27 (1992).

271. Denning & Ramsey, *supra* note 12, at 905 (arguing that permitting executive preemption in foreign affairs shifts "the burden of overcoming legislative inertia . . . from the President to the claimants"). For a general discussion on the erosion of the enumerated powers

* * *

In sum, those that press for exceptionalism in immigration federalism explicitly or tacitly treat potential breakdowns along the separation of powers dimension as a basis for further concessions along the federalism dimension. They tend to highlight Congress's plenary power over immigration, vast conferrals of policymaking power to the Executive, and inherent executive power to make immigration "Law."²⁷² The theory of immigration structuralism that I advance here takes a fundamentally different tack. Among other things, it treats possible failings along the separation of powers dimension as a reason for insisting upon preemption doctrine's conventional application. That means rejecting a presumption in favor of preemption and foreclosing the preemptive effect of nonbinding executive enforcement policies. These limitations safeguard federalism by channeling preemption decisions to Congress, and, concomitantly, away from the Executive and courts.

B. Safeguarding Separation of Powers

Apart from safeguarding federalism, the normalization of immigration preemption doctrine may also indirectly safeguard separation of powers in four critical respects. First, limiting the class of preemptive federal laws to those expressly contemplated in the Supremacy Clause puts pressure on the federal political branches to adhere to constitutionally prescribed lawmaking procedures—at least when the political branches intend such policies to have preemptive effect.²⁷³ In a system where executive policies can trump state law, Congress has far more political incentive to delegate than to decide; meanwhile, the Executive has far more political incentive to decide

doctrine and its implications for preemption doctrine, see, for example, Young, *The Ordinary Diet*, *supra* note 173, at 306 (“[T]he enumerated limits on Congress’s powers now play an extremely limited role in preserving the federal balance, and preemption has become the central question of our federalism.”).

272. See, e.g., Fan, *supra* note 134, at 1273, 1275, 1296–98 (arguing that the “plenary power doctrine, though oft critiqued as protection stripping and a basis for judicial nonintervention, can inform in our contemporary context judicial intervention against overreaching state laws” and “protect[] against the new strategy of dissentient state laws encroaching on executive enforcement policy”).

273. See Denning & Ramsey, *supra* note 12, at 829 (“Giving mere Executive policy preemptive effect . . . bypasses these constitutional processes and concentrates power in the executive branch.”); see also *id.* (“[R]ejecting executive preemption enhances checks and balances in foreign affairs; accepting it reduces them.”).

for itself than to seek congressional approval.²⁷⁴ Either way, immigration power is accumulated in the Executive. That is certainly problematic if Congress did not intend it.²⁷⁵ If, on the other hand, Congress intends wink-and-nod lawmaking through de facto delegation, then judicial foreclosure of executive preemption could help curb that pathology.

Second, applying the Supremacy Clause in a way that discriminates between legislative and executive action preserves certain subfederal policies that could otherwise be preempted.²⁷⁶ The resulting regulatory overlap can generate political discourse that sheds light on the federal policy, can spur Congress to take a harder look at the issues, and can even provide Congress political grist to decide those issues.²⁷⁷ Indeed, if nothing else, the subfederal restrictionist movement has successfully galvanized a national debate on the desirability of greater or lesser immigration enforcement.²⁷⁸

Third, the friction generated by federal-state overlap sheds light on *which* federal institution has ownership of the policies at issue.²⁷⁹ This becomes particularly salient in contexts like those at issue here, where the law on the books may not reflect its operational expression. In a system where executive enforcement policies can trump state law, it would not matter whether executive policies are consistent with or antithetical to congressional design. Removing the outlet of executive preemption, however, puts political pressure on the Executive to achieve its desired ends through the legislative process. Short of that, the Executive would have to come clean in its inability or

274. *Cf. id.* at 902 (“[T]o the extent executive preemption is accepted as a constitutional power, it broadens the President’s ability to conduct foreign affairs without a congressional check.”).

275. In similar regard, John Yoo and Robert Delahunty note that “the threat of non-enforcement gives the President improper leverage over Congress by providing a second, post-enactment veto.” Yoo & Delahunty, *supra* note 19, (manuscript at 9).

276. For example, absent the administration’s enforcement priorities, it is possible that Arizona’s S.B. 1070 Section 3 (involving registration violations) and Section 6 (involving warrantless arrests) would not have been preempted. *See supra* notes 154–59 and accompanying text. In any event, the absence of executive preemption could only lead to equal or more federal-state regulatory overlap.

277. *Cf. Gerken & Bulman-Pozen, supra* note 80, at 1305 (“A more limited preemption doctrine . . . would require Congress to engage more directly with state policies it wished to override.”); Hills, *Against Preemption, supra* note 227, at 9–10 (2007) (“State lawmaking can give Congress the right incentives to focus on the most important ambiguities in federal law.”).

278. *See* Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 68 (2010) (making the point that S.B. 1070 forced national elites to engage the issue of immigration).

