

# NOTES

## DIVIDED WE STAND: CONSTITUTIONALIZING EXECUTIVE IMMIGRATION REFORM THROUGH SUBFEDERAL REGULATION

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*With Congress divided over comprehensive immigration reform, federal and subfederal actors have stepped into the breach. In 2012 and 2014, in an effort to counter congressional paralysis, President Barack Obama extended deferred action to millions of undocumented noncitizen children and their parents. In doing so, he reignited debates about the constitutional boundaries of executive power. Among other things, these debates have highlighted the ephemerality of executive directives, raising questions as to whether beneficiaries of deferred action will be stripped of its entitlements once the Obama Administration cedes office.*

*This Note addresses the durability of Deferred Action for Childhood Arrivals (DACA) and its attendant benefits post-Obama. It argues that by entrenching integrationist policies at the subfederal level, state and local actors can legitimize and ultimately constitutionalize deferred action and the benefits available to immigrants thereunder. In doing so, it demonstrates the fallacy of federal exclusivity in the regulation of non-citizens and documents an ongoing reallocation of constitutional immigration authority to state and local actors. Lastly, it situates DACA in Youngstown's tripartite framework and proposes the framework be expanded to better reflect evolving trends in American federalism.*

### INTRODUCTION

The narrative is by now familiar: Faced with congressional deadlock and a “[f]ederal [g]overnment that does not want to enforce the immigration laws,” states have taken up the reins of immigration regulation.<sup>1</sup> The purpose and tenor of subfederal immigration law vary by locality. Some states, hoping to drive undocumented immigrants out, wield the law as a sword, denying unauthorized noncitizens benefits and privileges under state law as a means of deterring newcomers and promoting “self-deportation”<sup>2</sup>

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1. *Arizona v. United States*, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., concurring in part and dissenting in part).

2. See, e.g., *Texas v. United States*, 86 F. Supp. 3d 591, 634 (S.D. Tex. 2015) (“[T]here are many individuals each year that self-deport from the United States and return to their homeland.”); *Arizona’s Immigration Law Is Back in Court, “Self-Deportation” on the Rise*, Pub. Radio Int’l (Apr. 26, 2012, 9:00 AM), <http://www.pri.org/stories/2012-04-26/arizonas-immigration-law-back-court-self-deportation-rise> [<http://perma.cc/4QZ4-L>]

or “attrition through enforcement.”<sup>3</sup> In other states, pro-immigrant legislation facilitates an unprecedented degree of social integration, promising opportunity and bodily safety at the local level.<sup>4</sup> Yet state action tells only half the story behind the current immigration landscape. While states legislated, President Barack Obama muscularly deployed executive power to reorient national immigration policy. Frustrated by congressional paralysis, the Administration initiated Deferred Action for Childhood Arrivals (DACA) in 2012, which accorded approximately 1.2 million undocumented youth respite from the specter of deportation.<sup>5</sup> In 2014, President Obama significantly expanded DACA’s scope, suspending the initial age cap and relaxing the original date-of-entry requirement.<sup>6</sup> Should

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AQY] (explaining term “self-deportation,” which “started out as a joke made by Mexican-American satirist Lalo Alcaraz,” has “becom[e] a catch-phrase for supporters of anti-illegal immigration legislation”).

3. See S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (declaring intent of Arizona’s infamous SB 1070 “is to make attrition through enforcement the public policy of all state and local government agencies in Arizona”); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 *Duke J. Const. L. & Pub. Pol’y* 81, 119 (2013) (“Restrictionist laws embodying the ‘attrition-through-enforcement’ philosophy are purposefully designed to encourage the self-deportation of unauthorized immigrants.”). See generally Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 *Tulsa J. Comp. & Int’l L.* 155, 156 (2008) (describing theoretical justifications for attrition-through-enforcement policy).

4. See generally Jeanne Batalova et al., *DACA at the Two-Year Mark: A National and State Profile of Youth Eligible and Applying for Deferred Action*, Migration Policy Inst. 2 (2014), <http://www.migrationpolicy.org/sites/default/files/publications/DACA-Report-2014-FINALWEB.pdf> [<http://perma.cc/VZG8-YN6Y>] (concluding DACA has facilitated “significant milestones on the path to economic self-sufficiency that previously had been closed to most unauthorized immigrant youth”); Tom K. Wong & Carolina Valdivia, *In Their Own Words: A Nationwide Survey of Undocumented Millennials* 3 (2014), [http://media.wix.com/ugd/bfd9f2\\_4ac79f01ab9f4247b580aeb3afd3da95.pdf](http://media.wix.com/ugd/bfd9f2_4ac79f01ab9f4247b580aeb3afd3da95.pdf) [<http://perma.cc/ZD6H-ZDT7>] (reporting 64% of survey respondents felt greater sense of belonging in United States after becoming “DACAmended” and identical percentage expressed “they are no longer afraid because of their immigration status” (internal quotation marks omitted)).

5. See generally Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., & John Morton, Dir., U.S. Immigration & Customs Enf’t (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/6RSK-2ELK>] (announcing DACA and detailing corresponding changes in enforcement policies); Stephen Collinson, *Defiant Obama Says He Won’t Bend to GOP*, CNN (Nov. 17, 2014, 9:17 AM), <http://www.cnn.com/2014/11/16/politics/obama-congress> [<http://perma.cc/D7MZ-D5EZ>] (quoting President Obama, who stated with respect to immigration reform, “I can’t wait in perpetuity when I have authorities that at least for the next two years can improve the system”).

6. See Memorandum from Jeh Charles Johnson, Sec’y of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t, & R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot. 3–5 (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<http://perma.cc/KBJ4-47NC>] (announcing substantive changes in Executive’s deferred action policy). Originally, only those “who entered the United States before June 15, 2007,” while “under the age of 16” and who remained “under the age of 31 on June 15, 2012,” were eligible for DACA. *Id.* at 3. Under the revised policy announced

these modifications go into effect,<sup>7</sup> deferred action will extend to approximately 300,000 additional immigrant youth as well as the roughly four million undocumented parents of American citizens and legal permanent residents,<sup>8</sup> making nearly half of America's unauthorized population eligible for work authorization and lawful presence.<sup>9</sup>

President Obama's unabashed use of executive power in implementing DACA provoked divided commentary from the start. Supporters emphasize the policy's socioeconomic benefits and humanitarian appeal. Constitutionally speaking, they consider DACA a permissible—even unremarkable—instantiation of presidential power.<sup>10</sup> In contrast, opponents tend

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in 2014, those who entered the United States prior to January 1, 2012, became eligible “regardless of how old they were in June 2012 or are today.” *Id.* at 3–4. The Administration also extended the period of deferred removal from two years to three. *Id.*

7. The Southern District of Texas enjoined both expansions soon after their announcement. See *Texas*, 86 F. Supp. 3d at 646–77 (granting injunction after finding plaintiffs likely to succeed in challenging legality of DACA expansion and DAPA). The Fifth Circuit affirmed the District Court's preliminary injunction on November 9, 2015. See *Texas v. United States*, No. 15-40238, 2015 WL 6873190, at \*1 (5th Cir. Nov. 9, 2015) (“[W]e affirm the preliminary injunction because the states have standing; they have established a substantial likelihood of success on the merits of their procedural and substantive APA claims; and they have satisfied the other elements required for an injunction.”). The Obama Administration has sought Supreme Court review. See Seung Min Kim & Josh Gerstein, *Obama Administration Takes Immigration Battle to Supreme Court*, *Politico* (Nov. 20, 2015, 10:15 AM), <http://www.politico.com/story/2015/11/obama-immigration-supreme-court-216100> [<http://perma.cc/L366-J4BX>] (describing Administration's reaction to Fifth Circuit ruling).

8. Alicia Parlapano, *What Is President Obama's Immigration Plan?*, *N.Y. Times* (Nov. 20, 2014), <http://www.nytimes.com/interactive/2014/11/20/us/2014-11-20-immigration.html> (on file with the *Columbia Law Review*) (presenting data on new DACA policy).

9. An estimated 11.2 million unauthorized individuals reside in the United States. See Jeffrey S. Passel & D'Vera Cohn, *Pew Research Ctr., Unauthorized Immigrant Totals Rise in 7 States, Fall in 14*, at 6 (2014), [http://www.pewhispanic.org/files/2014/11/2014-11-18\\_unauthorized-immigration.pdf](http://www.pewhispanic.org/files/2014/11/2014-11-18_unauthorized-immigration.pdf) (on file with the *Columbia Law Review*) (“Nationally, the population of 11.2 million unauthorized immigrants in 2012 was unchanged from 2009 . . .”). Of those, approximately 5.3 million are eligible for DACA. See *supra* text accompanying notes 5–7.

10. See, e.g., Daniel A. Arellano, *Keep Dreaming: Deferred Action and the Limits of Executive Power*, 54 *Ariz. L. Rev.* 1139, 1145–50 (2012) (“Immigration authorities have explicitly acknowledged their power to exercise prosecutorial discretion in the form of deferred action in immigration enforcement since 1975.” (citing Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 *Conn. Pub. Int. L.J.* 243, 282 (2010))); see also Greg Sargent, *How Far Can Obama Go on Deportations?*, *Wash. Post* (Aug. 6, 2014), <http://www.washingtonpost.com/blogs/plum-line/wp/2014/08/06/how-far-can-obama-go-on-deportations> [<http://perma.cc/N55K-B6FU>] (transcribing interview with former acting counsel for Department of Homeland Security, who stated “ICE officers have always exercised discretion and always implemented priorities” and “[l]ong-standing law already allows for individuals . . . granted deferred action to gain work authorization”). President Obama has defended his actions as “not only lawful” but also “the kinds of actions taken by every single Republican president and every Democratic president over the past half-century.” Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, *N.Y. Times* (Nov. 20, 2014), <http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html> (on file with the *Columbia Law Review*).

to decry the policy as foisting upon states unwanted economic and social burdens.<sup>11</sup> On the constitutional front, detractors classify deferred action as interbranch power mongering, an exercise in executive aggrandizement.<sup>12</sup> Legal analyses have reproduced this rift in popular opinion as academics set forth opposing accounts of DACA's doctrinal legitimacy.<sup>13</sup> These assessments—both popular and academic—have focused on DACA's constitutionality in the abstract. Yet, for DACA beneficiaries, curiosity about the program's doctrinal standing is crucial only insofar as it sheds light on the fate of millions of noncitizens who have come to rely on deferred ac-

11. See, e.g., Amended Complaint for Declaratory and Injunctive Relief at 24, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 1:14-cv-254), 2014 WL 7497780, at 24 (alleging, in contesting constitutionality of DACA expansion and DAPA, "Plaintiff States will be forced to expend substantial resources on law enforcement, health care, and education"); Malia Zimmerman, *Elusive Crime Wave Data Shows Frightening Toll of Illegal Immigrant Criminals*, Fox News (Sept. 16, 2015), <http://www.foxnews.com/us/2015/09/16/crime-wave-elusive-data-shows-frightening-toll-illegal-immigrant-criminals> [<http://perma.cc/U9P3-S5TY>] ("[L]ocal, state and federal statistics . . . show illegal immigrants are three times as likely to be convicted of murder as members of the general population and account for far more crimes than their 3.5-percent share of the U.S. population would suggest."); cf. CNN Tea Party Debate Transcript Part 4 – #CNNTeaParty, CNN (Sept. 13, 2011), <http://www.politico.com/2011/09/13/cnn-tea-party-debate-transcript-part-4-cnn-teaparty> [<http://perma.cc/PER2-BRSH>] (transcribing statement by Michele Bachmann that "American way is not to give taxpayer subsidized benefits to people who have broken our laws or who are here . . . illegally" and advocating for "people [to] come . . . with sponsors so . . . they don't fall back on the taxpayers to take care of them"); Full Transcript: Undercard GOP Debate, Wash. Post (Sept. 16, 2015), <http://www.washingtonpost.com/news/post-politics/wp/2015/09/16/running-transcript-undercard-gop-debate> [<http://perma.cc/NR5M5U5J>] (reproducing statement by Rick Santorum that wages of U.S. workers are "flatlining" because "70 to 90 percent of people who've come into this country . . . are wage earners that are holding wages down, taking jobs away from America"); id. (relating statement by Bobby Jindal that "immigration without assimilation is invasion"); Wednesday's GOP Debate Transcript, Annotated, Wash. Post (Sept. 16, 2015), <http://www.washingtonpost.com/news/the-fix/wp/2015/09/16/annotated-transcript-september-16-gop-debate> [<http://perma.cc/GZQ8-JA6Z>] (documenting claim by Donald Trump that "we have a lot of really bad dudes in this country from outside," which has led to "gangs all over the place").

12. See, e.g., Amended Complaint at 20, *Crane v. Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013) (No. 3:12-cv-03247-O), 2012 WL 5199509 (claiming DACA "is a legislative act" that "usurps the legislative authority conferred by the Constitution exclusively on Congress"); Julia Preston & John H. Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. Times (June 15, 2012), <http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html?pagewanted=all&r=0> (on file with the *Columbia Law Review*) (reporting statement of Senator Charles E. Grassley of Iowa that "[P]resident's action [of initiating DACA] is an affront to the process of representative government by circumventing Congress and with a directive [the President] may not have the authority to execute"); Court Rules DACA Is Likely Unconstitutional: FAIR Calls upon the Administration or Congress to End Backdoor Amnesty Program, PRNewswire (Aug. 1, 2013), <http://www.prnewswire.com/news-releases/court-rules-daca-is-likely-unconstitutional-218012601.html> [<http://perma.cc/URX6-73DD>] (relating statement of president of Federation for American Immigration Reform that "DACA clearly preempts the Legislative Branch's exclusive authority to determine our immigration laws and it must be terminated" (internal quotation marks omitted)).

13. See *infra* Part III (discussing differing opinions as to DACA's constitutionality).

tion for their dignity, livelihood, future, and freedom.<sup>14</sup> For them, DACA's legality is more than a topic of spirited debate. It represents promotion from an "underclass" "caste"<sup>15</sup> and a chance at true, productive membership in American society.

This Note assesses the likelihood that noncitizen DACA beneficiaries will continue to enjoy the benefits and entitlements of deferred action after the Obama Administration cedes power. Some have attempted to address this question. Professor Lauren Gilbert suggests the President's "bold assertion of Executive authority will have lasting impact" only if it "serves as a stepping stone to . . . comprehensive immigration reform."<sup>16</sup> Similarly, Daniel Arellano argues, "[President Obama's] policies are likely to have little lasting effect without further legislative action."<sup>17</sup> Other scholars to consider the matter, whether directly or collaterally, tend to agree.<sup>18</sup> These conclusions oversimplify the constitutional issue by characterizing DACA as a dichotomous conflict between Congress and the Executive to the exclusion of all other constitutional entities. This characterization ignores the reality of immigration policymaking in modern American government. In contrast, this Note emphasizes the vital entrée President Obama's deferred action strategy has opened for states into the domain of immigration policy and argues that as states claim an increasingly robust role in regulating immigrants, federalism demands consideration of their sovereign prerogative in assessing the constitutionality and durability of DACA and its attendant benefits.

This Note proceeds in several parts. Part I opens with a brief history of American immigration federalism.<sup>19</sup> Section I.A.1 traces fluctuations in state and federal immigration power from the colonial era to the present

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14. See, e.g., Simeon Lancaster, As 'Dreamers' Renew Status, They Face Both Opportunities and Fears, *MinnPost* (Oct. 2, 2014), <http://www.minnpost.com/politics-policy/2014/10/dreamers-renew-status-they-face-both-opportunities-and-fears> [<http://perma.cc/4TJU-LGN7>] ("I just can't comprehend my life without DACA or being able to contribute to this country the way I am now.").

15. *Plyler v. Doe*, 457 U.S. 202, 218–19 (1982).

16. Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 *W. Va. L. Rev.* 255, 310 (2013).

17. Arellano, *supra* note 10, at 1140.

18. See, e.g., Rubenstein, *supra* note 3, at 87 (emphasizing nonbinding nature of unilateral executive action and concluding discretionary policies such as DACA do not preempt subfederal immigration policy); Josh Blackman, *Gridlock and Executive Power* 40–42, 55 (July 15, 2014) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2466707](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466707) (on file with the *Columbia Law Review*) (using DACA as example of presidential "corrective powers" and concluding "[e]xecutive actions cannot be justified as a means to evade [congressional] gridlock when legitimate political reforms . . . could make salutary, permanent, and lawful changes to our system of government").

19. This Note concurs with Professor Stella Burch Elias's definition of "immigration federalism." See Stella Burch Elias, *The New Immigration Federalism*, 74 *Ohio St. L.J.* 703, 706 (2013) (arguing term "encompass[es] all multi-governmental rulemaking pertaining to immigrants and immigration . . . undertaken by various government entities acting in cooperation with or in opposition to one another").

and deconstructs the myth of federal exclusivity that has justified the judicial minimization of states' role in setting national immigration policy. Section I.A.2 describes the momentous shift in constitutional immigration power to the subfederal level that has taken place during the Obama Administration, further undermining the received narrative of federal immigration supremacy as constitutional axiom. Part II argues that a return to robust subfederal immigration authority may be preferable to renewed federal dominance and possible under the Supreme Court's most recent immigration precedent. It then reveals how integrationist states can use their newly reclaimed immigration authority to entrench policies such as DACA indefinitely. Finally, Part III locates Obamian immigration reform within the traditional tripartite framework for executive action announced in *Youngstown Sheet & Tube Co. v. Sawyer* and suggests the framework be expanded to include calculations of *state* power.<sup>20</sup> So modified, *Youngstown's* schema not only resolves questions as to DACA's constitutionality but also better accounts for the real-world distribution of policymaking authority within our federalist system, encouraging precedent more closely aligned with the live dimensions of American government. Ultimately, this Note argues that subfederal political support, if carefully cultivated and deftly maneuvered, can succeed in ratifying Obamian immigration reform, both within the *Youngstown* framework and as a matter of popular constitutionalism.

