

# Articles

## IMMIGRATION EXCEPTIONALISM

*David S. Rubenstein & Pratheepan Gulasekaram*

**ABSTRACT**—The Supreme Court’s jurisprudence is littered with special immigration doctrines that depart from mainstream constitutional norms. This Article reconciles these doctrines of “immigration exceptionalism” across constitutional dimensions. Historically, courts and commentators have considered whether immigration warrants exceptional treatment as pertains to rights, federalism, or separation of powers—as if developments in each doctrinal setting can be siloed. This Article rejects that approach, beginning with its underlying premise. Using contemporary examples, we demonstrate how the Court’s immigration doctrines dynamically interact with each other, and with politics, in ways that affect the whole system. This intervention provides a far more accurate rendering of how immigration exceptionalism translates into practice. By simultaneously accounting for rights, federalism, and separation of powers, our model captures a set of normative tradeoffs that context-specific appraisals have dangerously missed. For better and worse, the doctrines of immigration exceptionalism can operate very differently in combination than they do in isolation. Moreover, our expanded frame offers new insights on controversies arising at the intersection of constitutional dimensions, including the recent landmarks of *United States v. Texas*, *Arizona v. United States*, and President Trump’s executive orders issued in his first few weeks in office. Indeed, the transition between Presidents with drastically different views on immigration crystallizes the types of tradeoffs the Article highlights.

**AUTHORS**—David S. Rubenstein, Professor of Law and Director, Robert Dole Center for Law & Government, Washburn University School of Law. Pratheepan Gulasekaram, Professor of Law, Santa Clara University School of Law. The authors would like to thank Professors Jason Cade, Linus Chan, Jennifer Chacón, Gabriel Chin, Ming Hsu Chen, Adam Cox, Erin Delaney, Justin Driver, Ingrid Eagly, Amanda Frost, Alex Glashauser, Clare Huntington, Kevin Johnson, Michael Kagan, Anil Kalhan, Daniel Kanstroom, Joseph Landau, Stephen Legomsky, Peter Margulies, Craig Martin, Hiroshi Motomura, Mark Noferi, Ashira Ostrow, Aaron Simowitz, David Sloss, Peter Spiro, Rick Su, and Rose Villazor for their incisive

comments, questions, and suggestions. Drafts of this paper were presented, and benefitted from feedback, at the American Association of Law Schools 2016 Annual Meeting, the Northern California International Law Scholars Meeting at Stanford Law School, faculty workshop series at Georgia State, U.C. Davis, and Washington & Lee, and the 2016 Immigration Law Teachers Conference. Finally, for tireless research and editing assistance, we thank the *Northwestern University Law Review*, Kendra Conner, Hank Driskell, Penny Fell, Nicole Pottroff, and Alan Vester.

INTRODUCTION .....	584
I. DESCRIPTIVE EXCEPTIONALISM .....	593
A. <i>Rights</i> .....	594
B. <i>Federalism</i> .....	600
C. <i>Separation of Powers</i> .....	609
II. PRESCRIPTIVE EXCEPTIONALISM .....	614
A. <i>Rights</i> .....	615
B. <i>Federalism</i> .....	618
C. <i>Separation of Powers</i> .....	623
III. EXCEPTIONALISM AS MEANS TO ENDS .....	627
A. <i>Cross-Currency of Exceptionalism Rationales</i> .....	628
B. <i>Doctrinal Spillovers</i> .....	630
C. <i>Exceptionalism’s Political Space</i> .....	632
IV. AN EXCEPTIONALISM “TRILEMMA” .....	635
A. <i>The Rights Preference</i> .....	635
B. <i>The Federalism Preference</i> .....	639
C. <i>Separation of Powers Preference</i> .....	649
V. A NEW FOUNDATION FOR IMMIGRATION THEORY .....	651
CONCLUSION .....	654

## INTRODUCTION

Immigration law is famously exceptional. The Supreme Court’s jurisprudence is littered with special immigration doctrines that depart from mainstream constitutional norms.<sup>1</sup> These doctrines do not apply to other regulatory fields and enable government action that would be unacceptable

---

<sup>1</sup> See Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (tracing the Supreme Court’s departures from mainstream norms in immigration cases); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) (“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.”).

if applied to citizens. This Article provides the first comprehensive study of “immigration exceptionalism”<sup>2</sup>—and with some urgency.

More than ever, the scope of immigration power is coming face-to-face with constitutional rights, federalism, and separation of powers. National security threats have galvanized nativist sentiment, including proposals to ban immigrants of certain religions and nationalities.<sup>3</sup> Meanwhile, congressional gridlock on immigration reform has prompted the President, states, and cities to take matters into their own hands, generating new cuts of institutional conflict across all levels of government.<sup>4</sup> With the future of immigration law hanging in the balance, the doctrines of immigration exceptionalism could be decisive.<sup>5</sup>

To start, consider the following headline examples:

1. *Rights*. Weeks before this Article was going to print, President Trump issued an executive order that temporarily banned the admission of immigrants from certain predominantly Muslim countries.<sup>6</sup> Under the

---

<sup>2</sup> It has long been appreciated that, when it comes to immigration, the normal constitutional rules do not always apply. *See generally infra* Parts I–II. But the term for this phenomenon, “immigration exceptionalism,” made its first literary appearances in the late 1980s and early 1990s. *See* T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 10, 34 (1990); Peter H. Schuck, *Introduction: Immigration Law and Policy in the 1990s*, 7 YALE L. & POL’Y REV. 1, 19 (1989).

<sup>3</sup> *See* Geoff Earle, *Trump’s Poll Numbers Surge After Muslim Ban Comments*, N.Y. POST (Dec. 14, 2015), <http://nypost.com/2015/12/14/trumps-poll-numbers-surge-after-muslim-ban-comments/> [<https://perma.cc/RN79-S2L9>]; Texas Health & Human Servs. Comm’n v. United States, 166 F. Supp. 3d 706, 714 (N.D. Tex. 2016) (denying Texas’s request for an injunction to suspend the resettlement of Syrian refugees in the state).

<sup>4</sup> *See* Section I.B (discussing spate of state initiatives in immigration); Section I.C (discussing executive initiatives in immigration); *see also* David S. Rubenstein, *Self-Help Structuralism*, 95 B.U. L. REV. 1619, 1630–32, 1650–57 (2015) (describing how the President and states have engaged in “constitutional self-help”); *Taking Action on Immigration*, WHITE HOUSE, <https://www.whitehouse.gov/issues/immigration> [<https://perma.cc/E5AE-7F3J>] (outlining President Obama’s immigration plans and actions).

<sup>5</sup> In his first weeks in office, President Trump issued a series of executive orders concerning immigration. *See, e.g.*, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017). Each raises constitutional questions that will fill court dockets in the years to come. For some cases that are already underway, *see* Complaint, City & Cty. of S.F. v. Trump, No. 3:17-cv-00485, 2017 WL 412999 (N.D. Cal. Jan. 31, 2017) and *infra* note 6.

<sup>6</sup> *See* Exec. Order No. 13,769. The litigation over President Trump’s executive order is sprawling. *See, e.g.*, Loughalam v. Trump, No. 17-10154-NMG, 2017 WL 479779 (D. Mass. Feb. 3, 2017); Washington v. Trump, No. 17-35105, 2017 WL 655437 (9th Cir. Feb. 16, 2017). After being preliminarily enjoined by the U.S. Court of Appeals for the Ninth Circuit, President Trump signed a revised order, dropping Iraq to reduce the list of covered countries from seven to six. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). Unsurprisingly, litigation over the immigration ban continues. *See* Lydia Wheeler, *ACLU on Trump’s Revised Travel Ban: ‘Litigation Lives On,’* THE HILL (Mar. 7, 2017, 1:37 PM), <http://thehill.com/business-a-lobbying/322734-aclu-on-trumps-revised-travel-ban-litigation-lives-on> [<https://perma.cc/Q3XK-QSXJ>].

Court's mainstream equal protection and First Amendment doctrines, discrimination on account of nationality or religion would likely be unconstitutional.<sup>7</sup> But the answer is far less clear under the Court's infamous "plenary power doctrine," which affords the federal government virtually unchecked power to make immigration decisions.<sup>8</sup>

2. *Federalism*. Can federal immigration enforcement policies preempt state laws? This question has come to a head in recent years. The past decade has witnessed an unprecedented uptick in state and local laws directed at immigrants. Many of these subfederal measures are "restrictionist" (i.e., they place burdens or restrictions on immigrants),<sup>9</sup> other subfederal laws are "integrationist" (i.e., they seek to extend benefits and a general sense of belonging to immigrants).<sup>10</sup> Meanwhile, the Executive Branch has increasingly made its immigration enforcement policies publicly known.<sup>11</sup> These political developments make comparisons between federal and subfederal enforcement preferences ripe for testing under the Supremacy Clause.<sup>12</sup> Under the Court's mainstream preemption doctrine, only federal statutes and

---

<sup>7</sup> See, e.g., *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 579 (1993) (Blackmun, J., concurring in the judgment) ("When a law discriminates against religion as such . . . it automatically will fail strict scrutiny . . ."); *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) ("[C]lassifications based on . . . nationality or race[] are inherently suspect and subject to close judicial scrutiny." (footnotes omitted)).

<sup>8</sup> As mentioned, at the time of publication, litigation over President Trump's immigration ban is already quite extensive. See list of cases in *supra* note 6. For commentary preceding President Trump's election, see Pratheepan Gulasekaram, *The Legality of Muslim Exclusion*, AM. CONST. SOC'Y BLOG (Dec. 9, 2015), <http://www.acslaw.org/acsblog/the-legality-of-muslim-exclusion> [<https://perma.cc/L9E9-APY3>]; Peter J. Spiro, *Trump's Anti-Muslim Plan Is Awful, and Constitutional*, N.Y. TIMES (Dec. 8, 2015), <https://www.nytimes.com/2015/12/10/opinion/trumps-anti-muslim-plan-is-awful-and-constitutional.html> [<https://perma.cc/WAU3-C63T>]. But see Kevin R. Johnson, *Trump's Idea on Muslims Fails, Despite Precedent*, NAT'L L. J. (Dec. 21, 2015) (offering an alternative view).

<sup>9</sup> For examples, see *infra* notes 91–94 and accompanying text.

<sup>10</sup> For examples, see *infra* notes 95–98 and accompanying text.

<sup>11</sup> See, e.g., Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't. of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al. 1 (Nov. 20, 2014) [hereinafter DAPA Memo], [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) [<https://perma.cc/MWC3-87ZJ>]; Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. 1 (Jun. 15, 2012) [hereinafter DACA Memo], <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/H46N-EHKE>] (detailing the Department of Homeland Security's plan to exercise prosecutorial discretion with regard to undocumented immigrants who came to the United States as children); Barack Obama, President, White House, Remarks by the President on Immigration—Chicago, Illinois (Nov. 25, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/25/remarks-president-immigration-chicago-il> [<https://perma.cc/3JXP-Y2T8>].

<sup>12</sup> U.S. CONST. art. VI, cl. 2.

binding administrative action can preempt conflicting state policies.<sup>13</sup> In *Arizona v. United States*, however, the Court strongly indicated (if not held) that the Executive’s *nonbinding* enforcement policies could form the basis of a preemptive conflict and struck down at least one of Arizona’s restrictionist laws, partially on this ground.<sup>14</sup> Now, under the Trump Administration, can nonbinding executive policies preempt state integrationist laws too?

3. *Separation of Powers*. Congress has clear authority to grant legal reprieve to some or all of the 11 million undocumented immigrants currently in the country.<sup>15</sup> But can the Executive Branch unilaterally grant temporary legal reprieve and work authorization to large swaths of this population, as the Obama Administration’s signature “deferred action” programs contemplate?<sup>16</sup> Last term, the Court had an opportunity to decide this question in *United States v. Texas*.<sup>17</sup> During oral argument, some Justices expressed concern that the President’s immigration initiative might invert the conventional congressional–executive lawmaking model.<sup>18</sup> In a telling nod to exceptionalism, the U.S. Solicitor General replied: “I don’t think [the lawmaking relationship is] upside down. I think it’s different . . . in recognition . . . of the unique nature of immigration policy.”<sup>19</sup> The Court’s 4–4 split

---

<sup>13</sup> See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009) (holding that preamble to regulation, which was not binding, could not have preemptive effect); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 866 (2000) (holding that an agency regulation with force of law preempted a state tort law claim).

<sup>14</sup> See *Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012) (preempting provisions of Arizona’s S.B. 1070, at least in part because of its potential conflict with federal immigration enforcement priorities); see also *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014) (declining to resolve a similar preemption claim but deeming it “plausible”). The enforcement policies at issue disclaimed having a legal force, at least as against the federal government. See, e.g., Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, to All Field Office Dirs. et al. 6 (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/WPZ8-EC94>] (“[T]his memorandum . . . does not, and may not be relied upon to create any right or benefit . . . enforceable at law by any party . . .”).

<sup>15</sup> Indeed, Congress has granted immigration amnesty in the past, see Immigration Reform Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (1986), albeit to what was then a much smaller population of undocumented immigrants.

<sup>16</sup> See DAPA Memo, *supra* note 11; DACA Memo, *supra* note 11.

<sup>17</sup> 136 S. Ct. 2271 (2016) (mem.) (per curiam).

<sup>18</sup> See, e.g., Transcript of Oral Argument at 23–24, *Texas*, 136 S. Ct. 2271 (No. 15-674); see also *infra* Sections I.C, II.C (discussing the lawmaking relationship between Congress and Executive, in immigration and more generally).

<sup>19</sup> Transcript of Oral Argument, *supra* note 18, at 24.

decision in *Texas* leaves open this important separation of powers question.<sup>20</sup>

For decades, and continuing today, scholars and advocates have addressed these types of constitutional questions by focusing on whether immigration law warrants special treatment in regards to rights, *or* federalism, *or* separation of powers—much like we have explicated above.<sup>21</sup> At first blush, this disjunctive approach seems sensible. After all, rights, separation of powers, and federalism are different.

This Article rejects that conventional approach, beginning with its underlying premise. As we show, the Court’s exceptional immigration doctrines are conceptually and pragmatically intertwined. Thus, answers to any one of the examples above can influence answers to the others. Building on that insight, this Article develops an alternative model of immigration exceptionalism that arcs simultaneously across rights, federalism, and separation of powers.

This theoretical intervention yields several analytic and pragmatic payoffs. First, it provides a far more accurate rendering of how immigration exceptionalism translates into practice. Doctrinally, the Court sometimes—but not always—treats immigration exceptionally.<sup>22</sup> Prescriptively, scholars and advocates sometimes—but not always—want immigration treated that way.<sup>23</sup> In short, immigration exceptionalism has exceptions. Our model allows that exceptionalism is not, and need not be, an all-or-nothing proposition.<sup>24</sup> Yet, once that is recognized, it becomes imperative to understand how strands of exceptional and mainstream constitutional

---

<sup>20</sup> See *Texas*, 136 S. Ct. at 2272. Subsequently, the United States filed a petition for rehearing, Petition for Rehearing, *id.* (No. 15-674), which the Court denied. Petition for Rehearing Denied, *Texas*, 137 S. Ct. 285 (No. 15-674).

<sup>21</sup> The academic literature on immigration exceptionalism is legion, featuring commentary from nearly every prominent immigration law scholar, and others, over the past four decades. Cf. David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 30 (2015) (“It almost seems an obligatory rite of passage for scholars embarking on the study of immigration law to provide their own critique of plenary power or related doctrines of deference.”). For the scholarship on rights exceptionalism, see *infra* Section II.A; on federalism, see *infra* Section II.B; and on separation of powers, see *infra* Section II.C.

<sup>22</sup> See *infra* Part I (canvassing the Court’s immigration jurisprudence).

<sup>23</sup> See *infra* Part II (surveying academic treatments of immigration exceptionalism over time and across constitutional contexts).

<sup>24</sup> See Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1393 (1999) (“Immigration can be exceptional for some purposes and not for others.”); cf. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 114–16, 121 (2015) [hereinafter MOTOMURA, IMMIGRATION] (arguing that the exclusivity principle can apply differently to subfederal restrictionist and integrationist laws).

doctrines interface with each other, and with politics, in ways that impact the immigration system *as a whole*.

Second, our model unmasks how seemingly discrete doctrines can look very different in combination than how they appear in isolation.<sup>25</sup> For instance, a President might unilaterally craft federal integrationist policies (courtesy of separation of powers exceptionalism). And those policies, in turn, may preempt subfederal restrictionist policies as in *Arizona* (courtesy of federalism exceptionalism).<sup>26</sup> Still, this outcome is highly contingent. To see how, mix in rights exceptionalism and change the President. Under this alternative scenario, the new President could unilaterally act (again, courtesy of separation of powers exceptionalism) in rights-depriving ways (under rights exceptionalism) and may seek to have that policy preempt subfederal integrationist policies, such as California's (via federalism exceptionalism).<sup>27</sup>

We return later to these and other crosscutting possibilities. For now, these sketch examples are simply meant to illustrate why a coordinated approach to immigration exceptionalism matters: these doctrines may offset or aggregate, sometimes to very different ends, vis-à-vis immigrant interests. Yet we cannot know until we expand the frame to look on a system-wide basis, over time, and with sensitivity to political swings.

---

<sup>25</sup> As recent studies in systems theory suggest, complex systems often behave in ways that are not easily predictable. Cf. ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* (2011) (bringing systems theory to constitutional law).

<sup>26</sup> In 2010, Arizona enacted S.B. 1070 to impose a policy of “attrition through enforcement,” which overtly sought to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.” *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012) (quoting Note following ARIZ. REV. STAT. ANN. § 11–1051 (2012)). Section 3 imposed criminal penalties on aliens who failed to comply with federal alien-registration requirements. ARIZ. REV. STAT. ANN. § 13–1509 (2016). Section 5(C) criminalized unauthorized aliens who sought or engaged in work in the state. *See id.* § 13–2928(C). Section 6 authorized officers to arrest without a warrant a person “the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States.” *Id.* § 13–3883(A)(5). Finally, Section 2(B) provided that officers who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person’s immigration status with the federal government. *See id.* § 11–1051(B). The Court invalidated Sections 3, 5(C), and 6 on preemption grounds but left section 2(B) intact. *Arizona*, 132 S. Ct. at 2510. For further discussion of the case, see *infra* notes 113–21 and accompanying text.

<sup>27</sup> Cf. Karthick Ramakrishnan & Allan Colbern, Op-Ed., *Immigration Reform: ‘The California Package,’* L.A. TIMES (June 24, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-0624-ramakrishnan-state-citizenship-20150624-story.html> [<https://perma.cc/LY5U-AV9E>] (explaining how California has “encourage[ed] integration rather than deportation” through immigration policies); “Sanctuary Cities,” *Trust Acts, and Community Policing Explained*, AM. IMMIGR. COUNCIL (Oct. 10, 2015), <http://www.immigrationpolicy.org/just-facts/sanctuary-cities-trust-acts-and-community-policing-explained> [<https://perma.cc/N9H8-UTYU>] (describing federal sanctuary laws, which generally limit local law enforcement from actively assisting in immigration enforcement).

Third, with this reorientation, recent landmark cases like *Texas* and *Arizona* take on more nuance and peril than conventional analyses suggest.<sup>28</sup> Both cases raise bundled constitutional questions, which context-specific approaches have no way to register.<sup>29</sup> By contrast, our model contextualizes these cases, capturing the tensions and overlaps between them. Moreover, our holistic approach provides new analytical ingress to future cases, including those currently pending in the Court.<sup>30</sup>

With so much immigration policy up for grabs across all levels of government,<sup>31</sup> a reappraisal of immigration exceptionalism is necessary to meet the mounting challenge. More broadly, this Article also contributes to nascent studies of doctrinal cross-pollination in other areas of constitutional and administrative law.<sup>32</sup> Thus, while this Article's central focus is

---

<sup>28</sup> *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.) (per curiam) (affirming, without opinion, the Fifth Circuit's preliminary injunction of DAPA in *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015)); *Arizona*, 132 S. Ct. 2492.

<sup>29</sup> Cf. Reply Brief for United States at 2, *Texas*, 136 S. Ct. 2271 (No. 15-674) (characterizing the case as one "that implicates fundamental questions of standing, separation of powers, federal immigration authority, and administrative law"); Adam B. Cox, *Enforcement Redundancy*, 2012 SUP. CT. REV. 31, 62–63 ("*Arizona* may be less significant for its impact on state immigration initiatives than for ratifying and furthering the consolidation of immigration authority in the executive branch."); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 85–87 (2013) (situating *Arizona* at the intersection of separation of powers and federalism); *infra* Section III.C.1 and accompanying notes (exposing additional overlaps between *Arizona* and *Texas*).

<sup>30</sup> At least two constitutional immigration cases will be heard this upcoming term. See *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted*, *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (due process challenges to the federal government's immigration detention policies); *Morales-Santana v. Lynch*, 804 F.3d 520 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016) (equal protection challenge to immigration statute's facial gender distinctions regarding parental conferral of derivative citizenship to children).

<sup>31</sup> See, e.g., *Border Security, Economic Opportunity, and Immigration Modernization Act: Hearing on S. 744*, 113th Cong. (2013) (passed Senate but voted down in House); Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017); PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM* ch. 3 (2015) (surveying uptick in state and local laws pertaining to noncitizens); John M. Glionna, *Arizona Immigration: "Show Me Your Papers" Enforcement to Begin*, L.A. TIMES (Sept. 18, 2012), <http://articles.latimes.com/2012/sep/18/nation/lan-na-nn-arizona-immigration-20120918> [<https://perma.cc/7772-UEXX>]; Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES (Nov. 20, 2014), <https://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html> [<https://perma.cc/726D-BY8F>].

<sup>32</sup> The crossovers and intersections of rights, separation of powers, and federalism questions are as old as the Constitution itself. The questions abounding today, however, are how these dimensions interact, or should interact, to account for new dynamics in modern government. See, e.g., Cynthia R. Farina & Gillian E. Metzger, *Introduction: The Place of Agencies in Polarized Government*, 115 COLUM. L. REV. 1683, 1685–87 (2015) (summarizing a set of recent symposium contributions, all of which hit on one or more of the intersections between rights, separation of powers, federalism, and administrative law); David S. Rubenstein, *Administrative Federalism as Separation of Powers*, 72 WASH. & LEE L. REV. 171 (2015) (recasting administrative federalism as proxy for separation of powers). The Court, too, seems increasingly sensitive to these crossovers, but can generally approach

immigration, its animating themes may usefully inform other fields of public law.

The Article proceeds in five parts. Part I summarizes the Court's jurisprudence on immigration exceptionalism. We suggest that the contours of this fractured canon are in flux. Some exceptional doctrines show signs of receding, while others may be ascending.<sup>33</sup>

Part II charts the academic reactions to the Court's immigration exceptionalism jurisprudence across time and constitutional contexts. The scope of our survey is the first of its kind. More importantly, this study uncovers a set of advocacy patterns and trends that are central to our project. Foremost, scholars invariably renounce immigration exceptionalism as it pertains to constitutional *rights*, but often defend or promote special immigration doctrines for *federalism* and *separation of powers*.<sup>34</sup> This contrast suggests that context-specific arguments in favor or against the Court's immigration doctrines are a means to ends. For example, scholars and advocates gesture to exceptionalism as added legal cover for executive action that is favorable to immigrant interests. In other instances, exceptionalism is invoked to tamp down restrictionist state policies, or, more generally, to root out perceived injustices in the immigration system.

Part III explains why immigration exceptionalism is a fraught means to certain ends. More specifically, we highlight how the Court's immigration doctrines share a common set of rationales that reverberate across constitutional dimensions. Accordingly, the reasons for giving immigration exceptional (or normalized) treatment in any one doctrinal setting can pull and push across other settings, in potentially crosscutting and unintended ways. For example, if immigration is exceptional for purposes of federalism (in ways that someone favors), then perhaps immigration will continue to be exceptional for rights too (in ways that the same person disfavors). Moreover, political shifts can upset expectations about how mainstream and exceptional doctrines will translate in action. Control of the White House, for instance, comes with levers that can shape

---

them only ad hoc. *See, e.g.*, *Bond v. United States*, 134 S. Ct. 2077, 2101 (2014) (explaining that “[t]he distinction between provisions protecting individual liberty, on the one hand, and ‘structural’ provisions, on the other,” is not always helpful because “structure in general—and especially the structure of limited federal powers—is *designed* to protect individual liberty”); *United States v. Windsor*, 133 S. Ct. 2675, 2692–93 (2013) (relying on a mix of federalism and rights theories to strike down the federal Defense of Marriage Act).