279. *Cf. Gerken & Bulman-Pozen, supra* note 80, at 1289 (noting that accountability is a benefit that is derived from the overlap of federal-state regulation).

unwillingness to obtain congressional support. Insofar as subfederal governments are relying on *Congress's* law, the Executive must effectively shrug off Congress when it shrugs off subfederal resistance.²⁸⁰ A doctrine that forecloses the preemptive effect of nonbinding executive policies exposes the gulf between what the law says and does, and thus may spur Congress or the courts into action.²⁸¹

Fourth, as earlier explained, the line between permissible law execution and impermissible lawmaking is obscured, in part, by the question of whether the Executive's policy owes to resource constraints or political preference. Foreclosing executive preemption may help to bring more transparency to the Executive's actions. If executive underenforcement is born of resource constraints (and thus justified against separation of powers challenges), it becomes more difficult for the administration to credibly argue that subfederal enforcement initiatives preemptively conflict with federal law: The multiplier of subfederal enforcement generally should not pose an obstacle (and thus should not be preempted).²⁸² Meanwhile, if the administration insists that subfederal initiatives conflict with executive priorities (thus raising the specter of a preemptive conflict), courts may begin to appreciate those executive priorities as a type of affirmative policy encroaching on the legislative function (thus exposing a potential separation of powers problem).

These points come to life in the legal and political discourse surrounding the Executive's DACA program. As discussed earlier, DACA permits certain qualifying undocumented immigrants to remain and work in the United States for renewable two-year periods.²⁸³ Arizona and other states have adopted policies of denying drivers licenses to DACA beneficiaries.²⁸⁴ The American Civil

280. Cf. Bulman-Pozen, *supra* note 12, at 483, 486, 489 (making a similar point for cooperative federalism schemes).

281. Cf. *id.*

282. Of course, if subfederal enforcement initiatives burden executive resources in ways not intended by Congress, then a preemptive conflict might exist. The party claiming preemption, however, should bear the burden of demonstrating that. For the interesting view that subfederal enforcement measures may be unconstitutional as a type of "reverse-commandeering," see generally Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535 (2012). But even assuming that the Constitution protects the *federal* government against commandeering, cf. *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding that *states* are protected against federal commandeering), substantiating such a claim would still require showing that subfederal measures have commandeering effect.

283. See *supra* notes 14–15 and accompanying text (allowing for discretion in prosecuting illegal immigrants that came to the United States as children).

284. See *supra* note 27.

Liberties Union and others have recently filed suits to enjoin this subfederal resistance, raising the questions of whether DACA could or should have preemptive effect.²⁸⁵ For reasons earlier explained, I do not think DACA can preempt. Nor do I think it should.

It will be useful here to compare and contrast how a “yes” or “no” answer to the preemption question might change the political dynamics. To begin with, a “yes” answer significantly alleviates the Executive’s incentive to obtain congressional support for the DACA program. Indeed, past efforts to obtain congressional support have repeatedly failed,²⁸⁶ leaving us to wonder whether members of Congress intended, or simply hoped, to pass the buck. This shines light on a related concern with a “yes” answer: Congress has less incentive to enact such legislation if it knows or expects the Executive to accomplish similar ends. This is not the way federal Law is supposed to be made.²⁸⁷ Nor is it the best way. Indeed, as generous as the DACA program is, immigrant advocates have expressed a strong preference for a *legislative* solution on account of the assurance and stability it would bring relative to the administration’s nonbinding program.²⁸⁸

By contrast, a “no” answer to whether DACA can preempt leaves room for subfederal governments to dissent—such as by denying drivers licenses to DACA beneficiaries. This still permits the Executive to promote the DACA policy, but only as a national default, subject to jurisdictional resistance. The existence of competing policies shines greater political light on the fact that DACA is an *executive* (rather than congressional) policy, because as a statutory program it would clearly have preemptive effect. Once attributed to the Executive, questions naturally arise over whether the

285. See *supra* note 28. Recently, the United States District Court of Arizona held that Arizona’s policy of denying drivers licenses to DACA beneficiaries was not preempted, dismissing the plaintiffs’ claim. *Arizona Dream Act Coalition v. Brewer*, No. 2:12-cv-02546, 2013 WL 2128315 (D. Az. May 16, 2013).

286. See Amended Complaint, *Crane v. Napolitano*, *supra* note 16, at 18–19 (collecting cites for two dozen bills in which the DREAM Act, in various forms, has been proposed).

287. See U.S. CONST. art. I, § 7 (declaring that Law shall be made through bicameral congressional legislation and presented to the President).

288. See, e.g., Gilbert, *Obama’s Ruby Slippers*, *supra* note 19; Jens Erik Gould, *Why Are Some Undocumented Nervous About Obama’s Immigration Reform?*, TIME (Aug. 13, 2012), <http://nation.time.com/2012/08/13/why-are-some-undocumented-nervous-about-obamas-immigration-reform/#ixzz2CJ0Sg8lf>; Tamar Jacoby, *Obama’s Executive Order Is Good News, But Not the Solution*, U.S. NEWS & WORLD REPORT DEBATE CLUB (June 19, 2012), <http://www.usnews.com/debate-club/is-obama-right-to-grant-young-illegal-immigrants-work-permits/obamas-executive-order-is-political-theater>; Michael Olivas, *Why “Deferred Action” Isn’t Enough*, FROM THE SQUARE (Oct. 25, 2012), <http://www.fromthesquare.org/?p=3829>.

initiative is born of resource constraint, preferential policy, or both. This, in turn, can force transparency, which conceivably could aid a court in determining whether the Executive is “tak[ing] Care that the Laws be faithfully executed.”²⁸⁹ Even short of a judicial check, however, pressuring the Executive to explain whether the program is born of resource constraints or political preference helps point to where political accountability rests.²⁹⁰

* * *

The foregoing Part advanced a theory of immigration structuralism. Its underlying premise is that we should consult both federalism and separation of powers norms in addressing questions of relative power in the current immigration debate. The interdimensional relationship between separation of powers and federalism generates possibilities for harnessing that relationship in structurally and politically reinforcing ways. The normalization of immigration preemption doctrine seeks to do just that, offering safeguards for both federalism and separation of powers.