#### I. AN INCONSTANT POWER: CONSTITUTIONALIZING IMMIGRATION REGULATION

That the power to regulate immigration must reside, as a matter of logic, in the federal government is a nearly axiomatic proposition in American law. Indeed, classical immigration law depicts Congress's power over non-citizens as absolute—the so-called plenary power doctrine.<sup>21</sup> Yet from a textual standpoint, the Constitution hardly demands federal exclusivity in immigration.<sup>22</sup> Despite its constitutional complexion, the plenary pow-

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20. 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring in the judgment) (delineating three zones of presidential power).

21. See, e.g., Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 *Colum. L. Rev.* 1833, 1839 (1993) (“[M]odern immigration law is permeated with the assumption that regulating immigration is inherently a federal activity . . .”).

22. See, e.g., Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* 18 (2006) [hereinafter Motomura, *Americans in Waiting*] (“The Constitution authorizes Congress ‘to establish a uniform Rule of Naturalization.’ Perhaps power to naturalize includes power to regulate immigration, but the Constitution does not say this.”); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 *Vand. L. Rev.* 787, 792, 811–12 (2008) (“The text and structure of the Constitution allow for shared [immigration] authority . . . [T]here is no clear commitment in the text or institutional structures of the Constitution to federal exclusivity.”); Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 *U. Ark. Little Rock L. Rev.* 579, 581 (2009) (“The U.S. Constitution contains no language that expressly grants Congress the power to regulate immigration. The Constitution only gives Congress the express power to create a uniform rule of naturaliza-

er doctrine is a jurisprudential myth, produced by grafting extratextual norms onto ambiguous constitutional language.<sup>23</sup> Perhaps because of this unconventional pedigree, the doctrine has proven unsteady. Scholars have chronicled plenary power's slow, twentieth-century decline.<sup>24</sup> Now, in the twenty-first century, this erosion seems to have gained speed. As states compensate for Congress's abstinence in immigration regulation, plenary power appears increasingly vestigial.

This Part details the rise and fall of plenary power, placing particular emphasis on periodic shifts in the degree of immigration authority accorded the federal government and states, respectively. It then assesses the impact President Obama's deferred action policies have had on the allocation of immigration authority between state and federal governments, updates existing historical accounts, and delineates the current power balance. In doing so, it undercuts the popular perception of federal immigration supremacy as constitutional axiom.

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tion."); cf. Linda S. Bosniak, *Immigrants, Preemption and Equality*, 35 Va. J. Int'l L. 179, 179–80 (1994) [hereinafter *Bosniak, Immigrants, Preemption, and Equality*] (remarking "principle that only the federal government can legitimately make and enforce immigration policy" is "based on the now-outmoded premise that the conduct of foreign relations must remain the exclusive preserve of the federal government").

23. See Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255, 255, 260 [hereinafter *Legomsky, Plenary Congressional Power*] (remarking "[i]mmigration law is a constitutional oddity" and "an area in which the normal rules of constitutional law simply do not apply"); Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1, 1 (1984) [hereinafter *Schuck, Transformation*] ("Immigration has long been a maverick, a wild card, in our public law. Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.").

In the past two hundred years, the Supreme Court has articulated various divergent justifications for plenary power. Some are textual in nature: the Commerce Clause, the Naturalization Clause, and the foreign affairs power, for example. See U.S. Const. art. I, § 8; *Edwards v. California*, 314 U.S. 160, 173 (1941) (classifying interstate movement of people as commerce regulable by Congress); *Chae Chan Ping v. United States*, 130 U.S. 581, 605–06 (1889) (associating power to regulate immigration with power to regulate foreign affairs). Others flow from structural interpretations of the Constitution, including sovereign prerogative, necessity, and national identity. See *Chae Chan Ping*, 130 U.S. at 609 (characterizing "power of exclusion of foreigners" as "incident of sovereignty"); Thomas Alexander Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 192–93 (7th ed. 2012) (suggesting United States would lose right to self-determination absent plenary power doctrine).

24. See, e.g., Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 Hastings Const. L.Q. 925, 937 (1994) (predicting "[u]nlikely as the Court is to abolish the plenary power doctrine outright, it can, and probably will, give us [plenary power doctrine]-lite"); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 Va. J. Int'l L. 201, 202–05 (1994) [hereinafter *Motomura, Immigration and Alienage*] (describing "slow erosion of the plenary power doctrine").

A. *Plenary Power Cradle to Grave*

1. *Immigration in the Premodern Era.* — Immigration regulation was a purely local affair in colonial America. Structured around royal charters with a distant sovereign, colonial governments enjoyed considerable autonomy in the management of local affairs, including the authority to define and regulate terms of social membership.<sup>25</sup> Immigration laws differed significantly from one locality to the next as colonies pursued “widely varying policies” of admission, inhabitation, and exclusion.<sup>26</sup> These localist policies persisted with the Articles of Confederation,<sup>27</sup> under which the fledgling states retained full control over the laws of admission, exclusion, and naturalization applied within their borders.<sup>28</sup> Confederation achieved one notable change, however. Whereas the colonies had been free to disregard their sister settlements in crafting immigration policy, the Articles entitled the “free inhabitants” of each newly formed state “to all privileges and immunities of free citizens in the several States.”<sup>29</sup> Each state was therefore bound to treat as citizens all foreigners naturalized by her sister states, including foreigners inadmissible under a state’s own laws.<sup>30</sup> Thus, by crossing state lines, naturalized aliens might gain access to privileges greater than those available in their own state.<sup>31</sup> Conversely, an al-

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25. See James E. Hickey, Jr., *Localism, History and the Articles of Confederation: Some Observations About the Beginning of U.S. Federalism*, 9 *Ius Gentium* 5, 9 (2003) (“The American colonies essentially governed themselves under royal charters from England. . . . Local authority in towns and counties was pervasive and was exercised in almost every sphere . . . .”); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 *N.C. L. Rev.* 1557, 1566–69 (2008) (stating colonies and early states “[c]ontroll[ed] the movement of people across their borders”); Gordon S. Wood, *The First National Constitution of the United States*, in *Government Structures in the U.S.A. and the Sovereign States of the Former U.S.S.R.* 12, 12 (James E. Hickey, Jr. & Alexej Ugrinsky eds., 1996) (“All the colonies in the seventeenth century experienced an acute localization of authority.”).

26. Emberson Edward Proper, *Colonial Immigration Laws: A Study of the Regulation of Immigration by the English Colonies in America* 17 (1900) (explaining settlements “differed fundamentally in character and purpose”). For a detailed survey of colonial immigration law, see *id.* at 21–72 (analyzing laws of Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, Virginia, Maryland, North Carolina, South Carolina, and Georgia).

27. See Hickey, *supra* note 25, at 10 (explaining localism “translated rather easily into concepts of individual state sovereignty” under Articles of Confederation).

28. See 2 *The Records of the Federal Convention of 1787*, at 271 (Farrand ed., 1911) [hereinafter *Records of the Federal Convention*] (“The States have formed different qualifications themselves, for enjoying different rights of citizenship.”); see also *Articles of Confederation of 1781*, art. II (providing “[e]ach state retains its sovereignty, freedom, and independence”).

29. *Articles of Confederation of 1781*, art. IV.

30. See *The Federalist No. 42*, at 270 (James Madison) (Clinton Rossiter ed., 1961) (arguing Articles’ privileges and immunities clause granted states “very improper power . . . of naturalizing aliens in every other State”).

31. See *id.* (stating under Articles “*free inhabitants* of a State, although not citizens of such State, are entitled, in every other State, to all the privileges of *free citizens* of the latter; that is, to greater privileges than they may be entitled to in their own State”).



ien might “elude” durational residency requirements necessary for citizenship in one state by acquiring citizenship in a jurisdiction with less stringent qualifications.<sup>32</sup>

While this legal oddity failed to provoke serious conflict among the confederated states, it posed a risk the Founding Fathers would not abide. James Madison concluded that a system comprised of conflicting naturalization schemes was simply unworkable.<sup>33</sup> It was legally incoherent and provided fodder for interstate conflict,<sup>34</sup> a prospect at odds with the central aim of the developing constitutional project.<sup>35</sup> If the new Constitution were to have any chance at “break[ing] and control[ing] the violence of faction” it would therefore have to take naturalization in hand.<sup>36</sup> It would do so “by authorizing the general government to establish a uniform rule of naturalization throughout the United States.”<sup>37</sup> With regard to the regulation of immigrants, constitutional ratification thus effectuated a momentous shift in power from the states to the new federal government. From that point on, congressional legislation would reign supreme, superseding state naturalization schemes and seizing from the states a key tool of local identity—at least in theory.<sup>38</sup>

In practice, states continued virtually unabated in their regulation of immigrants for close to a century.<sup>39</sup> Several factors enabled states’ contin-

32. See *id.* (“In one State, residence for a short term confirms all the rights of citizenship: in another, [more is] required. An alien . . . incapacitated for . . . rights in the latter, may, by previous residence . . . in the former, elude his incapacity; [rendering] the law of one State . . . paramount to the law of another . . .”).

33. See *id.* at 269–71 (discussing Articles of Confederation and commenting “dissimilarity in the rules of naturalization has long been remarked as a fault in our system”).

34. See *id.* at 270 (“We owe it to mere casualty that very serious embarrassments on this subject have been hitherto escaped . . . . Whatever the legal consequences might have been, other consequences would probably have resulted of too serious a nature not to be provided against.”).

35. See *The Federalist* No. 10, at 77 (James Madison) (Clinton Rossiter, ed., 1961) (explaining “[a]mong the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than” its ability to combat factionalism).

36. *Id.*

37. *The Federalist* No. 42, *supra* note 30, at 270–71.

38. The Supreme Court announced as much in *Chirac v. Chirac*, observing “the law of the state of Maryland, according to which [the plaintiff] took the oaths of citizenship [was] virtually repealed by the constitution of the United States, and the [1790] act of naturalization enacted by congress.” 15 U.S. (2 Wheat.) 259, 269 (1817).

39. See Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 *Colum. L. Rev.* 1625, 1626 (1992) [hereinafter Motomura, *Curious Evolution*] (“‘Immigration law,’ which is commonly defined as the federal law governing the admission and expulsion of aliens, did not exist in this country until 1875.” (footnote omitted)); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *Yale L.J.* 545, 550 (1990) [hereinafter Motomura, *Phantom Norms*] (“The story of the plenary power doctrine’s role in constitutional immigration law begins with the Supreme Court’s 1889 decision in the *Chinese Exclusion Case*.”); see also, e.g., *Ex Parte Knowles*, 5 Cal. 301, 303–06 (1855) (holding state as well as federal courts have ability to naturalize citizens);

ued regulatory dominance. Declining to pass legislation of its own, the newly instituted Congress implicitly reaffirmed states' immigration power.<sup>40</sup> To meet the new and diverse challenges of nineteenth-century immigration, states legislated to fill the void left by congressional inaction.<sup>41</sup> Furthermore, demand for settlers in America's sparsely populated western territories weighed against and made impracticable uniform, restrictionist immigration policies.<sup>42</sup> Securing and developing the western frontier required productive bodies.<sup>43</sup> Thus, at the turn of the nineteenth century, "the main role for government in immigration was to encourage it."<sup>44</sup> To expedite settlement in remote geographic areas not meaningfully subject to federal control, questions of social suitability and exclusion were left to state and territorial governments.<sup>45</sup> Finally, and perhaps

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Stumpf, *supra* note 25, at 1570 ("The early 1800s was an era marked by the joint exercise of federal and state power over immigration.").

40. See, e.g., Kai Bartolomeo, Immigration and the Constitutionality of Local Self Help: *Escondido's* Undocumented Immigrant Rental Ban, 17 S. Cal. Rev. L. & Soc. Just. 855, 858 (2008) ("Rather than a comprehensive system of federal immigration legislation, the federal government shared its regulatory power with the states." (citing Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 119 (1997))). Congress also acquiesced to state regulation in more explicit ways. For example, under the Articles, a "first cautious step that avoided the appearance of" federal intrusion "in an area previously under the control of each colony was a resolution" in September 1788, which encouraged states to "pass proper laws for preventing the transportation of [convicts] from foreign countries." E.P. Hutchinson, *Legislative History of American Immigration Policy 1798–1965*, at 11 (1981) (internal quotation marks omitted) (quoting *Journals of Congress*, 13:105–6). "[T]he resolution was . . . a tacit recognition of state jurisdiction over immigration . . ." *Id.* "In later years, after the federal Constitution had taken effect, further states enacted similar legislation, and states that already had such legislation reenacted or amended their provisions." Neuman, *supra* note 21, at 1843.

41. For a comprehensive account of state immigration legislation from 1776–1875, see generally Neuman, *supra* note 21. States did not necessarily relish this role. Massachusetts legislators, for example, apparently uncertain in the face of congressional silence as to "how far they could go in restricting immigrants' territorial rights without violating the Constitution," petitioned Congress to pass legislation capable of remedying the practice of "foreign pauper dumping." Kunal M. Parker, *State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts*, 19 *Law & Hist. Rev.* 583, 608 & n.64 (2001); cf. Neuman, *supra* note 21, at 1843 ("The federal government was slow to take action to exclude foreign convicts.").

42. See Hiroshi Motomura, *Immigration Outside the Law* 66 (2014) [hereinafter Motomura, *Outside the Law*] ("The vastness of the expanding nation and the rudimentary nature of communication and transportation precluded comprehensive immigration control").

43. See Motomura, *Americans in Waiting*, *supra* note 22, at 19 ("Attitudes early in the 1800s favored a sustained flow of immigrants . . . The reasons were largely economic, with immigrant labor badly needed to settle the new land . . ."); see also *Henderson v. Mayor of the City of N.Y.*, 92 U.S. 259, 270 (1875) (acknowledging immigrants bring "labor which we need to till our soil, build our railroads, and develop the latent resources of the country in its minerals, its manufactures, and its agriculture").

44. See Motomura, *Americans in Waiting*, *supra* note 22, at 19.

45. See Motomura, *Outside the Law*, *supra* note 42, at 66 ("[S]ettler society was shaped regionally and locally."); *id.* (explaining territorial governments "recruit[ed] the desirable" and "kep[t] out the unwanted").

most importantly, the concept of naturalization was inextricably bound up in the unresolved debate over slavery.<sup>46</sup> While northern states considered freedpersons citizens,<sup>47</sup> the South deemed slaves property and resisted efforts to expand the definition of citizen beyond that of “free white person.”<sup>48</sup> Until 1856—the year the Supreme Court handed down its decision in *Dred Scott*<sup>49</sup>—establishing a uniform rule of naturalization would therefore have required Congress take a stance on slavery by announcing a clear definition of “citizen.”<sup>50</sup> This proved a more than unsavory proposition.

Thus, it was not until the tail end of the nineteenth century that the balance of immigration authority truly began to shift from the states to the federal government. Several events precipitated this belated transition. The first was the Civil War. Though horrific in its slaughter, the war successfully broke the back of slavery. Northern victory facilitated the pas-

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46. Neuman, *supra* note 21, at 1878–79 (noting because Congress was legally and politically disabled from regulating slave trade, “much was left to the states” and stating many state regulations “may be considered comparable to traditional immigration laws”); *id.* at 1866 (“Historians have reasonably suggested that a primary cause of the federal government’s failure to adopt qualitative restrictions on immigration before the Civil War was the slave states’ jealous insistence on maintaining power over the movement of free blacks as a states’ right.”).

47. See Motomura, *Outside the Law*, *supra* note 42, at 67 (“In the first half of the nineteenth century, Northern states recognized free blacks born in the United States as citizens, but Southern states did not.”).

48. See Elizabeth Beaumont, *The Civic Constitution: Civic Visions and Struggles in the Path Toward Constitutional Democracy* 124–29 (2014) (internal quotation marks omitted) (quoting 1790 Naturalization Act, ch. 4, 1 Stat. 103 (1790) (repealed 1795)) (describing establishment and development of antebellum “pro slavery constitutional order”). The southern slavocracy also invoked the Tenth Amendment, proclaiming the regulation of freedpersons a matter of state right. See *id.* at 127 (observing “pro slavery constitutionalists were extremely successful at coopting” concept of states’ rights). This emphasis on states’ rights “skewed the structure of federalism” in states’ favor and “defin[ed] . . . the limits of Congress’s operation.” *Id.*; see also *id.* (“Much of the legal apparatus constricting citizenship operated at the state level, through state constitutions and statutes enforcing slavery in the South and denying rights in the North. But the national constitution permitted this, and placed no limits on states’ abilities to confer or deny citizenship or rights.” (footnote omitted)).

49. *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

50. See Motomura, *Outside the Law*, *supra* note 42, at 67 (“The divide over whether African Americans were property, rather than persons, left the nation unable to speak in one voice on who counted as Americans . . .”). This, of course, was the conundrum Justice Taney intended to resolve with his infamously racist opinion in *Dred Scott*. See 60 U.S. at 403–27 (explaining why African Americans cannot be made citizens of United States). To that end, Justice Taney barred both the states and the federal government from declaring African Americans federal citizens. “The Constitution,” Taney wrote, “took from the States all power by any subsequent legislation to introduce as a citizen into the political family of the United States any one.” *Id.* at 418. With regard to the federal government, he concluded, “[the] power granted to Congress to establish an uniform rule of *naturalization*” is “not a power to raise to the rank of a citizen any one born in the United States, who, from birth or parentage, by the laws of the country, belongs to an inferior or subordinate class.” *Id.* at 417.

sage of the Fourteenth Amendment, which declared African Americans citizens. The definition of “citizen” formally resolved, a major impediment to federal immigration legislation vanished.<sup>51</sup> Second, the Supreme Court took a hard line on state immigration regimes in the postbellum era. The Court had previously flirted with the notion of federal exclusivity in immigration,<sup>52</sup> but its 1889 decision in *Chae Chan Ping v. United States* placed the naturalization power entirely in the hands of Congress.<sup>53</sup> In no uncertain terms, Justice Field declared the power to regulate immigration a uniquely *federal* “incident of sovereignty.”<sup>54</sup>

Out of *Chae Chan Ping* emerged the plenary power doctrine, which, by the mid-twentieth century, came to encompass a series of broad principles. The first was unqualified federal exclusivity in the enactment, promulgation, and enforcement of immigration laws.<sup>55</sup> Justice Stevens provided the clearest description of federal exclusivity in *Hampton v. Mow Sun Wong*, explaining “the authority to control immigration” is “vested

51. See Motomura, *Outside the Law*, supra note 42, at 69 (stating Civil War “allowed immigration regulation to become exclusively federal” and “established the primacy of national citizenship”).