<sup>33</sup> *See infra* Part I.

<sup>34</sup> Of course, there is some important nuance to this claim, which we develop in Part II.

immigration policy not only at the federal level, but at the subfederal level too.<sup>35</sup>

Part IV then hypothesizes a range of normative tradeoffs that inhere in this dynamic regime of law and politics. We frame the discussion around a stylized “trilemma”—a dilemma with three horns.<sup>36</sup> More specifically, we illustrate how arguments for or against special immigration doctrines for rights, federalism, and separation of powers will almost certainly require normative compromises within or across constitutional dimensions. Under most immigration scholars’ and advocates’ ideal preference, immigration law would be exceptional for some purposes (e.g., for federalism and perhaps for separation of powers), while simultaneously normalized for rights adjudication. This preferred end-state, however, is fundamentally unstable, and most likely out of reach under existing precedent. Thus, we argue, strategic prioritization among competing values and second-best assessments are necessary.

Part V offers some specific thoughts for how theorists, advocates, and jurists might put this Article’s insights to use. For scholars and immigrant advocates, this Article presents a new set of considerations about whether and how to ring the exceptionalism bell.<sup>37</sup> For jurists, the takeaway may be different but links to the same lessons. Foremost, doctrines and cases can look different in combination than they do in isolation.<sup>38</sup> The way forward is anything but sure. Regardless of ideological orientation, however, this Article’s holistic approach to immigration exceptionalism offers a new foundation on which to build.

---

<sup>35</sup> See Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President & Immigration Federalism*, 68 FLA. L. REV. 101 (2016) (discussing the myriad ways Presidents can influence state-level policy on immigration).

<sup>36</sup> The term has been used before in other settings. See, e.g., *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (explaining that the rationale of the Fifth Amendment’s privilege against self-incrimination is to free criminal defendants of the “cruel trilemma of self-accusation, perjury or contempt”). Here, we employ the term to capture a set of normative tradeoffs across the constitutional dimensions on rights, federalism, and separation of powers.

<sup>37</sup> Government lawyers may also appreciate and draw from this Article’s offerings. But government lawyers are not our primary audience here, for reasons that dovetail with our broader claims. The government can always argue for exceptionalism in court, yet mitigate its effects politically or administratively when it so chooses. For instance, the federal government can choose to pass more rights-regarding laws, acquiesce to state and local policies, afford procedural protections beyond what the Administrative Procedure Act requires, and so forth. By contrast, immigrant advocates and theorists do not have those luxuries; they can argue for or against exceptionalism but have little control over the government’s uses (and abuses) of the resulting power arrangements.

<sup>38</sup> To be clear, we do not suggest that courts can or should decide more than what is before them. With this Article’s insights, however, jurists can make more informed decisions about the actual scope and real-world implications of the cases they decide.

## I. DESCRIPTIVE EXCEPTIONALISM

The story of how immigration law became and stayed exceptional is foundational to our nation's history.<sup>39</sup> This Part recalls some of that story, and provides context for Part II's novel spinoff: namely, how academic reactions to immigration exceptionalism have varied across time and doctrinal contexts. To mark those contrasts, here we chart the Court's immigration jurisprudence. Section I.A offers a descriptive account of the Court's rights jurisprudence. We then turn to structure, offering descriptive accounts of immigration federalism in Section I.B, and separation of powers in Section I.C.

Before proceeding, we offer two refining caveats. First, the very idea of exceptionalism is relativistic inasmuch as it connotes departures from mainstream legal norms. Some might reasonably quibble with characterizing immigration as exceptional writ large, given that other domains—such as foreign affairs and Indian law—also famously depart from the mainstream.<sup>40</sup> Still, this Article abides to the widely held view that special legal norms often apply in immigration.<sup>41</sup> As one prominent commentator described immigration law more than thirty years ago, in ways that still register today: “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.”<sup>42</sup>

Second, some commentators might characterize a particular immigration doctrine as exceptional, whereas others may not. That is, reasonable minds may differ on immigration exceptionalism writ small. We

---

<sup>39</sup> See STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 177–222 (1987) (tracing that history); see also Schuck, *supra* note 1.

<sup>40</sup> See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 10 (2002) (linking these domains); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1900, 1913, 1928–29 (2015) (situating immigration exceptionalism within the foreign relations exceptionalism tent). We should note that while there is overlap between these exceptional domains, there are also major differences among them. Immigration may have a foot in foreign relations law, but the other foot is firmly planted in domestic law.

<sup>41</sup> See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 564–65 (1990) (treating immigration law as exceptional); see also Sitaraman & Wuerth, *supra* note 40, at 1924–34 (describing foreign relations law as exceptional, some of the time, and arguing for across-the-board normalization in this domain). The alternative is to abandon the idea of constitutional and subconstitutional mainstems—an intriguing possibility worth pursuing, but one that we bracket here. Cf. Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 714–15 & n.48 (1997) (questioning the idea of “mainstream public law,” and thus hedging on the idea of immigration exceptionalism).

<sup>42</sup> See Schuck, *supra* note 1, at 1.

flag these possibilities throughout,<sup>43</sup> but they are mostly inconsequential to our project. Here, we are foremost concerned with how courts and commentators have conjured immigration’s distinct features as reasons for specialized legal treatment.<sup>44</sup> The exceptionalism label is useful shorthand. But whether a particular doctrine is exceptional, as a formal matter, is less important for our purposes than the functional tensions and overlaps that emerge across doctrinal settings.

### A. Rights

President Trump’s temporary ban on refugees and immigrants from several Muslim-majority countries sent political shock waves through the American psyche and rippled across the globe.<sup>45</sup> Perhaps more shocking, to some, is that his immigration ban might be constitutional.<sup>46</sup> In non-immigration contexts, Congress’s complete (i.e., plenary) authority over a subject is generally tested for compliance with structural limitations,<sup>47</sup> and subject to judicial scrutiny when constitutional rights are implicated.<sup>48</sup> In stark contrast, judicial review of federal immigration law under the “plenary power doctrine” is extremely lax and forgiving.<sup>49</sup> Thus,

---

<sup>43</sup> See *infra* notes 106–09, 197–207 and accompanying text.

<sup>44</sup> However, for a recent account that the Court is trending toward normalization, see Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Unexceptionalism*, 68 OKLA. L. REV. 57 (2015). This claim is contestable, however. See *supra* Part I (discussing how recent cases have reified old forms of exceptionalism and shown signs on new forms emerging).

<sup>45</sup> See *supra* notes 5–6 and accompanying text; see also Aaron Blake, *Trump’s Travel Ban Is Causing Chaos—And Putting His Unflinching Nationalism to the Test*, WASH. POST. (Jan. 29, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/president-trumps-travel-ban-is-causing-chaos-dont-expect-him-to-back-down/?utmterm=.d195c9324944> [<https://perma.cc/GSV9-B63K>]. In his electoral run, then-candidate Trump’s suggestion to ban Muslims from the country received a similar ovation. See, e.g., Russell Berman, *Donald Trump’s Call to Ban Muslim Immigrants*, ATLANTIC (Dec. 7, 2015), <http://www.theatlantic.com/politics/archive/2015/12/donald-trumps-call-to-ban-muslim-immigrants/419298/> [<https://perma.cc/3WBL-YYHS>]; Pema Levy, *Trump Soars to New Heights in Poll After Proposing Muslim Ban*, MOTHER JONES (Dec. 14, 2015), <http://www.motherjones.com/mojo/2015/12/donald-trump-proposes-ban-muslims-soars-new-heights-poll> [<https://perma.cc/L8LC-SLM3>].

<sup>46</sup> For competing views, see *supra* note 8.

<sup>47</sup> See, e.g., *NFIB v. Sebelius*, 132 S. Ct. 2566, 2609 (2012) (reviewing and striking down Affordable Care Act provisions as invalid exercises of congressional Spending and Commerce Clause authority, despite recognizing Congress’s “plenary” authority over interstate commerce) (Ginsburg, J., concurring in part and dissenting in part).

<sup>48</sup> *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (applying the “undue burden” standard used to assess due process challenges in abortion context to uphold federal abortion restrictions); *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995) (remanding and instructing lower court to apply strict scrutiny in determining constitutionality of a federal law that required contract provision that gave preference to disadvantaged individuals from certain racial and ethnic groups).

<sup>49</sup> See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210

substantive constitutional rights—such as equal protection, due process, freedom of association, and so on—tend to garner less judicial scrutiny in immigration cases than other areas of federal regulation.<sup>50</sup>

The plenary power doctrine in rights cases debuted in the late nineteenth century, shortly after the federal government began regulating immigration.<sup>51</sup> In *Chae Chan Ping v. United States*, the Court upheld the Chinese Exclusion Act of 1882 on the grounds that the federal government had plenary authority to exclude immigrants on any basis, including race or nationality.<sup>52</sup> Soon after, in *Fong Yue Ting v. United States*, the Court extended this reasoning to uphold a federal statute that made Chinese laborers presumptively deportable.<sup>53</sup> Because of Congress’s plenary authority over immigration, the lack of due process afforded to the petitioners was constitutionally irrelevant.<sup>54</sup>

In these *Chinese Exclusion Cases*, the Court’s putative rationales for the plenary power doctrine ranged from institutional (e.g., the relative competencies of the Court vis-à-vis the political branches in foreign affairs), to extraconstitutional (e.g., international norms of sovereignty), to pragmatic (e.g., national security).<sup>55</sup> Whatever the underlying rationale, the end result was a doctrine of broad judicial deference that, in many

(1953) (internal quotation marks omitted)); see also Motomura, *supra* note 41, at 547; Legomsky, *supra* note 1, at 179 (coining the term “plenary power doctrine”).

<sup>50</sup> See, e.g., *Fiallo*, 430 U.S. at 792–94, 798–99 (upholding discriminatory law that excluded out-of-wedlock children from claiming their biological fathers—but not mothers—as “parents” for immigration benefits); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (reifying Congress’s virtually impenetrable discretion, stating that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned”).

<sup>51</sup> See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1841–80 (1993) (explaining that in the first one hundred years of the republic, the federal government played only a very minor role relative to states in regulating immigration).

<sup>52</sup> 130 U.S. 581, 604 (1889).

<sup>53</sup> 149 U.S. 698 (1893). Chinese immigrants were required to obtain a certificate to prove their residency and rebut the presumption of deportability, but by regulation, such certificate would only be issued on the testimony of a “white witness.” *Id.* at 729.

<sup>54</sup> *Id.* at 728 (opining on the breadth of congressional power to deport, noting “Congress, under the power to exclude or expel aliens, might have directed any Chinese laborer, found in the United States without a certificate of residence, to be removed out of the country by executive officers, without judicial trial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country”).

<sup>55</sup> See *Chae*, 130 U.S. at 602–03 (stating that the Court is not a “censor of the morals of other departments of the government”); *id.* at 603 (“Jurisdiction over its own territory to [exclude aliens] is an incident of every independent nation.”); *id.* at 606 (providing wide berth for the legislature to protect national security and make determinations that allowing in foreigners might endanger peace and security); see also Legomsky, *supra* note 1 (parsing and critiquing the Court’s expressed justifications for the plenary power doctrine).

situations, foreclosed noncitizens from rights guaranteed to other persons under the Constitution.

Of course, when these foundational immigration cases were decided, the Court's rights jurisprudence was undeveloped.<sup>56</sup> As that jurisprudence evolved over time, however, immigration law lagged behind. Still today, the federal government's immigration laws contain explicit gender distinctions, ideological bars, associational restrictions, and per-country limitations that inure to the detriment of specific nationalities.<sup>57</sup> In addition, the plenary power doctrine relaxes procedural protections for noncitizens in admission and removal proceedings,<sup>58</sup> and condones the extended detention of potential deportees.<sup>59</sup> More generally, the plenary power doctrine results in a regulatory regime that, in the Court's own words, "would be unacceptable if applied to citizens."<sup>60</sup>

To be sure, some fissures in the Court's plenary power doctrine complicate this narrative.<sup>61</sup> Occasionally, the Court has found deportation or exclusion processes to be overly punitive or lacking sufficient safeguards.<sup>62</sup> In other instances, the Court has spoken the language of mainstream constitutional standards, but has arguably applied those

---

<sup>56</sup> See Motomura, *supra* note 41, at 551.

<sup>57</sup> See, e.g., 8 U.S.C. § 1409 (2012) (gender distinction in ability to transfer citizenship to children born out of wedlock); *id.* § 1152 (numerical limitations on individual foreign states); *id.* § 1182(a)(3)(D) (exclusion for membership in totalitarian party); *id.* § 1182(a)(4) (exclusion on public charge grounds). See generally Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 15–22 (2009) (explaining racial dimensions of immigration law).

<sup>58</sup> *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 an alien denied entry is concerned.").

<sup>59</sup> See, e.g., *Demore v. Kim*, 538 U.S. 510, 530–31 (2003) (upholding lengthy mandatory detention); *Shaughnessy v. Mezei*, 345 U.S. 206, 215–16 (1953) (upholding government detention of noncitizen on Ellis Island).

<sup>60</sup> *Mathews v. Diaz*, 426 U.S. 67, 80 (1976). Rachel Rosenbloom draws critical attention to how immigration exceptionalism also implicates the rights of citizens who get snared in immigration enforcement, but have difficulty establishing citizenship owing to lax administrative procedures and judicial review under the plenary power doctrine. See Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965 (2013).

<sup>61</sup> See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (opining that even the significant deference to federal immigration power does not authorize indefinite detention without review of noncitizens whom no country will accept); *Landon v. Plasencia*, 459 U.S. 21, 36–37 (1982) (holding that a returning legal permanent resident was entitled to more process than provided by the government); see also Legomsky, *supra* note 1 (discussing inroads into the plenary power doctrine over time); Motomura, *supra* note 41 (same).

<sup>62</sup> See, e.g., *Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903) (suggesting that some procedural guarantees applied in deportation proceedings); *Wong Wing v. United States*, 163 U.S. 228, 237–38 (1896) (holding that the Constitution prevented deportees from being subjected to hard labor prior to deportation).

standards differently. *Nguyen v. INS* is an example of this phenomenon.<sup>63</sup> There, the Court upheld provisions of the Immigration and Nationality Act (INA) that treat unwed fathers differently than unwed mothers for purposes of conferring citizenship to their biological children. Because the Court ruled that the INA provision survived mainstream gender discrimination scrutiny, it had no need to rely on the exceptional plenary power doctrine and expressly declined to do so.<sup>64</sup> Justice O'Connor's dissent in *Nguyen*, however, accused the majority of "recit[ing]" the mainstream substantive standard for heightened scrutiny of sex-based classifications, "but depart[ing] from the guidance . . . in several ways."<sup>65</sup> Thus, *Nguyen* might be read either as a move towards normalization, or, alternatively, as a case that uses a mainstream façade to mask an exceptional analysis and result.

Even granting these nuances, rights challenges to the federal political branches' immigration decisions generally swim upstream against the plenary power doctrine and its vestiges.<sup>66</sup> Indeed, two terms ago, the Court's plurality decision in *Kerry v. Din* rejected a U.S. citizen's due process claim that the State Department improperly denied her spouse a visa on terrorism-related grounds.<sup>67</sup> The plurality was unmoved by Din's asserted liberty interest in family unification, stating: "This Court has consistently recognized that these various distinctions are policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress."<sup>68</sup>

---

<sup>63</sup> 533 U.S. 53 (2001).

<sup>64</sup> *Id.* at 72–73 ("[W]e need not assess the implications of statements in our earlier cases regarding the wide deference afforded to Congress in the exercise of its immigration and naturalization power.").

<sup>65</sup> *Id.* at 78 (O'Connor, J., dissenting).

<sup>66</sup> See Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 26–28 (2015); Martin, *supra* note 21 (providing an account for why the plenary power doctrine endures); see also *infra* Section II.A (discussing academic critiques of Court's immigration rights jurisprudence and frustrations over the stickiness of the plenary power doctrine).

<sup>67</sup> 135 S. Ct. 2128, 2138 (2015) (plurality opinion); see also Kevin Johnson, *Argument Preview: The Doctrine of Consular Non-Reviewability—Historical Relic or Good Law?*, SCOTUSBLOG (Feb. 18, 2015, 9:55 AM), <http://www.scotusblog.com/2015/02/argument-preview-the-doctrine-of-consular-non-reviewability-historicalrelic-or-good-law/> [<https://perma.cc/6C32-2SCM>] (describing the doctrine of consular non-reviewability, at issue in *Din*, as the "first cousin of immigration law's exceptional 'plenary power' doctrine").

<sup>68</sup> *Din*, 135 U.S. at 2136 (quoting *Fiallo v. Bell*, 430 U.S. 787, 798 (1977)) (internal quotation marks omitted). Two additional Justices concurred only in judgment, writing that even assuming Din had a due process interest, plaintiff received the process she was due. *Id.* at 2141 (Kennedy & Alito, JJ., concurring in the judgment) ("[R]espect for the political branches' broad power over the creation and administration of the immigration system extends to determinations of how much information the Government is obliged to disclose about a consular officer's denial of a visa to an alien abroad."). The four dissenting Justices argued that Din both had a due process interest, and that the process she received was insufficient. *Id.* at 2142–47 (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.).

The foregoing account describes the Court's general approach when *federal* regulations are challenged on constitutional rights grounds. But the Court's general treatment of similar challenges to *state and local* regulations is governed by a different set of doctrines.<sup>69</sup> For example, the Court generally applies strict scrutiny to state laws that discriminate on the basis of alienage or nationality, at least when challenged by lawful permanent residents.<sup>70</sup>

The Court's incongruent treatment of rights challenges to federal and subfederal regulations was drawn into sharp relief in a famous pair of cases decided in the 1970s. In *Graham v. Richardson*, the Court reviewed challenges to the legality of a state law that denied public assistance to some legal resident noncitizens.<sup>71</sup> The Court declared—for the first time—that alienage is a suspect classification.<sup>72</sup> Thus, the Court applied the requirements of strict scrutiny and struck down the state law on equal protection grounds.<sup>73</sup>

A few years after *Graham*, however, the Supreme Court clarified in *Mathews v. Diaz* that the federal government was not bound by the same limitation.<sup>74</sup> More specifically, the *Diaz* Court invoked the plenary power doctrine and upheld federal alienage distinctions for receiving certain benefits.<sup>75</sup> Distinguishing *Graham*, the Court explained that the “Fourteenth Amendment’s limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization.”<sup>76</sup>

The incongruence in the Court's immigration rights jurisprudence is, itself, an anomaly in the law. Indeed, in non-immigration contexts, the

---

<sup>69</sup> See Linda Bosniak, *Membership, Equality, and the Difference Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1104–05 (1994) (discussing the incongruity); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 838 (2008) (same); see also Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155, 158–59 (2014).

<sup>70</sup> See, e.g., *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (applying strict scrutiny to state law discriminating on account of alienage). The level of judicial scrutiny applicable to state laws that discriminate against undocumented immigrants is less certain. In *Plyler v. Doe*, the Court noted that aliens' unlawful status was constitutionally relevant, and that undocumented immigrants as a class were generally not protected under heightened judicial scrutiny. 457 U.S. 202, 235–36 (1982) (Blackmun, J., concurring); see also *id.* at 219 n.19 (majority opinion) (explicitly rejecting the notion that “illegal aliens” are a “suspect class”). *Plyler*'s reasoning, however, has not been extended beyond application to undocumented children in primary or secondary school.

<sup>71</sup> 403 U.S. at 366.

<sup>72</sup> *Id.* at 371–72.

<sup>73</sup> *Id.* at 376. According to the Court, a state's fiscal interests and “desire to preserve limited welfare benefits for its own citizens” did not justify this invidious distinction between residents. *Id.* at 374.

<sup>74</sup> 426 U.S. 67 (1976).

<sup>75</sup> *Id.* at 85.

<sup>76</sup> *Id.* at 86–87.

Court has stressed the need for congruity in how equal protection challenges are handled under the Fifth Amendment (for the federal government) and Fourteenth Amendment (for the states).<sup>77</sup>

The issue of rights exceptionalism will surely continue to occupy the federal courts' agenda. Indeed, as this Article goes to print, the Supreme Court is deliberating on two cases that squarely pit immigration exceptionalism against constitutional rights.<sup>78</sup> In *Jennings v. Rodriguez*, the Court will decide whether due process requires that certain immigration detainees be afforded bond hearings when detained for prolonged periods.<sup>79</sup> And, in *Lynch v. Morales-Santana*, the Court will decide whether statutory gender distinctions regarding parental transfers of citizenship to children satisfy equal protection requirements.<sup>80</sup> In both cases, looming questions of immigration exceptionalism may be decisive.<sup>81</sup>

In addition, jurisprudence on the incongruous treatment of state versus federal alienage classifications continues to develop in lower federal and state courts. Notably, these emerging cases may be smoothing out the differences between judicial approaches to federal and state immigration-related restrictions. However, it is not clear in which direction this incongruity will break. One recent study suggests that lower federal courts may be trending toward giving subfederal laws more deference, with reasoning that seems to channel plenary power analysis.<sup>82</sup>

---

<sup>77</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 215–18, 226–27 (1995) (holding “that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny”); see also *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (“[T]he Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”).

<sup>78</sup> See *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted*, *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (due process and statutory challenges to the federal government’s immigration detention policies); *Morales-Santana v. Lynch*, 804 F.3d 520 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016) (equal protection challenge to immigration statute’s facial gender distinctions regarding parental conferral of derivative citizenship to children).

<sup>79</sup> See Petition for Writ of Certiorari, *Rodriguez*, 136 S. Ct. 2489 (No. 15-1204).

<sup>80</sup> See Petition for Writ of Certiorari, *Morales-Santana*, 136 S. Ct. 2545 (No. 15-1191).

<sup>81</sup> In a recent article, Michael Kagan also discusses immigration laws looming problems with the Fourth Amendment. See Michael Kagan, *Immigration Law’s Looming Fourth Amendment Problem*, 104 GEO. L.J. 125 (2015).

<sup>82</sup> See generally Jenny-Brooke Condon, *The Preempting of Equal Protection for Immigrants?*, 73 WASH. & LEE L. REV. 77, 129–150 (2016) (citing and discussing *Soskin v. Reinertson*, 353 F.3d 1242 (10th Cir. 2004); *Bruns v. Mayhew*, 750 F.3d 61 (1st Cir. 2014); *Korab v. Fink*, 797 F.3d 572 (9th Cir. 2014); *Hong Pham v. Starkowski*, 16 A.3d 635 (Conn. 2011); *Doe v. Comm’r of Transitional Assistance*, 773 N.E.2d 404 (Mass. 2002)). Professor Condon argues that these cases “reflect a congressional imprimatur theory of state alienage discrimination.” *Id.* at 133. Moreover, she argues that these decisions “turning back equal protection challenges to states’ unequal allocation of state resources to legal residents and citizens illustrate courts’ tendency to view such issues with a formalism that insufficiently probes state responsibility for immigrants’ unequal treatment, and instead disproportionately credits congressional immigration prerogatives . . .” *Id.* at 138.

*B. Federalism*

For the nation's first hundred years, the federal government hardly regulated immigration.<sup>83</sup> Instead, states and local jurisdictions did.<sup>84</sup> Later, in the mid- to late-nineteenth century, the Court interpreted the Constitution to vest immigration power solely in the federal government. And, as a consequence, the Court struck down several subfederal immigration laws of that era.<sup>85</sup>

Until recently, the Court's general hostility to state and local immigration measures quieted most subfederal attempts to regulate immigrants.<sup>86</sup> The past decade, however, has witnessed an unprecedented surge in state and local immigration initiatives.<sup>87</sup> The reasons behind this trend are a matter of some debate, but partisan polarization and political opportunism are perhaps the primary drivers.<sup>88</sup> Viewed broadly, the "subfederal immigration revolution" captures a range of political preferences for our ailing immigration system, especially as Congress effectively remains sidelined.<sup>89</sup>

---

<sup>83</sup> See Neuman, *supra* note 51, at 1841–80.