IV. FORM AND SUBSTANCE

This concluding Part responds to perhaps the most trenchant objection to my proposal: that it improvidently values form over substance. To curb expectations, those of the view that structural norms are irrelevant or wholly expendable may safely stop reading. Nothing I offer below is intended or likely to convince otherwise. Surely, my own view is that structure matters—not only because of the liberty-enhancing values it promotes, but also, more fundamentally, because our Constitution demands it.²⁹¹ Though federalism may not yield optimal outcomes in all cases, it remains central to our governmental order.²⁹² To insist on these points at any

289. U.S. CONST. art. II, § 3.

290. President Obama publically took the position that the policy is due to resource constraints. See Barack Obama, *Exclusive: A Nation of Laws and a Nation of Immigrants*, TIME (June 17, 2012), <http://ideas.time.com/2012/06/17/a-nation-of-laws-and-a-nation-of-immigrants/>.

291. See, e.g., Young, *Making Federalism*, *supra* note 135, at 1762–64 (“Even if one were convinced that all the functional arguments for federalism . . . were spurious, it would not be open to us to reject federalism and create a unitary system.”). But see generally Edwin Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 903–52 (1994) (offering a classic view to the contrary, and arguing that the current dominant interpretation of federalism is grounded in improper functional valuations).

292. See *New York v. United States*, 505 U.S. 144, 157 (1992) (“Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework

greater length here, however, is beyond the scope of this Article's ambition. Rather, my only hope for this Part is to explain why elevating substance over form—while principled—may be a dangerous long-term strategy for the very advocates of that ordering.

A. Valuing Immigration Federalism

The exclusivity principle would be more attractive if there were simply no value in leaving subfederal space to operate. But there is potential value, even if we think that many of the subfederal measures on the table are politically misguided or morally reproachable.

First, immigration federalism offers a means toward satisfying more citizen preferences than federal exclusivity necessarily would. Professor Rodriguez explains, for example, that because “the effects of immigration are felt differently in different parts of the country,” subfederal “participation in integration matters can promote efficiency” and optimize localized political preferences.²⁹³ In this regard, Professor Rodriguez highlights the “primary function states and localities play” in integrating both legal and illegal immigrants into the body politic.²⁹⁴ This integrative function is born of territorial necessity; but, as such, it is also a function over which subfederal governments have developed experience and expertise.²⁹⁵ Preferences can thus be locally tailored and attuned in ways that centralized decisionmaking generally cannot.²⁹⁶

Recent history evidences both a need and a desire for this flexibility. Though some subfederal governments enact restrictionist measures, others enact protectionist measures that federal law does not require (and in some cases may not even allow). For example, some subfederal governments provide welfare benefits that federal

set forth in the Constitution.”); *see also* Ashutosh Bhagwat, *Wyeth v. Levine and Agency Preemption: More Muddle, or Creeping to Clarity?*, 45 TULSA L. REV. 197, 225 (2009) (“The Constitution preserves state authority even when it is inefficient . . .”).

293. Rodriguez, *The Significance of the Local*, *supra* note 41, at 608–09; *see also* Huntington, *supra* note 139, at 831 (“Decentralizing and devolving decisionmaking regarding non-citizens may accommodate, and reflect a great variety of views on, non-citizens . . .”); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N. CAR. L. REV. 1619, 1632–54 (2008) (highlighting the important potential for localism in immigration regulation).

294. Rodriguez, *The Significance of the Local*, *supra* note 41, at 571 (demonstrating how states integrate immigrants in order to establish the proposition that immigration regulation should be included in the list of quintessentially state interests).

295. *Id.* at 582.

296. *See id.* at 582–90 (providing examples of how different states create different solutions to best solve localized immigration issues).

law does not require, allow day-labor centers for unauthorized workers, offer in-state tuition to unauthorized immigrants, grant them drivers licenses, and resist cooperating with federal immigration enforcement.²⁹⁷ Federal exclusivity would eliminate these localized preferences. Indeed, as Professors Young and Baker note, subfederal laws that violate no federal or state constitution but that “nonetheless express a moral preference that some find reprehensible” tend to denote areas of moral disagreement and thus are “precisely the areas in which interstate diversity is most valuable.”²⁹⁸

Second, preserving a subfederal role promotes regulatory experimentation.²⁹⁹ For example, as Professor Huntington explains, some restrictionist localities might invest in new means and resources for identifying unlawful immigrants.³⁰⁰ The national and other subfederal governments might be informed about the utility of others’ experiments, without having to make investments themselves.³⁰¹ If subfederal enforcement results in other problems, “such as racial profiling, decreased reporting of crimes by non-citizens, and fewer arrests for other crimes, the national government might reconsider its enlistment of state and local officers and decide to preempt the conduct.”³⁰² At the same time, subfederal protectionist initiatives that might otherwise be preempted by a centralized and uniform law also afford experimental opportunities.³⁰³

297. *Id.* (discussing subfederal integrative schemes). For a discussion of the permissibility of subfederal “sanctuary” programs, see generally Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Policies & Immigration Federalism: A Dialectic Analysis*, 55 WAYNE L. REV. 1683 (2009).