52. See, e.g., *Henderson v. Mayor of the City of NY*, 92 U.S. 259, 274–75 (1875) (striking down head taxes on arriving immigrants and reasoning “this whole subject [of foreign commerce] has been confided to Congress by the Constitution”); *Passenger Cases*, 48 U.S. (7 How.) 283, 394 (1849) (deeming power “to establish a uniform rule of naturalization” among one of several powers “beyond State jurisdiction”); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197–200, 215–16 (1824) (finding transportation of passengers constitutes “commerce” and endorsing federal supremacy over interstate commerce).

53. See 130 U.S. 581, 609 (1889) (“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution . . . cannot be granted away or restrained on behalf of any one.”).

54. *Id.*; see also *id.* at 603, 606 (stating proposition that “government of the United States, through the action of the legislative department, can exclude aliens from its territory is [one] which we do not think open to controversy” and “for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power”); accord *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) (attributing power over admission and exclusion of immigrants to “national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war”); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (“[E]very sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”); *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 555 (1871) (“The United States is . . . the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, . . . all which are forbidden to the State governments.”). The key question in *Chae Chan Ping* boiled down to whether it was “within the power of Congress to prohibit Chinese laborers” who had temporarily departed “from returning to the United States.” 130 U.S. at 603.

55. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.” (internal quotation marks omitted) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909))); *Truax*, 239 U.S. 33, 42 (1915) (“The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government.”).

solely in the Federal Government, rather than the States.”<sup>56</sup> Second, as a means of safeguarding federal exclusivity, the Court developed strict limits on the scope of judicial review in immigration cases.<sup>57</sup> Until the late twentieth century, federal appellate courts therefore “abjured any significant judicial role” in defining immigration policy,<sup>58</sup> deferring “almost completely to the decisions of the federal legislature and the executive branch.”<sup>59</sup> Consequently, the adjudication of aliens’ constitutional rights became an exercise in near-total deference to federal policy.<sup>60</sup> Finally, in necessitating “very strong versions of obstacle and field preemption,” the plenary power doctrine supplanted subfederal immigration laws.<sup>61</sup> Thus, at its height, the plenary power doctrine accorded the federal government carte blanche in regulating immigration, suppressed state power, abetted the curtailment of aliens’ constitutional rights, and mandated judicial deference to “practices that were decidedly, sometimes grotesquely, illiberal.”<sup>62</sup>

Plenary power carried the seeds of its own destruction. As early as 1892, members of the Supreme Court denounced the notion of un-

56. 426 U.S. 88, 101 n.21 (1975) (citing *Truax*, 239 U.S. at 42).

57. See, e.g., *id.* (“[T]he power over aliens is of a political character and therefore subject only to narrow judicial review.”).

58. Schuck, *Transformation*, supra note 23, at 14; see also *id.* at 14–16 (“With a few exceptions, the Supreme Court reflexively confirmed the deference principle with a decision on the merits in favor of the government . . .”).

59. Stumpf, supra note 25, at 1572.

60. See, e.g., 8 U.S.C. § 1252(d)(1) (2012) (limiting judicial review to final, nondiscretionary removal orders and habeas corpus petitions and only once “alien has exhausted all administrative remedies available . . . as of right”); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as the alien denied entry is concerned.”); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (“As to [aliens], the decisions of executive or administrative officers . . . are due process of law.”); Schuck, *Transformation*, supra note 23, at 14 (stating until 1960s “egalitarian potential of the due process and equal protection safeguards of the fifth and fourteenth amendments, especially as applied to aliens, remained largely undiscovered” (footnote omitted)); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 *N.Y.U. L. Rev.* 493, 500–18 (2001) (discussing scope of equal protection doctrine in immigration jurisprudence).

61. Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 *Mich. L. Rev.* 567, 621 (2008); see also Motomura, *Outside the Law*, supra note 42, at 69 (stating “cascade of federal immigration statutes” and Supreme Court’s plenary power precedent “left virtually no room for states to address immigration without conflicting impermissibly with federal immigration authority”); Huntington, supra note 22, at 788–95 (acknowledging assumption that federal exclusivity in immigration is synonymous with “structural” preemption); Stumpf, supra note 25, at 1573 (observing early plenary power cases “ousted the states from their original role as the primary regulators of the movement of noncitizens” (citing *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875); *Henderson v. Mayor of New York*, 92 U.S. 259, 274 (1875); *Smith v. Turner*, 48 U.S. (7 How.) 283, 394 (1849))).

62. Schuck, *Transformation*, supra note 23, at 3; see also, e.g., Legomsky, *Plenary Congressional Power*, supra note 23, 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.”).

checked federal power over resident aliens, calling it “undisguised despotism and tyranny.”<sup>63</sup> Likely driven by these and similar concerns, the Court began narrowing the scope of plenary power in the mid-twentieth century.<sup>64</sup> In doing so, it initiated a gradual transfer of immigration power back to the states. The shift commenced in 1941 with the Supreme Court’s decision in *Hines v. Davidowitz*.<sup>65</sup> *Hines* involved a challenge to Pennsylvania’s Alien Registration Act, which required that all aliens over the age of eighteen register annually with the state and carry “an alien identification card ‘at all times.’”<sup>66</sup> While traditional plenary power rhetoric featured prominently in its opinion,<sup>67</sup> the Court sidestepped appellees’

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63. *Fong Yue Ting v. United States*, 149 U.S. 698, 755 (1892) (Field, J., dissenting); see also *id.* at 754 (Field, J., dissenting) (lamenting arbitrary circumscription of aliens’ due process rights, writing, “If one rule may lawfully be laid aside . . . , another rule may also be laid aside, and all rules may be discarded,” which “ignore[s] the teachings of our history, the practice of our government, and the language of our Constitution”). Ironically, it was Justice Field who laid the foundation of plenary power in *Chae Chan Ping*. See *supra* note 53 (quoting Court’s plenary power language). However, *Chae Chan Ping* was intended to define the scope of federal power with respect to *arriving* aliens, not aliens physically present within the territorial boundaries of the United States. See *Chae Chan Ping v. United States*, 130 U.S. 581, 589 (1889) (characterizing act at issue as “prohibiting Chinese laborers from entering the United States who had departed before its passage”). In Justice Field’s view, “[t]he moment any human being . . . comes within the jurisdiction of the United States . . . he becomes subject to all their laws, is amenable to their punishment and entitled to their protection.” *Fong Yue Ting*, 149 U.S. at 754; see also Stumpf, *supra* note 25, at 1578 (“[W]hen the Court first articulated [plenary power], it would have applied only to immigration laws that governed the external borders of the United States . . . . [T]he Court may have imagined it had granted the federal government a mere sliver of omnipotence.”). In contrast, *Fong Yue Ting* made no meaningful territorial distinction. As Motomura has explained, in *Fong Yue Ting*, “the Court further extended plenary power to the deportation of resident aliens already in the United States.” Motomura, *Phantom Norms*, *supra* note 39, at 553. Writing for the majority, “[Justice] Gray declined to distinguish between the power to deport and the power to exclude, dismissing the idea that deportation should trigger the more substantial constitutional safeguards associated with ‘punishment.’” *Id.*

64. See, e.g., Motomura, *Phantom Norms*, *supra* note 39, at 546–58 (describing “gradual demise” of plenary power beginning in the 1970s and “corresponding reintegration of our usual expectations regarding judicial review into immigration law”); Schuck, *Transformation*, *supra* note 23, at 4 (writing in 1984, “[n]ew principles based upon fundamentally different values are beginning to undermine the classical [immigration] regime and to etch the outlines of a new legal order”).

65. 312 U.S. 52 (1941).

66. *Id.* at 59 (citing Pa. Stats. Ann., tit. 35, §§ 1801–1806). The statute also required registrants pay a registration fee, produce the registration card “whenever it may be demanded” by qualified law enforcement officers, and “exhibit the card as a condition precedent to registering a motor vehicle” or “obtaining a license to operate one.” *Id.*

67. See *id.* at 62 (“That the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution, was pointed out by The Federalist in 1787, and has since been given continuous recognition by the Court.”); *id.* at 63 (“The Federal Government . . . is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties . . . . [T]he whole nation[] imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.”).

claim that federal exclusivity rendered the Pennsylvania statute inherently unconstitutional. It instead construed the issue as one of preemption, “expressly leaving open” appellee’s argument “that the federal power in this field, whether exercised or not, is exclusive.”<sup>68</sup> More remarkable was the Court’s clear endorsement of concurrent state power. Both the majority and dissent approved the notion of subfederal immigration power, though the majority did so more tepidly, acknowledging only that “[a]ny concurrent state power that may exist is restricted to the narrowest of limits.”<sup>69</sup> The dissent delved deeper. “The existence of the national power to conduct foreign relations,” Justice Stone wrote, “does not foreclose state legislation dealing exclusively with aliens as such.”<sup>70</sup> Validating states’ long time defense to federal exclusivity, Justice Stone deemed the Pennsylvania statute a permissible exercise of state police power.<sup>71</sup> Accepting the majority’s preemption framework, he nonetheless offered words of caution: “At a time when the exercise of the federal power is being rapidly expanded through Congressional action, it is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what Congress might have intended” in enacting a given immigration regulation.<sup>72</sup>

*Hines* memorialized two key innovations in the Supreme Court’s immigration jurisprudence. The Court’s opinion effectively tore out the roots of plenary power—Congress’s unqualified supremacy. Conventional accounts of plenary power depicted the doctrine as “smother[ing] the entire field of immigration.”<sup>73</sup> In contrast, *Hines*’s preemption framework preserved a role for the states in regulating noncitizens (albeit a small one).<sup>74</sup> *Hines* also introduced a crucial definitional distinction. In his discussion of state police power, Justice Stone distinguished between laws reg-

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68. *Id.* at 62.

69. *Id.* at 68. Ultimately, the majority invalidated the Pennsylvania law, but not because it found the state lacked the power to enact it. See *id.* at 75 (Stone, J., dissenting) (“The opinion of the Court does not deny, and I see no reason to doubt that the Pennsylvania registration statute, when passed, was a lawful exercise of the constitutional power of the state.”). The Court instead found the law preempted by Congress’s Alien Registration Act, which came into effect a year after the Pennsylvania law. See *id.* at 68–74 (majority opinion) (holding Pennsylvania registration statute obstacle preempted).

70. *Id.* at 77 (Stone, J., dissenting).

71. *Id.* at 80 (Stone, J., dissenting) (“A federal registration act . . . can stand consistently with a like statute . . . passed in aid of state laws and as a safeguard to property and persons within the state, as readily as the federal and state laws which annually demand two separate income tax returns . . .”).

72. *Id.* at 75 (Stone, J., dissenting).

73. Motomura, *Phantom Norms*, *supra* note 39, at 574.

74. See Margaret Hu, *Reverse-Commandeering*, 46 *U.C. Davis L. Rev.* 535, 568–74 (2012) (“[A]s Congress enacted increasingly comprehensive federal immigration laws, a preemption framework evolved as the new norm for evaluating the legality and constitutionality of immigration federalism efforts.”).

ulating *immigration*—the “direct regulation of entrance and abode”<sup>75</sup>—and efforts to regulate the economic and social behavior of immigrants in civil society—what academics refer to as alienage law.<sup>76</sup> It is on the basis of this distinction that the Court officially welcomed states back into the regulatory fold.<sup>77</sup> Thus, in *De Canas v. Bica*, the Court dismissed the argument that “all state regulation of aliens [is] *ipso facto* regulation of immigration.”<sup>78</sup> “Standing alone,” the Court insisted, “the fact that aliens are the *subject* of a state statute does not render it a regulation of immigration.”<sup>79</sup> Thus, so long as a state law regulated immigrants’ participation in—as opposed to admission or exclusion from—American society, it qualified as a permissible use of the state’s power to prescribe alienage law. The Court reaffirmed this doctrinal volte-face seven years later in *Plyler v. Doe*, offering a contemporary justification for the states’ role in immigrant affairs.<sup>80</sup> Repeating the mantra of “exclusive federal control,” the *Plyler* Court nonetheless refused to conclude that “States are without any power” to regulate and deter immigrants “whose numbers might have a discernible impact on traditional state concerns.”<sup>81</sup> The federal government had clearly lost its monopoly on immigration authority.

75. Wishnie, *supra* note 60, at 523; see also Huntington, *supra* note 22, at 795–96 (stating “[i]mmigration law traditionally [encompasses] the rules governing the admission and removal of non-citizens” while “alienage law[] determines the rights and obligations of non-citizens while in the country”); Motomura, *Immigration and Alienage*, *supra* note 24, at 202 (“As traditionally understood, ‘immigration law’ concerns the admission and expulsion of aliens, and ‘alienage law’ embraces other matters relating to their legal status.”).

76. Wishnie, *supra* note 60, at 523 (defining alienage law as “general civil, economic, and social regulation of noncitizens”); see also Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* 38 (2008) (asking, “[w]hat legitimate bearing” sovereign prerogatives have on “treatment of noncitizens . . . present in our society[,] . . . residing in the national territory and participating in national life[,]” or, put differently, “[w]hat . . . is the proper relationship between *immigration* law and policy . . . and *alienage* law and policy”); *id.* at 38–39 (describing difference between immigration and alienage law as “jurisdictional dispute in the law”).

77. That is to say, the Court officially *sanctioned* state immigration regulation on the basis of this distinction. Constitutional or not, states actively regulated immigrants in the plenary power era. See *Hines*, 312 U.S. at 79 (Stone, J., dissenting) (reminding Justices in majority that nineteen states required “some form of registration for aliens” at time Congress passed Alien Registration Act); see also *Tashiro v. Jordan*, 278 U.S. 123, 125–26 (1928) (finding no “conflict between the exercise of the treaty-making power of the federal government and the reserved powers of [California]” to enact Alien Land Law); *Minneapolis v. Reum*, 56 F. 576, 580 (8th Cir. 1893) (preserving state’s right to “confer on foreign citizens or subjects” rights and privileges other than naturalization); Motomura, *Outside the Law*, *supra* note 42, at 68–69 (stating states maintained “significant role in naturalization” until 1906).

78. 424 U.S. 351, 355 (1976). Citing *Hines*’s preemption analysis, Justice Brennan emphasized, “the existence *vel non* of federal regulation is wholly irrelevant if the Constitution of its own force requires preemption of such state regulation.” *Id.* (citing *Hines*, 312 U.S. at 52).

79. *Id.* at 355 (emphasis added).

80. 457 U.S. 202 (1982).

81. *Id.* at 228 n.23.



2. *Immigration in the Modern Era.* — In recent years, the toehold states gained in *Hines*, *De Canas*, and *Plyler* has precipitated a full-blown constitutional schism regarding the limits of subfederal immigration regulation. Over the last decade, states have brazenly asserted their immigration authority, stimulated by congressional paralysis and a forceful, “pro-immigrant” Executive. From 2006–2007, state legislatures spurred a nationwide increase of 174% in the number of proposed subfederal immigration bills and a nearly 200% increase in the rate of subsequent enactment.<sup>82</sup> From 2008–2014, this flood of subfederal legislation produced 1,885 immigration laws.<sup>83</sup> An additional 288 proliferated in 2014,<sup>84</sup> and in the first six months of 2015 alone, states passed another 153 immigration-related laws.<sup>85</sup> Barring drastic congressional or judicial action, it is unlikely states will abandon such legislative efforts anytime soon.

Contemporary subfederal immigration law comes in two flavors, termed “restrictionist” and “integrationist” in this Note. From a constitutional perspective, scholars and the national media have devoted greater attention to restrictionist policies, and for good reason. Restrictionist laws such as Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act (commonly referred to by its legislative designation, SB 1070)<sup>86</sup> and Hazleton, Pennsylvania’s Illegal Immigration Relief Act,<sup>87</sup> directly implicate or appropriate federal law, thereby raising clear preemption concerns.<sup>88</sup> In contrast, integrationist policies typically look like archetypal alienage laws, meaning they bear the façade of state police power, arguably falling within the scope of the Tenth Amendment.<sup>89</sup> This makes

82. These calculations are based on data reported by Kris Kobach. See Kris W. Kobach, Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration [hereinafter Kobach, Rule of Law], in *Strange Neighbors: The Role of States in Immigration Policy* 99 (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014).

83. Immigration Enactments Database, Nat’l Conference of State Legislatures, <http://www.ncsl.org/research/immigration/immigration-laws-database.aspx> (on file with the *Columbia Law Review*) (last visited Sept. 19, 2015) (selecting year from pull-down menu, conducting search for years 2008–2014, and totaling results).

84. *Id.* (on file with the *Columbia Law Review*) (last visited Oct. 28, 2015) (conducting search for 2014).

85. 2015 Report on State Immigration Laws (January–June), Nat’l Conference of State Legislatures 1 (July 31, 2015), [http://www.ncsl.org/documents/immig/Immigration\\_Report\\_July2015.pdf](http://www.ncsl.org/documents/immig/Immigration_Report_July2015.pdf) [<http://perma.cc/5TJC-2A7Y>] [hereinafter Immigrant Policy Project (July 2015)].

86. See *infra* section II.A.2 (discussing *Arizona v. United States*, 132 S. Ct. 2492 (2012)).

87. See *Lozano v. City of Hazleton*, 724 F.3d 297, 300–01 (3d Cir. 2013) (describing Hazleton, Pennsylvania’s Illegal Immigration Relief Act Ordinance and Rental Registration Ordinance, which restricted unauthorized aliens’ ability to obtain employment and rental housing).