<sup>84</sup> See *id.* (explaining how states regulated migration through ports-of-entry taxes and restrictions on the movement of paupers, criminals, and those posing health risks); GULASEKARAM & RAMAKRISHNAN, *supra* note 31, ch. 3 (chronicling state and local restrictionist laws from 1876 through the present day).

<sup>85</sup> *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 273–75 (1875) (striking down requirement of a bond to be posted by shipmasters for arriving alien passengers); *Chy Lung v. Freeman*, 92 U.S. 275, 276, 280–81 (1875) (striking down state regulation that imposed a bond for arriving alien passengers deemed to be "lewd and debauched"); *The Passenger Cases*, 48 U.S. (7 How.) 283, 572–73 (1849) (striking down state laws that imposed taxes on arriving alien ship passengers).

<sup>86</sup> See, e.g., *Toll v. Moreno*, 458 U.S. 1, 17 (1982) (holding that state denial of student financial aid to certain visa holders was preempted); *Graham v. Richardson*, 403 U.S. 365, 376–80 (1971) (striking down state welfare laws that discriminated against legal permanent residents); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (striking down state alienage restriction on commercial fishing licenses); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (striking down state alien registration scheme); *Truax v. Raich*, 239 U.S. 33 (1915) (striking down state law prohibiting hiring of noncitizens); *cf.* *Huntington*, *supra* note 69, at 822–23 (noting that "states and localities have not enacted pure immigration laws since the end of the nineteenth century").

<sup>87</sup> See GULASEKARAM & RAMAKRISHNAN, *supra* note 31, at 5–8, 57–59; MOTOMURA, *supra* note 24, at 58–59, 80–81; *State Laws Related to Immigration and Immigrants*, NAT'L CONF. OF ST. LEGISLATURES (Jan. 7, 2015), <http://www.ncsl.org/research/immigration/state-laws-related-to-immigration-and-immigrants.aspx> [<https://perma.cc/44XM-4KJZ>] (tracking a steady rise in state immigration-related laws and resolutions over the past decade).

<sup>88</sup> GULASEKARAM & RAMAKRISHNAN, *supra* note 31, at ch. 4.

<sup>89</sup> Rubenstein, *supra* note 29, at 81–82 (explaining that "[a]t the heart of the 'subfederal immigration revolution' are two core questions": first, "what to do about our 'broken' immigration system," and second, "which institution of government, relative to others, has the power to do what" (footnotes omitted)).

As noted earlier, subfederal immigration policies fill a spectrum from *restrictionist* to *integrationist* measures.<sup>90</sup> In short, the idea behind most restrictionist measures is to encourage undocumented immigrants to “self-deport.”<sup>91</sup> Examples of restrictionist laws include those that give subfederal officials a role in detection, arrest, and detention of noncitizens on the basis of federal immigration violations. Restrictionist laws also make it difficult or impossible for undocumented immigrants to rent housing, find work, or attend public schools.<sup>92</sup> Arizona’s harsh immigration policies, some of which were at issue in *Arizona v. United States*, are just the tip of the iceberg.<sup>93</sup> A patchwork of restrictionist subfederal law persists throughout the country.<sup>94</sup>

By contrast, state and local integrationist measures offer a sense of belonging and welcoming to immigrants. Examples of integrationist laws include so-called sanctuary laws, which limit the discretion of subfederal officers to identify and detain individuals suspected of unlawful presence.<sup>95</sup> Other types of integrationist laws provide public benefits to undocumented immigrants, such as in-state college tuition, municipal identification cards, or access to healthcare benefits.<sup>96</sup> New York even considered extending

---

<sup>90</sup> See, e.g., Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703 (2013) (discussing a range of subfederal immigration-related measures).

<sup>91</sup> See, e.g., S.B. 1070, 49th Leg., 2d Reg. Sess. § 1 (Ariz. 2010) (declaring the purpose of the Act to be “attrition through enforcement”); see also Kris Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 472 (2008) (promoting restrictionist state and local laws as a means to self-deportation). Incidentally, self-deportation, in general, is not something that the federal government disapproves of. See Kevin R. Johnson, *Government Ads Nudge Immigrants to Self-Deport*, IMMIGRATIONPROF BLOG (Aug. 13, 2008), <http://lawprofessors.typepad.com/immigration/2008/08/government-ads.html> [<https://perma.cc/MS5C-SEJZ>].

<sup>92</sup> See MOTOMURA, *supra* note 24, at 58–59, 80–81.

<sup>93</sup> Arizona’s S.B. 1070 contained several provisions, but four were at issue in the Supreme Court case. See *supra* note 26 (providing a capsule summary of the provisions at issue in the *Arizona* litigation). The Court invalidated three of the four provisions, leaving only Section 2(B) in force. *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012). Litigation on the discriminatory potential of Section 2(B) continued in a separate suit, which was recently settled by the plaintiffs and Attorney General of Arizona, rendering the provision unenforceable. *Valle del Sol v. Whiting*, No. CV 10-1061-PHX-SRB, 2012 WL 8021265, at \*1 (D. Ariz. Sept. 5, 2012).

<sup>94</sup> See *State Laws Related to Immigration and Immigrants*, *supra* note 87 (tracking state and local immigration initiatives).

<sup>95</sup> See Barbara E. Armacost, ‘Sanctuary’ Laws: *The New Immigration Federalism* (Virginia Pub. Law and Legal Theory, Research Paper No. 2016-45), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2823925](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2823925) [<https://perma.cc/D24H-3PMQ>]; “Sanctuary Cities,” *Trust Acts, and Community Policing Explained*, *supra* note 27 (describing federal sanctuary laws, which generally limit local law enforcement from actively assisting in immigration enforcement); see also Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245 (2016) (providing a descriptive and empirical account of recent subfederal law enforcement policies).

<sup>96</sup> See GULASEKARAM & RAMAKRISHNAN, *supra* note 31, at 5–8, 57–67, 127–41 (chronicling and describing the range of integrationist subfederal laws); Ramakrishnan & Colbern, *supra* note 27 (describing “the California package” of immigrant-friendly laws).

“state citizenship” to undocumented immigrants, along with a portfolio of associated benefits.<sup>97</sup> This integrationist trend encompasses lawfully present noncitizens as well, with some measures aimed at allowing them to vote in certain types of local elections.<sup>98</sup>

In exceptionalism’s shadow, questions proliferate over whether these subfederal initiatives can survive, and if so, which ones and why not others. The uncertainty is mostly of the Court’s own making. Its immigration–federalism jurisprudence consists of a mash of preemption- and rights-based rationales, which are partly exceptional and partly not.<sup>99</sup>

Most notably, the Court applies mainstream statutory preemption doctrines to test subfederal immigration laws. Under the Court’s statutory preemption taxonomy, Congress can expressly or impliedly preempt subfederal laws.<sup>100</sup> For implied preemption, Congress’s intent can be inferred from a framework of regulation “so pervasive . . . that Congress left no room for the States to supplement it” or where a “federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject” (i.e., field preemption).<sup>101</sup> Moreover, state laws are preempted when they conflict with federal law, including when they stand “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>102</sup> Applying this familiar framework, for example, the Court recently considered whether congressional statutes expressly or impliedly preempted Arizona’s laws

---

<sup>97</sup> See Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869 (2015) (explaining and defending the legality of the proposed state citizenship bill). Ultimately, the bill did not pass, although the idea behind it and its provisions remain poignant and revivable in New York and elsewhere.

<sup>98</sup> Kanishk Tharoor, *Non-Citizens in New York City Could Soon Be Given Right to Vote*, GUARDIAN (Apr. 2, 2015), <https://www.theguardian.com/us-news/2015/apr/02/new-york-city-non-citizens-local-elections> [<https://perma.cc/TL2R-WTPK>]; Pamela Constable, *D.C., Other Cities Debate Whether Legal Immigrants Should Have Voting Rights*, WASH. POST (Feb. 9, 2015), [https://www.washingtonpost.com/local/should-legal-immigrants-have-voting-rightscontentious-issue-comes-to-dc-other-cities/2015/02/09/85072440-ab0f-11e4-ad71-7b9eba0f87d6\\_story.html](https://www.washingtonpost.com/local/should-legal-immigrants-have-voting-rightscontentious-issue-comes-to-dc-other-cities/2015/02/09/85072440-ab0f-11e4-ad71-7b9eba0f87d6_story.html) [<https://perma.cc/T74G-FDJM>].

<sup>99</sup> See, e.g., *Graham v. Richardson*, 403 U.S. 365, 376–78 (1971) (striking down alienage distinctions in state welfare laws on both preemption and equal protection grounds); *Truax v. Raich*, 239 U.S. 33, 39, 41–42 (1915) (striking down state law limiting employment of noncitizens as a violation of the Fourteenth Amendment, but also insisting that that the authority to control immigration is vested solely with the federal government); see also GULASEKARAM & RAMAKRISHNAN, *supra* note 31, at 187 (“[K]ey foundational immigration federalism cases have consistently evinced an implicit meshing of both federalism and equal protection doctrine.”).

<sup>100</sup> See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

<sup>101</sup> See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citations omitted).

<sup>102</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted).

that regulated employment of undocumented immigrants, with mixed results.<sup>103</sup>

Beyond the mainstream, immigration federalism jurisprudence is inflected with at least two (maybe three) exceptional features. Namely: (1) the federal exclusivity principle, (2) preemption via nonbinding executive enforcement policies; and, less clearly, (3) incorporating equality norms into preemption analysis.

*1. The Exclusivity Principle.*—The federal government has exclusive control over the “regulation of immigration.”<sup>104</sup> Any state attempts to regulate in this sphere are per se invalid under this standard.<sup>105</sup> The exclusivity doctrine’s scope, however, depends on what qualifies as immigration regulation.

In *De Canes v. Bica*, the Court provided some guidance, explaining that immigration regulation pertains only to the admission and expulsion of noncitizens.<sup>106</sup> So construed, the exclusivity principle has little or no bearing on state and local “alienage” regulations, which are defined residually as policies that pertain to immigrants but that do not govern their admission or expulsion.<sup>107</sup>

The line between immigration regulation and alienage regulation can be hard to discern in practice.<sup>108</sup> Functionally speaking, many laws that pertain to immigrants—both at the federal and subfederal level—may impact migration decisions, indirectly even if not directly. For present purposes, however, what matters is that the exclusivity principle automatically preempts subfederal laws that qualify as immigration regulation (whereas subfederal alienage regulations may still be displaced by other preemption doctrines but not under the exclusivity doctrine).<sup>109</sup>

---

<sup>103</sup> See *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012) (applying mainstream preemption doctrines and striking down sanctions directed at unlawful workers); *Chamber of Commerce v. Whiting*, 563 U.S. 582, 588, 593–611 (2010) (applying mainstream preemption doctrines and upholding state licensing sanctions directed at employers that knowingly hired unauthorized workers).

<sup>104</sup> See, e.g., *De Canas v. Bica*, 424 U.S. 351, 353–54 (1976).

<sup>105</sup> See, e.g., *Toll v. Moreno*, 458 U.S. 1, 17 (1982) (holding that state denial of student financial aid to certain visa holders was preempted).

<sup>106</sup> See 424 U.S. at 355.

<sup>107</sup> See, e.g., Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 259–61, 263–64, 269 (2011) (defining “alienage law” in opposition to “immigration law”).

<sup>108</sup> See Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 U. PA. L. REV. 341, 351–53 (2008) (arguing that the distinction between immigration law and alienage law is misguided).

<sup>109</sup> For instance, alienage regulations may still be preempted by federal statutes under the Court’s mainstream preemption doctrine or by executive action. See *infra* Section I.B.2. See generally *Arizona v. United States*, 132 S. Ct. 2492 (2012) (preempting three Arizona state laws on these grounds).

Unlike the Court's statutory preemption doctrine, preemption via the exclusivity principle is pegged to the Constitution itself (or, more precisely, to the Court's interpretation of the Constitution's structural allocations of power).<sup>110</sup> Although there is room for disagreement, we think it is fair to characterize the exclusivity principle as an exceptional relic of "dual federalism," under which federal or state power over a subject is regarded as mutually exclusive.<sup>111</sup> However, dual federalism has long been regarded as dead in almost all other contexts.<sup>112</sup> Instead, garden-variety domestic law is characterized today by federal–state regulatory overlap, of both "cooperative" and "uncooperative" varieties.<sup>113</sup>

To be sure, federal statutes and regulations (as opposed to the Constitution itself) sometimes displace all state or local law in a particular field.<sup>114</sup> In the Court's own words, Congress's intent is the "ultimate

---

<sup>110</sup> See Huntington, *supra* note 69, at 821–24 (discussing the genesis of the notion of "exclusive" federal authority over immigration).

<sup>111</sup> See Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 3–4 (1950) (describing this federalist conception).

<sup>112</sup> See generally *id.* (providing the classic account of this conceptual and doctrinal transformation). Even as an expression of dual federalism, the exclusivity principle as it operates in immigration law is a special type: the federal government "devolves" its exclusive immigration power to states. For example, Congress expressly permits states to treat classes of immigrants differently as pertains to federal welfare benefits, see Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 400–451, 110 Stat. 2105, 2260–77, and expressly allows a role for subfederal actors to enforce federal immigration regulations, see 8 U.S.C. § 1357(g) (2012). The government's official position on immigration enforcement is that it is both devolvable to subfederal actors, and, moreover, that unless preempted, states have some inherent authority to enforce at least certain aspects of immigration law. See Non-Preemption of the Auth. of State & Local Law Enforcement Officials to Arrest Aliens for Immigration Violations, 26 Op. O.L.C. 1 (2002). That devolution would not be possible under traditional conceptions of dual federalism. Cf. Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 987 (2004) ("[T]he immigration power is an exclusively federal power that must be exercised uniformly."); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 500 (2001) (arguing that "Congress's 1996 effort to devolve its federal immigration power is constitutionally impermissible").

<sup>113</sup> See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–84 (2009); ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009) (explaining that regulatory overlap is common and discussing the values of it); see also Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2098 (2014) (observing that the Court's immigration federalism looks quite different from its economic federalism); Cox, *supra* note 29, at 37–41 (explaining how the *Arizona* Court's conception of immigration enforcement contrasts with other enforcement contexts).

<sup>114</sup> See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.").

touchstone” in every preemption case.<sup>115</sup> But this type of statutory field preemption is rare.<sup>116</sup> More to the point, the exclusivity principle operates to preempt state law irrespective of congressional intent, and for that reason alone is different than statutory field preemption.

The exclusivity principle seems to have less traction in the Supreme Court than it once did (although lower court judges still invoke the doctrine rather liberally).<sup>117</sup> In *Arizona*, for example, the Supreme Court treated the state’s restrictionist laws as alienage regulations, despite Arizona’s announced purpose to encourage undocumented immigrants to self-deport.<sup>118</sup> Likewise, in *Chamber of Commerce v. Whiting*, the Court upheld two other state immigration-related provisions without gesturing to the exclusivity principle.<sup>119</sup> In both *Arizona* and *Whiting*, the Court arguably could have characterized and treated the state laws as immigration regulation. If nothing else, the Court’s treatment of these state laws as alienage regulations suggest that the zone of federal exclusivity—over the

---

<sup>115</sup> See, e.g., *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008); *Retail Clerks Int’l Ass’n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963).

<sup>116</sup> See *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (“[E]ven where a federal statute does displace state authority, it rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states . . . . Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives.” (internal quotation mark omitted)).

<sup>117</sup> Cf. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (“In preemption analysis, courts should assume that ‘the historic police powers of the States’ are not superseded ‘unless that was the clear and manifest purpose of Congress.’” (quoting *Rice*, 331 U.S. at 230)). Recent lower court treatments have relied to greater and lesser extents on the exclusivity principle. See, e.g., *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 546 (5th Cir. 2013) (Dennis, J., specially concurring) (arguing that city’s policy penalizing landlords for renting property to unauthorized immigrants “violates the principle that the removal process is entrusted to the discretion of the [f]ederal [g]overnment” (quoting *Arizona*, 132 S. Ct. at 2506)); *id.* at 543 (Reavley, J., concurring in judgment) (“Because the sole purpose and effect of this ordinance is to target the presence of illegal aliens . . . and to cause their removal, it contravenes the federal government’s exclusive authority on the regulation of immigration . . . .”); *United States v. Alabama*, 691 F.3d 1269, 1294–96 (11th Cir. 2012) (characterizing Alabama’s law that invalidated contracts entered into by unauthorized immigrants as “a calculated policy of expulsion” and “a thinly veiled attempt to regulate immigration,” and therefore striking down the law because the power to expel immigrants “is retained only by the federal government”); *Lozano v. Hazleton*, 620 F.3d 170, 221–22 (3d Cir. 2010) (noting that the city ordinance at issue was designed to effectively remove undocumented immigrants from the political subdivision); cf. *Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 901, 917 (9th Cir. 2016) (holding that Arizona’s classifications of undocumented immigrants was preempted, but sending mixed signals on whether preemption was attributable to the exclusivity principle or the Immigration and Nationality Act’s field-preemption).

<sup>118</sup> See S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (“The legislature declares that the intent of this act is to make attrition through enforcement the public policy of [the] state . . . . [T]his act [is] intended . . . to discourage and deter the unlawful entry and presence of aliens . . . .”); *Arizona*, 132 S. Ct. at 2497 (explicitly noting this state intent).

<sup>119</sup> 563 U.S. 582, 587, 594–607 (2011) (applying ordinary statutory preemption principles to state law penalizing employment of unauthorized workers).

admission and expulsion of noncitizens—will be tightly construed by the Court in future cases.

2. *Executive Preemption via Nonbinding Policy.*—Yet, just as the Court seems to be cabining the exclusivity principle, it may be embracing a new form of federalism exceptionalism. More specifically, the *Arizona* majority strongly implied (if not held) that executive branch enforcement policies had independent preemptive effect.<sup>120</sup> As earlier explained, a valid congressional statute clearly has preemptive effect.<sup>121</sup> Furthermore, the Court has long held that federal agency action with the “force of law” can have preemptive effect.<sup>122</sup> Thus, for example, agency regulations promulgated pursuant to notice-and-comment rulemaking procedures can

---

<sup>120</sup> See *Arizona*, 132 S. Ct. at 2506 (finding one of the state laws preempted on the partial ground that state law “could be exercised without any input from [the Executive] about whether an arrest is warranted in a particular case,” thus “allow[ing] the State to achieve its own immigration policy”); see also David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J.L. & PUB. POL’Y 267, 280–81 (2015) (explaining the ways in which the Court’s signals were mixed on the issue of whether executive enforcement policies can, or did, have preemptive effect); Eric Posner, *The Imperial President of Arizona*, SLATE (June 26, 2012, 12:04 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/06/the\\_supreme\\_court\\_s\\_arizona\\_immigration\\_ruling\\_and\\_the\\_imperial\\_presidency\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/the_supreme_court_s_arizona_immigration_ruling_and_the_imperial_presidency_.html) [<https://perma.cc/93RJ-W8US>] (observing that the *Arizona* majority found certain provisions of S.B. 1070 preempted, not because they conflicted with federal law, but because they “conflict[ed] with the president’s policy”).

<sup>121</sup> See, e.g., *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (“[T]he purpose of Congress is the ultimate touchstone’ in every pre-emption case.” (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996))); see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 9–20 (1824) (priming preemption decision with an exploration of whether the federal law at issue was valid under the Commerce Clause in the first place).

<sup>122</sup> See *supra* note 13. In general, the term “force of law” connotes an agency policy or action that is binding on the public or agency. Whether a particular agency action has the force of law—and its implications—can depend on context. Cf. Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can’t Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 23 (2009) (describing the “force of law” as “one of the more pernicious phrases in American administrative law”); see also Kristen E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 467 (2013) (exploring the “old perennial” question: “what does it mean for agency action to carry the ‘force of law’?”). The confusion is partly of the Court’s own making. It employs the term in at least three administrative law contexts: (1) administrative preemption, (2) judicial deference to agency action, and (3) exemptions from notice-and-comment rulemaking under the Administrative Procedure Act (APA). For discussions of these alternative uses of force of law, see Rubenstein, *supra* note 120, at 278–79 (discussing force of law in the context of administrative preemption); Hickman, *supra*, at 472–90 (discussing force of law in the context of the Court’s *Chevron* doctrines and APA rulemaking exceptions). As a general matter, agency adjudications and legislative rules have the force of law, whereas other agency action—such as “general statements of policies” expressed in agency memoranda, manuals, regulatory preambles, and amicus briefs—do not have the force of law. See *Wyeth v. Levine*, 555 U.S. 555, 580 (2009) (holding that preamble to regulation, which was not binding, could not have preemptive effect); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (stating that, for the purposes of applying the *Chevron* deference doctrine, agency opinion letters, interpretations in policy statements, agency manuals, and enforcement guidelines do not have the force of law).

preempt conflicting state law.<sup>123</sup> Arguably, however, executive enforcement policies that are not promulgated pursuant to these procedures are not “law,” and thus should not have preemptive force.<sup>124</sup>

In a partially concurring and partially dissenting opinion, Justice Alito drew attention to this point in *Arizona*.<sup>125</sup> He rejected the federal government’s “remarkable” position that “a state law may be pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency’s current enforcement priorities . . . [which] are not law.”<sup>126</sup> But the majority did not directly engage this objection. Instead, the Court relied on the Executive’s enforcement policies as a ground (or partial basis) for preempting at least one, and maybe two, of the Arizona provisions at issue.<sup>127</sup>

3. *Equal Pro-Emption*.—A third immigration federalism idea may also be unfolding (or, depending on perspective, resurfacing) in the lower courts. Today, some courts may be incorporating an equality norm into preemption analysis in ways that load the dice against subfederal

---

<sup>123</sup> See, e.g., *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 881 (2000). In recent years, the subject of administrative preemption has drawn extensive academic interest. Some commentators support administrative preemption on constitutional and normative grounds. See, e.g., Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 761–66 (2008); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2091–100 (2008); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 756–58 (2010); Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125, 2127–28, 2158–63 (2009); Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1593–94 (2008). Others, however, have been far more critical of administrative preemption. See, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1430–38 (2001); David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1153–63 (2012); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 869–71 (2008).

<sup>124</sup> Cf. *Wyeth*, 555 U.S. at 580 (holding that nonbinding preamble to regulation could not have preemptive effect). Outside of the immigration context, commentators that have addressed the issue are generally of the view that agency policies must first undergo notice and comment, or otherwise have the force of law, before these policies may have preemptive effect. See, e.g., Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 2010–12 (2008); Merrill, *supra* note 123, at 761–66; Rubenstein, *supra* note 29, at 129 n.247; Young, *supra* note 123, at 897–900; see also *supra* note 122 and accompanying text (discussing force of law). Catherine Kim argues, however, that for immigration in particular, nonbinding enforcement policies should nevertheless have preemptive effect. See Catherine Y. Kim, *Immigration Separation of Powers and the President’s Power to Preempt*, 90 NOTRE DAME L. REV. 691, 728–32 (2014). But see David S. Rubenstein, *Black-Box Immigration Federalism*, 114 MICH. L. REV. 983, 1001–04 (2016) (taking the opposite view and explaining the problems with preemption via nonbinding enforcement policies on constitutional and normative grounds).

<sup>125</sup> See *Arizona*, 132 S. Ct. at 2527 (Alito, J., concurring in part and dissenting in part).

<sup>126</sup> See *id.*

<sup>127</sup> See *supra* note 120 and accompanying text.

restrictionist laws.<sup>128</sup> One of us has recently dubbed this idea “Equal Pro-Emption” to capture its hybrid composition.<sup>129</sup>

The Third Circuit’s pre-*Arizona* decision in *Lozano v. City of Hazleton* arguably fits this mold.<sup>130</sup> There, the court struck down restrictionist city rental and employment ordinances on preemption grounds. Yet, with seeming relevance, the court’s written opinion also emphasized the employment ordinance’s discriminatory nature.<sup>131</sup>

More recently, in *Arizona Dream Act Coalition v. Brewer*,<sup>132</sup> the Ninth Circuit offered an interesting twist on this theme. At issue was whether Arizona’s policy of denying driver’s licenses to certain undocumented immigrants violated equal protection or was otherwise preempted by federal law.<sup>133</sup> During the preliminary injunction phase, the Ninth Circuit ruled against the state on equal protection grounds.<sup>134</sup> Thus, the court had no need to rule on preemption grounds and expressly declined to do so (though it noted that the plaintiffs’ preemption claim was likely viable).<sup>135</sup> However, in the permanent injunction phase, the court switched gears. Still ruling against the state, the court invoked the doctrine of constitutional avoidance and based its holding on preemption grounds.<sup>136</sup>

---

<sup>128</sup> See Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL’Y 1, 10–40 (2013) (tracing this idea and its development in the pre-1980 era); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1736–46 (2010) (discussing the relationship between the preemption and equal protection arguments).