298. Baker & Young, *supra* note 47, at 155–56.

299. See Huntington, *supra* note 139, at 847 (discussing the experimental value of restrictive subnational laws); Matthew Parlow, *A Localist’s Case for Decentralizing Immigration Policy*, 84 DENV. U. L. REV. 1061, 1070–71 (2007) (explaining that “local government experimentation in the immigration realm can lead to successes or failures that can inform federal policy-making”). *But cf.* Cunningham-Parmeter, *supra* note 137, at 1673–77 (challenging the assertion that states can serve as valuable laboratories of immigration reform).

300. Huntington, *supra* note 139, at 843.

301. *Id.*

302. *Id.*

303. See Rodriguez, *The Significance of the Local*, *supra* note 41, at 580 (noting that subfederal protectionist measures are “vulnerable in the face of a strong theory of preemption”); see also Howard Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357, 363–64 (2002) (observing that “we might just as plausibly view federal authorization of divergent state policies as creating laboratories of generosity toward immigrants”).

Third—and perhaps most importantly—our federalist system was intended to preserve a role for the states as a check against federal policies.³⁰⁴ As noted earlier, subfederal governments have important economic and social stakes in unlawful immigration. To the extent that the national policy does not address these concerns, leaving a role for subfederal governments is critical.³⁰⁵ Through dissenting action, subfederal governments can summon the federal government to respond in ways that verbal criticism alone cannot.³⁰⁶ In this regard, Jessica Bulman-Pozen and Heather Gerken explain: “[I]t is desirable to have some level of friction, some amount of state contestation, some deliberation-generating froth in our democratic system.”³⁰⁷ In like regard, Robert Schapiro explains that “[a] state law can provide an important protest—a powerful criticism of the federal approach” that may in time help to produce a change in federal policy.³⁰⁸

This holds equally true for both restrictionist and protectionist subfederal measures. As relates to federal underenforcement in particular, states can provide a check on executive policy—and simultaneously protect their own interests—through increased enforcement efforts.³⁰⁹ Even if such checks do not occasion change at the federal level, at least states will not be powerless to protect themselves against the unevenly distributed costs of unlawful immigration. As Margaret Lemos observes (speaking outside the immigration context but in terms fully apt here), a subfederal

304. See *infra* text accompanying notes 320–32 (describing how immigration federalism can act as a check against federal overreach); see also Huntington, *supra* note 139, at 836–37 (“Sharing immigration authority means that states and localities also will be able to counteract federal immigration regulation.”).

305. See Huntington, *supra* note 139, at 833 (arguing that national immigration policy fails to adequately address state-specific economic and social concerns).

306. Bulman-Pozen & Gerken, *supra* note 80, at 1284–85 (noting surprising neglect in federalism literature of how states implementing federal mandates can be a dissenter, rival, and challenger); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1749, 1783 (2005) (noting that “federalism can be understood at least in part as a strategy for allowing would-be dissenters to govern in some subpart of a system,” which in turn contributes to the marketplace of ideas, and facilitates self-government and self-expression).

307. Bulman-Pozen & Gerken, *supra* note 80, at 1284.

308. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 289 (2005).

309. See Lemos, *supra* note 251, at 748 (“Enforcement authority creates a state-level check against underenforcement by federal agencies.”); Amy Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitalization of State Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008*, 29 YALE L. & POL’Y REV. 165, 176–77 (2010) (explaining that enforcement authority enables states to step in when federal agencies fail to enforce).

enforcement role “offers a hedge against the possibility that the federal government will occupy the field . . . and then abdicate on enforcement.”³¹⁰ Indeed, federal abdication is precisely what many subfederal jurisdictions are complaining about. At the same time, preserving subfederal autonomy offers a vital check against what may be ill-advised federal enforcement policies. The recent surge of subfederal resistance to President Obama’s Secure Communities program is a testament to this.³¹¹ Under the Secure Communities program, DHS receives fingerprint data for persons arrested by local law enforcement.³¹² If the arrestee is found to be unlawfully present, DHS issues a “detainer” requesting that local enforcement hold the arrestee for up to forty-eight hours while DHS arranges to transfer the individual into federal custody.³¹³ Though many subfederal jurisdictions have embraced Secure Communities, a growing number have expressed disapproval, with some actively (and openly) refusing to comply.³¹⁴ These complaining jurisdictions have argued that the federal program may upset civil rights and undermine community building efforts of local law enforcement.³¹⁵ Rendering subfederal governments impotent would sideline local preferences and vitiate a dialogue-generating counterbalance to federal enforcement policy. Providing space for dissenting action—whether protectionist or

310. Lemos, *supra* note 251, at 764; *see also* Schapiro, *Toward a Theory of Interactive Federalism*, *supra* note 308, at 290 (noting that “redundancy constitutes a fail-safe mechanism—an additional source of protection if one or the other government should fail to offer adequate safeguards” arising from a failure either to address an issue or to enforce applicable regulations).