88. See, e.g., Kobach, Rule of Law, *supra* note 82, at 113–15 (recommending state statutes mirror federal immigration laws as means of avoiding preemption).

89. The Supreme Court’s anticommandering principle, for example, seems to limit challenges to sanctuary laws, which announce a state or locality’s refusal to facilitate or participate in the enforcement of federal immigration law. See *Printz v. United States*, 521 U.S. 898, 933 (1997) (“The Federal Government may not compel the States to enact or

doubts as to their constitutionality “speculative and indirect”<sup>90</sup>—in short, unsexy. But the strength of the subfederal integrationist movement should not be underestimated. Between 2005–2009, states and localities passed 226 pro-immigrant statutes.<sup>91</sup> In 2013, forty-three states and the District of Columbia adopted 438 immigration-related laws and resolutions,<sup>92</sup> with “few exceptions to the general pro-immigrant trend.”<sup>93</sup> In 2014, immigrant-friendly statutes continued to gain traction in statehouses across the country, and state lawmakers demonstrated a strong interest in integrationist policies.<sup>94</sup> And in its 2015 mid-year report, the

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administer a federal regulatory program.” (internal quotation marks omitted) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)); accord *City of New York v. United States*, 179 F.3d 29, 33, 35 (2d Cir. 1999) (suggesting federal government could not compel states to cooperate with federal immigration enforcement but striking down New York law prohibiting *voluntary* cooperation by state officials); Rodríguez, *supra* note 61, at 628 (noting under *Printz*, Congress “cannot compel state governments to assist in enforcing federal law” and would therefore “be hard pressed to make the claim that the mere existence of the noncooperation laws conflicts with the general purpose of regulating and enforcing immigration laws”). For a description of various sanctuary laws and their purpose, see McKanders, *supra* note 22, at 586–87.

90. *De Canas v. Bica*, 424 U.S. 351, 355–56 (1976) (“[E]ven if [a] local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration . . .”).

91. Huyen Pham & Pham Hoang Van, *Measuring the Climate for Immigrants: A State-By-State Analysis*, in Hessick & Chin, *supra* note 82, at 21, 30 (tallying pro-immigrant statutes). Illinois and California demonstrated the greatest commitment by far to immigrants’ rights during this time period. See *id.* at 32 (assigning California and Illinois highest Immigrant Climate Index scores). Connecticut, Indiana, Iowa, Maryland, Massachusetts, Minnesota, New Mexico, New York, Ohio, Pennsylvania, Washington, and Wisconsin also ranked as immigrant-friendly states, though they lagged substantially behind in the number of pro-immigrant statutes. See *id.* (ranking states based on enactment of immigrant-friendly statutes relative to enactment of anti-immigrant ones).

92. Nat’l Conference of State Legislatures, *Report on 2014 State Immigration Laws 2* (Jan. 6, 2015), <http://www.ncsl.org/documents/immig/ImmigrationReport2014Final.pdf> [<http://perma.cc/XN3F-B7E5>] [hereinafter, *Immigrant Policy Project* (Jan. 2015)].

93. *Inclusive Policies Advance Dramatically in the States: Immigrants’ Access to Driver’s Licenses, Higher Education, Workers’ Rights, and Community Policing*, Nat’l Immigration Law Ctr. 1, 15, <http://www.nilc.org/pubs.html#statesessions> (on file with the *Columbia Law Review*) (last updated Oct. 2013). This study only includes data from January–October 2013.

94. See *Immigrant Policy Project* (Jan. 2015), *supra* note 92, at 2 (reporting “as of Nov[ember] 30, 2014, lawmakers in 43 states and the District of Columbia enacted 171 laws and 117 resolutions related to immigration,” many of which were pro-immigrant); Elias, *supra* note 19, at 705–06 (2013) (arguing “post-*Arizona* legal landscape . . . will be grounded in immigrant-inclusionary rulemaking”); Kirk Semple, *De Blasio to Host Mayors at Immigration Forum*, *N.Y. Times* (Dec. 6, 2014), <http://www.nytimes.com/2014/12/07/nyregion/de-blasio-to-host-mayors-at-immigration-forum.html?hp&action=click&pgtype=Homepage&module=second-column-region&region=top-news&WT.nav=top-news> (on file with the *Columbia Law Review*) (describing efforts of twenty democratic mayors to implement President Obama’s executive policies and galvanize progressive immigration reform); Matthew Kolodziej, *Local Anti-Immigrant Laws Die as More States and Municipalities Pursue Pro-Immigrant Policies*, *Immigration Impact* (Mar. 5, 2014), <http://immigrationimpact.com/2014/03/05/local-anti-immigrant-laws-die-as-more-states-and-municipalities-pursue-pro-immigrant-policies/> [<http://perma.cc/FHV5-ZS3D>] (“Local anti-immigrant laws

National Conference of State Legislatures noted the passage of an additional 391 immigration-related laws and resolutions: a 16% increase compared to mid-year 2014.<sup>95</sup> Among such measures were bills incentivizing the certification of bilingual teachers (Texas),<sup>96</sup> lowering barriers to in-state college tuition for undocumented students (Connecticut),<sup>97</sup> mandating safety skills training for undocumented agricultural workers (Washington),<sup>98</sup> extending access to driver's licenses (Delaware, Hawaii),<sup>99</sup> requiring "qualified health care interpreters to ensure accurate and adequate health care for those with limited English proficiency" (Oregon),<sup>100</sup> and instituting a statewide director of immigrant integration (California).<sup>101</sup>

These data are significant for several reasons. First, they illustrate the growing power of the subfederal integrationist movement. States have, to be sure, enacted integrationist legislation throughout the past decade.<sup>102</sup> However, recent efforts have focused on nationalizing the integrationist agenda.<sup>103</sup> This suggests integrationism's political impact might escalate

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have failed both as policy and as political strategy, and increasingly local governments are rejecting them in favor of pursuing pro-immigrant policies instead.").

95. Immigrant Policy Project (July 2015), *supra* note 85, at 1.

96. See *id.* at 5 (describing Texas's HB 1 bill, H.B. 1, 84th Leg., Reg. Sess. (Tex. 2015)).

97. See *id.* (describing Connecticut's HB 6844 bill, H.B. 6844, 2015 Gen. Assemb., Reg. Sess. (Conn. 2015)).

98. See *id.* at 6 (describing Washington's HB 1127 bill, H.B. 1127, 64th Leg., Reg. Sess. (Wash. 2015)).

99. See *id.* at 1 ("Delaware and Hawaii enacted legislation to give unauthorized immigrants driving privileges."). As of July 2015, twelve states (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, New Mexico, Utah, Vermont, Washington), the District of Columbia, and Puerto Rico allow immigrants to obtain driver's licenses. See Driver's Licenses Map, Nat'l Immigration Law Ctr., <http://www.nilc.org/driverlicenseemap.html> [<http://perma.cc/K8NU-R8SJ>] (last updated July 1, 2015).

100. Immigrant Policy Project (July 2015), *supra* note 85, at 1.

101. See *id.* at 2 (referencing task forces created).

102. See *supra* notes 91–101 and accompanying text (providing empirical evidence of subfederal immigration legislation enacted since 2005); see also Immigrant Policy Project (July 2015), *supra* note 85, at 2, 11–12 (discussing state resolutions seeking action from Congress).

103. Take, for example, Cities United for Immigration Action, a national Democratic mayoral steering committee that has pledged to "defend" and "support" the President's actions. Semple, *supra* note 94 (internal quotation marks omitted). Members of Cities United promise "to put the executive action President Obama announced . . . into effect on the local level, push for congressional action on immigration reform, and rally grassroots support." Katie Zezima, Mayors Form Coalition to Support Obama's Immigration Action, *Wash. Post* (Dec. 1, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/12/01/mayors-begin-coalition-to-support-obamas-immigration-action> [<http://perma.cc/C6DY-NS9y>]; see also Semple, *supra* note 94 ("This is the biggest news for America's cities in a long time and I think it's America's mayors that will lead on this issue." (quoting interview with Mayor Eric Garcetti of Los Angeles)); Email from Mayors' Steering Committee, Cities United for Immigration Action, to author (Jan. 10, 2015, 5:07 PM) (on file with the *Columbia Law Review*) ("We believe the president's action will help our cities prosper and be more inclusive, maximizing the contributions of immigrants to our local economies

as states collaborate in the drafting and codification of pro-immigrant legislation. Of course, restrictionist legislators have also acted. For example, in 2014, well-known restrictionist and Kansas Secretary of State Kris Kobach introduced legislation designed to undermine President Obama's efforts and hastened the passage of similar bills across the nation.<sup>104</sup> Finally, subfederalist rhetoric implies a direct relationship between state action and Obamian immigration policy. As San Francisco Mayor Ed Lee stated, "The President's bold action on immigration has set the course, and now we must follow through."<sup>105</sup>

The widespread adoption of subfederal immigration legislation—both restrictionist and integrationist—illuminates another significant facet of immigration federalism. It demonstrates mass endorsement of im-

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while encouraging their participation in civic activities and broadening access to city resources."). "What we're trying to do is amplify a historical moment," New York Mayor Bill de Blasio explained, "I think we're in a very fluid dynamic." Semple, *supra* note 94 (internal quotation marks omitted). Cities United represents a broader integrationist movement in favor of expanded state immigration power, proving restrictionist states are not the only ones capable of capitalizing on the Constitution's ambiguous allocation of immigration authority. Cf. Weber, *supra* note 107, at 734 ("If controversial measures such as the revocation of a business license, mandatory implementation of E-Verify and potentially even occupancy licenses are allowed, why not also allow (or encourage) subfederal driver's license laws, locally-issued work permits, Mini-Dream Act laws, or sanctuary laws?" (footnote omitted)). The mayoral coalition does not identify its mission as constitutional reinterpretation; its stated goal is to realize local prerogatives and "jump-start the campaign to overhaul immigration legislation" at the federal level. Semple, *supra* note 94. But rhetoric and political intention operate in a sphere apart from constitutional reality. Cf. Larry Kramer, *Understanding Federalism*, 47 *Vand. L. Rev.* 1485, 1491 (1994) ("[T]he forces propelling [institutional] change [are] often fortuitous and just as often prompted by events having nothing to do with federalism."). The coalition is using a decidedly localist strategy to redefine federal policy from the ground up. This necessarily informs debates about the proper vertical allocation of the constitutional power to regulate noncitizens. Cf. Amanda Peterson Beadle, *Pro-Immigrant Measures Make Gains at the State Level*, *Immigration Impact* (Mar. 29, 2013), <http://immigrationimpact.com/2013/03/29/pro-immigrant-measures-make-gains-at-the-state-level/> [<http://perma.cc/3QDX-XGWX>] ("[S]tate efforts to improve immigration policy are complementary to national efforts to craft a comprehensive immigration plan.").

104. See John Celock, *Kris Kobach Plans State Based Push Against Obama Immigration Plan*, *Celock Report* (Dec. 19, 2014), <http://johncelock.com/kris-kobach-immigration> [<http://perma.cc/A36S-MGXF>] (reporting Kobach's statement that "bill pushes back very hard against the Obama Administration," conveying state's "position that federal law is not consistent with Obama"); Alan Greenblatt, *Kris Kobach Tackles Illegal Immigration*, *Governing* (Mar. 2012), <http://www.governing.com/topics/politics/gov-kris-kobach-tackles-illegal-immigration.html> [<http://perma.cc/67AV-BEKG>] (reporting "Kobach's success in drafting and defending laws meant to curb illegal immigration—not just in Arizona, but also in Alabama and other states and localities from Pennsylvania to Texas").

105. Press Release, Office of the Mayor of N.Y., *Mayor Bill de Blasio Hosts Immigration Summit for Cities Across Country* (Dec. 8, 2014), <http://www1.nyc.gov/office-of-the-mayor/news/547-14/mayor-bill-de-blasio-hosts-immigration-summit-cities-across-country#/0> <http://perma.cc/3LSL-CUGV>; see also *id.* (documenting statement of Hartford Mayor Pedro Segarra, who credited President Obama with "defin[ing] a path forward on immigration" and pledged to "take the baton and work within our communities to ensure we make [integrationism] successful").

migration regulation at the state level; though fueled by the actions of a Democratic President, the expansion of subfederal authority over immigration has become a bipartisan endeavor in the modern era, one states may not soon abandon.

## II. ¿SÍ SE PUEDE? THE CONSTITUTIONALITY OF SUBFEDERAL REFORM

The pace and scope of subfederal immigration legislation has blurred the boundaries of federal supremacy and strained the Supreme Court's preemption jurisprudence. Following President Obama's lead, states have done far more than question federal exclusivity: They have assumed the ability to regulate noncitizens. "Immigration law is undergoing an unprecedented upheaval," Keith Cunningham-Parmeter has commented.<sup>106</sup> "The field has not experienced such a dramatic shift in power since the nineteenth century."<sup>107</sup> But one must not put the cart before the horse. States' regulatory efforts must survive the Supreme Court's most recent immigration federalism decisions if they are to have any chance at lasting constitutional or political impact.

This Part evaluates the constitutionality of subfederal immigration regulations, relying primarily on the Supreme Court's recent decisions in *Chamber of Commerce v. Whiting*<sup>108</sup> and *Arizona v. United States*.<sup>109</sup> Section II.A.1 canvasses the Court's opinions in *Whiting*, assessing the degree to which each Justice accepts or rejects the concept of immigration federalism. Section II.A.2 does the same with respect to the Court's opinion in *Arizona*. Section II.A.3 presents a working conclusion regarding the constitutionality of subfederal immigration reform, while section II.B addresses the normative desirability of subfederal reform and discusses the ways in which states can force the constitutionalization of Obamian reform.

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106. Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 *Hastings L.J.* 1673, 1674 (2011).

107. *Id.* at 1675; cf. Elias, *supra* note 19, at 705 ("*Arizona v. United States* may mark a watershed in U.S. immigration law and policy, but it does not mark the end of state and local engagement in immigration regulation."); Huntington, *supra* note 22, at 790 (calling immigration federalism "central political issue of our time" that "has led to numerous confrontations between the political branches of governments"); Stumpf, *supra* note 25, at 1564 (noting trend "toward acceptance in the public and judicial minds of a subnational role in the regulation of noncitizens"); David P. Weber, *State and Local Regulation of Immigration: The Need for a Bilateral (Reciprocal) Ratchet*, 18 *ILSA J. Int'l & Comp. L.* 707, 714 (2012) (stating "another shift in immigration-related preemption is already underway" and that "most interesting aspect of the current shift is the potential extent to which states' roles in immigration may be enlarged").

108. 131 S. Ct. 1968 (2011).

109. 132 S. Ct. 2492 (2012).

A. *Constitutional Precipice: Whiting and Beyond*

The Supreme Court's recent immigration decisions provide no definitive answers to the constitutional question posed by immigration sub-federalism—namely, whether and to what extent states possess the power to regulate noncitizens. These decisions do, however, provide powerful clues. An analysis of *Chamber of Commerce v. Whiting* and *Arizona v. United States* yields significant doctrinal commonalities regarding the permissible allocation of immigration power in the American federalist system. In both cases, the Court takes as given the states' ability to regulate immigrants. More importantly, these cases finesse the tenuous balance between state and federal immigration authority and tacitly condone a recalibration of that balance through the political process.

1. *Chamber of Commerce v. Whiting*. — At issue in *Chamber of Commerce v. Whiting* was whether Congress's Immigration Reform and Control Act (IRCA), which prohibits states from imposing criminal sanctions for the employment of unauthorized aliens,<sup>110</sup> preempted the Legal Arizona Workers Act (LAWA), which mandated the use of E-Verify and subjected state employers to licensing penalties for knowingly employing unauthorized workers.<sup>111</sup> Despite the laws' substantial similarity, the Court upheld the Arizona statute.<sup>112</sup> Statist rhetoric permeates the majority opinion. Responding to Justice Breyer's objection that upholding LAWA marked a "departure from 'one centralized enforcement scheme,'"<sup>113</sup> Chief Justice Roberts wrote, "Congress expressly preserved the ability of the States to impose their own sanctions through licensing; that—like our federal system in general—necessarily entails the prospect of some departure from homogeneity."<sup>114</sup> The Court even went so far as to treat the state's regulatory efforts as unexceptional. Prohibiting the knowing employment of unauthorized aliens, it concluded, "is certainly within the mainstream of [the State's] police power."<sup>115</sup> The dissent did not disagree. Justice Breyer, with whom Justice Ginsburg joined, construed state

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110. See 8 U.S.C. § 1324a(a)(1)(A) (2012) (making it unlawful for "person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien").

111. See Ariz. Rev. Stat. Ann. § 23-212 (2012) (stating "employer[s] shall not knowingly employ an unauthorized alien" and describing potential ramifications).

112. See *Whiting*, 131 S. Ct. at 1981, 1985 (upholding LAWA and finding it did not conflict with federal scheme).

113. *Id.* at 1979 (quoting *id.* at 1990 (Breyer, J., dissenting)).

114. *Id.* at 1979–80; cf. *id.* at 1975 (critiquing IRCA for "restrict[ing] the ability of States to combat employment of unauthorized workers").