<sup>129</sup> See Rubenstein, *supra* note 124, at 1006.

<sup>130</sup> 620 F.3d 170 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011).

<sup>131</sup> *Id.* at 217.

<sup>132</sup> 818 F.3d 901 (9th Cir. 2016), *reh’g denied and opinion amended*, 2017 WL 461503 (Feb. 2, 2017).

<sup>133</sup> *Id.* at 905–06. More specifically, the Arizona policy precluded beneficiaries of the Obama Administration’s Deferred Action for Childhood Arrivals (DACA) program from receiving state driver’s licenses, even though other classes of undocumented immigrants could receive such licenses. *Id.* at 907.

<sup>134</sup> *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1058 (9th Cir. 2014) (noting that the policy accepts Employment Authorization Documents as proof of lawful presence for two groups of similarly situated immigrants but not for DACA recipients).

<sup>135</sup> *Id.* at 1061–63.

<sup>136</sup> *Ariz. Dream Act Coal.*, 818 F.3d at 905–06, 920. Interestingly, the Ninth Circuit deemed preemption a nonconstitutional basis for deciding the case, despite preemption’s roots in the Supremacy Clause. But, even assuming that statutory preemption can be deemed nonconstitutional, this logic would not seem to extend to *structural* preemption via the exclusivity principle. Whereas statutory preemption links to the Supremacy Clause’s coverage of “Laws . . . made in [p]ursuance [of the Constitution],” structural preemption links to the Constitution itself. See *supra* notes 104–10 and accompanying text; see also Rubenstein, *supra* note 29, at 93–96 (discussing the different sources of preemption under the Supremacy Clause). Intentionally or not, the Ninth Circuit’s reasoning in *Arizona Dream Act Coalition* blurred past this distinction. Parts of its reasoning and language sounds in statutory field preemption (insofar as it cited to the INA as the preemptive source); other parts, however, sound in structural preemption (insofar as it cited to and uses the language of structural preemption cases). *Ariz. Dream Act*

Older federalism cases also leveraged discrimination concerns as a reason, or partial reason, for finding state immigration laws preempted.<sup>137</sup> In some of those cases, the Court found actual equal protection violations (thus establishing the predicate rights violation) and/or expressly invoked the Civil Rights Act of 1870 (thus pinning preemption to a statute, rather than a more nebulous equality norm).<sup>138</sup>

Yet, perhaps most important for present purposes, those earlier decisions predate the Supreme Court's subsequent developments in equal protection and preemption jurisprudence.<sup>139</sup> As compared to equal protection, Equal Pro-Emption relaxes or departs from the Court's general requirement that the *plaintiff* demonstrate a discriminatory purpose when challenging facially neutral laws.<sup>140</sup> Indeed, circumventing the Court's mainstream equal protection jurisprudence may be the *sine qua non* of Equal Pro-Emption.<sup>141</sup> Moreover, the Court does not appear to be imbuing preemption analysis with an equality norm in other areas of law. Thus, even if Equal Pro-Emption was not exceptional fifty years ago, it might be today if measured against the Court's extant equal protection and preemption doctrines.

### C. Separation of Powers

Many of the Court's foundational immigration cases refer to the *federal government's* plenary power without differentiating between the

---

*Coal.*, 818 F.3d at 914–17. For more discussion on this point, see Alan Vester, Comment, *Hybrid Immigration Preemption*, 56 WASHBURN L.J. (forthcoming 2017) (on file with authors).

<sup>137</sup> See GULASEKARAM & RAMAKRISHNAN, *supra* note 31, at 186–88 (describing how a handful of immigration cases from the early- to mid-twentieth century intermingled preemption analysis with discussions of discrimination).

<sup>138</sup> See, e.g., *Graham v. Richardson*, 403 U.S. 365, 376–77 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419–20 (1948); *Hines v. Davidowitz*, 312 U.S. 52, 69–70 (1941). The key provision of the Civil Rights Act of 1870 provides, in relevant part, that “[a]ll persons . . . shall have the same right” as “white citizens” in “every State and Territory” to certain enumerated rights. See 42 U.S.C. § 1981(a) (2012).

<sup>139</sup> See *Arizona v. United States*, 132 S. Ct. 2492, 2492–511 (2012) (making no mention of the Civil Rights Act of 1870, or an equality norm, in upholding one state law and preempting three others); *Chamber of Commerce v. Whiting*, 563 U.S. 582, 582–611 (2011) (upholding state law against preemption challenge and making no mention of the Civil Rights Act of 1870); *De Canas v. Bica*, 424 U.S. 351, 354–56 (1975) (finding that state law was not an “invalid state incursion on federal power” without relying on grounds of the Equal Protection Clause or the Civil Rights Act of 1870); see also Rubenstein, *supra* note 124, at 1006–12 (elaborating on these points).

<sup>140</sup> See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 269–70 (1977) (holding that plaintiffs did not meet burden of proving racial discrimination, despite evidence of a racially discriminatory impact); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (requiring plaintiffs in an equal protection suit to show evidence of discriminatory intent, and not just discriminatory impact).

<sup>141</sup> MOTOMURA, *supra* note 24, at 135 (explaining how a judicially countenanced equality norm can turn “a losing equal protection . . . challenge” into “a winning preemption challenge”).

federal political branches.<sup>142</sup> But what happens when congressional and executive power come into conflict? That issue reached a boiling point during the Obama Administration, owing to congressional gridlock and President Obama's insistence—in words and action—that “we can't wait” for Congress.<sup>143</sup> And it is resurfacing again with President Trump's invocation of broad executive authority.

One place to look for answers is the Take Care Clause, which instructs the President to “take Care that the laws be faithfully executed.”<sup>144</sup> But the parameters of this provision are murky.<sup>145</sup> On some occasions, the Court has conjured the Take Care Clause for the proposition that the President cannot suspend or supersede Congress's laws;<sup>146</sup> at other times, however, the Court has cited the Take Care Clause as the fount of inherent prosecutorial discretion.<sup>147</sup> Thus, even outside of the immigration context, questions of executive authority vis-à-vis Congress remain unsettled in the Court's jurisprudence. Accordingly, separation of powers arguments about the lawmaking relationship between the President and Congress commonly draw from scholarly assessments, historical practice, and legal memoranda from the Department of Justice's Office of Legal Counsel.

---

<sup>142</sup> See, e.g., *Chae Chan Ping v. United States*, 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* . . . cannot be granted away or restrained on behalf of any one.” (emphasis added)).

<sup>143</sup> Barack Obama, President, Remarks by the President on the Economy and Housing (Oct. 24, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/10/24/remarks-president-economy-and-housing> [<https://perma.cc/D8FN-3C9A>] (“So I'm here to say to all of you . . . we can't wait for an increasingly dysfunctional Congress to do its job. Where they won't act, I will.”); *Taking Action on Immigration*, *supra* note 4 (outlining President Obama's immigration plans and actions).

<sup>144</sup> U.S. CONST. art. II, § 3.

<sup>145</sup> See Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1838 (2016) (“The Court's decisions rely heavily on the Take Care Clause but almost never interpret it, at least not in any conventional way.”).

<sup>146</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) (rejecting the notion that “the obligation imposed on the President to see the laws faithfully executed[] implies a power to forbid their execution”); see also *Heckler v. Chaney*, 470 U.S. 821, 832–33 n.4 (1985) (suggesting that judicial review might be available to review acts of executive abdication of statutory responsibilities).

<sup>147</sup> See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (concluding that the Attorney General and U.S. Attorneys have wide prosecutorial discretion “because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed’” (quoting U.S. CONST. art. II, § 3)); *Heckler*, 470 U.S. at 832 (“[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’” (quoting U.S. CONST. art. II, § 3)).

The Court's seminal decision in *INS v. Chadha* was the most direct, if not the only, jurisprudential foray into the lawmaking relationship between Congress and the Executive in immigration.<sup>148</sup> In *Chadha*, the Court famously struck down Congress's "[l]egislative [v]eto," which permitted the House or Senate to overturn the Attorney General's discretionary decision to suspend the deportation of immigrants.<sup>149</sup> According to the Court, the legislative veto violated the Constitution's bicameralism and presentment requirements for federal lawmaking.<sup>150</sup> Tellingly, the majority opinion brushed the plenary power doctrine aside in this case.<sup>151</sup>

Although *Chadha* might indicate that normal separation of powers principles apply to immigration, a broader historical perspective complicates the picture. In an influential study, Professors Adam Cox and Cristina Rodríguez suggest that the lawmaking relationship between the President and Congress has vacillated over time between exceptional and nonexceptional modes.<sup>152</sup> They offer historical examples that arguably involved unilateral presidential action, such as the Bracero Program in the mid-twentieth century.<sup>153</sup> On their account, this unilateralism was an exercise of inherent executive authority, which might only be justified through an exceptionalism frame.<sup>154</sup> Similarly, in *United States ex rel. Knauff v. Shaughnessy*, the Court suggested that the Executive possessed inherent and broad power over immigration.<sup>155</sup>

On the other hand, as Cox and Rodríguez explain, Congress has delegated significant authority to the Executive Branch in more recent

<sup>148</sup> 462 U.S. 919, 934–35 (1983).

<sup>149</sup> *Id.* at 925 n.2, 934, 959.

<sup>150</sup> *Id.* at 955–58.

<sup>151</sup> *Id.* at 940–44 (discussing whether the “plenary authority of Congress over aliens” made the legislative veto provision a nonjusticiable political question but concluding that no political question was presented); see also Legomsky, *supra* note 1, at 301–02 (arguing that in *Chadha*, “it seems clear that the Court made a conscious decision not to apply the plenary power doctrine”).

<sup>152</sup> Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 *YALE L.J.* 458, 461, 476–78 (2009) (“These alternative theories—one emphasizing immigration’s exceptional position within the constitutional structure, the other its ordinary place in administrative law—raise the question of which account better fits the historical contours of the relationship between the President and Congress.”).

<sup>153</sup> *Id.* at 485. The Bracero Program, which operated from 1942 to 1964, provided for temporary Mexican laborers (“braceros”) to lawfully enter the United States on a seasonal basis to satisfy labor demands in the United States. *Id.* at 485–90. For most of its existence, the Bracero Program was based on a series of agreements between the United States and Mexico, most significantly the bilateral agreements of 1942 and 1951. *Id.* These agreements detailed the volume and conditions under which laborers from Mexico could work in the United States. For an excellent account of this program, see BARBARA A. DRISCOLL, *THE TRACKS NORTH: THE RAILROAD BRACERO PROGRAM OF WORLD WAR II* 51–58 (1999).

<sup>154</sup> Cox & Rodríguez, *supra* note 152, at 490–91.

<sup>155</sup> 338 U.S. 537, 543 (1950).

times.<sup>156</sup> And, in turn, “the Court’s understanding of the relationship between the branches [has taken] on more of the trappings of typical separation of powers jurisprudence, with delegation serving as the primary mechanism for power allocation.”<sup>157</sup>

But between these two poles of exceptional and mainstream executive authority, Cox and Rodríguez describe a “two-principals” lawmaking model that, in their view, best captures the immigration policymaking relationship between the political branches today.<sup>158</sup> Under this model, both Congress and the President are independent sources of authority. Fundamentally, the two-principals model rejects the conventional principal–agent model. Under the latter, Congress and the President are cast as principal and agent, respectively. As put by the Court in *Youngstown Sheet & Tube Co. v. Sawyer*: “[T]he President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”<sup>159</sup>

---

<sup>156</sup> Cox & Rodríguez, *supra* note 152, at 490–91.

<sup>157</sup> *Id.* at 476.

<sup>158</sup> See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 110–11, 159–73 (2015) [hereinafter Cox & Rodríguez, *Redux*] (“Far from fitting into a faithful-agent framework, therefore, our modern system of presidentially driven, ex post immigration screening is better understood as embodying a ‘two-principals’ model of immigration policymaking.”); see also Cox & Rodríguez, *supra* note 152, at 485 (“[T]he intricate rule-like provisions of the immigration code, which on their face appear to limit executive discretion, actually have had the effect of delegating tremendous authority to the President to set the screening rules for immigrants—that is, to decide on the composition of the immigrant community.”).

<sup>159</sup> 343 U.S. 579, 587–88 (1952); see also *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) (“The power of executing the laws . . . does not include a power to revise clear statutory terms that turn out not to work in practice.”). At least as a formal matter, the OLC memorandum defending DAPA ascribes to this conventional model, insofar as it attempts to anchor the Executive’s program to ostensible congressional priorities reflected in the INA. The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. 1, 24 (2014) [hereinafter *The Opinion*], <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<https://perma.cc/MCG9-Y7FK>] (“[A]ny expansion of deferred action to new classes of aliens must be carefully scrutinized to ensure that it reflects consideration within the agency’s expertise, and that it does not seek to effectively rewrite the laws to match the Executive’s policy preferences, but rather operates in a manner consonant with congressional policy expressed in the statute.”). In rejecting the principal–agent model for immigration, Cox and Rodríguez also reject the reasoning (although not the conclusions) of the OLC memorandum. Cox & Rodríguez, *Redux*, *supra* note 158, at 146 (“[T]he [OLC’s] congressional priorities approach perpetuates a ‘faithful-agent’ model of law enforcement that is neither descriptively accurate nor normatively attractive.”). For other treatments of OLC’s analysis, see Peter Margulies, *Deferred Action and the Bounds of Agency Discretion: Reconciling Policy and Legality in Immigration Enforcement*, 55 WASHBURN L.J. 143, 143 (2015) (critiquing OLC’s congressional priorities analysis, inasmuch as it “ignores the context of compromises embedded” in the INA (internal quotation marks omitted)); Zachary Price, *Two Cheers for OLC’s Opinion*, BALKINIZATION (Nov. 25, 2014, 1:30 PM), <http://balkin.blogspot.com/2014/11/two-cheers-for-olcs-opinion.html> [<https://perma.cc/E7JV-EG53>] (commending OLC’s attempt to tie the Executive’s

Last term, *United States v. Texas* presented the Court with a prime opportunity to address the constitutional relationship between Congress and the President in the context of immigration law (and more generally).<sup>160</sup> At issue was the legality of the Obama Administration's Deferred Action for Parents of Americans (DAPA) program,<sup>161</sup> which offered millions of qualifying undocumented immigrants a multi-year and renewable reprieve from deportation, the opportunity to work legally in the country, and other associated benefits.<sup>162</sup>

Shortly after DAPA was announced, several states joined in a lawsuit to challenge the program on separation of powers and administrative law grounds.<sup>163</sup> The Fifth Circuit preliminarily enjoined the program only on the latter basis, skirting the separation of powers question.<sup>164</sup> When the Supreme Court granted certiorari, it specifically requested briefing on whether DAPA violated the Take Care Clause.<sup>165</sup> That issue, however, received scant attention at oral argument, and no attention in the Court's one-sentence per curiam decision.<sup>166</sup>

---

enforcement program to congressional priorities, but expressing some skepticism about whether OLC drew the correct conclusions with respect to that analysis, for immigration and beyond).

<sup>160</sup> See 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam). As earlier noted, the Court has provided spotty guidance on what the Take Care Clause entails, especially for executive nonenforcement programs. See notes 144–47 and accompanying text. *Heckler v. Chaney*, for instance, suggests in dicta that judicial review of agency action might be warranted if an agency were to adopt a general policy that is an “abdication of its statutory responsibilities.” 470 U.S. 821, 832–33 n.4 (1985). But the space between permissible prosecutorial discretion, and executive “abdication” is potentially vast and heavily dependent on the particulars of any given case. See *id.* at 831 (noting in the administrative law context that “an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise”); see also The Opinion, *supra* note 159, at 7 (noting that the President's enforcement discretion is not limitless and citing *Heckler* for the proposition that the Take Care Clause does not permit the Executive to abdicate its statutory responsibilities). *United States v. Texas* thus presented the Court with an opportunity to address this issue not only in the context of immigration, but perhaps more generally.

<sup>161</sup> *Texas*, 809 F.3d 134.

<sup>162</sup> See DAPA Memo, *supra* note 11; see also DACA Memo, *supra* note 11.

<sup>163</sup> Complaint, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 1:14CV00254).

<sup>164</sup> *Texas*, 809 F.3d 134.

<sup>165</sup> *United States v. Texas*, 136 S. Ct. 906 (2016) (granting certiorari and directing the parties to address the additional question of whether federal immigration law guidance violates the Take Care Clause).

<sup>166</sup> See *United States v. Texas*, 136 S. Ct. 2271 (mem.) (per curiam) (The full opinion reads: “The judgment [of the Fifth Circuit] is affirmed by an equally divided Court.”). At the time of decision, the Court was a member short. Justice Scalia's death left a vacancy on the Court that was not filled during the 2015 Term, which continued into the 2016 Term. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html> [https://perma.cc/W3M6-EAPY]. On February 20, 2017, DHS Secretary John Kelly issued a guidance memoranda that expressly superseded the DAPA Memo. See Memorandum

\* \* \*

In sum, as a purely descriptive matter, immigration is exceptional some of the time. But that is not to say it should be, much less for the reasons or in the ways found in the Court's jurisprudence. We now turn to the rich scholarship addressed to these prescriptive questions.

## II. PRESCRIPTIVE EXCEPTIONALISM

As this Part explains, many (if not most) commentators engage questions of immigration exceptionalism with a view toward vindicating the rights and interests of immigrants. To that end, commentators sometimes criticize the Court's exceptional doctrines. At other times, however, commentators work within or leverage exceptionalism to argue in defense of particular immigration arrangements or policies.

When considered together, these doctrinal preferences seemingly work toward a collection of ends along the rights, federalism, and separation of powers dimensions. We refer to this set of normative preferences as the "first-best scenario" from the vantage of immigrant interests. Under this ideal: (1) immigrants would have robust rights protections (the "rights preference"), (2) immigrants would be integrated into our national community with state and local help, and, correlatively, restrictionist subfederal policies would be preempted (the "federalism preference"), and (3) the federal Executive would make enforcement decisions and administrative programs that ease Congress's harsh deportation laws (the "separation-of-powers preference").<sup>167</sup>

To start, it will be useful to appreciate that the first-best scenario for immigrant interests likely depends on a propitious mix of *rights normalization* and *structural exceptionalism*. If immigration is always exceptional, then the rights preference cannot be realized. Conversely, if immigration is never exceptional, then the federalism and separation of powers preferences might not be realized. However, if immigration can be treated exceptionally for some structural purposes, while treated normally for constitutional rights, then perhaps the rights, federalism, and separation of powers preferences sketched above can be realized simultaneously.

The catch, of course, is that creating and maintaining this equilibrium may not be possible—for reasons we take up more fully in Parts III and IV. The more immediate point is that the first-best scenario consists of a set of

---

from John Kelly, Sec'y, U.S. Dep't. of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot., et al. (Feb. 20, 2017).

<sup>167</sup> These normative priors are amply reflected in the literature surveyed in the remainder of this Part. Cf. Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 58 & n.3 ("[T]he immigration law professoriate occupies a position at the extreme left in the national debate over immigration." (footnote omitted)).

end-states that immigration exceptionalism may episodically support or interfere with.

In this Part, we identify patterns and trends in the leading scholarly works on exceptionalism, with due regard for some important nuance and exceptions along the way. As a general matter, scholars tend to write about exceptionalism pertaining to rights (Section II.A), federalism (Section II.B), or separation of powers (Section II.C), as if developments in each area can be siloed from the others.

### A. Rights

Theorists and advocates have labored for decades to eradicate rights exceptionalism from the Court's jurisprudence. Below, we offer a loose taxonomy of that concerted effort, which includes: (1) dislodging the plenary power doctrine from the Court's rights jurisprudence, (2) dismantling the doctrine's conventional rationales, (3) detouring around the doctrine, (4) disabling the doctrine, and (5) denying the doctrine's existence or significance in modern times.<sup>168</sup> Though conceptually distinct, each of these tacks angles toward the same preference: namely, robust rights protection for noncitizens.

*Dislodge.* One line of attack sought to extricate the plenary power doctrine from rights jurisprudence. Most notably, Professor Stephen Legomsky explained that the Court first invoked the doctrine in the context of federalism challenges to state laws.<sup>169</sup> He argued that the Court tragically erred by extending the rationale of these federalism precedents to foreclose judicial review of constitutional rights challenges.<sup>170</sup> On this account, the idea of federal plenary power is not wrong as applied to questions of federalism; it is just misplaced as applied to constitutional rights.<sup>171</sup>

*Dismantle.* A related line of attack sought to topple the plenary power doctrine by debunking its supporting rationales. In the foundational *Chinese Exclusion Cases*, discussed in Part I, the Court linked federal immigration power to foreign affairs and the inherent right of sovereign nations.<sup>172</sup> But as many thoughtful commentators have since argued, the foreign affairs justification is overbroad. Much immigration policy, they

---

<sup>168</sup> We present this taxonomy as one potential way of organizing the voluminous literature on rights exceptionalism. While this categorization is meant to be helpful, nothing in our argument depends on this particular grouping.

<sup>169</sup> LEGOMSKY, *supra* note 39; see also Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995) [hereinafter Legomsky, *Ten More Years*] (reifying his earlier claim that the Court had unwittingly relied on federalism cases to reach conclusions about individual constitutional rights).

<sup>170</sup> See LEGOMSKY, *supra* note 39, at 180–86.

<sup>171</sup> See *id.*

<sup>172</sup> See *Chae Chan Ping v. United States*, 130 U.S. 581, 603–04 (1889).

argue, is domestic and has only tangential bearing on the nation's foreign relations.<sup>173</sup> Moreover, some have argued, the sovereignty rationale as pertains to constitutional rights challenges was probably wrong to begin with, and is certainly wrong by contemporary lights.<sup>174</sup> In short, sovereignty is not a reason why the Constitution should not apply.

*Detour.* Some scholars have also suggested end-runs around the plenary power doctrine and its rights-depriving effects. Again, in groundbreaking work, Legomsky argued that the Court might use mainstream procedural due process standards to compensate for the inability to advance substantive constitutional rights claims.<sup>175</sup> Building on the work of Legomsky and others, Professor Hiroshi Motomura has championed non-frontal assaults on the plenary power doctrine by linking the fortunes of citizens and noncitizens.<sup>176</sup> Motomura has also argued that preemption doctrine might serve immigrant interests without having to directly invoke constitutional rights—for example, by incorporating an equality norm into preemption analysis.<sup>177</sup> Approaches like these rely on oblique proxies to vindicate immigrant rights.

*Disenable.* Somewhat more counterintuitively, Motomura has also suggested severing the plenary power doctrine's mainstream life supports. Expanding on the work of others, Motomura explained in seminal work that the plenary power's staying power was owed, in part, to the Court's practice of importing "phantom" mainstream constitutional norms into

---

<sup>173</sup> Legomsky, *supra* note 1, at 262–63 (suggesting that “[a] better approach would be to reserve the judicial deference for the special case in which the court concludes, after a realistic appraisal, that applying the normal standards of review would interfere with the conduct of foreign policy”); Aleinikoff, *supra* note 2, at 12 (“While foreign policy has provided a convenient excuse, it hardly seems to capture the deep structure of our thinking about immigration and the Constitution.” (internal quotation marks omitted)); Schuck, *supra* note 1, at 16–17 (observing that foreign affairs has very little if any bearing on the many domestic contexts where the Court invoked the plenary power doctrine); Matthew J. Lindsay, *Disaggregating “Immigration Law,”* 68 FLA. L. REV. 179, 182–84 (2016) (same); Peter J. Spiro, *Explaining the End of Plenary Power,* 16 GEO. IMMIGR. L.J. 339, 340–41, 345–55 (2002) (suggesting that the plenary power might fade as immigration law becomes decoupled from foreign relations law). In a recent account, however, David Martin argues that the foreign affairs rationale is a major reason why the plenary power doctrine endures today. *See* Martin, *supra* note 21, at 39–48.