311. The list of non-complying jurisdictions includes, but is not limited to, Connecticut, *see* Mary E. O’Leary, *Connecticut First State to Set Rules for Holding Undocumented Immigrants for ICE*, NEW HAVEN REGISTER (Mar. 27, 2012), <http://nhregister.com/articles/2012/03/27/news/doc4f727619070ce218682048.txt>; Milwaukee, *see* Milwaukee, Wis., County Bd. Res. 12-135 (June 4, 2012); the District of Columbia, *see* D.C. Council, *The Immigration Detainer Compliance Amendment Act of 2011* (June 5, 2012); Santa Clara, *see* Santa Clara, Calif., Board of Supervisors’ Policy Manual Sec. 3.54, *Civil Immigration Retainer Requests* (Oct. 18, 2011); San Francisco, *see* San Francisco, Calif., Board of Supervisors Resolution 535-11, *Supporting Policy Restricting Use of Local Funds to Respond to Civil Immigration Detainers* (Dec. 23, 2011); and Cook County (Chicago), *see* Cook County, Ill., County Commission Ordinance 11-0-73, *Fair and Equal County for Immigrants Ordinance* (Sept. 7, 2011); *see also* Lornet Turnbull, *3 King County Officials Balk at ICE Detainer Program*, SEATTLE TIMES, May 9, 2012; Mihir Zaveri, *In D.C., No Warm Welcome for Immigration Crackdown*, WASH. POST, June 6, 2012.

312. TASK FORCE ON SECURE CMTYS., HOMELAND SEC. ADVISORY COUNCIL, U.S. DEP’T OF HOMELAND SEC. 4 (2011).

313. *Id.* at 26–27.

314. *See supra* note 311 (collecting examples).

315. *See* Turnbull, *supra* note 311; Zaveri, *supra* note 311.

restrictionist—can thus be a virtue.

None of this is to insist that the values of decentralization will be met with every subfederal law. Sometimes the costs of decentralization will be outweighed by the values of centralization. For example, uniformity may counteract race-to-the-bottom and externality pathologies that decentralization may produce.³¹⁶ Beyond these concerns, decentralization may upset the foreign affairs principle that we speak as a nation with “one voice” on matters involving immigration.³¹⁷ Finally, there is concern that violations of individual rights are more likely to occur when subfederal governments play a role in enforcement.³¹⁸

These are real concerns, indeed. But Congress—not the courts, and not the Executive—should be making decisions about when the values of centralization outweigh the potential values of decentralization. Congress is the institutional body best positioned to make those decisions, and the Supremacy Clause also seems to require it.³¹⁹ To the extent that there is something special about immigration, Congress can and should take action to give it special treatment. Our concern should be aroused, however, when the courts elevate either their own or the Executive’s will over that of Congress.

316. See, e.g., Cunningham-Parmeter, *supra* note 137, at 1725 (discussing these pathologies as related to subfederal restrictionist laws); see also Baker & Young, *supra* note 47, at 125–26 (noting that the “need to overcome externalities and other collective action problems . . . is one of the classic justifications for federal action”). Of course, whether subfederal initiatives to enforce the immigration laws signify a race to the bottom (or top) probably depends on one’s perspective.

317. See Lauren Gilbert, *Immigrant Laws, Obstacle Preemption and the Lost Legacy of McCulloch*, BERKELEY J. EMP. & LAB. L. 153, 191, 204 (2012); Michael Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 35, 53; Pham, *supra* note 95, at 991, 1001; Spiro, *Demi-Sovereignities*, *supra* note 174, at 156 (summarizing foreign affairs arguments for unitary federal control); see also *United States v. Arizona*, 641 F.3d 339, 352–53 (9th Cir. 2011) (enjoining preliminarily portions of S.B. 1070 on the ground that it would “have a deleterious effect on the United States’ foreign relations” to the point that it creates “actual foreign policy problems of a magnitude far greater than incidental”); *id.* at 366–39 (Noonan, J., concurring) (focusing on foreign affairs reasons to preliminarily enjoin sections of S.B. 1070).

318. See, e.g., Pham, *supra* note 95, at 997 (“The possibility of rogue enforcement of immigration laws, where officers employ racial profiling and other prohibited practices, is much more likely to occur at the local levels, compounding the uniformity problem.”); see also Orde Kittrie, *Federalism, Deportation and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1477 (2006) (explaining why police may be hesitant to be involved in immigration law enforcement); Michael J. Wishnie, *Introduction: Immigration and Federalism*, 58 NYU ANN. SURVEY AM. L. 283, 291 (2002) (describing various tensions that may arise between local law enforcement and federal immigration agencies).

319. See *supra* Part III (explaining why Congress both should and must have the final say on matters of immigration Law).

B. The Dangers of Selective Exceptionalism

Still, given the immediacy of the problem at hand, most immigrant advocates may understandably prefer to take their chances with a doctrine that promotes across-the-board federal uniformity, even (or especially) in the face of congressional silence or ambiguity. The exigencies of the subfederal immigration revolution, they may argue, can neither await nor be made to depend upon a legislative response. To be sure, this view of immigration federalism is entirely principled: it understands the restrictionist measures as wrongheaded—either because they are ineffectual or harmful—and seeks to liberalize structural norms to accommodate desired ends. But that approach leaves much cause for concern.