115. *Id.* at 1974 (alteration in *Whiting*) (quoting *De Canas v. Bica*, 424 U.S. 351, 356 (1976)); see also Michael Rubinkam, Supreme Court: Hazleton, Pennsylvania Immigration Law Must Be Re-Examined, *Huffington Post* (June 6, 2011), [http://www.huffingtonpost.com/2011/06/06/hazleton-pennsylvania-immigration\\_n\\_871791.html](http://www.huffingtonpost.com/2011/06/06/hazleton-pennsylvania-immigration_n_871791.html) [<http://perma.cc/GA3S-VAW6>] (quoting Temple University Law School Professor Peter Spiro, who said "the clear message is they [the Justices] are going to tolerate some level of state and local participation in immigration enforcement").

regulations as constitutional unless, and until explicitly, preempted by federal law.<sup>116</sup> Dissenting separately, Justice Sotomayor noted that IRCA “displaced . . . myriad state laws,” intimating these laws legally governed prior to IRCA’s enactment.<sup>117</sup>

Unanimous with regard to the existence of state immigration power, the Justices declined to debate the constitutionality of subfederal immigration regulation per se. The Court could have easily struck down the Arizona statute as impliedly, structurally, or field preempted, thereby reaffirming federal immigration supremacy. Yet it declined to do so, avoiding altogether the question of federal exclusivity.<sup>118</sup> That, the Court signaled, is a question Congress must solve in exercising (or declining to exercise) its preemptive power—a constitutional rendition of use it or lose it.<sup>119</sup> As Chief Justice Roberts emphasized, “Congress did indeed seek to strike a balance . . . when it enacted IRCA,” and part of that balance “involved allocating authority between the Federal Government and the States.”<sup>120</sup> Upholding Arizona’s foray into immigration regulation thus fell “well within the confines of the authority Congress chose to leave to the States.”<sup>121</sup>

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116. See *Whiting*, 131 S. Ct. at 1992–97 (Breyer, J., dissenting, joined by Ginsburg, J.) (emphasizing IRCA’s express preemption clause and contrasting clause with preemptive language in prior congressional immigration statutes); see also *id.* at 1994 (Breyer, J., dissenting, joined by Ginsburg, J.) (noting before IRCA “States as well as the federal government could license agricultural labor contractors” (emphasis added)). The dissent did, however, voice concerns. Breyer, with whom Justice Ginsburg joined in dissent, began by attacking the majority’s statutory interpretation as well as LAWA’s potentially discriminatory effect. See *id.* at 1987–92 (Breyer, J., dissenting, joined by Ginsburg, J.) (criticizing majority’s interpretation of “license” and emphasizing LAWA contains no “protection against unlawful discrimination”).

117. *Id.* at 2000 (Sotomayor, J., dissenting) (emphasis added).

118. See *id.* at 1981 (majority opinion) (finding implied preemption analysis unnecessary because “[IRCA] specifically preserved . . . authority for the States”). It is worth noting that the Chamber of Commerce did not portray the federal government’s power to regulate alien employment as inherently exclusive. Rather, it claimed that in enacting IRCA, Congress “intended the federal system to be exclusive.” *Whiting*, 131 S. Ct. at 1981 (emphasis added) (quoting Brief for the Petitioners at 39, *Whiting*, 131 S. Ct. 1968 (No. 09-115), 2010 WL 3483324). In other words, the Chamber implied preemption was proper because Congress declared its exclusivity—in a field that otherwise would not necessarily be exclusively reserved for Congress.

119. See *Whiting*, 131 S. Ct. at 1985 (Kennedy, J., concurring in part and concurring in the judgment) (“Implied preemption analysis does not justify a ‘freewheeling judicial inquiry into whether a state statute is in tension with federal objectives’; such an endeavor ‘would undercut the principle that it is Congress rather than the courts that preempts state law.’” (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992))). See generally Thomas W. Merrill, Preemption and Institutional Choice, 102 *Nw. U. L. Rev.* 727 (2008) (investigating “how much weight courts should give to the views of other institutions in resolving preemption controversies”).

120. *Whiting*, 131 S. Ct. at 1984.

121. *Id.* at 1981.

*Whiting's* clear emphasis on congressional intent demonstrates that the bounds of Congress's immigration power have become a question of statutory rather than constitutional interpretation. This explains, in part, the Court's decision to send *City of Hazleton v. Lozano* back to the Third Circuit,<sup>122</sup> to deny certiorari in *City of Farmers Branch v. Villas at Parkside Partners*,<sup>123</sup> and to deny rehearing in *Brewer v. Arizona Dream Act Coalition*.<sup>124</sup> Moreover, the Justices' unwavering deference to Congress indicates the Court's willingness to allow a recalibration of state immigration power—so long as it occurs through the political process. This, of course, is a far cry from declaring subfederal immigration regulations unconstitutional *per se*.

2. *Arizona v. United States*. — *Arizona v. United States*, in which the Court held federal law preempted three out of four provisions of Arizona's SB 1070, reads initially as an homage to plenary power. "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens," Justice Kennedy began.<sup>125</sup> "This authority," he specified, "rests, in part, on the National Government's constitutional power to 'establish a uniform Rule of Naturalization' and its inherent power as sovereign to control and conduct relations with foreign nations."<sup>126</sup> Yet, consistent with the Court's statist tone in *Whiting*, Kennedy immediately segued into a discussion of federalist principles. "[B]oth the National and State Governments have elements of sovereignty the other is bound to respect," he emphasized, a contention at odds with traditional notions of federal exclusivity in immigration.<sup>127</sup> Moreover, Justice Kennedy reprised language central to *Whiting* itself. Declaring section 5(C) of the Arizona law preempted, he noted a contrary decision "would

122. 131 S. Ct. 2958 (2011).

123. 134 S. Ct. 1491 (2014).

124. 757 F.3d 1053 (9th Cir. 2014), reh'g denied, 135 S. Ct. 889 (2014). Interestingly, Justices Scalia, Thomas, and Alito would have granted the stay, likely in order to protect states' right to pass laws regulating immigrants. See 135 S. Ct. 889, 889 (2014). The D.C. Circuit has rebuffed questions of constitutionality in the separation-of-powers context as well. Recently, Judge Beryl A. Howell dismissed a claim alleging DACA involved an unconstitutional use of executive power. See *Arpaio v. Obama*, 27 F. Supp. 3d 185, 191 (D.D.C. 2014) ("[O]ur Constitution places such sensitive immigration and economic judgments squarely in the hands of the Political Branches, not the courts." (quoting *Fogo de Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1151 n.10 (D.C. Cir. 2014))).

125. *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).

126. *Id.* (citations omitted) (quoting U.S. Const., art. I, § 8, cl. 4) (citing *Toll v. Moreno*, 458 U.S. 1, 10 (1982)).

127. *Id.* at 2500 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)); see also *id.* at 2503 ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)); *De Canas v. Bica*, 424 U.S. 351, 356 (1976)); *Rodríguez*, *supra* note 61, at 620 ("Courts often begin their [immigration federalism] analysis with strong statements of exclusivity but then strike down state laws on a conflict-preemption basis.").



interfere with the *careful balance struck by Congress* with respect to unauthorized employment of aliens.”<sup>128</sup> He used the same language to reference the precedential import of *Hines v. Davidowitz*.<sup>129</sup> Justice Kennedy’s message is clear: The scope of congressional immigration power depends more on congressional drafting than on any ironclad constitutional allocation of power.

The dissent, far from critiquing Justice Kennedy’s federalist rationale, complained the majority stopped short of the result federalism demands. Justice Scalia characterized the Arizona law as a valid “exercise of [the state’s] *own power*,” the “implementation of *its own policies*.”<sup>130</sup> In fact, Scalia explicitly endorsed immigration federalism. “In light of the predominance of federal immigration restrictions in modern times,” he warned, “it is easy to lose sight of the States’ traditional role in regulating immigration—and to overlook their sovereign prerogative to do so.”<sup>131</sup> Justice Thomas disavowed the propriety of the Court’s preemption analysis altogether, finding SB 1070 did not conflict with federal law<sup>132</sup> and lambasting the majority’s finding of preemption as based on “judicially divined legislative purposes.”<sup>133</sup> Justice Alito considered the majority opinion equally problematic. Finding SB 1070 emblematic of “state police powers,” he demanded clearer evidence of congressional preemptive intent.<sup>134</sup> He also criticized the majority for misconstruing *De Canas* in support of its holding. Employing classic, albeit outmoded, Tenth Amendment rhetoric, he offered his own interpretation: “*De Canas v. Bica* . . . held that employment regulation, even of aliens unlawfully present in this country, is an area of traditional state concern.”<sup>135</sup>

As in *Whiting*, the *Arizona* Court unanimously agreed that some sub-federal immigration regulation is per se constitutional. The sole dispute

128. *Arizona*, 132 S. Ct. at 2505 (emphasis added).

129. See *id.* at 2501 (stating federal statute at issue in *Hines* “struck a careful balance” between state and federal law (citing *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941))).

130. *Id.* at 2519 (Scalia, J., concurring in part and dissenting in part).

131. *Id.* at 2514 (Scalia, J., concurring in part and dissenting in part); see also *id.* at 2511 (Scalia, J., concurring in part and dissenting in part) (“As a sovereign, Arizona has the inherent power to exclude persons from its territory . . . . That power to exclude has long been recognized as inherent in sovereignty.”); Cunningham-Parmeter, *supra* note 106, at 1682–84 (discussing characterization of states as “immigration sovereigns”).

132. See *Arizona*, 132 S. Ct. at 2523 (Thomas, J., concurring in part and dissenting in part) (“I reach the conclusion . . . that there is no conflict between the ‘ordinary meaning [g]’ of the relevant federal laws and that of [SB 1070].” (alteration in original) (quoting *Wyeth v. Levine*, 555 U.S. 555, 588 (2009))).

133. *Id.* at 2524 (Thomas, J., concurring in part and dissenting in part).

134. See *id.* at 2525 (Alito, J., concurring in part and dissenting in part) (reasoning “state police powers are implicated here” and Congress failed to speak “with the requisite clarity to justify invalidation of” otherwise permissible state law).

135. *Id.* (Alito, J., concurring in part and dissenting in part) (citing *De Canas v. Bica*, 424 U.S. 351, 351 (1976)).

pertained to the *degree* of subfederal regulation permissible under the Constitution.

3. *Forging Consensus.* — Scholars rightly critique the Supreme Court's recent immigration precedent as unclear,<sup>136</sup> but its opinions in *Whiting* and *Arizona* bespeak unanimity among the Justices with respect to the constitutionality of immigration federalism. Notwithstanding Justice Kennedy's plenary power rhetoric in *Arizona*, not a single Justice in that case or in *Whiting* condemned subfederal immigration regulation as unconstitutional *per se*.<sup>137</sup> Instead, the Justices seemed to agree that congressional intent, rather than constitutional necessity, determines the preemptive force of federal immigration statutes. In other words, the modern Court has rejected exclusive federal authority over immigration, relying instead on principles of statutory preemption to test the constitutionality of state regulations on a case-by-case basis.<sup>138</sup>

The demise of federal exclusivity does more than legitimize the subfederal regulation of noncitizens; it also necessitates a reconceptualization of the boundary line between federal and state immigration authority. Unsurprisingly, *Whiting* and *Arizona* eschew any attempt at line drawing. Shorn of its plenary power myths, the Constitution says nothing about the optimal balance of immigration power between the state and federal governments.<sup>139</sup> Any effort by the Supreme Court to police the boundary between state and federal immigration power would therefore amount to little more than judicial activism. Accordingly, the Court's recent deference to Congress in matters of preemption represents a statement regarding institutional role, a willingness to entrust the current recalibration of constitutional immigration power to the political process. Crucially, *Whiting* and *Arizona* also exhibit a normative, federalist gloss, hinting at the permissibility of returning to an era of robust state immigration authority.<sup>140</sup>

#### B. *Constitutionalizing Executive Action: The Power of Subfederal Reform*

Left uncodified, Obamian immigration policy will expire with the Administration. Deferred action and its attendant benefits might cease to exist, leaving millions of noncitizens at the mercy of an unknown majority. Unwilling to forsake the well-being of their noncitizen residents, states around the country have begun to mobilize support for integra-

136. See, e.g., Hu, *supra* note 74, at 570–74 (discussing development and lack of clarity in Court's preemption doctrine).

137. See *supra* section II.A (discussing *Whiting* and *Arizona*).

138. As Clare Huntington has explained, "To the extent that the federal government does not exercise its authority—that is, it does not statutorily preempt states and local laws—subnational governments are free to exercise their authority to regulate immigration." Huntington, *supra* note 22, at 825.

139. See *supra* notes 22–23 and accompanying text (explaining lack of textual evidence in Constitution regarding proper allocation of immigration authority).

140. See *supra* section II.A (analyzing federalist rhetoric in *Whiting* and *Arizona*).

tionist legislation that would entrench Obamian policy at the subfederal level. But success will require states do much more than write existing executive policy into law. To avoid preemption by an unsympathetic Congress, integrationists will have to shift the locus of constitutional immigration power back to the states.<sup>141</sup> The possibility of such a shift raises crucial questions. Most importantly, it requires grappling with questions of normative desirability (the why) and questions of implementation (the how). This section addresses both. It first addresses the why, arguing that while perhaps not ideal, a stronger state role in immigration may provide greater benefits to noncitizens than continued federal dominance.<sup>142</sup> It then details the how, describing the shift in immigration power precipitated by Obamian reform and how states can leverage the political process to constitutionalize the new power dynamic.

1. *The Why.* — Critics of subfederal immigration regulation focus on the potential for rights abuses at the local level. Localism, they argue, is a double-edged sword. While immigrants in progressive states are likely to benefit from local policies, immigrants in other states will supposedly face increasingly oppressive legislation, a phenomenon described in the literature as a “race to the bottom.”<sup>143</sup> Critics also claim localism jeopardizes the observance and enforcement of immigrants’ constitutional rights in general, and equal protection in particular.<sup>144</sup> While these concerns

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141. The shift may be temporary, enduring just long enough for the election of a sympathetic, integrationist Congress or President. Or, it may persist over the long-term, displacing Congress in affairs not obviously related to “pure” immigration law—the admission, exclusion, and removal of aliens. The former approach is less radical, but also less effective in that it fails to reshape the boundaries of federal supremacy; integrationist state laws would face the specter of preemption with each new Congress. In contrast, the latter option narrows the definition of immigration law while expanding the definitional boundary of alienage law—the rights and obligations of noncitizens at the state and local level. It thereby reduces the overlap between federal and state authority and limits the scope of congressional preemption indefinitely, accomplishing a significant decentralization of immigration authority.

142. See Cunningham-Parmeter, *supra* note 106, at 1710–11 (“State enforcement models may generate externalities, but those externalities might pale in comparison to current costs.”).

143. See, e.g., George J. Borjas, *Heaven’s Door: Immigration Policy and the American Economy* 118 (1999) (“[T]he main immigrant-receiving states will soon be leading the ‘race to the bottom,’ as they attempt to minimize the fiscal burden imposed by the purposive clustering of immigrants in those states that provide the highest benefits.”); see also Wishnie, *supra* note 60, at 554 (citing Borjas, *supra*, at 118) (“One should . . . be concerned about the possibility of a race-to-the-bottom among states.”). This notion has been somewhat debunked. See Peter H. Schuck, *Some Federal-State Developments in Immigration Law*, 58 N.Y.U. Ann. Surv. Am. L. 387, 389 (2002) (noting, despite predictions of “race to the bottom,” none occurred with respect to aliens’ welfare benefits after welfare reform law of 1996).

144. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1990–93 (2011) (Breyer, J., dissenting) (criticizing Arizona’s SB 1070 because it would lead “to ever stronger safeguards against the hiring of unauthorized aliens—without counterbalancing protection against unlawful discrimination”); Bosniak, *Immigrants, Preemption, and Equality*, *supra* note 22, at 183 (arguing preemption doctrine “must be regarded, at least functionally, as a

have merit, it is nonetheless important to balance the risks and benefits of reverting to a system of federal regulation against those accompanying continued federal dominance; before reifying the constitutional status quo with aggressive claims of federal preemption, activists and critics must meaningfully assess the likelihood of rights abuses at the local level. As Cristina Rodríguez has observed, “It is important not to cut short the processes by which states learn to integrate immigrants by employing aggressive preemption strategies or by presuming that immigration and integration issues should be channeled up to the national level.”<sup>145</sup> Indeed, subfederal immigration regulation may yet prove a sheep in wolf’s clothing.

As recent challenges to state and local laws demonstrate, subfederal immigration regulation risks equal protection violations.<sup>146</sup> What remains unclear is the extent to which federal exclusivity necessarily decreases this risk and whether such violations are more likely to be detected and remedied by federal actors.<sup>147</sup> At least some skepticism is in order. Federal prerogative has and continues to justify the denial of noncitizens’ human and constitutional rights.<sup>148</sup> Even now, federal exclusivity underlies the asym-

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crucial part of [the] structure of protections available to aliens against state power”); Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. Rev. 2074, 2133 (2013) [hereinafter Gulasekaram & Ramakrishnan, *Immigration Federalism*] (“Despite judicial avoidance of equal protection in its evaluation of state enforcement schemes, the salience of ethnic nationalism in the genesis of the new immigration federalism begs a greater role for equality-based jurisprudential norms.”); Rick Su, *Notes on the Multiple Facets of Immigration Federalism*, 15 *Tulsa J. Comp. & Int’l L.* 179, 184 (2008) (“[M]any of the immigration precedents at the heart of the most recent controversy over sub-federal regulations of immigration are better understood through the ongoing effort to define the substantive and procedural protections that our structure of federalism guarantees.”); Wishnie, *supra* note 60, at 553 (making different but comparable constitutional argument that permitting devolution of Congress’s immigration power “endorses the creation of state and local laboratories of bigotry against immigrants”); Bill Ong Hing, *Like It or Not, Arizona’s SB 1070 Is About Racial Profiling*, *Huffington Post* (Apr. 27, 2012) [http://www.huffingtonpost.com/bill-ong-hing/arizona-immigration-law\\_b\\_1457435.html](http://www.huffingtonpost.com/bill-ong-hing/arizona-immigration-law_b_1457435.html) [<http://perma.cc/23SQ-DXEE>] (“SB 1070 is in fact all about racial profiling given the institutionalized racism under which the law and its copycat statutes across the country have emerged.”).

145. Rodríguez, *supra* note 61, at 582; cf. Huntington, *supra* note 22, at 824 n.155 (“[P]reemption removes issues within its scope from the policy agenda of state and local governments, requiring that citizen participation and deliberation with respect to those issues take place at the national level.” (quoting Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 *Tex. L. Rev.* 1, 130–31 (2004))).