<sup>174</sup> *See, e.g.,* LEGOMSKY, *supra* note 39, at 185 (“Problems with the sovereignty theory become manifest when the rationales arguably supporting it are closely examined.”); Michael A. Scaperlanda, *Polishing the Tarnished Golden Door,* 1993 WIS. L. REV. 965, 1028–29 (arguing that emergence of modern human rights law renders classical international law’s emphasis on sovereignty obsolete).

<sup>175</sup> Legomsky, *supra* note 1, at 298–305 (arguing that courts might apply greater procedural due process analysis to immigration cases to “avoid[] the harshness of the plenary power doctrine”).

<sup>176</sup> *See* Motomura, *supra* note 128, at 1728 (“[A]n unauthorized migrant may successfully assert rights if recognizing those rights would protect a U.S. citizen or lawfully present noncitizen who serves as a citizen proxy.”).

<sup>177</sup> *See id.* at 1730; MOTOMURA, *supra* note 24, at 133–35. As discussed in Section II.B, this idea has come into vogue in recent years, with wide-ranging support within the academy. *See infra* notes 207–16 and accompanying text (collecting citations).

statutory interpretation in immigration rights cases.<sup>178</sup> These phantom norms effectively enabled the plenary power doctrine to endure, inasmuch as they relaxed some of that doctrine's more extreme applications.<sup>179</sup> Motomura acknowledged that the phantom norms had salutary short-term effects for immigrant interests.<sup>180</sup> But, taking the longer view, he also suggested that isolating the plenary power doctrine from the phantom norms might, in due time, cause the plenary power doctrine to suffocate under its own weight.<sup>181</sup>

*Deny.* Meanwhile, others have questioned the significance of the plenary power doctrine. Ultimately, this nothing-to-see-here approach hoped to convince courts and commentators that immigration law need not be exceptional as a descriptive matter, and therefore should not be treated as such as a prescriptive matter. Professor Jack Chin, for example, has argued that despite the Court's homage to the doctrine, the Court would have reached the same result in most cases using then-extant mainstream legal standards.<sup>182</sup> A similar tack is reflected in the amicus brief filed by several scholars in the *Rodriguez* case pending before the Court,<sup>183</sup> and in commentators' responses to President Trump's recent immigration ban.<sup>184</sup>

---

<sup>178</sup> Motomura, *supra* note 41, at 549 (“[M]any courts have relied on what I call phantom constitutional norms, which are not indigenous to immigration law but come from mainstream public law instead. The result has been to undermine the plenary power doctrine through statutory interpretation.” (internal quotation marks omitted)).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 612 n.374 (recognizing that “[f]or a while,” abandoning phantom norms may result in “aliens . . . los[ing] a few more immigration cases than before,” but anticipating “that this movement will hasten the complete demise of the plenary power doctrine”).

<sup>182</sup> Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 281–82 (2000) (arguing that the plenary power doctrine arose at a time of general judicial deference and that immigration law may not be as much of a constitutional outlier as scholars conventionally believe). *But cf.* Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to “Is there a Plenary Power Doctrine?”*, 14 GEO. IMMIGR. L.J. 289, 291–96 (2000) (responding to Professor Chin and arguing that de facto racial discrimination in immigration enforcement, and the disparate treatment of noncitizens in removal proceedings, suggests a continued gap between immigration law and mainstream constitutional law).

<sup>183</sup> Brief of Professors of Constitutional, Immigration, and Administrative Law as Amici Curiae in Support of Respondents at 3, *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016) (No. 15-1204). Their argument supports the immigrants' position that indefinite or prolonged detention without bond hearings are unlawful. *Id.* Specifically, their brief argues that the federal government reads *Shaughnessy v. Mezei*, 345 U.S. 206 (1953), too broadly. *Id.* In that Cold War era case, the Court upheld the government's indefinite detention of a noncitizen who was deemed inadmissible under the immigration laws. *Id.* To minimize *Mezei*'s impact, amici in *Jennings* argue that *Mezei* was a product of then-extant due process standards and is not the controlling precedent today. *See id.* at 25.

<sup>184</sup> *See, e.g.,* Adam Cox, *Why a Muslim Ban Is Likely to Be Held Unconstitutional: The Myth of Unconstrained Immigration Power*, JUST SECURITY (Jan. 30, 2017, 10:21 AM), <https://www.justsecurity.org/2017/01/30/muslim-ban-unconstitutional/>

As discussed in Section I.A, the plenary power doctrine has proven remarkably resilient despite these academic assaults.<sup>185</sup> That outcome is relevant to this Article's broader claims in two regards. First, decades of scholarship have ably advanced many reasons to abrogate, relax, work around, and compensate for the plenary power doctrine. Still, judicial buy-in is required. How that happens, if at all, can impact other exceptionalism strands, as we develop more fully in Parts III and IV. Second, the academic refrain against *rights* exceptionalism provides contextual contrast to how commentators engage questions of immigration exceptionalism for federalism and separation of powers.

### B. Federalism

Most immigration scholars tend to affirm or defend the plenary power doctrine and its corollaries as they pertain to federalism.<sup>186</sup> At least as applied to certain restrictionist laws, commentators defend or accept three strands of federalism exceptionalism: (1) the federal exclusivity principle, (2) preemption via nonbinding executive enforcement policies, and (3) Equal Pro-Emption (i.e., importing an equality norm into statutory preemption analysis).

1. *The Exclusivity Principle.*—Most commentators not only defend the exclusivity principle, but also support a rather robust version of it.<sup>187</sup> To date, however, this support targets subfederal *restrictionist* measures for preemption (e.g., the policies in Arizona and Alabama), but not *integrationist* measures (e.g., the policies in New York and California).<sup>188</sup>

Some scholars, for instance, have specifically invoked the plenary power doctrine as a reason to preempt restrictionist state laws like Arizona's flagship S.B. 1070.<sup>189</sup> Other scholars have not overtly summoned

---

[www.justsecurity.org/36988/muslim-ban-held-unconstitutional-myth-unconstrained-immigration-power/](http://www.justsecurity.org/36988/muslim-ban-held-unconstitutional-myth-unconstrained-immigration-power/) [<https://perma.cc/K5WR-WUSX>].

<sup>185</sup> Cf. Legomsky, *Ten More Years*, *supra* note 169, at 934 (lamenting that time was not kind to his earlier predictions regarding the demise of the plenary power doctrine and that, more likely, “the lower courts and the Supreme Court [will] allow the plenary power doctrine to wear away by attrition”).

<sup>186</sup> This point has been made before. See Schuck, *supra* note 167, at 57–58 (“An interesting feature of these critiques of the plenary power doctrine is that the critics seem to have no difficulty accepting its corollary—the principle that federal authority over immigration preempts the states from playing any independent role in the development and administration of immigration law and policy.”). Professor Schuck suggests that “[t]his conjunction of positions, which might otherwise seem illogical or at least awkward, is probably best explained by ideology and politics.” *Id.* at 58.

<sup>187</sup> For dissenting views, see *infra* notes 193–98 and accompanying text.

<sup>188</sup> See *supra* notes 90–98 and accompanying text (describing differences between restrictionist and integrationist laws, and providing examples).

<sup>189</sup> See, e.g., Karla M. McKanders, *Welcome to Hazleton! “Illegal” Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 26 (2007) (arguing that “because immigrants’ civil rights are implicated . . . the plenary powers doctrine

the plenary power doctrine, but nevertheless defend the idea of federal exclusivity in immigration enforcement for a variety of immigration-specific reasons. For example, Professor Michael Olivas argues that state exercises of “general immigration functions are unconstitutional as a function of exclusive federal preemptory powers.”<sup>190</sup> And Professor Huyen Pham maintains that “the immigration power is an exclusively federal power that must be exercised uniformly.”<sup>191</sup> Other notable scholars advance similar views.<sup>192</sup>

Still, there are some important exceptions to this general trend. Professor Peter Spiro, for example, argues that the rationale for federal exclusivity melts away once immigration law is untethered from the faux foreign policy rationale.<sup>193</sup> For this and some additional reasons, Professors Cristina Rodríguez, Clare Huntington, and Peter Schuck (writing separately) have eschewed the idea of federal exclusivity on constitutional and functional grounds.<sup>194</sup>

Here, it is important to appreciate that both sides of this particular debate take immigrant interests into account, albeit to greater and lesser extents relative to other considerations. For example, Spiro’s well known “steam-valve” theory suggests that federal exclusivity may, on balance,

---

should be applied to broadly preclude municipal regulation”). For a description of the provisions of S.B. 1070 that were at issue in *Arizona*, see *supra* note 14.

<sup>190</sup> Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 34.

<sup>191</sup> Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 967 (2004).

<sup>192</sup> See, e.g., Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 581–82 (2012) (criticizing the *Arizona* Court’s underenforcement of the exclusivity principle); Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535, 539–40 (2012) (arguing that state attempts to create strict immigration policy via “mirror-image” laws interfere with federal power); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT’L L. 201, 215–16 (1994) (explaining why states cannot lawfully resort to immigration “self-help”); Wishnie, *supra* note 112, at 500 (“Congress’s 1996 effort to devolve its federal immigration power [to subfederal institutions] is constitutionally impermissible.”).

<sup>193</sup> Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT’L L. 121, 165–67 (1994).

<sup>194</sup> See Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571–72 (2008) (arguing that the federal exclusivity principle “has become a formal doctrine without strong constitutional justification,” and urging a functional approach to immigration federalism); Huntington, *supra* note 69, at 792 (arguing that “[t]he text and structure of the Constitution allow for shared authority” and that “nothing in Supreme Court precedent clearly supports a claim of structural preemption”); Schuck, *supra* note 167, at 64 (arguing “that the legitimate goals of federal immigration policy might be better served by recognizing state authority in certain areas,” including, in particular, “employment-based admissions, integration with state and local criminal justice systems, and employer sanctions”).

inure to the detriment of immigrants.<sup>195</sup> He argues that allowing limited outlets for subfederal restrictionist fervor may dissipate political pressure to enact more encompassing restrictionist laws at the *federal* level.<sup>196</sup> Meanwhile, Rodríguez cautions that a robust exclusivity principle threatens to preempt subfederal integrationist laws.<sup>197</sup> And, as Huntington explains, “there is no structural reason to believe that one level of government will be more or less welcoming to non-citizens and therefore, on this basis, to favor [federal] uniformity over [state and local] experimentalism.”<sup>198</sup>

To be clear, we draw attention to these sorts of mediating arguments not because we think these scholars’ constitutional claims are consequentially motivated. Rather, the point is that calls for normalization that cut against the academic grain are almost invariably paired with some explanation for why doing so could be advantageous for immigrant interests, or at least not as dangerous as other immigration scholars generally believe.

2. *Executive Preemption via Nonbinding Policy.*—In the wake of recent congressional gridlock over comprehensive immigration reform, a separate immigration federalism debate is brewing over whether executive enforcement policies that do not have the force of law can nevertheless preempt subfederal alienage laws. Most immigration scholars have taken this mode of preemption for granted. That is, they start from the general premise that federal law preempts state law, and then extend this idea to include nonbinding executive policies.<sup>199</sup>

The few immigration scholars who have directly grappled with this form of executive preemption generally support it, at least as applied to restrictionist laws. Cox, for example, suggests that federal–state enforcement redundancy is ill-suited for immigration, given the Executive’s vast discretion in the field.<sup>200</sup> Along similar lines, Motomura argues that “law in action” is just as much a part of federal immigration law as Congress’s written statutes, and thus should have corresponding

---

<sup>195</sup> See Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997).

<sup>196</sup> *Id.* at 1645.

<sup>197</sup> Rodríguez, *supra* note 194, at 580 (noting that subfederal protectionist measures are “vulnerable in the face of a strong theory of preemption”); see also Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357, 363–64 (2002) (“[W]e might just as plausibly view federal authorization of divergent state policies as creating laboratories of generosity toward immigrants.” (emphasis removed)).

<sup>198</sup> Huntington, *supra* note 69, at 831.

<sup>199</sup> *But cf.* Rubenstein, *supra* note 124, at 985–86 (arguing that preemption via nonbinding executive enforcement policies is a dangerous proposition that “should not be taken for granted—perhaps especially by immigrant advocates”).

<sup>200</sup> See Cox, *supra* note 29, at 56–59.

preemptive effect.<sup>201</sup> Meanwhile, Professor Catherine Kim argues that preemption via executive policies that forgo notice-and-comment rulemaking may not be ideal, but is preferable to a regime without this exceptionality.<sup>202</sup>

Still, there is at least one dissenting view.<sup>203</sup> On formal grounds, nonbinding enforcement policies are not “law,” much less are they “Law” for purposes of the Supremacy Clause.<sup>204</sup> Moreover, on functional grounds, preemption via nonbinding executive action arguably makes it too easy for a sufficiently motivated Executive to preempt state alternatives, and thus unilaterally quell one of the few remaining structural checks against federal immigration policy.<sup>205</sup> Worth noting, however, is how this critique also has immigrant interests in view. Preemption via nonbinding executive policies could permit executive branch officials to preempt state integrationist laws (as well as restrictionist laws) with equal facility—a point we return to in Part IV.<sup>206</sup>

3. *Equal Pro-Emption*.—Recall that under the proposed Equal Pro-Emption doctrine, courts would import an equality norm into immigration preemption analysis. The idea for this is old.<sup>207</sup> Its popularity today is new.<sup>208</sup>

<sup>201</sup> See, e.g., MOTOMURA, *supra* note 24, at 22, 124 (“The operation of immigration law in practice strongly suggests that the exercise of federal executive discretion in enforcement supplies the real content of federal immigration law for the purpose of deciding what is inconsistent with state and local decisions.”).

<sup>202</sup> See Kim, *supra* note 124, at 731.

<sup>203</sup> That dissenting view has been advanced by one of this Article’s authors. See, e.g., Rubenstein, *supra* note 120, at 283–95; Rubenstein, *supra* note 124, at 999–1004.

<sup>204</sup> See Rubenstein, *supra* note 124, at 999–1004; U.S. CONST., art. VI, cl. 2 (delineating “Laws” as having preemptive effect).

<sup>205</sup> On this account, executive preemption via nonbinding policies may be worse, on balance, than insisting on the Court’s mainstream force of law preemption requirement (which embeds procedural resistance within the administrative apparatus), and/or having Congress decide whether to preempt subfederal law (which embeds political and procedural resistance through the legislative process). See, e.g., Rubenstein, *supra* note 29, at 139–51.

<sup>206</sup> See *infra* Sections IV.B, IV.C; see also Rubenstein, *supra* note 29, at 89–90, 139–51 (warning of danger to immigrant interest if preemption through executive guidance policies becomes established doctrine).

<sup>207</sup> See Note, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 YALE L.J. 940 (1980); David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1070 (1979) (arguing that Supreme Court’s equal protection analysis is unintelligible and that opinions actually reflect “an unarticulated theory of preemption” that should be explicitly embraced).

<sup>208</sup> See MOTOMURA, *supra* note 24, at 133–35; Chacón, *supra* note 192, at 606–14; Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-“Alien” Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905, 932–43 (2011); Guttentag, *supra* note 128; Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 619 (2012); Motomura, *supra* note 128, at 1726; Olivas, *supra* note 190, at 28; Carrie L.

Academic support for this exceptional doctrine must be understood in context. Most commonly, Equal Pro-Emption is offered as a partial reason for why subfederal *restrictionist* (but not *integrationist*) laws should be preempted. Motomura and Guttentag, for example, argue that incorporating equality concerns is a principled way for reviewing courts to greet subfederal restrictionist laws with greater skepticism.<sup>209</sup> Restrictionist laws, they argue, are likely to be motivated by discrimination in ways that integrationist laws are not.<sup>210</sup>

Alternatively, Equal Pro-Emption may be understood as a compensating adjustment for the Court's rights jurisprudence. As Motomura explains, the Court's mainstream discriminatory purpose test for facially neutral laws leaves many discriminatory enforcement actions undetected or unremedied.<sup>211</sup> Shifting the burden of proof to restrictionist states to disprove discriminatory intent might close some of the gap between the equality norm and the Court's mainstream disparate purpose test.<sup>212</sup> Similarly, Professor Jennifer Chacón argues that importing an equality norm into immigration preemption analysis could venerably compensate for the Court's lax application of Fourth Amendment principles in immigration enforcement.<sup>213</sup>

Professor Mary Fan offers yet another reason to support, or at least to understand, Equal Pro-Emption.<sup>214</sup> As she explains, this doctrinal construct not only eases the plaintiff's burden of proving discriminatory intent, it also eases the judicial burden of having to directly rule on antidiscrimination grounds.<sup>215</sup> Moreover, inasmuch as Equal Pro-Emption is grounded in an antidiscrimination norm, it is arguably preferable to alternative preemption

---

Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-Federal Immigration Laws: The California TRUST Act*, 18 CHAP. L. REV. 481, 483, 523 (2015); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004). And, for a variation on this theme, see Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. (forthcoming 2017) (suggesting a "proportionality norm" as an alternative or at least additional factor motivating the Court's preemption analysis in *Arizona*).

<sup>209</sup> Cf. MOTOMURA, IMMIGRATION, *supra* note 24, at 134; Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States*, 9 STAN. J. C.R. & C.L. 1 (2013).

<sup>210</sup> MOTOMURA, IMMIGRATION, *supra* note 24, at 134; Guttentag, *supra* note 209, at 2 & n.4 (2013).

<sup>211</sup> See MOTOMURA, IMMIGRATION, *supra* note 24, at 135.

<sup>212</sup> See *id.*; see also *Washington v. Davis*, 426 U.S. 229, 238–39 (1976) (requiring plaintiff to demonstrate a discriminatory purpose, not merely a discriminatory impact, when challenging facially neutral laws under the Equal Protection Clause); Reva B. Siegel, *Equality Divided*, 127 HARV. L. REV. 1, 16–17 (2013) (describing the development of this equal protection requirement).

<sup>213</sup> See Chacón, *supra* note 192, at 613.

<sup>214</sup> Fan, *supra* note 208.

<sup>215</sup> *Id.* at 908–09 (noting that preemption frames can often be more "palatable" than antidiscrimination frames in judicial review of subfederal restrictionist laws).

frames (such as the exclusivity principle, and mainstream preemption doctrines), which are formally agnostic to equality principles.<sup>216</sup>

### C. Separation of Powers

The academic reception for special separation of powers standards in immigration law is also mixed, at least as refracted through the debate over the Obama Administration's DAPA and Deferred Action for Childhood Arrivals (DACA) programs. Many immigration professors defend the legality of these programs,<sup>217</sup> but it is far less clear how much of their legal support for the programs depends on exceptionalism, if at all.<sup>218</sup>

Just as we noted in Section I.C that separation of powers exceptionality is hard to pin down descriptively, here we suggest three reasons why it is hard to pin down prescriptively. First, the Court has provided only sporadic and somewhat fuzzy parameters on what the President's duty to "faithfully execute the law" entails.<sup>219</sup> Without a clear baseline set by the Court against which to compare, judgments about what qualifies as exceptional executive action defy precision.

Second, because the INA delegates so much authority, the Executive Branch might not be acting exceptionally even when it acts without express congressional endorsement. Under mainstream separation of powers precedent, for instance, the court might employ the familiar three-tier framework from *Youngstown* to assess the constitutionality of executive action.<sup>220</sup> Even then, however, it is not clear where to situate DAPA/DACA

---

<sup>216</sup> *Id.* at 909–10.

<sup>217</sup> See Open Letter from Immigration Law Professors 6 (Nov. 25, 2014), <http://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/executive-action-law-prof-letter.pdf> [<https://perma.cc/N5QU-2GWG>] (letter of support signed by approximately one hundred law professors and clinicians); Letter from Immigration Law Professors, to Barack Obama, President, White House 4 (May 28, 2012), <http://www.nilc.org/document.htmlid=754> [<https://perma.cc/8ZVY-52E8>] (same).

<sup>218</sup> Indeed, the Office of Legal Counsel opinion providing legal cover for DAPA maintains that Congress provided sufficient authority for these exercises of executive authority in existing statutes. The Opinion, *supra* note 159, at 4. *But see* Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 216 (2015) (critiquing OLC's reasoning); Cox & Rodríguez, *Redux*, *supra* note 158, at 146–57 (critiquing OLC's reasoning but defending DAPA on other grounds); Zachary Price, *supra* note 159 (arguing that DACA and DAPA "go beyond either conventional agency priority-setting or ad hoc deferred action by deeming broad categories of immigrants presumptively eligible for a prospective promise of non-enforcement").

<sup>219</sup> See *supra* notes 144–47 and accompanying text.

<sup>220</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). The framework divides exercises of presidential power into three categories: First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635 (footnote omitted). Second, "in absence of either a congressional grant or denial of authority, . . . there is a zone of twilight in which he and Congress may have concurrent authority." *Id.* at 637. Finally,

within *Youngstown*'s three tiers, because it is not clear whether or how immigration's special qualities should factor in that analysis.<sup>221</sup> Moreover, if DAPA/DACA is not an act of executive lawmaking (and conceived, instead, only as executive prosecutorial discretion), then *Youngstown* may not be the appropriate constitutional standard.

Third, commentators shying away from explicitly invoking exceptionalism tropes may purposefully blur the line between exceptionalism and normalization. The potential dangers inhering in an exceptional executive immigration power may be reason enough to avoid relying on (or reifying) that power. Quite obviously, executive power can be abused in ways that make it more concerning than other forms of exceptionalism. Thus, prudence might have counseled for defending President Obama's deferred action programs on mainstream grounds (if possible), and exceptionalism grounds (if at all) only as a backup.

The brouhaha surrounding DAPA and DACA bring these potential hedges to light. As noted, most immigration scholars defend these programs without relying on exceptionalism *per se*.<sup>222</sup> Still, we think it's fair to say that some scholars may be turning to one or more of immigration's special features to argue for special (even if not unique or exceptional) legal dispensation.

For instance, Cox and Rodríguez (writing together), as well as Motomura, have argued that the conventional principal-agent model between Congress and the Executive is ill-equipped for immigration.<sup>223</sup>

---

"[w]hen the President takes measures incompatible with the expressed or implied will of Congress, . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* To succeed in this third category, the President's asserted power must be both "exclusive" and "conclusive" on the issue. *Id.* at 637–38.

<sup>221</sup> For instance, Professor Lauren Gilbert argues that DACA, and presumably DAPA too, "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." Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 279 (2013) (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). Meanwhile, Professor Peter Margulies employs mainstream norms to argue that DAPA falls into *Youngstown*'s third tier and is unconstitutional. Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Present, and Immigration Law*, 64 AM. U. L. REV. 1183, 1253–54 (2015). Professor Josh Blackman has gone even further, to argue that DAPA "descend[s] . . . even below the lowest ebb." Josh Blackman, *supra* note 218, at 267 (internal quotation marks omitted). For an intriguing approach to *Youngstown*, which factors in federalism, see Bianca Figueroa-Santana, Note, *Divided We Stand: Constitutionalizing Executive Immigration Reform Through Subfederal Regulation*, 115 COLUM. L. REV. 2219, 2257 (2015) ("[When] evaluating the constitutionality of executive action within the traditional *Youngstown* framework, . . . subfederal power and prerogative function as a fourth 'zone,' capable of supplementing or undermining the legitimacy of unilateral presidential policy.").

<sup>222</sup> See *supra* notes 217, 221.

<sup>223</sup> MOTOMURA, *supra* note 24, at 21–22, 31, 124 ("The operation of immigration law in practice strongly suggests that the exercise of federal executive discretion in enforcement supplies the real

Instead, their dynamic lawmaking models place a premium on historical context, and, more generally, an immigration regime characterized by a significant mismatch between the law on the books and the law in action.