First, claims for an expansive preemption doctrine in immigration rely heavily on the same foreign affairs rationale excoriated by generations of immigrant advocates in their assault on the plenary doctrine.³²⁰ Though that assault is mostly directed at promoting limits on federal action through the Bill of Rights,³²¹ the very same concerns resonate for structuralism—inasmuch as it too is directed at securing liberty.³²² Even in the subconstitutional context of administrative law, the nexus between immigration and foreign affairs has been scrupulously parsed to prevent immigration agencies from too easily taking advantage of the notice-and-comment rulemaking exception for foreign affairs.³²³ To selectively rely on foreign affairs as a reason

320. See *supra* notes 86–97 and accompanying text (explaining the plenary doctrine and noting that the foreign affairs rationale has historically been used to uphold federal action against immigrant interests). See also Legomsky, *Immigration Law*, *supra* note 81, at 155, 261–65 (questioning the foreign affairs rationale for the plenary doctrine, and noting that “commentators . . . are in broad agreement that not all matters affecting foreign policy are beyond judicial cognizance”); Neuman, *The Lost Century*, *supra* note 183, at 1898 (“[T]he correlation between the substance of immigration policy and the [foreign relations] factors that have been invoked to justify extreme judicial deference is very weak.”). *But cf.* Legomsky, *Immigration Law*, *supra* note 81, at 266–67 (suggesting that the foreign affairs rationale might have a different application in federalism, as opposed to the separation of powers context).

321. See, e.g., Chin, *Segregation’s Last Stronghold*, *supra* note 84, at *passim* (arguing that the plenary doctrine allows racial discrimination in federal immigration laws).

322. See *supra* notes 57–60 and accompanying text (explaining how vertical separation of powers was intended to provide a check against the federal government).

323. See *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995) (holding that Administrative Procedure Act’s foreign affairs exception for notice-and-comment rulemaking did not apply due to an insufficient link between the agency’s policy and foreign affairs); *Jean v. Nelson*, 711 F.2d 1455, 1477–78 (11th Cir. 1983) (construing the foreign affairs exception very narrowly); see also *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010) (noting that “it would be problematic if incidental foreign affairs effects eliminated public participation in this entire area of administrative law”).

for federal exclusivity or for a special Executive role in preemption undermines important progress made by immigration advocates in other contexts.

Second, Professor Spiro's "steam-valve" theory offers yet another cautionary note. Using historical immigration examples, he explains how allowing space for subfederal governments to act on anti-immigrant sentiments can diminish "interest on their part to seek national legislation to similarly restrictionist ends."³²⁴ By providing room for subfederal governments to "let off their steam, however scalding it may be, the nation need not visit the same sins."³²⁵ At the same time, subfederal variance "could also work to distribute the costs of undocumented aliens more equitably among the states" and "encourage migration to where their presence is more desired."³²⁶

Professor Spiro's steam-valve theory takes on added significance when considered in connection with the plenary doctrine. As preemption doctrine expands to suppress subfederal interests, states can be expected to push harder for a national solution that suits their restrictionist agenda. And, if successful, those restrictionist policies "will move from a context in which judicial discipline is extremely stern to one in which it is most relaxed."³²⁷ Without knowing what Congress will decide if and when it tackles the issues, or what a future administration might bring, it seems short-sighted for immigrant advocates to invest in structural doctrines that instill an undifferentiated federal monopoly. As Professor Huntington notes, "there is no structural reason to believe that one level of government will be more or less welcoming to non-citizens and therefore, on this basis, to favor uniformity over experimentalism."³²⁸

324. Spiro, *Learning to Live*, *supra* note 92, at 1627. These examples included congressional restrictionist enactments in 1996, following the judicial defeat of California's Proposition 187.

325. Spiro, *Demi-Sovereignities*, *supra* note 174, at 174. For critiques of Professor Spiro's steam-valve theory, see, for example, Gulasekaram & Ramakrishnan, *A Reappraisal*, *supra* note 170 (rejecting the premise of the steam-valve theory); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1436-37 (1995); Wishnie, *Laboratories of Bigotry*, *supra* note 174, at 558 ("History simply does not support reliance on 'steam valve federalism' as a reason to celebrate the claimed new state freedom to discriminate against immigrants.").

326. Spiro, *Demi-Sovereignities*, *supra* note 174, at 173.

327. Spiro, *Learning to Live*, *supra* note 92, at 1632.

328. Huntington, *supra* note 139, at 831 ("In a world where some states are offering in-state tuition to unauthorized migrants while the federal government is seeking to construct a wall along the southern border, it is by no means clear that the national government will better protect the interests of non-citizens.").

Third, as several commentators have expressed, a principal concern with the restrictionist movement is that it is racially motivated.³²⁹ To the extent that concern is well founded, the equal-protection doctrine (not the preemption doctrine) would seem to be the more appropriate fix.³³⁰ Whereas the *federal* government's alienage classifications are mostly immune from judicial review under the plenary doctrine, the Court has declared *subfederal* "classifications based on alienage" to be "inherently suspect to close judicial scrutiny," at least when the discrimination targets lawfully present immigrants.³³¹ As to lawfully present immigrants, then, the Court can be expected to thwart unlawful discrimination without having to distort preemption doctrine for that purpose.³³²

329. See, e.g., Lucas Guttentag, *Discrimination, Preemption, and Arizona's Immigration Law: A Broader View*, 65 STAN. L. REV. ONLINE 1 (June 18, 2012), <http://www.stanfordlawreview.org/online/discrimination-preemption> (noting that the current immigration debate is driven by discrimination); Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 636 (2012) ("Modern immigration clearly implicated issues of race."); Johnson, *Minorities, Immigrant and Otherwise*, *supra* note 84, at 79 (arguing that immigrants are punished by voters as a consequence of their race); Motomura, *The Rights of Others*, *supra* note 6, at 1743 ("[T]he most forceful and often repeated criticism of state and local involvement in immigration enforcement is improper reliance on race and ethnicity. . . . [T]he concern is that not only unauthorized migrants, but also lawfully present U.S. citizens and noncitizens, will suffer targeting and discrimination by race and ethnicity." (internal citation omitted)); see also Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 163, 163 (2010) ("[S]tate and local anti-immigrant laws lead to segregation, exclusion, and degradation of Latinos from American society in the same way that Jim Crow laws excluded African Americans from membership in social, political, and economic institutions within the United States and relegated them to second-class citizenship.").