146. See, e.g., *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1057–58 (9th Cir. 2014) (finding plaintiffs “demonstrated a likelihood of success on the merits of their equal protection claim” challenging Arizona policy “prevent[ing] DACA recipients from obtaining Arizona driver’s licenses”).

147. See Huntington, *supra* note 22, at 831 (“[T]here 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.”).

148. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 595, 609 (1888) (upholding treaty enacted upon belief that migration of Chinese laborers “was in numbers approaching the character of an Oriental invasion, and was a menace to [American] civ-

metrical application of the equal protection doctrine, whereby state alienage classifications receive strict judicial scrutiny while federal alienage classifications must satisfy only rational basis review<sup>149</sup>—and this despite the Court’s clear statement in *Graham v. Richardson* that “classifications based on alienage” are “*inherently* suspect and subject to close judicial scrutiny.”<sup>150</sup> Finally—and perhaps most problematically—federal dominance has encouraged the elision and impeded the development of immigrants’ substantive rights in constitutional adjudication. When challenging subfederal immigration regulations such as Arizona’s SB 1070, litigators have learned to rely on preemption doctrine over individual rights precedent to support claims of unconstitutionality.<sup>151</sup> Conversely, courts have been able to skirt individual rights questions by deciding cases on preemption grounds.<sup>152</sup> The result is the collateral adjudication of immigrants’ rights, a trend that pushes real issues of race, nativism, and discrimination aside and places questions of federal authority ahead of

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ilization”); *Matter of D-J*, 23 I. & N. Dec. 572, 583 (U.S. Att’y Gen. 2003) (permitting government to introduce generalizations about noncitizens as rationale for denying bond in individualized asylum hearings); *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 180–85 (D.D.C. 2015) (enjoining deterrence as justification for blanket detention of noncitizens in light of noncitizens’ due process rights); Cristina Constantini, *Anastasio Hernandez Rojas Death: 16 Members of Congress Call for Justice*, Huffington Post (May 10, 2012), [http://www.huffingtonpost.com/2012/05/11/anastasio-hernandez-rojas\\_n\\_1507274.html](http://www.huffingtonpost.com/2012/05/11/anastasio-hernandez-rojas_n_1507274.html) [<http://perma.cc/5323-RSYK>] (describing congressional response to death of “undocumented immigrant who [was] tased and beaten by U.S. Border Patrol Agents”).

149. See *Mathews v. Diaz*, 426 U.S. 67, 82 (1976) (applying rational basis test to federal alienage classification); see also *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 788 (9th Cir. 2014) (distinguishing *Demore v. Kim*, 538 U.S. 510 (2003), which upheld categorical denial of bail for unauthorized immigrants, in striking down Arizona statute prescribing the same, explaining *Demore* “applied rational basis review, not heightened scrutiny, because it involved federal regulation of immigration”); *Rodríguez*, *supra* note 61, at 628 (“The notion that federal alienage classifications are inherently rational, whereas state classifications might not be, is hard to explain without the backdrop of federal exclusivity . . .”); *Wishnie*, *supra* note 60, at 496 (reasoning “at the federal level, equal protection norms must be balanced against the deference traditionally accorded to exercises of the federal immigration power”).

150. 403 U.S. 365, 372 (1971) (emphasis added).

151. See, e.g., *Petition for Writ of Certiorari, Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), 2011 WL 3562633, at \*i (phrasing question presented as “whether the federal immigration laws preclude Arizona’s efforts at cooperative enforcement and impliedly preempt [] four provisions of S.B. 1070 on their face”).

152. See, e.g., *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1970–87 (2011) (declining to respond to Justice Breyer’s equal protection objection to LAWA); *Jean v. Nelson*, 472 U.S. 846, 857 (1985) (concluding discrimination against Haitians unconstitutional because federal immigration law does not “authorize discrimination on the basis of race and national origin,” and not because violative of equal protection doctrine); see also *Karen Nelson Moore, Aliens and the Constitution*, 88 N.Y.U. L. Rev. 801, 820–21 (2013) (stating “debate over what distinctions concerning the legality of an alien’s presence may be permissibly drawn” often takes form of legal “challenges [that] rely on federal preemption arguments rather than equal protection ones”).

the Bill of Rights.<sup>153</sup> At this juncture, with federal precedent largely stacked against noncitizens, such strategic avoidance remains prudent. Yet, insisting on federal supremacy and, consequently, the preeminence of oftentimes anti-immigrant precedent, stifles the conversation at both ends. *Stare decisis* constrains the federal judiciary in matters of immigration policy while supremacy short-circuits the search for alternatives by nonfederal actors.

The notion that federal exclusivity better protects noncitizens' individual rights also requires a dubious assumption about the nature of constitutional law—namely that the constitutional protections aliens currently enjoy are inextricably tied to federal exclusivity. Many immigrants' rights activists worry that the constitutional protections thus far extended to noncitizens by the Supreme Court will be eroded if states gain the power to regulate immigrants at the local level. It is unclear why this would necessarily be the case. From a doctrinal perspective, deference to state alienage classifications is not constitutionally required and is in fact disallowed under *Graham v. Richardson*.<sup>154</sup> More fundamentally, immigration federalism would not exempt state alienage classifications from challenges in federal court, nor would a federal court upholding a discriminatory law escape the threat of judicial review.<sup>155</sup> This of course assumes federal courts will not relax their scrutiny of state alienage classifications to reflect greater tolerance for subfederal immigration regulation.<sup>156</sup> As-

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153. See Moore, *supra* note 152, at 815 n.59 (noting “robust preemption jurisprudence in the state-alienage legislation arena . . . often provides grounds for striking down state statutes without reaching the constitutional equal protection issues” (citing *Toll v. Moreno*, 458 U.S. 1 (1982))).

154. See *Graham*, 403 U.S. at 372 (declaring classifications based on alienage inherently suspect and therefore subject to strict scrutiny).

155. Subfederal immigration regulations might even stimulate equal protection challenges. As the Court's jurisprudence currently stands, litigants must be able to show a pattern of discrimination or intent to discriminate in order to prevail on an equal protection claim. See generally *Washington v. Davis*, 426 U.S. 229, 238–43 (1976) (requiring petitioners demonstrate purposeful, invidious discrimination in order to succeed on equal protection claim). Restrictionist state laws often include clear statements of animus. See, e.g., Rebecca Leber, *Republicans Admit Racism Is Big Obstacle to Passing Immigration Reform*, *Think Progress* (Jan. 30, 2014), <http://thinkprogress.org/immigration/2014/01/30/3226951/immigration-gop-racism> [<http://perma.cc/SW44-ZANT>] (reporting racist comments made at town meetings and by politicians); see also Gulasekaram & Ramakrishnan, *Immigration Federalism*, *supra* note 144, at 2135 (advocating “strong judicial role in monitoring and deterring the use of unlawful and illegitimate characteristic in the genesis of subfederal immigration law”).

156. Critics claim the Supreme Court's equal protection doctrine will lose its potency if power to regulate immigrants is delegated or devolved to the states. See, e.g., Wishnie, *supra* note 60, at 553 (arguing against devolution of federal immigration power and stating “devolution would erode the antidiscrimination and anticaste principles that are at the heart of our Constitution and that long have protected noncitizens at the subfederal level”). This concern arises from the Supreme Court's holding in *Mathews v. Diaz* that federal alienage classifications require only rational basis review. See *supra* note 149–150 and accompanying text (discussing asymmetrical application of equal protection standard

suming *stare decisis* fails to curb such a phenomenon, activists might be justified in fearing the erosion of immigrant-friendly precedent such as *Graham*. Yet, an erosion of this magnitude would require reflexive acceptance of the state and local interests justifying subfederal alienage classifications. That is to say, courts would be required to find state discrimination on the basis of alienage no longer inherently suspect once the barrier of federal exclusivity is dissolved.

That courts would do so is far from sure. Even in the narrow set of circumstances in which courts have traditionally afforded state alienage classifications rational basis review, they have done so circumspectly. The public interest doctrine, which allowed states to discriminate against non-citizens in the allocation of state resources, failed even to survive to the modern era.<sup>157</sup> In 1948, the Supreme Court discarded the doctrine, finding sovereign ownership “inadequate to justify” a California law that prevented aliens from profiting off of state resources “while permitting all others to do so.”<sup>158</sup> The Court has similarly curtailed its public function exception.<sup>159</sup> Grounded in states’ inherent power to define their political

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depending on whether alienage classification drawn by state or federal government). According to Wishnie, the less stringent rational basis standard would devolve along with the power to regulate noncitizens. See Wishnie, *supra* note 60, at 553–54 (noting risk of decreased immigrant access to social benefits). This Note does not argue that federal immigration power should be devolved or delegated to states. Rather, it argues that states have the political power to compel a structural shift in immigration power, one that is not prohibited by the Constitution and that has the ability to shape the content of policy measures.

157. See Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 *Iowa L. Rev.* 707, 734–36 (1996) (describing origins of public interest doctrine and explaining, “[w]here the discrimination pertained to the regulation or distribution of the public domain, or of the common property or resources of the people of [a] State,” such property or resources could be “limited to [the state’s] citizens” (internal quotation marks omitted) (quoting *Cabell v. Chavez-Salido*, 454 U.S. 432, 437 (1982))).

158. *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 421 (1948); see also Scaperlanda, *supra* note 157, at 735–36 (explaining *Takahashi* “signaled the decline of [the public interest doctrine]”).

159. The public function exception allows states, subject only to rational basis review, to “exclude aliens from positions intimately related to the process of democratic self-government.” *Bernal v. Fainter*, 467 U.S. 216, 220 (1984); see also *Cabell*, 454 U.S. at 439 (“The exclusion of aliens from basic governmental processes is . . . a necessary consequence of the community’s process of political self-definition.”); *Foley v. Connelie*, 435 U.S. 291, 295–96 (1978) (“[W]e have recognized ‘a State’s historical power to exclude aliens from participation in its democratic political institutions,’ as part of the sovereign’s obligation ‘to preserve the basic conception of a political community.’” (citations omitted)); *id.* at 295 (“It would be inappropriate . . . to require every statutory exclusion of aliens to [satisfy] ‘strict scrutiny,’ because to do so would ‘obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship.’” (quoting *Nyquist v. Mauclet*, 432 U.S. 1, 14 (1977) (Burger, C.J., dissenting))); cf. *Ambach v. Norwick*, 441 U.S. 68, 73–74 (1978) (applying rational basis review to alienage-based discrimination under state laws governing “state functions . . . so bound up with the operation of the State as a governmental entity as to permit exclusion from those functions of all persons who have not become part of the process of self-government”).

communities,<sup>160</sup> the public function exception was used to uphold discriminatory state laws barring noncitizens from positions as public school teachers,<sup>161</sup> probation officers,<sup>162</sup> police officers,<sup>163</sup> and political office-holders.<sup>164</sup> Importantly, the doctrine lost much of its potency after *Graham*.<sup>165</sup> In narrowing the doctrine post-*Graham*, the Supreme Court therefore indicated its willingness to trench on areas of previously unquestioned state prerogative.<sup>166</sup> It seems at least plausible that courts would do so again

160. See Scaperlanda, *supra* note 157, at 736–37 (“[T]he public function doctrine finds its moorings in an exclusionary theory of the political community. The Court will not employ strict scrutiny . . . where the state . . . is merely engaging in the ongoing process of ‘defin[ing] its political community.’” (quoting *Sugarman v. Dougall*, 413 U.S. 634, 642–43 (1973))).

161. See *Ambach*, 441 U.S. at 79–80 (holding citizenship requirement for public school teachers satisfied rational basis review because teachers “influence the attitudes of students toward government, the political process, and a citizen’s social responsibilities”).

162. See *Cabell*, 454 U.S. at 444 (concluding state’s ability to “limit the exercise of . . . coercive police powers over the members of the community to citizens” rendered California law proscribing noncitizen probation officers “sufficiently tailored” to pass “lower level of scrutiny”).

163. *Foley*, 435 U.S. at 299–300 (“It is not surprising . . . that most States expressly confine the employment of police officers to citizens, whom the State may reasonably presume to be more familiar with and sympathetic to American traditions.” (footnotes omitted)).

164. *Sugarman*, 413 U.S. at 647–48 (condoning citizenship requirement for state office where requirement is rationally related to legitimate state interest).

165. See *Bernal v. Fainter*, 467 U.S. 216, 222–27 (1984) (finding Texas citizenship requirement for notary publics did not fall within political function exception and “statute is therefore subject to strict judicial scrutiny”); *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (stating “[state] legislature must have substantial latitude to establish classifications” that bear “some fair relationship to a legitimate public purpose” but emphasizing “we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification”); *Nyquist v. Mauclet*, 432 U.S. 1, 5–6, 11 (1977) (stating in recognizing states’ interest in regulating their political communities, “Court had in mind a State’s historical and constitutional powers to define the qualifications of voters” and certain subsets of state officials, not their ability to limit in-state tuition to citizens); *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 604 (1976) (acknowledging, “in *Truax* the Court drew a distinction between discrimination against aliens” where “the State has a special interest in affording protection to its own citizens” but stating “[t]hat distinction . . . is no longer so sharp as it then was” (citing *Truax v. Raich*, 239 U.S. 33, 39–40 (1915))); *In re Griffiths*, 413 U.S. 717, 722–23, 725 (1973) (finding it “undisputed that a State has a constitutionally permissible and substantial interest in determining whether an applicant [to the bar] possesses the character and general fitness requisite for an attorney” yet finding exclusion of aliens not “necessary to the promoting or safeguarding of this interest” (internal quotation marks omitted) (quoting *Law Students Research Council v. Wadmond*, 401 U.S. 154, 159 (1971))); *Sugarman*, 413 U.S. at 642–43, 647 (recognizing “State’s interest in establishing its own form of government, and in limiting participation in that government” but finding law excluding aliens from civil-service positions “neither narrowly confined nor precise” enough to “withstand scrutiny under the Fourteenth Amendment”).

166. See *supra* note 165 (collecting cases in which Court acknowledged states’ traditional authority to discriminate in certain circumstances while finding such circumstances lacking with regard to challenged alienage classifications). This is likely due to the increased value the Supreme Court seems to have placed on personhood in immigration



were subfederal regulation to spawn discriminatory state legislation.<sup>167</sup> To the extent that noncitizens seek to enforce other constitutional guarantees, such as due process or reasonable search and seizure, the Supreme Court's existing jurisprudence would likewise remain protective.<sup>168</sup> Furthermore, laws designed to drive noncitizens out of local communities could easily be construed as pure immigration law and, therefore, necessarily preempted as clear usurpations of federal authority.<sup>169</sup> These are

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litigation in recent years. Compare *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring) (“[W]hether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general[,] . . . the underlying policies of what classes of aliens . . . shall be allowed to stay, are for Congress exclusively to determine even though such determination may . . . offend American traditions . . .” (citations omitted)), with *Zadvydas v. Davis*, 533 U.S. 678, 695–96 (2001) (distinguishing constitutionality of Congress’s plenary power to admit or expel noncitizens and that of congressional *procedures* used to do so while emphasizing noncitizen petitioners’ countervailing “liberty interest”), and Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. Rev. 1047, 1109 (1994) [hereinafter *Bosniak*, *Difference that Alienage Makes*] (“*Graham* is fundamentally an equality case: It emphasizes aliens’ personhood . . . and (implicitly) their functional identity with citizens in virtually all areas of state life. On this basis *Graham* imposes a substantial burden of justification on states that choose to discriminate against them.”). Indeed, personhood was a key reason behind the decline of the plenary power doctrine, outweighing, in the Court’s eyes, federal sovereign prerogatives such as the foreign relations power. See *Bosniak*, *Difference that Alienage Makes*, *supra*, at 1115–16 (“[T]he Court has carved out for all aliens a zone of protected personhood, where the nation’s membership interests are of no consequence at all.”).

167. It is also worth noting that under the equal protection doctrine the level of scrutiny applied to classifications based on legal status remains ambiguous. See Moore, *supra* 152, at 814 & n.59 (arguing it is unclear whether Supreme Court “has explicitly adopted” application of strict scrutiny to state classifications but rational basis review to federal ones “as a part of its constitutional jurisprudence”); see also *id.* at 813–15 (questioning relationship between plenary power and degree of scrutiny applied in equal protection cases). The Supreme Court seems to have indicated that the degree of constitutional scrutiny depends on the legal status of the immigrant in question. Whereas alienage classifications (i.e., classifications premised on the distinction between citizenship and authorized immigrant status) have generally required strict scrutiny, see *supra* notes 157–167 and accompanying text (examining application of strict scrutiny versus rational basis review to state laws discriminating on basis of alienage), classifications based on *unauthorized* immigrant status apparently merit intermediate scrutiny, and arguably less if not accompanied by some constitutionally cognizable special circumstance. See *Plyler*, 457 U.S. at 219–25, 226, 230 (holding law prohibiting unauthorized children from public schools must “further[] some substantial goal of the State” and be “reasonably adapted to” that goal and, in finding law did neither, emphasizing immutability of unauthorized status, culpability, age, and importance of education); see also Motomura, *Outside the Law*, *supra* note 42, at 8–9 (arguing “[b]y asking for a substantial goal, the Court signaled that its analysis might be closer to . . . ‘intermediate scrutiny’” and remarking “*Plyler* remains a high-water mark for the constitutional protection of unauthorized migrants”).

168. See, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266, 267, 273 (1972) (holding search of noncitizen petitioner’s vehicle violated Fourth Amendment); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (“[A]ll persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth Amendments].”).

169. This would require courts to engage in line-drawing exercises, determining whether a state law exhibits a sufficient nexus to pure immigration law to be considered a regulation thereof. Rodríguez, *supra* note 61, at 629–30 (arguing acceptance of state im-

but several of many ways in which courts could prevent the erosion by restrictionist subfederal regulators of immigrants' constitutional entitlements.