Broader still, one might also maintain—as they and others do—that programs like DAPA and DACA have always been within the purview of the Executive Branch. As policy guidance, the Executive is best poised to make such decisions and routinely does. On this telling, DAPA and DACA are unexceptional exercises of presidential authority; they are distinguished only by the transparency and formality attending these programs, not because the President plays by different rules in immigration. Although some scholars may engage this defense agnostic of its relationship to broader immigration law implications, for others like Cox and Rodríguez, this line of argumentation may be appealing precisely because it may help avoid relying on claims of immigration exceptionalism.

Meanwhile, Professor Shoba Sivaprasad Wadhia and others emphasize a long tradition of categorical nonenforcement programs and congressional acquiescence thereof.<sup>224</sup> Again, this line of argument does not invoke exceptionalism per se. And we mean to leave open whether these arguments sound in exceptionalism at all.<sup>225</sup> But, even if not intended, heavy reliance on past *immigration* practice may be perceived as having exceptionalism undertones. After all, those earlier practices, themselves, may have been expressions of exceptional immigration power.<sup>226</sup> In any

---

content of federal immigration law for the purpose of deciding what is inconsistent with state and local decisions.”); Cox & Rodríguez, *Redux*, *supra* note 158, at 112 (arguing that a dynamic lawmaking model for immigration is more descriptively accurate and normatively desirable); *see also* Jason A. Cade, *Enforcing Immigration Equity*, 84 *FORDHAM L. REV.* 661, 694–719 (2015) (defending DACA/DAPA on the ground that the Executive must take the lead in the equitable enforcement of immigration law, especially in the wake of congressional gridlock on comprehensive immigration reform).

<sup>224</sup> SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* ch. 4 (2015); Open Letter from Shoba Sivaprasad Wadhia et al. (Mar. 13, 2015), [www.pennstatelaw.psu.edu/lawprof/trlawsuit](http://www.pennstatelaw.psu.edu/lawprof/trlawsuit) [https://perma.cc/Y9EE-HNWM]; *see also* *Executive Grants of Temporary Immigration Relief, 1956-Present*, AM. IMMIGR. COUNCIL (Oct. 2014), <https://www.americanimmigrationcouncil.org/research/executive-grants-temporary-immigration-relief-1956-present> [https://perma.cc/XMS4-M8EU]; Drew Desilver, *Executive Actions on Immigration Have a Long History*, PEW RESEARCH CTR. (Nov. 21, 2014), <http://www.pewresearch.org/fact-tank/2014/11/21/executive-actions-on-immigration-have-long-history/> [https://perma.cc/R2VT-BT3Y].

<sup>225</sup> *See* Shoba Sivaprasad Wadhia, *Employment Authorization and Prosecutorial Discretion: The Case for Immigration Unexceptionalism*, *YALE J. ON REG.: NOTICE & COMMENT BLOG* (Feb. 10, 2016), <http://yalejreg.com/nc/employment-authorization-and-prosecutorial-discretion-the-case-for-immigration-unexceptionalism-by-s/> [https://perma.cc/9FUQ-UZ5K].

<sup>226</sup> There is another strand of DACA/DAPA defenses that focuses on the exercise of prosecutorial discretion in all branches of law enforcement. This tack, of course, attempts to normalize the exercise of enforcement relief in the immigration context. *See, e.g.*, David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade*, 122 *YALE L.J. ONLINE* 167, 184 (2012) (arguing that the lawsuit filed by ICE field agents challenging DACA—*Crane*

event, we wish only to flag what we think the foregoing defenses of DAPA and DACA share in common: reliance on immigration's distinct demographics, history, or the INA's statutory structure as reasons for a flexible view of executive power, relaxed judicial checks on that authority, or both.

To be sure, not all agree that large-scale deferred action programs are constitutional. Tellingly, however, those dissenting views are more clearly applying mainstream separation of powers and administrative law.<sup>227</sup> As far as we are aware, no one has argued that DAPA is *unconstitutional* under an *exceptionalism* frame. Indeed, if the Executive does hold exceptional immigration power, then it is not at all clear if, or on what grounds, the Court would ever deem the constitutional line crossed.

\* \* \*

In sum, immigration exceptionalism is more than just a doctrinal phenomenon; it has prescriptive bents too.<sup>228</sup> For decades, commentators have labored to mitigate the injustices wrought by rights exceptionalism. By comparison, however, academic reception for structural exceptionalism is mixed.

This equivocation might signal differences in judgment about how specific strands of exceptionalism are likely to translate on the ground. Rights exceptionalism is almost invariably bad from the vantage of immigrant interests. Put otherwise, those interests seemingly have nothing to lose, and much to gain, from a normalized rights jurisprudence. By contrast, separation of powers and federalism doctrines allocate power, but cannot control how that exceptional power is used (or abused) across time and contexts. Thus, inasmuch as scholars and advocates are writing with an eye toward vindicating immigrant interests, there is arguably more reason to equivocate when it comes to federalism and separation of powers exceptionality. Doubling down on special structural doctrines, before all the political cards are dealt, is a risky gambit.

---

v. *Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013)—must be rejected and remarking that “[i]n any other law enforcement environment, this discipline [of a ranking enforcement officer creating enforcement priorities that bind lower level officers] would be unremarkable”).

<sup>227</sup> See Robert Delahunty & John Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 71 TEX. L. REV. 781, 784 (2013) (arguing that DACA is unconstitutional); Price, *supra* note 159 (same); Blackman, *supra* note 218, at 218–19 (same). See generally Margulies, *supra* note 221, at 1252–55 (rejecting the notion of an exceptional executive power in immigration, on constitutional and normative grounds).

<sup>228</sup> Cf. Cox, *supra* note 29, at 32 (writing about academic reactions to *Arizona* and noting that “while [exceptionalism] . . . can provide a label for a phenomenon, it does not itself explain it”).

## III. EXCEPTIONALISM AS MEANS TO ENDS

If we are correct that immigrant advocates and scholars often invoke exceptionalism as a means to particularized ends, a pressing follow-up question surfaces: to what extent can doctrinal exceptionalism (or normalization) deliver those ends? That question has been almost entirely neglected to date. And the scant attention it has received is generally cabined to a particular constitutional dimension.<sup>229</sup>

This Part explains why exceptionalism is a fraught means to ends. Section III.A revisits the rationales behind immigration exceptionalism. As we explain, the most commonly invoked supporting tropes repeat themselves across doctrines and constitutional dimensions. Section III.B emphasizes why that matters. Exceptionalism's supporting rationales tend to be doctrinally agnostic. Thus, gestational moves toward exceptionalism or normalization in one doctrinal context can push or pull on other doctrines, sometimes in crosscutting and unintended ways. In Section III.C, we inject an additional complication inherent in structural power allocations—namely, political uncertainty.

Appreciation for these doctrinal and political dynamics is crucial. Descriptively, our account may help to explain why exceptionalism endures. Immigrant advocates, government lawyers, and jurists are quite possibly caught in a feedback loop. Each may be invoking exceptionalism's supporting tropes for different reasons and for different ends. But the emergent result is the same: exceptionalism lingers.

Prescriptively, this reconceptualization may profitably inform how to engage questions of immigration exceptionalism (and normalization) moving forward. As yet, there is no organizing theory for when, why, or how to split the atom of immigration exceptionalism. Moreover, even assuming that advocates and theorists can meet the conceptual challenge of explaining why doctrines *should* be treated discretely, it may be too much to expect the Court to seize upon an exceptionalism-splitting theory that delivers just enough, but not too much, exceptionalism and in all the right places.

The political x-factor only compounds the complexity. Rights, federalism, and separation of powers doctrines set outer boundaries on how government actors can and cannot exercise power, but create no affirmative duty on government actors to exercise power in any particular way. It is in that space, between politics and the outmost limits of law, where the

---

<sup>229</sup> See *supra* Section II.B (canvassing debate over immigration federalism doctrines); *cf.* Margulies, *supra* note 221, at 1215–16 (cautioning how arguments in favor of excessive executive authority might be spun under new administrations).

consequences of exceptionalism can become terribly unstable and unpredictable.

*A. Cross-Currency of Exceptionalism Rationales*

We start with a simple but central insight that often goes overlooked: immigration exceptionalism needs reasons. After all, the Court does not, and will not, depart from mainstream legal norms without explanation. Nor should we expect the Court to abandon or limit long-standing exceptionalism doctrines without disclosing why. In short, reasons matter. Moreover, the reasons conventionally offered in support and derogation of exceptional immigration doctrines link across constitutional settings. To illustrate, we focus below on three commonly invoked exceptionalism rationales: foreign affairs, institutional competence, and sovereignty.

In the rights realm, for instance, the Court invokes foreign affairs as one of several reasons for judicial deference to the federal political branches.<sup>230</sup> Meanwhile, in federalism cases, the Court invokes the foreign affairs trope to justify robust preemption of state and local restrictionist laws.<sup>231</sup> And, at other times, the Court nods to the President's role in foreign affairs to legitimate broad executive discretion,<sup>232</sup> if not also inherent immigration authority.<sup>233</sup>

Likewise, the institutional-competence rationale cuts across doctrinal contexts. It surfaces in constitutional rights cases as a primary reason for judicial deference to the federal political branches.<sup>234</sup> It surfaces in federalism as a primary reason why the federal government, rather than states, should have exclusive control over the admission and expulsion of

---

<sup>230</sup> See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (abjuring stringent judicial review of the Chinese Exclusion Act and explaining that “[i]f the government of the country of which the foreigners excluded are subjects is dissatisfied with this action it can make complaint to the executive head of our government”).

<sup>231</sup> See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (explaining that the federal government's authority over immigration “rests, in part, on . . . its inherent power as sovereign to control and conduct relations with foreign nations” (citation omitted)); *Hines v. Davidowitz*, 312 U.S. 52, 62–66 (1941) (noting foreign affairs implications of immigration regulation); *Chy Lung v. Freeman*, 92 U.S. 275, 279–80 (1875) (invoking foreign affairs as a reason for the exclusivity principle).

<sup>232</sup> See *Arizona*, 132 S. Ct. at 2499 (“The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.”).

<sup>233</sup> See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (suggesting that the Executive possesses inherent power to regulate immigration as part of a broader foreign affairs power vested in the Executive).

<sup>234</sup> See, e.g., *Chae*, 130 U.S. at 602 (“The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts.”).

immigrants.<sup>235</sup> And it surfaces in separation of powers as a reason for judicial solicitude to the Executive's enforcement decisions.<sup>236</sup>

The sovereignty rationale threads a similar pattern. In the *Chinese Exclusion Cases*, for example, the Court infamously invoked national sovereignty as one basis for the federal government's plenary power over immigration, which the Court felt ill-equipped to second guess.<sup>237</sup> The sovereignty rationale has jurisprudential links to federalism too, with respect to preemption.<sup>238</sup> Moreover, the recent *Texas* litigation suggests how sovereignty links to separation of powers. Throughout that litigation, the federal government cautioned that, if the Court affords states special solicitude to challenge the federal Executive's policies, it would invite endless litigation anytime a state disagreed with federal policy, thus distorting the relationship between federal and state sovereignty.<sup>239</sup> But, in retort, Texas cautioned that if states do not have standing to challenge DAPA, then nobody might, thus leaving important separation of powers questions unchecked by courts.<sup>240</sup>

---

<sup>235</sup> See, e.g., *Arizona*, 132 S. Ct. at 2498–500 (detailing the complex involvement of several federal departments and agencies in immigration policy, and stating that “[i]t is fundamental that foreign countries concerned about the status, safety, and security of their nationals . . . must be able to confer and communicate . . . with one national sovereign, not the 50 separate [s]tates.”).

<sup>236</sup> See, e.g., *Knauff*, 338 U.S. at 543 (“[T]he decision to admit or to exclude an alien may be lawfully placed with the President. . . . [I]t is not within the province of any court, . . . to review the determination of the political branch of the Government to exclude a given alien.”); The Opinion, *supra* note 159, at 4 (defending legality of President Obama's DAPA program by stating that “[t]he principles of enforcement discretion . . . apply with particular force in the context of immigration”); see also *Arizona*, 132 S. Ct. at 2499 (“The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.”).

<sup>237</sup> *Chae*, 130 U.S. at 609 (linking “[t]he power of exclusion of foreigners” to the “sovereignty belonging to the government of the United States”); see also Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 617–18 (2013) (observing that “plenary power and structural immigration preemption are distinct concepts,” but that “early cases articulating the two doctrines drew on the same logic”).

<sup>238</sup> See *supra* notes 83–85, 174 and accompanying text.

<sup>239</sup> Brief for the Petitioners at 31, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) (“In the immigration context alone, the court of appeals' theory would give States virtually unfettered ability to conscript courts into entertaining their complaints about federal policies.”).

<sup>240</sup> See Brief for the State Respondents at 35–36, *Texas*, 136 S. Ct. 2271 (No. 15-674) (“It is aggressive enough to insist that States—which possess the dignity of sovereignty—are powerless to challenge DAPA's legality. But defendants go further. At several points, they make clear that they believe *nobody* can challenge DAPA.”); see also David S. Rubenstein & Pratheepan Gulasekaram, *United States v. Texas: Ex Ante or Ex Post Judicial Review?*, YALE J. ON REG.: NOTICE & COMMENT BLOG (June 9, 2016), <http://yalejreg.com/nc/united-states-v-texas-ex-ante-or-ex-post-judicial-review-by-david-s-rubenstein-pratheepan-gulasekara/> [<https://perma.cc/7C3P-Y4T5>] (discussing an alternative route to judicial review, whereby states might take oppositional action—as in *Arizona*, for example—and raise objections to executive enforcement policies in the posture of a defendant, thus avoiding the need for the state to establish standing).

To be clear, we are not concerned here with whether the foregoing rationales are good ones in any context, much less which contexts. Our point is more foundational: the conventional reasons for immigration exceptionalism proffered in the Court's doctrine, academic commentary, and litigation briefs, are not easily cabined to a particular doctrine or constitutional dimension. Rather, the reasons form a network of exceptionalism rationales, plugged into all three constitutional dimensions.

### B. *Doctrinal Spillovers*

We now turn to the implications of exceptionalism's common-root system. Foremost, doctrinal moves and prescriptive arguments in one doctrinal setting can have lateral effects on others. We call this phenomenon a "doctrinal spillover." As illustrated below, the outcomes of spillovers can be for better or worse (depending on perspective), and can occur intra-dimensionally (e.g., between two federalism doctrines) and inter-dimensionally (e.g., across federalism, separation of powers, and rights doctrines).

The plenary power doctrine, itself, is a remarkable example of an inter-dimensional spillover. Recall that the Court's application of this doctrine in *rights* cases drew inspiration from prior immigration *federalism* cases.<sup>241</sup> In short, the Court's rationale for uniformity in national immigration policy vis-à-vis the states (in federalism cases) exerted a shadowing influence on the Court's role vis-à-vis federal political branches (in rights cases). Only with the benefit of hindsight did it become apparent how foundational federalism victories for immigrants—which struck down restrictionist state laws—became the fount for rights-depriving federal laws shielded by the plenary power doctrine.

But, spinning that story further, it was also this same exceptional deference to the federal political branches that proved useful to immigrants in the *Arizona* litigation. There, the Court primed its opinion striking down much of Arizona's S.B. 1070 by citing foundational plenary power rights cases and reaffirming the federal government's broad immigration authority relative to the states'.<sup>242</sup>

Moreover, *Arizona* revealed a further connection between separation of powers and federalism exceptionalism. Recall that the Court struck down some of the state provisions based on a putative conflict with the

---

<sup>241</sup> See *supra* notes 83–85, 174 and accompanying text.

<sup>242</sup> See *Arizona v. United States*, 132 S. Ct. 2492, 2498–99 (2012); see also *Abrams*, *supra* note 237 (arguing that the Court borrowed plenary power principles from foundational immigration law cases when conducting conflict and field preemption analysis).

*Executive's* (rather than Congress's) immigration enforcement policies.<sup>243</sup> Essentially, the Court treated the federal government as an undifferentiated whole for purposes of its federalism analysis.

By doing so, the Court blurred past latent separation of powers issues concerning the lawmaking relationship between Congress and the Executive, which later came to a head in *United States v. Texas*.<sup>244</sup> There, the constitutional question was whether DAPA violates the Take Care Clause.<sup>245</sup> Yet the government's petition for certiorari began by announcing that "[t]he authority to control immigration . . . is vested solely in the Federal government," without differentiating between Congress and the Executive.<sup>246</sup> Moreover, the government took that quotation from *Truax v. Raich*, an immigration federalism and rights case. Then, only a few keystrokes later, the government asserted that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials."<sup>247</sup> This quotation, however, was drawn from *Arizona*, which is ostensibly a federalism (preemption) case.

These crossover arguments and outcomes pop up repeatedly, and quite often with no appreciation or fanfare. Here we have shone a spotlight on this phenomenon; later parts of the discussion will suggest what this phenomenon entails for immigration theory and advocacy. Although predicting specific spillovers can be tough, and controlling them even tougher, the first step is to appreciate that they sometimes happen.<sup>248</sup>

---

<sup>243</sup> See *Arizona*, 132 S. Ct. at 2506 (explaining that the state law "could be exercised without any input from the [Executive] about whether an arrest is warranted in a particular case," thus "allow[ing] the State to achieve its own immigration policy"); cf. *id.* at 2521 (Scalia, J., concurring in part and dissenting in part) ("[T]o say, as the Court does, that Arizona contradicts federal law by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind." (emphasis removed)). Of course, one might conceive of congressional intent broadly, in a manner that includes funding and appropriations inherently linked to interpreting the removal standards. On the other hand, however, Congress's lack of federal funding does not, of itself, necessarily signal an intent to forbid states from using their own funds toward immigration enforcement. Cf. Rubenstein, *supra* note 29, at 132–33.

<sup>244</sup> See *supra* notes 160–66 and accompanying text (discussing separation of powers issues raised by *Texas* litigation). See generally Rubenstein, *supra* note 124 (teasing out the separation of powers issues embedded within recent immigration federalism debates).

<sup>245</sup> See *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

<sup>246</sup> See Brief of the United States on Petition for Writ of Certiorari at 2, *United States v. Texas*, 136 S. Ct. 2271 (No. 15-674) (quoting *Truax v. Raich*, 239 U.S. 33, 42 (1915)) (internal quotation marks omitted).

<sup>247</sup> *Id.* at 3 (quoting *Arizona*, 132 S. Ct. at 2499).

<sup>248</sup> To be clear, we do not mean to suggest that spillovers always happen. Sometimes the Court does seem to cabin particular rulings to particular contexts. In *INS v. Chadha*, for example, the Court eschewed the plenary power doctrine in a separation of powers context. 462 U.S. 919, 940–44 (1983). Disappointing expectations, however, the Court continues to apply the plenary power doctrine in rights and federalism cases. See *supra* Part II. The absence of any cohering theory for why spillovers

These spillovers owe to exceptionalism's interlocking rationales. As importantly, they are set in motion by jurists, commentators, and advocates who tap into exceptionalism's network of supporting rationales. Whether strategically, unwittingly, or otherwise, "constitutional borrowing"<sup>249</sup> of exceptionalism's rationales and tropes from one area of constitutional law into another has at least two potential effects. First, it can serve to reify the borrowed concept.<sup>250</sup> Second, by bridging otherwise discreet doctrines, borrowing can deliver more coherence to the law.<sup>251</sup> In Parts IV and V, we revisit these potential implications as they pertain to the doctrines of immigration exceptionalism.

### C. *Exceptionalism's Political Space*

The political x-factor is another complicating variable. The capacity of judicial doctrine to deliver particular societal outcomes is limited. Courts can set outer boundaries on political action, but cannot dictate the choices within that space. As a result, what may at first appear as a legal "solution" to a problem may only be a partial remedy, or none at all, depending on the political will and policy choices still available to government actors operating within an exceptional regime.

For instance, the plenary power doctrine is neither a command nor a limit on federal action. It simply allows the federal political branches to use their exceptional powers in ways that are mostly immune from judicial control.<sup>252</sup> Likewise, in the first-best scenario for immigrant interests, the enactment of integrationist subfederal laws and executive nonenforcement policies are politically contingent. Assuming *arguendo* that these immigrant-friendly outcomes are legally permissible, federal and state officials still must act to operationalize these particular ends.

Indeed, even when the Court forbids certain government action (e.g., federal commandeering or discrimination), there is no guarantee that desired policy outcomes will result. In some instances, exceptional substitutes to the proscribed government action may be available through other legitimate means. Insofar as immigration exceptionalism expands the range of political choice, it also has the capacity to invite, if not also to justify, these substitutes.

---

sometimes but not always happen is partly what makes immigration exceptionalism chancy from an advocacy perspective. We return to this puzzle in Parts IV and V.

<sup>249</sup> Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 461–62 (2010). Professors Nelson Tebbe and Robert Tsai describe the phenomenon of "constitutional borrowing" as "the practice of importing doctrines, rationales, tropes, or other legal elements from one area of constitutional law into another for persuasive ends." *Id.*

<sup>250</sup> *See id.* at 493–94.

<sup>251</sup> *See id.*

<sup>252</sup> *See supra* Section I.A.

Of course, political contingency is not unique to immigration; the gap between doctrine and politics is an indelible feature of society. Our contributing claim, however, is that exceptionalism discourse can loosen the law's grip on politics even further. Against a backdrop of hyper-political polarization, this slack must be taken seriously. After all, by its very nature, political polarization can push immigration policy to the extremes.<sup>253</sup> And, it is at those extremes where immigration exceptionalism can make all the difference, for better and worse.

An historic example that captures this dynamic is the Haitian immigrant saga that unfolded in the 1970s and 1980s.<sup>254</sup> Immigrant advocates persuaded courts, under the Due Process Clause, to require additional procedures for processing Haitian applications for admission.<sup>255</sup> The expected outcome was that processing of Haitians would continue but with greater procedural safeguards that might result in better government decisions and fewer removals. That occurred to some extent. But instead of wholly capitulating, the Reagan Administration moved to a policy of interdicting Haitians on the high seas—outside the reach of the Due Process Clause and the courts' rulings. The Executive's extraordinary immigration power supported, if not also legitimized, this result.<sup>256</sup>

To be clear, the lesson from the Haitian interdiction saga, and others like it, is not that advocates should have remained sidelined in the face of the government's deficient procedures. Advocates performed not only reasonably but also admirably. Moreover, despite the government's change in enforcement tactics, the litigation and judicial result may have established important beachheads for an incremental project of advancing

---

<sup>253</sup> See GULASKEKARAM & RAMAKRISHNAN, *supra* note 31, at ch. 4 (cataloging examples of how political polarization has influenced federal and subfederal immigration policy).

<sup>254</sup> See *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1029–32 (5th Cir. 1982) (describing the INS “Haitian Program” that attempted to streamline and expedite removal of Haitians and denied them the same procedures that applied to other groups); David E. Ralph, *Haitian Interdiction on the High Seas: The Continuing Saga of the Rights of Aliens Outside United States Territory*, 17 MD. J. INT’L L. & TRADE 227, 232–33 (1993) (describing the history of Haitian migration to the United States during the repressive regimes in Haiti).

<sup>255</sup> See *Augustin v. Sava*, 735 F.2d 32, 37–38 (2d Cir. 1984) (holding that inadequate INS translation services in asylum hearings violated procedural rights); *Louis v. Nelson*, 544 F. Supp. 973, 997 (S.D. Fla. 1982) (“Plaintiffs may not be deprived of their liberty without due process of law and cannot be denied parole solely because of their race [and] national origin[, or both].”), *dismissed in part, rev’d in part, remanded with instructions sub nom.*, *Jean v. Nelson*, 727 F.2d 957, 984 (11th Cir. 1984) (holding that “[e]xcludable aliens cannot challenge the decisions of executive officials with regard to their applications for admission, asylum, or parole on the basis of the rights guaranteed by the United States Constitution” but that “[t]hey do have rights . . . to whatever process Congress—and through its regulations and established policies, the Executive branch—have extended them”), *remand aff’d*, 472 U.S. 846, 857 (1985).

<sup>256</sup> See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187–88 (1993) (upholding the Executive’s interdiction policy).

immigrants' dignity and rights in the long term. The federal Executive's domestic practices were disciplined, and perhaps it was forced into a more difficult, and less effective, type of enforcement.

Still, a disquieting lesson remains. Immediate judicial gains do not necessarily produce linear outcomes, as they otherwise might in regulatory fields where one can rely on a steady state of normalized doctrine applicable to all actors in all situations. In immigration law, judicial victories can lead to political responses at the same or different levels of government, which can be difficult to predict *ex ante*.