330. Indeed, several lawsuits challenge subfederal restrictionist policies on equal protection grounds. See, e.g., *Hispanic Interest Coal. v. Bentley*, 691 F.3d 1236 (11th Cir. 2012); *Ga. Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317, 1321 (N.D. Ga. 2011); *Complaint, League of United Latin Am. Citizens v. Arizona*, No. 10-1453 (D. Ariz. July 9, 2010); *Complaint, Valle del Sol v. Whiting*, No. CV 10-1061 (D. Ariz. May 17, 2010). And, the Department of Justice, for its part, has recently filed suits alleging constitutional and civil rights violations against officials in Arizona and North Carolina. See *Complaint, United States v. Maricopa Cnty.*, No. CV-12-00981-PHX-ROS, 2012 WL 1631747 (D. Ariz. May 10, 2012); *Complaint, United States v. Johnson*, No. 1:12-cv-01349 (M.D.N.C. Dec. 20, 2012).

331. Compare *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (invalidating an Arizona law that restricted legal aliens' access to benefits), with *Mathews v. Diaz*, 426 U.S. 67 (1976) (holding that the *federal government* could deny benefits to classes of noncitizens even though *states* could not). The "suspect class" designation has precluded most subfederal discrimination against legal resident immigrants. Unlawfully present immigrants have not enjoyed the same level of protection at the subfederal level, but are afforded at least as much (if not more) judicial protection against subfederal discrimination than at the federal level. Cf. *Plyler v. Doe*, 457 U.S. 202, 206–30 (1982) (holding that states cannot deny undocumented children equal access to primary and secondary education).

332. See, e.g., *Graham*, 403 U.S. at 371–72, 376 (finding alienage a suspect class, prompting strict scrutiny of two states' discriminatory laws concerning economic benefits for legal

To be sure, protecting *unlawful* immigrants against subfederal discrimination may be more difficult under the Equal Protection Clause, as the Court has yet to recognize unlawful immigrants as a protected class.³³³ Meanwhile, equal protection claims premised on racial or ethnic discrimination may be too difficult to substantiate given the jurisprudential hurdle of proving a discriminatory intent.³³⁴ It is in this spirit that some commentators favor an approach to preemption that will be more sensitive to, and perhaps compensate for, equal protection concerns.³³⁵

The allure of an equal protection approach to preemption is twofold. First, the approach leverages the perception that subfederal policymakers are discriminating, or at least are reasonably feared to be discriminating. Second, for immigrant advocates, infusing the preemption doctrine with equal protection norms is attractive because it provides a basis for arguing that restrictionist measures should be preempted even while protectionist measures are not.³³⁶

However, an equal protection approach to preemption carries its own problems, as some Justices made clear in *Arizona*. In a telling exchange during the opening moments of oral argument, Chief Justice Roberts interrupted Solicitor General Donald Verrilli to inquire: “Before you get into what the case is about, I’d like to clear up at the outset what it’s not about. No part of your argument has to do with racial or ethnic profiling, does it?”³³⁷ The Solicitor General relented, responding: “That’s correct.”³³⁸ And when the issue of race surfaced

permanent residents); *see also* *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419–20 (1948) (finding state regulation limiting commercial fishing licenses to persons ineligible for citizenship to violate the Equal Protection Clause); *Truax v. Raich*, 239 U.S. 33, 43 (1915) (finding state employment restrictions on immigrants to violate the Equal Protection Clause); *Yick Wo v. Hopkins*, 118 U.S. 356, 369–74 (1886) (finding Equal Protection to apply to non-citizens because the use of the term “person” in the Fourteenth Amendment should be read literally to include all people within the territory of the United States).

333. *But cf. Plyler*, 457 U.S. at 202–03 (offering somewhat more protection to undocumented *children*).

334. Indeed, this insight probably explains why the federal administration has favored preemption challenges over equal protection challenges in its legal assault on subfederal restrictionist laws.

335. *See, e.g., Guttentag, supra* note 329, at 1–2, 5 (claiming that federal law embodies anti-discrimination norms); Margulies, *supra* note 19; Motomura, *The Rights of Others, supra* note 6, at 1731–38 (arguing that institutional preemption-based arguments have been more effective in court than individual equal protection arguments).

336. *E.g., Guttentag, supra* note 329, at 6; Motomura, *The Rights of Others, supra* note 6.

337. Transcript of Oral Argument at 34, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182).

338. *Id.*

only minutes later in the Solicitor General's comments, Justice Scalia was quick to remind the Solicitor General of his earlier commitment to what the case was *not* about.³³⁹

These Justices' rush to a doctrinal tourniquet seems rather self-evident. If a doctrinal accommodation is warranted in the immigration context to account for rampant (though hidden) discriminatory intent, such accommodation should most naturally come in an equal protection challenge, not as a distorting variable in preemption analysis. Exactly how many thumbs on the scale in favor of preemption should the threat of subfederal discrimination yield? How would the threat of discrimination be proved; or, would the burden be on the subfederal government to disprove it?³⁴⁰ More generally, why would or should a court modify preemption doctrine instead of equal protection doctrine to accommodate concerns about discrimination? If the preemption doctrine is utilized to require anything less than the equal protection doctrine currently does, preemption may operate simply as an end-run around those hurdles. But if the shortfall is with the equal protection doctrine—either in general or as applied to immigration in particular—why not simply change *that*?