Critics of immigration subfederalism also lament the "balkanization" of state law that will purportedly occur as a result of subfederal regulation. According to the balkanization thesis, "today's multi-ethnic immigrant gateway regions" will become "individual melting pots" while other regions will exhibit "a lower tolerance for the issues and concerns of ethnically more diverse populations."<sup>170</sup> But balkanization is already a political reality; it is what has prevented federal immigration reform to date, rendering panacean portrayals of federal exclusivity ironic at best.<sup>171</sup> Furthermore, the notion that restrictionist states will necessarily persist in their restrictionism is a facile one. Anti-immigrant legislation entails significant costs for states, both in terms of labor and revenue. As these costs become apparent, states may opt to avoid such losses by repealing restrictionist laws.<sup>172</sup> Riverside, New Jersey, did just that after its legislation targeting unauthorized employment precipitated substantial economic loss.<sup>173</sup> Anti-immigrant legislators also run significant social and political risks. In response to SB 1070, for example, Arizona protestors "launched sophisticated boycott campaigns against the state, many of which [were] modeled after anti-apartheid efforts."<sup>174</sup> And by revealing the statistical and conceptual fallacies upon which restrictionist legislation is frequently

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migration regulation would require exploration of what types of regulations fall within states' powers). Some courts are already grappling with these line-drawing difficulties, suggesting courts are capable of conducting such assessments. See, e.g., *Keller v. City of Fremont*, 719 F.3d 931, 941 (8th Cir. 2013) ("Laws designed to deter, or even prohibit, unlawfully present aliens from residing within a particular locality are not tantamount to immigration laws establishing who may enter or remain in the country." (emphasis omitted)).

170. William H. Frey, *Immigration and Demographic Balkanization*, in *America's Demographic Tapestry: Baseline for New Millennium* 78, 79 (James W. Hughes & Joseph J. Seneca eds., 1999).

171. See Rodríguez, *supra* note 61, at 590, 596 (arguing with respect to immigration reform "interests in play are too diverse to produce even a minimally acceptable consensus policy" and "accepting the costs of some . . . local ordinances may be necessary to negotiate effectively the deep ideological divisions on this issue").

172. See *id.* at 639 (stating "[w]hatever is motivating [restrictionist policies] . . . is likely to give way over time to acceptance" but transition "is more likely to occur . . . if localities that adopt these ordinances come to feel the consequences of excluding immigrants from their communities").

173. See Cunningham-Parmeter, *supra* note 106, at 1711 (detailing consequences of law, which included "substantial legal bills," deferred "road maintenance and construction projects," store closures, and "businesses suffering weekly losses estimated at \$50,000" over course of approximately one year).

174. *Id.* at 1712.

based,<sup>175</sup> enacting such legislation may in fact do more to advance immigrants' rights than uniform federal policy.<sup>176</sup>

2. *The How.* — Proponents of immigration federalism pursue a lofty agenda. The integrationist movement seeks to reconstitutionalize subfederal immigration authority while also imbuing President Obama's immigration policies with constitutional authority. Thus, by sheer force of political will, integrationists hope to fortify against invalidation state and executive acts that, insofar as they challenge the reigning articulation of separated powers, remain of debatable constitutionality. Integrationists must therefore demonstrate some semblance of constitutional imprimatur justifying the reallocation of power necessary to legitimize their actions. Second, a translational mechanism capable of channeling states' veiled constitutional demands up to federal decisionmakers must exist.<sup>177</sup> Doubts as to whether either requirement can be satisfied have caused scholars and commentators to question the durability of both President Obama's deferred action policies and, more broadly, the constitutionality of subfederal integrationism. These doubts seem more an expression of political fatalism than constitutional logic. Federalism scholars not only depict the contemporary political process as perfectly capable of, if not ideally suited to, channeling up regulatory preferences but also provide ample support for the constitutionality of negotiations regarding the vertical allocation of power between state and federal governments.<sup>178</sup>

Addressing first constitutional imprimatur, existing scholarship provides ample support for state–federal negotiation regarding the allocation of disputed constitutional authority. To many contemporary federalism scholars, vertical power negotiation is not a matter of constitutional

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175. See S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 *Ariz. St. L.J.* 1431, 1450–74 (2012) (concluding restrictionist sentiment depends on “combination of demographic ‘facts’” that simply “[do] not stand up to empirical scrutiny”).

176. Cf. Weber, *supra* note 107, at 738–39 (“Providing states and localities a voice and a role, both pro-enforcement and pro-immigrant, in shaping the current legislation may be the best way for the [immigration] debate to evolve when faced with the very real possibility that no federal, comprehensive efforts will be forthcoming in the near future.”).

177. See Rodríguez, *supra* note 61, at 591 (“We cannot escape the need for a mechanism that enables people to express their diverse positions on unauthorized migration.”).

178. See generally, e.g., Erin Ryan, *Negotiating Federalism*, 52 *B.C. L. Rev.* 1, 11 (2011) [hereinafter Ryan, *Negotiating Federalism*] (“Notwithstanding the stylized narrative of federalism in rhetoric, the boundary between state and federal authority in practice is the subject of ongoing intergovernmental negotiation.”); Erin Ryan, *Negotiating Federalism and the Structural Constitution: Navigating the Separation of Powers Both Vertically and Horizontally*, 115 *Colum. L. Rev. Sidebar* 4, 13–20, 24–32, 35–37 (2015), <http://columbia.lawreview.org/wp-content/uploads/2015/04/Ryan-v5.pdf> (on file with the *Columbia Law Review*) [hereinafter Ryan, *Structural Constitution*] (reviewing vertical-federalism-bargaining scholarship and stating “[b]alanced [f]ederalism recognizes the primary role of vertical bargaining to allocate contested authority in the conduct of federalism-sensitive governance”).

permissibility, but rather one of constitutional *necessity*.<sup>179</sup> Where, as with immigration authority, the Constitution leaves the exact boundaries of vertical power sharing unclear, structural bargaining becomes inevitable.<sup>180</sup> Chief Justice John Marshall acknowledged as much in *McCulloch v. Maryland*, observing a constitution that “contain[s] an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.”<sup>181</sup> Subfederal actors bargaining with the federal government over the proper allocation of immigration authority therefore do so with implicit constitutional sanction. Furthermore, the resulting political and social disagreements invigorate the democratic process, “knitting together the national polity” in pursuit of consensus.<sup>182</sup> Thus, rather than undermining constitutional values, subfederal immigration regulation represents a form of live constitutional interpretation, desirable for its ability to forge national compromise in the face of textual ambiguity.<sup>183</sup>

Given these ambiguities, and the consequent need for intergovernmental bargaining, it is unsurprising that the contemporary political process includes mechanisms for channeling subfederal regulatory preferences up to federal decisionmakers. Formal models of cooperative federalism, such as devolution and delegation, do so by explicitly deferring to

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179. See Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 *Colum. L. Rev.* 1595, 1597 (2014) (“Questions invariably persist about the exact boundaries of institutional entitlements [granted by the Constitution].”); Ryan, *Structural Constitution*, *supra* note 178, at 24–28, 24 n.99 (“Scholars of negotiated structural governance generally agree that institutional bargaining is inevitable in the absence of clear constitutional entitlements.”).

180. See Ryan, *Structural Constitution*, *supra* note 178, at 10, 24 & n.99 (listing at least fifteen preeminent scholars who “acknowledge that structural bargaining takes place among the major institutions of governance, usually in response to uncertainty about which institutional actor is constitutionally privileged in a given context”). As Aziz Huq has explained, “Absent some novel theoretical account of how to decompose the Constitution into clear and distinct elementary particles—an account that eluded the Founders—boundary disputes between branches and between governments recognized in the Constitution will remain pervasive.” Huq, *supra* note 179, at 1662.

181. 17 U.S. (4 Wheat.) 316, 407 (1819).

182. Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 *Yale L.J.* 1889, 1894 (2014); see also Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 *Yale L.J.* 2094, 2097 (2014) [hereinafter Rodríguez, *Negotiating Conflict*] (stating American federalism “creates a multiplicity of institutions with lawmaking power through which to develop national consensus, while establishing a system of government that allows for meaningful expressions of disagreement when consensus fractures or proves elusive”).

183. See Erin Ryan, *Federalism and the Tug of War Within* 349 (2011) (“Bargaining that procedurally safeguards rights, enhances participation, fosters innovation, and harnesses interjurisdictional synergy accomplishes what federalism is designed to do—and what federalism interpretation is ultimately for. As such, it warrants interpretive deference from a reviewing court.”); Gerken, *supra* note 182, at 1892 (“It is possible to imagine federalism integrating rather than dividing the national polity.”).

the policy choices of subfederal actors within federalism's "discretionary spaces."<sup>184</sup> Immigration federalism activates the same political channels and processes at work in devolutionary and delegatory schemes.<sup>185</sup> It also triggers more traditional methods of vertical bargaining such as democratic mobilization and persistent constituent demands on congressional representatives—the very pith of the political process. In the context of immigration federalism, mobilization and state–congressional communication convey to Congress the array of conflicting subfederal priorities and policies with respect to the regulation of noncitizens. This exchange is crucial to the longevity of integrationist reforms.<sup>186</sup> The survival of subfederal, pro-immigrant legislation requires Congress to forego its considerable powers of preemption by declining to legislate, something it is more inclined to do when a policy question lacks majority consensus.<sup>187</sup> Vociferous yet inconsistent demands from subfederal actors regarding

184. Rodríguez, *Negotiating Conflict*, supra note 182, at 2097 (defining “discretionary spaces of federalism” as “policy conversations and bureaucratic negotiations that actors within the system must have to figure out how to interact with one another both vertically and horizontally”).

185. See Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 *Colum. L. Rev.* 459, 477–86 (2012) (classifying cooperative enforcement of federal immigration law as example of “concurrent delegation”); Hu, supra note 74, at 594 (noting “political branches are actively engaged in the ‘devolution’ of immigration law by delegating essential immigration screening, or federal immigration gatekeeping duties and responsibilities, to private third-parties, such as employers, and state agents, such as state and local police officers”); Huntington, supra note 22, 839–41 (assessing feasibility of delegating federal immigration authority to states). See generally, Wishnie, supra note 60, at 558 (arguing “we should embrace nondevolvability [of federal immigration power] on principle”). Devolution may in fact be a particularly apt description of changes in the balance of immigration authority in recent years. According to John Kincaid, “What is currently referred to as devolution is more accurately called ‘restoration’ or ‘rebalancing’ of powers between the federal government and the states to conform more closely to what the authors of the Constitution had in mind.” Robert Tannenwald, *Devolution: The New Federalism—An Overview*, *New Eng. Econ. Rev.*, May–Jun. 1998, at 2, <https://www.bostonfed.org/economic/neer/neer1998/neer398b.pdf> [<https://perma.cc/C49K-YE52>]; see also id. (“Devolution connotes a surrender of a function by a superior government to a subordinate government that is generally complete, permanent, and of ‘constitutional magnitude.’”). This definition aptly describes immigration federalism, which advocates a rebalancing of immigration power to better approximate the role states originally played in immigration regulation before the late nineteenth century (that is to say, an active one). See supra section I.A.1 (describing transfer of state immigration authority effectuated by plenary power doctrine).

186. See Kramer, supra note 103, at 1523 (1999) (“[P]olitical relationship[s] drive[] constitutional power and practice.”).

187. See, e.g., Jonathan R. Macey, *Federal Deference to Local Regulators and Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 *Va. L. Rev.* 265, 284–85, 289 (1990) (“Congress might . . . defer to the states in order to avoid the *loss* of political support on issues for which there is no clear national consensus.”); id. at 285 (explaining, faced with “imperfect information” about what “his [or her] constituents want,” legislator may maximize political support by “turn[ing] the matter . . . over to the states” (quoting Peter H. Aronson, Ernest Gelhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 *Cornell L. Rev.* 1, 60 (1983))).

immigration policy thus make deference to local legislative preferences particularly attractive to federal lawmakers in that such deference minimizes political risk while maximizing political support.<sup>188</sup> Ultimately, these political mechanisms represent an opportunity for states to influence the congressional response to immigration federalism. By entrenching policies at the local level, integrationists and immigrants' rights advocates can demand deference to local policy and dig in against future restrictionist preemption, thereby redefining the nature and scope of constitutional immigration power.

### III. FEDERALISM, MEET *YOUNGSTOWN*: CONSTITUTIONALIZING DEFERRED ACTION

In debating the constitutionality of deferred action, scholars have struggled to locate President Obama's executive policies within the traditional tripartite framework of *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>189</sup> Scholars applying the framework have announced wildly different results,<sup>190</sup> and with good reason. The nebulous relationship between congressional and executive behavior set forth in Justice Jackson's concurrence impedes neat categorization.<sup>191</sup> Furthermore, the most intuitively apposite of the three zones, the "zone of twilight," which weighs executive action against congressional inaction,<sup>192</sup> lacks precedential exposition, making it difficult to apply. However, as this Part will demonstrate, the greatest obstacle to successfully placing DACA within the *Youngstown* framework is the framework itself. Modern immigration law implicates far more than the separation of power between the President and Congress; it also entails significant questions regarding the division of power between the federal government and the states. Yet, as it currently

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188. See *id.* at 267 ("[T]he supremacy clause is a considerable source of political rents for Congress because it allows Congress to obtain political support by permitting independent or concomitant state regulation at little or no political cost to itself."); see also *id.* at 267–76 (listing and describing reasons for congressional policymaking deference to states and clarifying "deferring to state lawmakers does not deprive federal lawmakers of political support"); cf. Bulman-Pozen, *supra* note 185, at 484–85 (arguing existence of restrictionist state immigration schemes signals congressional deference to state power and that such deference results from "broader political climate" and "politics of [the] particular issue"). Moreover, because Congress can ultimately preempt subsequent state regulation, the long-term risk of state overreach remains quite low. See Macey, *supra* note 187, at 286 ("Congress always can decide to regulate when and if interest-group political support galvanizes around a particular regulatory solution, thereby signaling Congress that it can intervene safely.").

189. 343 U.S. 579 (1952).

190. See *infra* notes 196–201 and accompanying text (sampling scholarly conclusions).

191. See *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring) (delineating categories without clearly defining operative terms such as "implied authorization," or explaining whether and when categories overlap).

192. See *id.* at 637 (Jackson, J., concurring) (specifying zone of twilight results from "congressional inertia, indifference or quiescence").

stands, the *Youngstown* framework is ill-equipped to consider questions of vertical power sharing, thereby eliminating significant variables from its constitutional calculus. In the context of immigration policy—and American federalism more generally—these variables matter. Any plausible assessment of DACA’s constitutionality must therefore take verticalism into account, especially given states’ intense participation in the national immigration debate.

This Part explores the doctrinal relationship between vertical and horizontal separation of powers in American government and argues that, in evaluating the constitutionality of executive action within the traditional *Youngstown* framework, subfederal political power must be considered. Failure to do so exalts constitutional theory over political reality, perpetuating a *Youngstown* out of step with contemporary government and of limited practical applicability.<sup>193</sup> It also raises questions of doctrinal legitimacy. A *Youngstown* devoid of federalism generates precedent that is at best doctrinaire and at worst obsolete.<sup>194</sup> Incorporating federalism into the *Youngstown* schema avoids these pitfalls by bringing within its theoretical reach the full scope of modern intergovernmental power sharing. In this refurbished framework, subfederal power and prerogative function as a fourth “zone” capable of supplementing or undermining the legitimacy of unilateral presidential policy.

The *Youngstown* schema centers on one key phrase in Justice Jackson’s concurring opinion: “Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress.”<sup>195</sup> This phrase has become a cornerstone of separation-of-powers jurisprudence, mediating the ambiguous divide between congressional and presidential power. Despite its renown, applying Justice Jackson’s tiered framework presents its own difficulties, no less when assessing the constitutionality of deferred action. In this regard, commentary remains fractured. Josh Blackman places DACA in zone three, finding it “incompatible with the expressed or implied will of Congress,” and an example of presidential power “at its lowest ebb.”<sup>196</sup> John Jones reached the same

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193. See *infra* notes 215–218 and accompanying text (describing anachronism of formal separation-of-powers model).

194. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *Harv. L. Rev.* 2311, 2314 (2006) (noting omission of vertical politics from separation-of-powers doctrine has “generated judicial decisions and theoretical rationalizations that float entirely free of any functional justification grounded in the actual workings of separation of powers”).

195. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

196. Blackman, *supra* note 18, at 28–29, 36, 40–42 (internal quotation marks omitted). According to Blackman, DACA falls within *Youngstown*’s third zone because Congress “expressly declined to enact it” in failing to pass the DREAM Act, which constituted “a decision on policy in and of itself,” and a clear signal to the Executive of congressional disapproval. *Id.* at 41–42; see also Gilbert, *supra* note 16, at 278–79 (“Critics of DACA . . . argue that Congress considered and rejected various versions of the DREAM Act, whose eligibility criteria DACA closely mirrors. Thus . . . when the Executive promulgated DACA, it was

conclusion regarding DACA's work-authorization provision, reasoning, "since Congress has specifically denied work authorization to illegal immigrants, this facet of President Obama's plan lands in the 'lowest ebb' zone of Justice Jackson's framework."<sup>197</sup> Others have found DACA unconstitutional based on similar logic though not explicitly invoking *Youngstown*.<sup>198</sup> In contrast, according to Lauren Gilbert, DACA "arguably falls within Justice Jackson's twilight zone, which allows the President to act in cases of 'congressional inertia, indifference or quiescence,' particularly where Congress and the Executive enjoy concurrent authority."<sup>199</sup> A nonfrivolous argument can also be made for zone one. DACA "should be deemed as foreign policy where the President has the sole authority to take action,"<sup>200</sup> writes Jou-Chi Ho, a position supported by the Supreme Court's reasoning in *United States ex rel. Knauff v. Shaughnessy*.<sup>201</sup> More recently,

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acting contrary to the will of Congress." (citing Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 *Tex. L. Rev.* 781, 788–89 (2013)). But see Jou-Chi Ho, *Unfulfilled Promises, Educating to Deport: Plyler Students at 30*, in *We Build Our Bridges Together: 2013 Monograph Series 348*, 367 (Nat'l Ass'n of African Am. Studies et al., Feb. 2013), <https://www.naaas.org/wp-content/uploads/2014/09/2013monograph.pdf> [<http://perma.cc/R4P3-FY23>] (stating, with respect to DREAM Act, "President Obama's new immigration policy does not grant citizenship to unauthorized alien students" and concluding "he is [therefore] not in conflict with congressional naturalization authority"). In a more recent article, Blackman reached the same conclusion regarding President Obama's enjoined DAPA program. See Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 *Tex. Rev. L. & Pol.* 213, 265 (2015) ("DAPA falls into Jackson's third tier, where the executive's power is at its 'lowest ebb.'").