\* \* \*

In sum, immigration exceptionalism—as a means to *any* end—is a contextually alluring but highly contingent tactic. The possibility of doctrinal spillovers is a complication that disaggregated treatments of immigration exceptionalism either miss or have no way to account for. Meanwhile, the uncertainties of political action, inaction, and reaction, are often discounted in ways that warrant further attention.

When *multiple* ends are conjoined, as the first-best scenario contemplates, the tensions come into sharper image. Again, that scenario contemplates a set of normative preferences along all three constitutional dimensions, including: (1) that immigrants have robust rights protection; (2) that subfederal integrationist laws flourish while their restrictionist foils abate; and (3) that the federal Executive has power to ease Congress's deportation laws.

To be sure, some admixture of political action and mainstream doctrines might deliver the first-best scenario for immigrant interests. Still, as a practical matter, politics and mainstream norms will likely come up short. This is not just our skepticism. Rather, this skepticism surfaces, inchoately, when scholars and advocates implore the Court to shed exceptionalism in rights cases, while gesturing to (if not insisting on) special institutional arrangements for federalism and separation of powers.

Emphatically, our suggestion that scholars and advocates may be invoking immigration exceptionalism as a mean to an end is not a critique. After all, immigration *is* sometimes exceptional. There is no reason why it cannot, or should not, be exceptional in ways that inure to the benefit of noncitizens. Missing from the literature, however, is an organizing metatheory for how to sort exceptional and mainstream doctrines within and across constitutional dimensions, and to explain why immigration should be exceptional for some purposes but not for others. The absence of that coordinating theory poses far greater problems for advocates, theorists, and jurists than has been recognized to date.

## IV. AN EXCEPTIONALISM “TRILEMMA”

Building on the foregoing, this Part showcases how immigration exceptionalism almost certainly requires normative tradeoffs within the first-best scenario.<sup>257</sup> Although the collateral effects of arguing for or against exceptionalism may not be intended, they may nevertheless be anticipated. Here, we initiate that project by mapping putative cross-dimensional effects using examples culled from actual and foreseeable cases.

To be clear, similar types of tradeoffs will be necessary even for those who hold preferences that diverge from those advanced in the first-best scenario. That stylized scenario, however, provides a good starting template because it captures the essence of today’s frontline immigration debates. For commentators and jurists with alternative normative dispositions, the tradeoffs may be calculated differently. But the doctrinal and political dynamics feeding those tradeoffs are the same. Conceptually, the trilemma can be engaged from any of its three ports—rights, federalism, or separation of powers. But they all wind to the same place: a smorgasbord of normative choices. In Section IV.A, we start with the rights preference. In Sections IV.B and IV.C, we reengage the trilemma through the structural ports of federalism and separation of powers, respectively.

When all is said, theorists, advocates, and jurists may reach the same doctrine-specific decisions they do now about whether, where, why, and how immigration should receive special constitutional treatment. Our hypothesized trilemma, however, offers fresh takes on what those decisions may entail for the system as a whole.

A. *The Rights Preference*

Most immigrant advocates and theorists will surely welcome rights normalization. In a normalized regime, federal immigration regulation would be subject to the same judicial scrutiny as other government actions under the Bill of Rights. But *how* the rights victory comes, if at all, may be more important today than in prior times. That is because the mix of immigrant interests has expanded to include forms of structural exceptionalism too. Thus, any celebration of success in rights normalization must also account for potential downsides to immigrant interests under the Constitution as a whole.

To begin, imagine if the Court decides in the pending case of *Rodriguez v. Robbins* that immigration should no longer be treated

---

<sup>257</sup> See *supra* Part II.

exceptionally.<sup>258</sup> That categorical proclamation, trumpeted in a case involving due process questions for immigrant detainees, could easily spill into other rights settings. For instance, it might extend to an equal protection claim (as in the pending *Morales-Santana v. Lynch* case<sup>259</sup>), to First Amendment challenges, to Second Amendment challenges,<sup>260</sup> and so on. Indeed, if the Court were to declare in any rights case that immigration is no longer exceptional, it is fair to assume that immigrant advocates and scholars would be frontline champions of those *intra*-dimensional spillovers.

At the same time, however, the sweep of that judicial pronouncement in one or more rights settings could also extend, *inter*-dimensionally, to federalism and separation of powers. After all, if the Court suddenly declared that immigration is unexceptional, we might reasonably expect the Court to apply that freshly minted conception to other immigration contexts, at the urging of advocates or otherwise.

If so, this hypothetical could result in across-the-board immigration normalization. For instance, Congress could not pass racially discriminatory laws, applicants for admission to the country would be entitled to due process, and banning Muslim immigrants would likely be out of the question. At the same time, however, if the federalism and separation of powers preferences partly depend on immigration *being* exceptional, then a judicial ruling that immigration is *never* exceptional could undermine those ends. Thus, the tradeoff.

On first take, many might happily accept this package deal. But, on further reflection, the calculation becomes more fraught. Rights normalization alone would not remedy some of the deep and enduring pathologies of today's immigration system. Even with rights normalization, the United States would still have an estimated undocumented population of more than 11 million,<sup>261</sup> an expansive list of removal statutes that would

---

<sup>258</sup> 804 F.3d 1060 (9th Cir. 2015), *cert. granted*, 136 S. Ct. 2489 (2016) (challenge to the judicial procedures required by the federal government's immigration detention policies).

<sup>259</sup> 804 F.3d 520 (2d Cir. 2015), *cert. granted*, 136 S. Ct. 2545 (2016) (equal protection challenge to immigration statute's facial gender distinctions regarding parental conferral of derivative citizenship to children).

<sup>260</sup> There is a split between the Seventh Circuit and the Fourth, Fifth, and Eighth Circuits as to whether the Second Amendment protects unauthorized aliens within U.S. borders. See Maria Stracqualursi, Note, *Undocumented Immigrants Caught in the Crossfire: Resolving the Circuit Split on "the People" and the Applicable Level of Scrutiny for Second Amendment Challenges*, 57 B.C. L. REV. 1447, 1447-49 (2016).

<sup>261</sup> See Jen Manuel Krogstad, *Key Facts About Immigrants Eligible for Deportation Relief Under Obama's Expanded Executive Actions*, PEW RESEARCH CTR. (Jan. 19, 2016), <http://www.pewresearch.org/fact-tank/2016/01/19/key-facts-immigrants-obama-action/> [<https://perma.cc/MJ8B-KJ4A>] (estimating the total unauthorized immigrant population is 11.2 million based on residual methodology applied to 2012 American Community Survey).

withstand constitutional challenge under mainstream standards,<sup>262</sup> and restrictionist states ready and willing to pick up the federal government's enforcement slack.<sup>263</sup> These are the very problems that federalism and separation of powers exceptionalism could help mitigate under certain political conditions, but could not in a regime of across-the-board normalization. Absent special separation of powers doctrines, for example, the Executive may be deprived of constitutional authority to grant categorical reprieves like DAPA and DACA. Meanwhile, absent federalism exceptionalism, state and local jurisdictions may have greater license to pursue restrictionist agendas.<sup>264</sup>

The *Texas* litigation offers a glimpse of the types of unintended consequences of rights normalization that we have in mind. To see how requires rewinding the tape a bit. Prior to the *Texas* litigation, Arizona attempted to deny driver's licenses to the beneficiaries of the Executive's DACA program.<sup>265</sup> As earlier mentioned, the Ninth Circuit held in the preliminary injunction phase that the DACA beneficiaries had shown a likelihood of success on their equal protection claim.<sup>266</sup> That decision appeared to be an unmitigated victory for immigrants, both in its outcome and the court's use of a normalized constitutional rights framework to reach it.<sup>267</sup>

Harder to anticipate, however, was how that rights ruling in Arizona would be spun by oppositional forces in Texas to deny deferred action to an exponentially larger class of potential DAPA beneficiaries. Texas's

---

<sup>262</sup> See generally 8 U.S.C. § 1182 (2012) (inadmissibility); *id.* §1227 (deportability).

<sup>263</sup> See, e.g., Appellants' Opening Brief at 1, 12, 23, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. CV 10-1413-PHX-SRB) (explaining that Arizona S.B. 1070 was enacted against federal "non-enforcement of the federal immigration laws" and the Department of Homeland Security's alleged "inability (or unwillingness) to enforce the federal immigration laws effectively").

<sup>264</sup> To be sure, DAPA and DACA may not depend on exceptional norms; meanwhile, mainstream statutory preemption may be sufficient to preempt subfederal restrictionist laws. The point, however, is that scholars must at least account for the risk that mainstream norms will not fulfill those functions. See generally *supra* Part III (elaborating on these points).

<sup>265</sup> See *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1059–60 (9th Cir. 2014) (discussing Arizona's policy); see also ARIZ. REV. STAT. ANN. § 28-3153(D) (2016) (prohibiting Arizona Department of Transportation from issuing driver's licenses to anyone "who does not submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law").

<sup>266</sup> See *Ariz. Dream Act Coal.*, 757 F.3d at 1064–65. Thereafter, the Ninth Circuit issued a decision permanently enjoining Arizona's driver's license policy. But, rather than rest its decision on equal protection grounds, the court decided on preemption grounds. See *Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 901, 905–06, 913–17 (9th Cir. 2016); see also *supra* notes 132–36 and accompanying text (discussing the court's alternative dispositions).

<sup>267</sup> See, e.g., Fernanda Santos, *Court Blocks Arizona Policy of Denying Driver's Licenses to Some Immigrants*, N.Y. TIMES (July 8, 2014), [https://www.nytimes.com/2014/07/08/us/08arizona.html?\\_r=0](https://www.nytimes.com/2014/07/08/us/08arizona.html?_r=0) [<https://perma.cc/QM2L-YXWG>].

primary ground for standing was the putative fiscal cost of having to supply driver's licenses to DAPA recipients if the state supplies licenses to other deferred action recipients.<sup>268</sup> Indeed, the district court in the *Texas* litigation expressly invoked the Ninth Circuit's equal protection ruling as a reason why Texas *must* supply driver's licenses to DAPA beneficiaries.<sup>269</sup> In short, a move toward normalization in the rights realm reverberated in federalism and separation of powers arenas, in ways that may have far greater practical implications—not only for DAPA, but for state challenges to executive action more generally.

Again, our point here is not that advocates and scholars should have refrained from pushing for rights normalization as the basis for victory in the DACA driver's license case. Rather, our suggestion is that the possibility of doctrinal and contextual spillovers could (and perhaps should) be factored in *ex ante*. At a minimum, the potential costs (not just actual costs, and certainly not just the potential benefits) must be accounted for when assessing any moves toward normalization or exceptionality.

Before proceeding, we pause to acknowledge that the contingencies hypothesized above might be adjustable if, for example, the Court were to abrogate rights exceptionalism on more refined and textured reasoning than posited in our opening salvo. Rather than a categorical declaration that immigration is unexceptional, perhaps the Court will decide that foreign affairs, judicial solicitude to the political branches, or national sovereignty—or some combination of the aforementioned factors—are dubious reasons to treat immigration exceptionally in constitutional rights cases.<sup>270</sup> We leave open the possibility, revisited in Part V, that more granular reasoning along these or other lines might change the tenor and likelihood of doctrinal spillovers.<sup>271</sup>

Still, despite best efforts to avoid spillovers, they can still happen owing to exceptionalism's common-root system of supporting rationales. In the *Chinese Exclusion Cases*, for example, the Court infamously invoked national sovereignty as one basis for the federal government's plenary power over immigration.<sup>272</sup> Debunking the sovereignty rationale in service

---

<sup>268</sup> See *Texas v. United States*, 809 F.3d 134, 155–56 (5th Cir. 2015).

<sup>269</sup> See *Texas v. United States*, 86 F. Supp. 3d 591, 617–18 (S.D. Tex. 2015) (“[I]n the wake of the Ninth Circuit’s decision in *Arizona Dream Act Coalition v. Brewer*, it is apparent that the federal government will compel compliance by all states regarding the issuance of driver’s licenses to recipients of deferred action.”).

<sup>270</sup> See *supra* notes 169–74 and accompanying text.

<sup>271</sup> Indeed, for instrumentally minded advocates, these types of adjustments may be an important takeaway of this Article. See *infra* Part V (suggesting how advocates might leverage our insights about immigration exceptionalism’s common-root system of supporting rationales).

<sup>272</sup> *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (linking “[t]he power of exclusion of foreigners” to the “sovereignty belonging to the government of the United States”); see also Kerry

of the rights preference would seemingly tame immigration's extra-constitutional status and thus allow for normal judicial review when constitutional rights are implicated.<sup>273</sup> But doing so might also cascade into federalism. After all, thick notions of *national* sovereignty are potential antidotes to thick notions of *state* sovereignty. Thus, relaxing the former might have implications for the latter.<sup>274</sup> Indeed, both restrictionist and integrationist subfederal jurisdictions have rallied behind robust conceptions of state sovereignty to defend their immigration-related preferences.<sup>275</sup> Moreover, Texas relied on its sovereign status as a reason to support Article III standing to challenge DAPA, including on separation of powers grounds.<sup>276</sup> Now, states are doing the same in their legal challenges to President Trump's immigration ban.<sup>277</sup>

Again, it is not our purpose to make predictions here. Our aim is simply to bring new attention to the possibilities. Advocates and theorists may get a little more, or a little less, than they ask of courts. That slack is not unique to immigration. But, when dealing in the currency of exceptional government power, the effects can be vastly magnified.

### B. *The Federalism Preference*

Turning to the federalism dimension reveals similar tensions and accommodations. As explained in Parts I and II, there are several immigration federalism doctrines advanced and supported in the literature today, which to greater and lesser extents, may all be up for grabs in the

---

Abrams, *supra* note 237, at 617–18 (observing that “plenary power and structural immigration preemption are distinct concepts,” but that “early cases articulating the two doctrines drew on the same logic”).

<sup>273</sup> See *supra* Section IV.A.

<sup>274</sup> To be clear, these sovereignties are different. In the federalism context, however, they are relativistic. Thus, the meaning and scope of national sovereignty can have implications for state sovereignty, and vice versa.

<sup>275</sup> See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2511–12 (2012) (Scalia, J., dissenting) (“As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress.”); see also Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 296, 309 (2012) (providing constitutional defense of state and local sanctuary policies); Markowitz, *supra* note 97 (explaining and defending the legality of the proposed state citizenship bill on sovereignty grounds); Brief of Respondent Texas in Opposition at 17–19, *United States v. Texas*, 136 S. Ct. 2271 (2015) (No. 15-674) (arguing that Texas should be granted standing based on its sovereign status).

<sup>276</sup> See Brief of Respondent Texas in Opposition, *supra* note 275, at 17–19.

<sup>277</sup> See *Washington v. Trump*, No. 17-35105, 2017 WL 655437 (9th Cir. Feb. 16, 2017) (holding that Washington and Minnesota have standing); Complaint for Declaratory & Injunctive Relief, *Washington v. Trump*, No. C17-0141JLR (W.D. Wash. Jan. 30, 2017); see also *supra* notes 5–6 (original and revised immigration bans).

Court. We now revisit those immigration federalism doctrines, recast through our trilemma.

1. *The Exclusivity Principle*.—To begin, a robust exclusivity doctrine can help deliver part of the first-best scenario’s federalism preference—namely, the part that squeezes restrictionist state and local laws from the national landscape. Recall that the Court has limited the exclusivity principle to regulations governing the admission and expulsion of noncitizens (i.e., immigration regulation).<sup>278</sup> Some theorists, advocates, and lower court jurists have approached this doctrine functionally, such that restrictionist regulations that make life more difficult for undocumented immigrants, or indirectly affect migration decisions, are treated as immigration regulation.<sup>279</sup>

For immigrant advocates, the appeal of this functionalist approach is the ends it delivers. But the rationale behind the functional approach could be extended further to sweep immigration-friendly policies into the preemption vortex. After all, if indirect restrictionist *pushes* from a state or city are enough to trigger the exclusivity principle, why don’t integrationist *pulls* of immigrants into a state also trigger preemption? In theory, at least, if immigrants are mobile enough to exit from a jurisdiction where life is made hard for them or their families, immigrants may be mobile enough to enter a jurisdiction where life can be better. Empirically, perhaps that is not the case. But we are aware of no studies that demonstrate the difference. Although it is not clear how these tensions might be resolved, a robust exclusivity principle surely opens the possibility of this intra-dimensional tradeoff—namely, structural preemption of restrictionist *and* integrationist subfederal laws.<sup>280</sup>

---

<sup>278</sup> As explained earlier, preemption via the exclusivity principle is said to derive from the constitutional structure; thus, the existence (or not) of a conflict with federal law is theoretically irrelevant. See *supra* Section II.B.1. Instead, what matters is whether the subfederal law qualifies as a “regulation of immigration.” See *DeCanas v. Bica*, 424 U.S. 351, 353, 363–65 (1976); Rubenstein, *supra* note 29, at 118–31 (distinguishing structural preemption, statutory preemption, and administrative preemption).

<sup>279</sup> See, e.g., *Lozano v. City of Hazleton*, 620 F.3d 170, 220 (3d Cir. 2010), *vacated*, 563 U.S. 1030 (2011) (“We recognize, of course, that Hazleton’s housing provisions neither control actual physical entry into the City, nor physically expel persons from it. Nonetheless, [i]n essence, that is precisely what they attempt to do.” (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 160 (1989)) (internal quotation marks omitted)); see also *supra* Sections I.B.1, II.B.1.

<sup>280</sup> See Erin F. Delaney, Note, *In the Shadow of Article I: Applying a Dormant Commerce Clause Analysis to State Laws Regulating Aliens*, 82 N.Y.U. L. REV. 1821, 1834, 1839–40 (2007) (“[P]reemption analysis, even assuming that it is effectively and predictably applied, might actually undermine pro-immigrant reform efforts.”); cf. Rodríguez, *supra* note 194, at 609 (“[I]ntegration measures sometimes resemble immigration controls. This overlap is given little thought in a world of federal exclusivity, but the success of immigrant integration depends on it.”).

Moreover, inter-dimensionally, it is worth recalling here that the exclusivity principle is historically linked to the plenary power doctrine in rights cases. Thus, reifying the exclusivity principle may also indirectly reify rights exceptionalism. Immigrant advocates surely do not intend that. But government lawyers might.<sup>281</sup>

2. *Executive Preemption via Nonbinding Policy.*—Like the federal exclusivity principle, executive preemption via nonbinding policies is not a one-way ratchet. On the one hand, this exceptional doctrine has the potential to advance the federalism, rights, and separation of powers preferences simultaneously. For example, executive preemption can quash restrictionist subfederal laws (thus boosting the federalism preference). Meanwhile, executive preemption can root out race-based subfederal immigration enforcement (advancing the rights preference), and perform better in that regard than congressional statutes (thus furthering the separation of powers preference). Moreover, executive preemption can do useful work that the exclusivity principle cannot. Whereas the exclusivity principle operates only on subfederal immigration regulations, executive preemption can displace restrictionist alienage regulations (i.e., those that pertain to noncitizens but that do not qualify as regulations of admission or removal).<sup>282</sup>

On the other hand, however, executive preemption via nonbinding executive policy might upset the federalism, separation of powers, and rights preferences as well.<sup>283</sup> For instance, a sufficiently motivated Executive might unilaterally craft rights-depriving programs, and preempt integrationist state laws that try to intercede. Under this skeptical scenario, trending integrationist measures like California’s TRUST Act, local sanctuary laws throughout the country, and New York’s contemplated state citizenship bill may become the next targets of executive preemption.<sup>284</sup>

---

<sup>281</sup> See, e.g., Brief for Petitioner at 7, *Kerry v. Din*, 135 S. Ct. 2128 (2015) (No. 13-1402) (the government linking federal exclusivity to consular nonreviewability).

<sup>282</sup> See *supra* notes 104–09 and accompanying text (explaining the Court’s dichotomous treatment of immigration versus alienage regulations, and how the line between breaks down in theory and practice).

<sup>283</sup> See Rubenstein, *supra* note 124 (elaborating on these points).

<sup>284</sup> See California Trust Act, CAL. GOV’T CODE § 7282 (West 2014); Brief for the Center on the Administration of Criminal Law as Amicus Curiae Supporting Appellee-Plaintiff at 23, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645) (stating that at least seventy-three cities, counties, and states have at various times had “non-cooperation” provisions); Hing, *supra* note 275, at 296, 309 (discussing sanctuary laws and defending them on constitutional and normative grounds); Markowitz, *supra* note 97, at 905–10 (same for New York’s contemplated state citizenship law); Rosenbaum, *supra* note 208, at 504–14, 522–25 (same for California TRUST Act). Moreover, although the Obama Administration’s rollout of the Secure Communities program may not have been motivated to shut down subfederal sanctuary and non-cooperation laws, it had that effect throughout many

Indeed, President Trump’s executive order on interior enforcement makes it clear that his Administration intends to crack down on local jurisdictions that interfere with federal enforcement efforts.<sup>285</sup> In addition, he has directed DHS to enter into as many § 287(g) agreements<sup>286</sup> as possible with willing local agencies and municipalities.<sup>287</sup> In opposition, the California legislature is currently considering a “state sanctuary” bill, which includes a provision barring localities in the state from entering into section § 287(g) agreements.<sup>288</sup> If the state law passes, could the executive order and its implementing guidance preempt it?

To be clear, we take no position here on whether these and other integrationist initiatives can survive preemption challenges under existing federal statutes and mainstream federalism doctrines. For present purposes, the point is that a robust executive-preemption doctrine opens a new legal front: federal administrators’ interference with subfederal integrationist policies.<sup>289</sup> Certainly, there is no shortage of legal or political reasons that a sufficiently motivated administration might offer for doing so. Just to name a few, administrators might claim that state or local integration programs interfere with a federal statute,<sup>290</sup> interfere with (new) enforcement priorities, unduly incentivize unlawful migration to the country, create untoward races-to-the-top (or bottom) among the states for human

---

jurisdictions. *See Cox & Rodríguez, Redux, supra* note 158, at 137 (“Secure Communities promised to displace the unpredictable human element of formal and informal cooperation with local police.”).

<sup>285</sup> Exec. Order 13,768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017) (detailing, in § 9, an intent to have the DOJ and DHS impose financial penalties on “sanctuary jurisdictions”).

<sup>286</sup> *See id.*; 8 U.S.C. § 1357(g) (2006) (authorizing the federal government to enter into agreements with state and local agencies to seek state and local aid in immigration enforcement).

<sup>287</sup> Exec. Order 13,768, § 8 (detailing that it is the “policy of the executive branch to empower State and local law enforcement agencies . . . to perform the functions of an immigration officer” through the use of 287(g) agreements); *see also* Memorandum from John Kelly, Sec’y, U.S. Dep’t. of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot., et al. (Feb. 20, 2017) (detailing implementation policies for “[e]xpansion of the 287(g) [p]rogram in the [b]order [r]egion”).

<sup>288</sup> S.B. 54, 2017–2018 Leg., Reg. Sess. (Cal. 2017). This proposed state law, and specifically § 7284.6(a)(H), would prohibit state law enforcement agencies from “[p]erforming the functions of an immigration officer, whether pursuant to [§ 287(g)] . . . or any other law, regulation, or policy, whether formal or informal.”

<sup>289</sup> *See* Rubenstein, *supra* note 124, at 1004–05.

<sup>290</sup> *See, e.g.,* Application and Proposed Brief for Amicus Curiae the United States of America at 2, *In re Garcia*, 315 P.3d 117 (Cal. 2014) (No. S202512) [hereinafter *Garcia Amicus Brief*] (arguing that California had no authority under then-extant law to admit an undocumented immigrant to the state bar).

capital,<sup>291</sup> or reduce incentives for undocumented immigrants to voluntarily depart.<sup>292</sup>

Indeed, even the Obama Administration—which introduced DACA and DAPA—intervened to challenge certain state integrationist policies. For example, when Illinois tried to limit the use of the federal E-Verify system to check employment authorization, the Administration successfully sued to preempt that state law.<sup>293</sup> And, when the California Supreme Court was considering whether to admit an undocumented immigrant as a lawyer to the state bar, the Obama Administration filed an amicus brief arguing that the state court could not do so under existing federal law.<sup>294</sup>

To be sure, political forces might temper executive preemption of subfederal integrationist laws, particularly with the rising power and prominence of Latino voters.<sup>295</sup> But politics is not a limiting principle that theorists should necessarily rush to, especially if it is the *only* limiting principle. Politics has not prevented past administrations from taking hardnosed (not to mention, rights-depriving) actions against immigrants.<sup>296</sup>

---

<sup>291</sup> Cf. Rodríguez, *supra* note 194, at 588 (discussing a report in Iowa that called for “immigrant recruitment to reenergize the state’s population, characterizing immigrants as productive, motivated, eager to work, and entrepreneurial”).