These are tough and important questions. Yet they take me too far afield from my more immediate point: Immigrant advocates might do well to prefer equal protection's scalpel over exclusivity's sledgehammer. Excluding a subfederal role in enforcement will not necessarily rid immigration enforcement of discrimination; it simply accumulates potential for discrimination in the federal government. Though for the moment we may prefer to take our chances with federal enforcement, we need not look far for examples of executive enforcement policies alleged to violate civil liberties.³⁴¹ Investing in a

339. *Id.* at 47.

340. *Cf.* Motomura, *The Rights of Others*, *supra* note 6, at 1743 (“An equal protection challenge would require proof of discriminatory intent, but a preemption challenge can persuade some judges based on reasonable possibility of discriminatory intent. One wonders if the [Hazleton district court] would have found preemption if the plaintiffs had not introduced so much evidence on race and ethnicity.”).

341. *See e.g.*, Mohita Anand & Constantin Schreiber, *The NSEERS Effect: A Decade of Racial Profiling, Fear, and Secrecy* (Pa. State Law Rights Working Grp. 2012), available at http://law.psu.edu/_file/clinics/NSEERS_report.pdf. *See generally* KEVIN R. JOHNSON, *THE HUDDLED MASSES MYTH: IMMIGRATION AND CIVIL RIGHTS* (2004); David Cole, *Enemy Aliens*, 54 *STAN. L. REV.* 953 (2002) (reviewing harsh measures through immigration and other laws directed at Arab and Muslim noncitizens in the name of the “War on Terror”); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land*: United States v.

federal monopoly over immigration enforcement dangerously leaves no meaningful checks on federal action, because under the plenary doctrine such checks may not readily come from the courts, and subfederal units will have no traction for dissenting action. An approach that insists on federal exclusivity in the name of civil liberties may thus have it backward. Again, recent subfederal resistance to the Executive's Secure Communities program provides one example of the potential value in dissenting subfederal action against what many immigrant advocates perceive as executive overreaching.³⁴²

This leads to a fourth, and final, point. In light of the subfederal restrictionist measures actually on the table, the unknown variable of an as-yet-to-be-determined congressional response may still present the more attractive option. But, for decades, the congressional trend has been to significantly tighten immigration control.³⁴³ Though there may be hope for directional change, prudence suggests investing such hope in the political process rather than in judicial doctrines that would leave those choices unchecked by both the courts and the subfederal governments. Such a state of affairs would surrender what little remains of the "double security" baked into our government structure.³⁴⁴

To summarize, then, arguments for exceptionalism in immigration federalism may ultimately prove counterproductive to immigrants. At least a greater degree of reflection seems warranted given: (1) the expressed desire of some subfederal governments to afford *more* rights and protection than federal law requires or allows; (2) the absence of any clear direction on how the federal political balance

Brigoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010); *Ice Settles Case on Controversial Home Raids*, CENTER FOR CONSTITUTIONAL RIGHTS (Dec. 17, 2012), <http://ccrjustice.org/newsroom/press-releases/ice-settles-case-controversial-home-raids> (reporting on class action settlement against ICE for controversial house raids).

342. *See supra* notes 308–09 and accompanying text (describing subfederal resistance to the Secure Communities program).

343. *See, e.g.*, The Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, 2639; REAL ID Act of 2005, Pub. L. No. 109-13, 19 Stat. 231; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; *see also* Legomsky, *The Making of United States Refugee Policy*, *supra* note 4, at 677–80 (discussing the pre-1996 congressional trend).

344. THE FEDERALIST NO. 51, at 161 (James Madison) (Roy P. Fairfield ed., 1966).

over immigration will be struck; and (3) a Court that cannot be expected to provide any meaningful check on whatever those federal political choices end up being.

CONCLUSION

The political and judicial accommodations made for modern government have brought us a considerable distance from our original structure. That is mostly water under the bridge, and nothing I have said here is intended to return us to 1789. Still, however, immigration structuralism has founding principles in mind, not only because the Constitution requires it, but also because of the enduring values they serve.

A generational project among immigration scholars has been to normalize constitutional immigration law. That is all that immigration structuralism sets out to do—nothing more, nothing less. More specifically, it counsels for shedding the immigration preemption doctrine of special methodological and substantive rules. These special rules are directed at leaving subfederal governments very little to do, but for that very reason, also come at the cost of removing a vital check on federal political choices.

I am not blind to the challenges that immigration structuralism must overcome. For many skeptics, any abstract appeal of leaving a role for subfederal governments disassembles in the crucible of reality. But it is here, I caution, that the political question of *what* to do about immigration should not be made to distort the constitutional question of *which* institution has the power to do it. Waving the immigration-exceptionalism flag may help to win a battle or two in the subfederal revolution. Yet it may cost the war.³⁴⁵

345. For a similar expression, see Spiro, *Demi-Sovereignties*, *supra* note 174, at 173 (“The context demands innovative legal and political strategies in defense of the alien, one of which may be to concede lost battles with an eye to winning the war.”).