197. John Ira Jones IV, *Taking Care, or Prosecutorial Indiscretion? President Obama's Immigration Action in Historical Context* (Nov. 21, 2014) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2584596](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2584596) (on file with the *Columbia Law Review*).

198. See, e.g., Amended Complaint at 16, *Crane v. Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013) (No. 3:12-CV-03247-O), 2012 WL 5199509, ¶ 77 ("No federal regulation authorizes the conferral of the benefit of deferred action to an entire category of unlawfully present aliens . . ."); Jan Ting, *Ctr. for Immigration Studies, President Obama's "Deferred Action" Program for Illegal Aliens Is Plainly Unconstitutional* 13–15 (2014), [http://cis.org/sites/cis.org/files/ting-plan-unconstitutional\\_0.pdf](http://cis.org/sites/cis.org/files/ting-plan-unconstitutional_0.pdf) [<http://perma.cc/S4V8-WDKR>] (stating President "enjoys no constitutional authority to facilitate the employment of aliens," and DACA not only usurps "Congress's otherwise exclusive authority" but also "directly violates a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996").

199. Gilbert, *supra* note 16, at 279 (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

200. Ho, *supra* note 196, at 368.

201. 338 U.S. 537, 542 (1950) (finding power to dictate exclusionary policy "inherent in the executive power to control the foreign affairs of the nation" (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893))). While *Knauff* represents a high-water mark of presidential discretion, deference to executive authority is still a fixture in immigration jurisprudence. Professor Rodríguez points to three recent cases in particular, *INS v. Abudu*, 485 U.S. 94 (1988); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999); and *Jama v. ICE*, 534 U.S. 335 (2005), all of which "emphasize that deference to the Executive Branch is especially important in the immigra-



the D.C. Circuit concluded “Congress has acquiesced to, and even endorsed the use of, deferred action on removal of undocumented immigrants by the executive branch on multiple occasions.”<sup>202</sup>

As these examples suggest, the conventional *Youngstown* framework will not necessarily yield satisfying answers with respect to the constitutionality of deferred action. This is not because Obamian immigration policy is of particularly dubious constitutionality. Rather, the difficulty of situating DACA within the *Youngstown* framework exposes a key limitation of the framework itself: its adherence to a stylized view of executive power that fails to account for the realities of power sharing within the American federalist system. This malady is not, to be fair, unique to *Youngstown*. Generally speaking, American constitutional precedent and scholarship adhere to classical, formalistic definitions of institutional power allocation.<sup>203</sup> Consequently, executive, legislative, and subfederal power are often portrayed as mutually exclusive and federal interbranch bargaining as distinct from vertical power sharing. That courts and scholars reproduce this inflexibility in applying *Youngstown* is therefore unsurprising. It nonetheless belies the reality that within our contemporary constitutional system, axes of vertical and horizontal power sharing intersect.<sup>204</sup> Expanding the *Youngstown* framework to reflect the prevalence of institutional bargaining achieves two goals. Regarding the focus of this Note, it enables a more nuanced analysis of DACA’s constitutionality, settling conflicting claims as to which of Jackson’s three zones applies.<sup>205</sup> More broadly, it serves to reconcile judicial doctrine and constitutional reality.

Federalism has the capacity to resolve inconsistent applications of the *Youngstown* framework by providing concrete indicia of legitimacy in

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tion context.” See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 *Yale L.J.* 458, 480–82 & n.71 (2009).

202. *Arpaio v. Obama*, 27 F. Supp. 3d 185, 194 (D.D.C. 2014) (citing 8 U.S.C. §§ 1154(a)(1)(D)(i)(II), (IV)); *id.* § 1227(d)(1); *id.* § 1227(d)(2); REAL ID Act of 2005, Pub. L. No. 109-13, div. B., 119 Stat. 231, 302 (codified at 49 U.S.C. § 30301 note)); accord Shoba Sivrasasad Wadhia, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 *Tex. L. Rev.* See Also 59, 62, 65 (2012), <http://www.texasrev.com/wp-content/uploads/Wadhia.pdf> [<http://perma.cc/LEE7-BP2Y>] (responding to claim that DACA violates Take Care Clause and emphasizing “U.S. Congress has affirmed the role of prosecutorial discretion in immigration law”).

203. See Huq, *supra* note 179, at 1597–602 (stating legal scholars “are just beginning to explore systematically the [proposition] that *institutions* such as states or federal branches might negotiate over their constitutional entitlements” and observing “[b]oth states and branches engage in such bargaining routinely, notwithstanding scholarly inattention to the practice”); Ryan, *Negotiating Federalism*, *supra* note 178, at 4 (critiquing “stylized model of zero-sum federalism dominating political discourse, which emphasizes winner-takes-all jurisdictional competition,” and “[c]ontemporary judicial doctrine present[ing] a similarly wooden view of sovereign antagonism within American federalism”).

204. See, e.g., Bulman-Pozen, *supra* note 185, at 461 (acknowledging tendency to “overlook how federalism affects the separation of powers”).

205. See *supra* notes 196–202 and accompanying text (detailing claims).

an otherwise unresolvable theoretical debate. Specifically, states' substantive policy preferences serve as a pragmatic antidote to the inherently indeterminate conceptual boundary between congressional and executive power. This vertical approach "frees us from the standard battles about whether we really can define the legislative, the judicial, and the executive" and instead measures power as a function of political reality.<sup>206</sup> Federalism may factor into *Youngstown* in strong or weak form. At its strongest, it might represent a fourth "zone" equal in weight to those already established. Alternatively, it may appear in weaker form, as a "subconstitutional"<sup>207</sup> or "phantom"<sup>208</sup> tiebreak. Either approach would factor state power into *Youngstown's* calculus as a means of facilitating zonal categorization in cases implicating both the horizontal and vertical allocation of power.<sup>209</sup> Where states favor an Executive's proposed allocation (or reallocation) of constitutional power, the President acts with greater constitutional imprimatur, suggesting zone one may be the most appropriate categorization. Where states express mixed or no preference, zone two most naturally applies. In these instances, the President ought to receive "interpretive deference"<sup>210</sup> as a matter of institutional competence<sup>211</sup> and democratic principle.<sup>212</sup> Finally, where states disfavor a President's power play, zone three controls.

Applied to DACA, this approach places President Obama's immigration directives closer to zone one (constitutionality) than zone three (un-

206. Victoria Nourse, *The Vertical Separation of Powers*, 49 *Duke L.J.* 749, 752 (1999).

207. Mark Tushnet, *Subconstitutional Constitutional Law: Supplement, Sham, or Substitute?*, 42 *Wm. & Mary L. Rev.* 1871, 1879 (2001) (noting purpose of subconstitutional norms "is to ensure full consideration of constitutional norms by the political branches without dictating the content of those branches' conclusions"); see also Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 *Wm. & Mary L. Rev.* 1575, 1583–84, 1587 (2001) (listing what author terms "structural" doctrines or rules," explaining, "these rules operate[] to safeguard some identifiable substantive constitutional value," and categorizing federalism as one such value).

208. See Motomura, *Curious Evolution*, *supra* note 39, at 1627 n.11 (defining "phantom" constitutional norms as principles "real enough to influence statutory interpretation, but not real enough to govern explicitly constitutional decisions").

209. See Ryan, *Structural Constitution*, *supra* note 178, at 16 (describing balanced federalism, which "recognizes the primary role of vertical bargaining to allocate contested authority in the conduct of federalism-sensitive governance").

210. *Id.* at 13–16 (arguing if bargaining over institutional power "is conducted in a manner . . . consistent with the fundamental federalism values, then the results warrant deference as a legitimate means of allocating contested constitutional authority," and such deference harnesses "unique governance capacities of local and national actors").

211. See *id.* at 16 (stating balanced federalism advocates "horizontal bargaining among the three branches to appropriately shift authority for resolving distinct interpretive dilemmas to the branch possessing the institutional capacity best suited for the task").

212. See Coenen, *supra* note 207, at 1689–98 (discussing cases in which Supreme Court refused to impose "federalism-based limit[s] on congressional action" where "national political process did not operate in a defective manner" (quoting *South Carolina v. Baker*, 485 U.S. 505, 513 (1988))).

constitutionality). This result depends, however, on properly characterizing the subfederal response. From a sociopolitical standpoint, one could classify the subfederal response to deferred action as mixed; states certainly do not agree on the appropriate response to unauthorized immigration. They do, however, appear to agree on a strategy for navigating this lack of consensus. Both integrationist and restrictionist states have capitalized on the constitutional power struggle accompanying Obaman immigration reform,<sup>213</sup> legislating within its shadow to entrench local policies and preferences. This state action reifies DACA's constitutionality in several ways. First, by responding in kind, states shore up President Obama's decision to buck the immigration power structure. Second, the states' grab for power signals widespread, systemic instability in the allocation of constitutional immigration authority. With the boundaries of immigration power shifting vertically between the state and federal governments, a similar horizontal shift between executive and legislative actors becomes far less suspect. Finally, the predominance of integrationist legislation at the subfederal level<sup>214</sup> legitimizes the substantive policy choices underlying deferred action.

Expanding *Youngstown* represents a new and significant development in constitutional doctrine and, as such, requires justification. The traditional, tripartite *Youngstown* model reflects a classical conception of separation of powers<sup>215</sup> premised on three functionally distinguishable departments.<sup>216</sup> This conception fails to capture modern American government,<sup>217</sup> in which state-federal relations exert a powerful influence on

213. See *supra* section IA.2 (discussing states' varied strategies for regulating immigrants).

214. See, e.g., Catalina Restrepo, Annual Review of State-Level Immigration Policy Still Trending Pro-Immigrant, Immigration Impact (Aug. 11, 2015), <http://immigrationimpact.com/2015/08/11/state-immigration-laws-2015/> [<http://perma.cc/DP3U-5Q8D>] ("After long legal battles over punitive, state anti-immigration laws . . . states have begun moving in a new direction by more generally enacting state immigration laws that seek to protect, integrate and capitalize on the social and economic opportunities immigration brings."). Seven states bucked the trend by "pass[ing] resolutions that encourage the federal government to take action on immigration." See *id.* These states are clearly in the minority.

215. See Malcolm P. Sharp, The Classical American Doctrine of "The Separation of Powers," 2 U. Chi. L. Rev. 385, 394 (1935) ("The idea that a separation of three powers of government among three separate organs is a natural and desirable thing, expressed in different forms by . . . classical authorities in America . . . became a part of our informed if not 'scientific' public opinion.").

216. See Nourse, *supra* note 206, at 755 ("So-called formal approaches to the separation of powers . . . insist that it is possible to achieve departmental separation if we simply hew to a sufficiently rigid tripartite formula.").

217. See generally Bulman-Pozen, *supra* note 185, at 464 (arguing due to administrative state "we no longer principally have two independent systems, federalism and the separation of powers, . . . but rather an interdependent system"); see also Levinson & Pildes, *supra* note 194, at 2313 ("Few aspects of the founding generation's political theory are now more clearly anachronistic than their vision of legislative-executive separation of powers."); Nourse, *supra* note 206, at 753 ("[T]he vertical separation of powers may help us understand the 'realism gap' between the nation's political life and the Supreme Court's recent and most controversial separation of powers cases . . .").

the federal interbranch power balance.<sup>218</sup> Through political exchanges with congressional representatives, subfederal actors communicate preferences regarding the scope of executive power and incentivize Congress to actuate those preferences.<sup>219</sup> As Professor Victoria Nourse explains, “Every shift in governmental function or task can be reconceived, not simply as a shift in tasks but also as a shift in the relative power of popular constituencies.”<sup>220</sup> This dynamic is evident in recurring debates surrounding the “imperial presidency,”<sup>221</sup> debates whose intensity fluctuates based on changes in political climate and partisan unity/disunity within the federal government.<sup>222</sup> Empirical research suggests, for example, that Congress is “less willing to delegate policymaking discretion to the executive branch when the policy preferences of the two branches diverge.”<sup>223</sup> Conversely, party politics can drive legislators to pursue “policy goals by conferring substantial authority on the executive branch.”<sup>224</sup> These observations highlight the important role subfederal political preferences play in shaping the interbranch power balance. They also raise serious questions as to whether the traditional *Youngstown* framework, insofar as it omits federalism, merits doctrinal and theoretical legitimacy.

No particular constitutional provision mandates accounting for state prerogatives in assessments of executive action. Apart from broad structural considerations, incorporating federalism into the existing *Youngstown* schema has no clear constitutional hook. Yet this is true of *Youngstown* as a whole. Justice Jackson’s opinion is self-consciously premised on structural, rather than textual or doctrinal, reasoning.<sup>225</sup> Justice Jackson himself describes his concurrence as giving “the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical im-

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218. See, e.g., Bulman-Pozen, *supra* note 185, at 465–68 (stating political process provides incentives to Congress to restrict or expand scope of executive power).

219. See Nourse, *supra* note 206, at 763–64 (“[S]ignificant across-the-board changes in . . . fundamental electoral relationships could change political incentives and thus structure.”).

220. *Id.* at 752.

221. See generally Arthur M. Schlesinger, Jr., *The Imperial Presidency* (1973) (coining term “imperial presidency”).

222. Cf. Larry D. Kramer, *Putting the Political Safeguards Back into the Political Safeguards of Federalism*, 100 *Colum. L. Rev.* 215, 224 (2000) (“[T]he cooperation and deference we observe between officials at the different levels of government is produced by extra-constitutional institutions that link their political fortunes—institutions . . . like political parties and an interlocking administrative bureaucracy.”); Levinson & Pildes, *supra* note 194, at 2347 (“Viewing separation of powers in light of political parties . . . identif[ies] the political conditions under which we should expect to find higher and lower levels of congressional skepticism of, and opposition to, executive actions.”).

223. Levinson & Pildes, *supra* note 194, at 2341.

224. Bulman-Pozen, *supra* note 185, at 468.

225. See Philip Bobbitt, *Youngstown: Pages from the Book of Disquietude*, 19 *Const. Comment.* 3, 8–12 (2002) (“Justice Jackson announces early on in his concurrence that he will be offering a structural argument.”).

plications instead of the rigidity dictated by doctrinaire textualism.”<sup>226</sup> He explicitly recognizes the potential for the reallocation of constitutional power over time, thereby impliedly conceding the ability of the tripartite model to account for such shifts.<sup>227</sup> Further, he openly acknowledges the political process as constitutive of executive power.<sup>228</sup> Notwithstanding its atextual provenance, the *Youngstown* framework has achieved landmark status and in doing so accorded structural considerations significant weight in executive-power jurisprudence.<sup>229</sup> Updating *Youngstown* to reflect the structural realities of vertical and horizontal power sharing—more specifically, the interaction between state and executive power—is therefore in keeping with Justice Jackson’s emphasis on “the imperatives of events and contemporary imponderables rather than on abstract theories of law.”<sup>230</sup>

### CONCLUSION

Since its inception, President Obama’s deferred action policy has validated and improved the lives of millions of noncitizen residents. That these benefits might sunset with the Administration is therefore a matter of great concern to immigrants, immigrants’ rights activists, and their allies. In order to combat this loss of benefits, states and integrationists are making concerted efforts before President Obama leaves office to entrench DACA’s policies and protections at the subfederal level. Despite the federal government’s traditional monopoly in regulating immigration, subfederal entrenchment may well pay off. By energizing political processes and channeling local, bipartisan preferences for subfederal regulation up to Congress, states are poised to change the constitutional

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226. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring).

227. *Id.* at 653 (Jackson, J., concurring) (“Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.”); cf. *id.* at 635 (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.”); *id.* at 640 (“[B]ecause the President does not enjoy unmentioned powers does not mean that the mentioned ones should be narrowed by a niggardly construction. Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times.”).

228. See *id.* at 654 (Jackson, J., concurring) (“[The] rise of the party system has made a significant extraconstitutional supplement to real executive power . . . . Party loyalties and interests . . . extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.”).

229. See, e.g., Herman C. Pritchett, *Civil Liberties and the Vinson Court* 206 (1954) (“[A]ll other [separation of powers] cases pale into insignificance.”); David Grey Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 *Const. Comment.* 155, 156–57 (2002) (“*Youngstown* featured the most thorough judicial exploration of presidential powers in the history of the Republic, and it constituted the most significant judicial commentary in the 20th century on the limits of those powers.” (footnote omitted)).

230. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

framework itself, demanding a reallocation of constitutional immigration authority in their favor. Such a restructuring of constitutional entitlements, once precluded by the plenary power doctrine, is now eminently possible as a result of the judiciary's gradual weakening of plenary power's strict mandates.

States' focus on immigration federalism and their assumption of greater subfederal regulatory power also have a role to play in constitutionalizing President Obama's executive reforms. On a basic level, states' power demands reflect the unstable constitutional allocation of immigration authority among constitutional actors, suggesting the traditional dichotomy between legislative and executive immigration authority is open to contestation. The pace and volume of state efforts also raise questions about the adequacy of *Youngstown's* tripartite framework. Consistent with its elision of federalism, *Youngstown* ignores the real-world interactions between executive and subfederal power. In doing so, it leads to inaccurate judicial determinations regarding the constitutionality of challenged executive actions and unquestionably betrays the flexible, pragmatic structural approach urged by Justice Jackson. Injecting federalism into the *Youngstown* framework thus does more than merely resolve the deferred action dilemma. It also promises a more nuanced, holistic, and realistic approach to questions of interbranch and intergovernmental power sharing.

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