<sup>292</sup> See Rubenstein, *supra* note 124, at 1005–06.

<sup>293</sup> See *United States v. Illinois*, No. 07-3261, 2009 WL 662703, at \*3 (C.D. Ill. Mar. 12, 2009).

<sup>294</sup> See Garcia Amicus Brief, *supra* note 290, at 2. Subsequent to oral argument at the California Supreme Court, the California legislature passed a law providing bar licenses for undocumented applicants, thus obviating the specific objection of the federal government. See CAL. BUS. & PROF. CODE § 30 (West 2014).

<sup>295</sup> This may be especially true as the Latino electorate becomes a critical voting bloc for winning presidential primaries and general elections. Mark Hugo Lopez & Paul Taylor, *Latino Voters in the 2012 Election*, PEW HISP. CTR. REP. (Nov. 7, 2012), <http://www.pewhispanic.org/2012/11/07/latino-voters-in-the-2012-election/> [<https://perma.cc/ZNN6-YTWU>]; Lizette Ocampo, *Top 6 Facts on the Latino Vote*, CTR. FOR AM. PROGRESS (Sept. 17, 2015, 9:04 AM), <https://www.americanprogress.org/issues/immigration/news/2015/09/17/121325/top-6-facts-on-the-latino-vote/> [<https://perma.cc/AT4L-9D7E>]. Even so, however, it assumes that Latino voting preferences on immigration will remain static and predictable. This may not be so. For example, in California, it has been true for a little more than two decades that Latinos vote mainly Democratic and care deeply about immigration issues. However, prior to Pete Wilson’s embrace of Proposition 187, Latino voting in California was much less predictable and up for grabs. See Cathleen Decker, *‘90’s Immigration Battle Remade California’s Political Landscape*, L.A. TIMES (Nov. 23, 2014), <http://www.latimes.com/local/politics/la-me-pol-california-politics-20141123-story.html> [<https://perma.cc/6H2A-CF4M>].

<sup>296</sup> See Johnson, *supra* note 208, at 635–36 (noting, among other episodes, “the repatriation of persons of Mexican ancestry . . . during the Great Depression, deportations of communist party members during the McCarthy era, exploitation of Mexican workers through the Bracero Program, the mass arrests, detentions, and removals of Muslim and Arab noncitizens after the attacks on September 11, 2001, and the raids, detention, and removal of noncitizens in contemporary times” (footnotes and internal quotation marks omitted)).

Quite often, anti-immigrant politics is to blame for these incursions, and it will be the cause of future ones.<sup>297</sup>

Moreover, administrative notice-and-comment rulemaking procedures could offer some inertial resistance against executive preemption. By law, those procedures open administrative decisions to a plurality of viewpoints (including by states and subfederal officials), requiring the agency to take competing viewpoints into consideration and to justify any final decisions made.<sup>298</sup> But, as discussed above, these administrative procedures are not prerequisites to the preemption doctrine under consideration.<sup>299</sup> Indeed, that is partly what makes preemption via nonbinding executive policies so exceptional and its backing by immigrant advocates so chancy.

Thus far, what has saved some integrationist measures from challenge is the general difficulty of establishing standing to sue.<sup>300</sup> But the *Texas*

---

<sup>297</sup> Consider the Obama Administration's raids to find and remove Central American immigrants, many of whom may have legitimate claims to asylum and are arguably not receiving fair treatment. For a recent report, see Jerry Markon and David Nakamura, *Tensions Escalate Further Between Obama, Democrats over Deportation Raids*, WASH. POST (Jan. 12, 2016), <https://www.washingtonpost.com/news/federal-eye/wp/2016/01/12/tensions-escalate-further-between-obama-democrats-over-deportation-raids/> [<https://perma.cc/M8AR-VKBN>].

<sup>298</sup> As applied by the Court, the APA's notice-and-comment procedure is demanding (though, to be sure, less demanding than the legislative process). First, the agency must provide advance notice of its proposed rulemaking in the Federal Register and offer interested parties the opportunity to submit written comments in response. See 5 U.S.C. § 553(b)–(c) (2012). Moreover, to enable meaningful public comments, courts have required the agency to make its intentions clearly known in the notice of rulemaking. See, e.g., *Nat. Res. Def. Council v. EPA*, 279 F.3d 1180, 1187–88 (9th Cir. 2002). Further, because courts require that an agency's final rule be a "logical outgrowth" of what the notice foreshadowed, the agency may not change an important aspect of a proposed rule without first providing an additional notice and opportunity for public comment. See, e.g., Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213, 214 (1996) ("Generally stated, if the final rule is found by the reviewing court to be the logical outgrowth of the proposed rule, it will find adequate notice . . ."). Finally, although the APA textually requires that a final regulation be accompanied by a "concise general statement of [the regulation's] basis and purpose," § 553(c), courts generally require the agency to respond to all significant comments received, which burdens the agency to explain its decisions rather thoroughly. See, e.g., *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983) (discussing that hard look review requires an agency to articulate the reasoning behind its decision and the court must review the reasoning); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 761 (2008) (providing that hard look doctrine requires agencies "to offer detailed, even encyclopedic, explanations" for agency actions); see also Hickman, *supra* note 122, at 474 (explaining that, despite the text of § 553(c), that judicial requirements for explanation "[e]schew[] concision"). Apart from the foregoing, notice-and-comment rulemakings potentially trigger political and judicial oversight. See Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244, 258 (1987).

<sup>299</sup> See *supra* notes 123–27, 199–205 and accompanying text.

<sup>300</sup> See, e.g., *Arpaio v. Obama*, 797 F.3d 11, 25 (D.C. Cir. 2015) (holding that Maricopa County, Arizona Sheriff, Joe Arpaio, lacked standing to challenge DAPA); *Day v. Sebelius*, 376 F. Supp. 2d 1022, 1033–34 (D. Kan. 2005) (holding that plaintiffs lacked standing to challenge Kansas's in-state

litigation challenging DAPA may widen or open new paths to state standing. The district court and the Fifth Circuit held that Texas had met its burden in this regard, and the Supreme Court evenly split on the issue.<sup>301</sup> In any event, standing requirements will not prevent the federal government from suing to shut down state laws—whether restrictionist (as the Obama Administration did in Arizona) *or* integrationist (as it did in Illinois)—or simply weighing in as amicus (as it did in California).

Ironically, the best defense for subfederal jurisdictions against robust executive power may be *mainstream* constitutional federalism norms, such as the anti-commandeering doctrine.<sup>302</sup> Taken at face value, the anti-commandeering doctrine forbids the Executive to compel state or local action. For instance, in the immigration context, the Executive would be prohibited from compelling subfederal lawmaking bodies to pass restrictionist immigration measures, compelling subfederal officers to share immigration-related information with federal authorities, or compelling subfederal officers to detain removable immigrants on the federal government’s behalf. Indeed, the anti-commandeering principle and related state sovereignty rationales play leading roles in the scholarship defending subfederal sanctuary policies and, more recently, state citizenship.<sup>303</sup>

But here again is the rub: as of yet, there is no judicially recognized theory that explains why certain federalism doctrines, but not others, should be relaxed for immigration. Indeed, the reasons for treating immigration federalism exceptionally could be marshaled in favor of an immigration law carve out from the anti-commandeering doctrine. The Court’s forefront (or at least formal) reasons for the anti-commandeering doctrine are rooted in thick notions of *state* sovereignty.<sup>304</sup> Yet, if that

---

tuition law for undocumented immigrants). *But cf.* *Texas v. United States*, 809 F.3d 134, 162–63 (5th Cir. 2015) (holding that the state of Texas had standing to challenge DAPA).

<sup>301</sup> *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (mem.) (per curiam); *Texas v. United States*, 809 F.3d 134, 151–63 (5th Cir. 2015); *Texas v. United States*, 86 F. Supp. 591, 616–44 (W.D. Tex. 2015); *cf.* *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (noting that states receive “special solicitude” in the standing analysis). Although the Supreme Court’s per curiam decision in *Texas* did not expressly provide the bases for its split, the four Justices upholding the lower court’s preliminary injunction could only have reached that result if they also found that Texas demonstrated the threshold requirement of Article III standing. Conversely, the four votes that would have overturned the lower court might have done so either on standing grounds, on the merits, or both.

<sup>302</sup> *See Printz v. United States*, 521 U.S. 898, 926–28 (1997) (holding that the federal government cannot commandeer subfederal officers); *New York v. United States*, 505 U.S. 144, 176 (1992) (holding that the federal government cannot commandeer state legislatures).

<sup>303</sup> *See generally* Hing, *supra* note 275 (relying on strong conceptions of state autonomy and sovereign authority to defend positions on sanctuary laws); Markowitz, *supra* note 97 (same as to state citizenship proposals, which include and extend beyond sanctuary policies).

<sup>304</sup> *See Printz*, 521 U.S. at 935 (explaining that federal commandeering of state officials is “fundamentally incompatible with our constitutional system of dual sovereignty”); *see also* *New York*,

sovereignty is porous enough to allow preemption via nonbinding executive policies, perhaps it is also porous enough to allow commandeering.

We are not suggesting that the anti-commandeering norm will or should be relaxed for immigration; just that the logic of exceptional immigration preemption authority leaves open the possibility. Lest it be forgotten, the federal government historically commandeered state courts in immigration. The Supreme Court's anti-commandeering holding in *Printz v. United States* distinguished that immigration precedent but did not expressly disavow it.<sup>305</sup>

3. *Equal Pro-Emption*.—Like the exclusivity principle and executive preemption, the proposed doctrine of Equal Pro-Emption carries a set of potential costs and benefits. Preliminarily, judicial buy-in to this exceptional doctrine may not be forthcoming. Equal Pro-Emption must overcome a trifecta of rights, federalism, and separation of powers jurisprudence of the Court's own creation.<sup>306</sup> The concern expressed here is not with the merits of Equal Pro-Emption. Instead, the concern that we flag is the immigration federalism regime that might emerge if Equal Pro-Emption is eschewed by the Court, while other exceptional preemption doctrines are ushered in.<sup>307</sup> Put otherwise, an immigration federalism package that includes robust federal exclusivity and executive preemption doctrines (without Equal Pro-Emption) might be worse on the whole than a federalism regime with no exceptional preemption doctrines.

Apart from these intra-dimensional considerations, Equal Pro-Emption's hybrid composition of federalism and rights norms cries out for an inter-dimensional assessment. On the one hand, Equal Pro-Emption—if adopted by the Court—could serve to preempt restrictionist subfederal laws, thus potentially vindicating constitutional rights indirectly. Moreover, it is often more palatable for courts to rule on preemption grounds than on

---

505 U.S. at 177 (striking down federal law directing state legislatures to pass laws consistent with federal standards).

<sup>305</sup> 521 U.S. at 905–07 (“These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.”); *see also id.* at 949 (Stevens, J., dissenting) (chastising the majority for discounting this historical precedent). Indeed, for the initial period of federal control over immigration (from 1882 to 1891) the federal government relied on existing state institutions and officials to execute its policies. This remained true until the federal government created its own administrative apparatus. *See* GULASEKARAM & RAMAKRISHNAN, *supra* note 31, at 26–27.

<sup>306</sup> *See* Rubenstein, *supra* note 29, at 107–12.

<sup>307</sup> *See id.*

constitutional rights grounds, as the latter requires courts to find that facially neutral laws are, indeed, purposefully discriminatory.<sup>308</sup>

On the other hand, however, what makes Equal Pro-Emption potentially problematic are these appealing qualities. To begin with, vindicating rights via preemption carries ancillary opportunity costs. In cases where Equal Pro-Emption might apply (namely, to challenge subfederal restrictionist laws), a more direct rights challenge will almost always be available.<sup>309</sup> Yet, when courts choose to directly rule *only* on preemption grounds, which is common,<sup>310</sup> then important questions about rights may go unanswered, or worse, simply shrugged away.<sup>311</sup>

The *Arizona* litigation, itself, offers a striking example. There, the federal government challenged Arizona's laws only on preemption grounds. And when pressed by Chief Justice Roberts during the opening moments of oral argument, the U.S. Solicitor General conceded that the federal government's challenge did not rely on claims of racial or ethnic

---

<sup>308</sup> See, e.g., Fan, *supra* note 208, at 940–42. That said, the initial hurdle of expressly adopting Equal Pro-Emption, in the first instance, will require the Court to explain why it is appropriate to shift the burden to states to disprove discriminatory intent. Cf. Rubenstein, *supra* note 124, at 1006–07 (explaining the institutional and doctrinal hurdles that make this unlikely from a conservative Court). Paradoxically, crafting the doctrine, in the first place, will require the very judicial hubris that the doctrine is designed to avoid in downstream applications. That is, before *applying* a judicially countenanced Equal Pro-Emption doctrine, the Court must first explain why shifting the burden to states to disprove discrimination is doctrinally appropriate. Perhaps for that reason, Equal Pro-Emption might do better as an inchoate doctrine. If lower courts are already receptive to employing an equality norm *sub silencio*, the best strategy for immigrant advocates may be to wink at the courts but without making it too obvious.

<sup>309</sup> Thus, in such cases, reviewing courts might choose to rule on preemption grounds, rights grounds, or both. The Supreme Court, for its part, has run the gamut. In *Toll v. Moreno*, a case challenging a state-alienage classification, the Court sidestepped the equal protection question, and decided the case on the basis of preemption. 458 U.S. 1, 11 n.16 (1982). In *Plyler v. Doe*, the Court ruled on equal protection grounds, and expressly declined to rule on preemption grounds. 457 U.S. 202, 224–26 (1982). And, in *Graham v. Richardson*, the Court ruled on both equal protection and preemption grounds. 403 U.S. 365, 375–76, 382 (1971). It bears noting, however, that *Graham* ruled that equal protection and preemption were each independent grounds for striking down the state law at issue. *Id.* By contrast, the Equal Pro-Emption theory infuses preemption with equality norms, but does not entail or require a finding that an equal protection violation has in fact occurred. See *supra* notes 128–41 and accompanying text.

<sup>310</sup> *Lozano v. City of Hazleton*, 620 F.3d 170, 206 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011); *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 765–67, 769 (10th Cir. 2010); *United States v. Arizona*, 703 F. Supp. 2d 980, 991–1007 (D. Ariz. 2010); *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835, 851–59 (N.D. Tex. 2010); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 866–75 (N.D. Tex. 2008); *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1056–57 (S.D. Cal. 2006).

<sup>311</sup> Johnson, *supra* note 208, at 612 (observing that judicial reliance on preemption theories to analyze subfederal restrictionist laws “often fails to directly address the civil rights impacts on minority communities”); see also Fan, *supra* note 208, at 932–38.

profiling.<sup>312</sup> Later, in upholding Section 2(B) against the government’s facial preemption challenge, the Court declined to presume that a state law would be interpreted by the state court in a way that would lead to constitutional violations against immigrants or people of color.<sup>313</sup>

Of course, the *result* in any particular case may be the same regardless of whether the reviewing court rules on preemption or rights grounds. Namely, the subfederal law at issue may be invalidated. Yet there is an important difference: preemption vindicates notions of federal primacy; it does not directly vindicate individual rights *per se*.<sup>314</sup> For some, that difference matters.<sup>315</sup>

In important respects, the subfederal immigration revolution of the past decade has presented an opportunity to rethink constitutional rights—not just in immigration, but also more generally. When courts and advocates rely on preemption theories as a crutch, it detracts and distracts from what arguably matters more: advancing rights *qua* rights. Of course, that is not to deny the relevance or importance of structural concerns. But, the fact that immigrant advocates and theorists tend to focus mostly on subfederal restrictionist laws, and not integrationist ones, strongly indicates that discrimination (not federalism) is the driving concern.

More generally, Equal Pro-Emption is a concession that immigration law can be exceptional. That could pose problems—now or later—for those claiming that immigration should not be exceptional. Meanwhile, for those who believe that immigration can or should be exceptional for some

---

<sup>312</sup> To the consternation of many immigrant advocates, the federal government challenged S.B. 1070 only on preemption grounds (presumably because challenging the state’s restrictionist laws on equal protection grounds would have been more difficult, both legally and politically). *Cf.* Fan, *supra* note 208, at 938 (“Antidiscrimination norms did not expressly enter the district court’s analysis, though the court was quite cognizant of the concerns and they arguably influenced its preemption analysis.” (footnote omitted)). In a telling exchange during the opening moments of oral argument, Chief Justice Roberts interrupted Solicitor General Donald Verrilli to inquire: “Before you get into what the case is about, I’d like to clear up at the outset what it’s not about. No part of your argument has to do with racial or ethnic profiling, does it?” Transcript of Oral Argument at 33, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182). The Solicitor General relented, responding: “That’s correct.” *Id.* And when the issue of race surfaced only minutes later in the Solicitor General’s comments, Justice Scalia was quick to remind the Solicitor General of his earlier commitment to what the case was not about. *Id.* at 47.

<sup>313</sup> *Arizona*, 132 S. Ct. at 2509–10.

<sup>314</sup> Bosniak, *supra* note 69, at 1107 (suggesting that federalism and the Supremacy Clause concern “institutional process” or “who decides” and not who are the “the rightful subjects of equality”).

<sup>315</sup> Harold Koh, for example, long ago lamented the inadequacies of preemption as a substitute for equal protection in cases involving discrimination against noncitizens. *See* Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 *HAMLIN L. REV.* 51, 97–98 (1985). Moreover, as Professor Mary Fan explains, a danger of using preemption as a proxy for vindicating rights is that it may allow racialized sentiments “to fester wholly unaided” and “embolden[] the angry and anxious to enact intensifying and multifarious vehicles of venting ire at the expense of out-groups.” Fan, *supra* note 208, at 942.

purposes (even if not for others), there might still be reason for pause. Equal Pro-Emption muddles the boundaries between rights and federalism. In other settings, that can lead to federalism–rights spillovers that inure to the detriment of immigrant interests.<sup>316</sup>

### C. Separation of Powers Preference

Finally, turning to separation of powers, some scholars and advocates support the notion that the Executive has (or should have) exceptional leeway to pursue immigration policies.<sup>317</sup> How the Court rules on that issue can have implications beyond separation of powers.

Consider the impact on the rights preference if the Court embraces an inherency or functional theory of executive power. If rights exceptionalism remains, then in future cases the Executive could use its power in rights-degrading ways.<sup>318</sup> For instance, the Executive could—as it did post-9/11—create enforcement or immigration-gathering programs that target immigrants of certain nationalities.<sup>319</sup> On an inherency rationale, the Executive might take even more pernicious action, without any need for express congressional authorization, and even despite statutory prohibitions.

If the retort is that immigrant interests, however defined, are in comparatively better hands with the Executive than in other government institutions, then much would seem to depend on who the President is. Under conditions where relevant political majorities and the White House are decidedly anti-immigrant, we can forget about the best-case scenario for immigrant interests and turn to worst-case scenarios. Indeed, those scenarios may be dawning under President Trump.

---

<sup>316</sup> Professor Condon’s recent study, which suggests that lower courts are increasingly consulting *federal* policies as a benchmark to gauge rights challenges to *subfederal* policies, may be a cautionary example. See Condon, *supra* note 82.

<sup>317</sup> See *supra* Section II.C.

<sup>318</sup> Cf. Margulies, *supra* note 159 (arguing that DAPA is ultra vires and cautioning that the program sets a dangerous political precedent); see also William P. Marshall, *Actually We Should Wait: Evaluating the Obama Administration’s Commitment to Unilateral Executive-Branch Action*, 2014 UTAH L. REV. 773, 775 (“Presidential power has already expanded dramatically since the middle part of the twentieth century . . . . In light of this reality, investing the presidency with even more powers is problematic no matter what the circumstances.”).

<sup>319</sup> Following the terrorist attacks of September 11, 2001, the Department of Justice rolled out the “special registration” program of the National Security Entry-Exit Registration System (“NSEERS”). Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 67,766 (Nov. 6, 2002). This program required thousands of young men from predominantly Muslim countries to report to local immigration offices for interrogations, fingerprints, and photographs, and withstood constitutional and administrative law challenges. See, e.g., *Kandamar v. Gonzales*, 464 F.3d 65, 73–74 (1st Cir. 2006); *Hadayat v. Gonzales*, 458 F.3d 659, 665 (7th Cir. 2006); *Ahmed v. Gonzales*, 447 F.3d 433, 439–40 (5th Cir. 2006); *Ali v. Gonzales*, 440 F.3d 678, 681 n.4 (5th Cir. 2006); *Zafar v. U.S. Att’y Gen.*, 461 F.3d 1357, 1367 (11th Cir. 2006).

Depending on perspective, these concerns may be partly allayed, or intensified, under the dynamic lawmaking models recently advanced by Cox and Rodríguez (writing together) and Motomura. They offer rule of law norms as a limiting principle.<sup>320</sup> Even then, however, the conditions for legitimate executive lawmaking under their models might be satisfied if the executive policy is transparent and reduces arbitrary enforcement relative to the system it replaces. So, for instance, if a President announces from the Rose Garden that Immigration and Customs Enforcement officials should consistently exclude Muslim immigrants, and offers arguably rational reasons for doing so, that might satisfy the rule of law values touted by supporters of DAPA/DACA.<sup>321</sup> And, insofar as the rule of law ideal is not a *judicially* enforceable standard—which Cox and Rodríguez acknowledge<sup>322</sup>—it is not clear that the rule of law is a limiting principle at all, beyond self-regulation in the *political* sphere.<sup>323</sup>

Beyond upsetting the rights preference, an exceptional executive authority can also undermine the federalism preference, for reasons that we have already previewed.<sup>324</sup> Under mainstream federalism doctrine, only valid federal laws can preempt state and local laws. But if the Executive has inherent or dynamic lawmaking authority, then that could vastly expand the class and types of federal law that can preempt subfederal laws.

Nothing we have said denies the potential good that may come from special separation of powers doctrines and arrangements. Foremost, the Executive might use its enhanced power in ways that ease Congress's harsh deportation laws in nonarbitrary ways (furthering the separation of powers preference), do so in rights-regarding ways (consistent with the rights preference), and promote state and local integration of immigrants (per the

---

<sup>320</sup> Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 26–27 (2016) (arguing that rule of law norms are a reason why (1) the plenary power should be abrogated, (2) top-down categorical enforcement policies within the Executive Branch—in particular, DACA and DAPA—are lawful, and (3) subfederal restrictionist laws should be preempted); see also Cox & Rodríguez, *Redux*, *supra* note 158, at 192–93; MOTOMURA, *supra* note 24, 204–05.

<sup>321</sup> Cf. Rubenstein, *supra* note 124, at 1002 (flagging this concern). The rule of law, of course, is a highly contested and complicated collection of norms. See Erwin Chemerinsky, *Toward a Practical Definition of the Rule of Law*, JUDGES J., Fall 2007, at 4 (“Few concepts in law are more basic than the rule of law, few are more frequently invoked, and yet few are more imprecisely defined.”). However, under most conceptions, judicial review is a core ingredient. See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 216–17 (1969). For a useful typology of the “thick” and “thin” gradients of the rule of law, see BRIAN TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* ch. 7 (2004).

<sup>322</sup> Cox & Rodríguez, *Redux*, *supra* note 158, at 210–14.

<sup>323</sup> Cf. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2011) (arguing that the modern presidency is unconstrained by law); Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1410–13 (2012) (reviewing and critiquing the account portrayed by Posner and Vermeule).

<sup>324</sup> See *supra* notes 288–93 and accompanying text.

federalism preference). But there are less idyllic scenarios, which deserve greater airtime in debates about immigration exceptionalism.

\* \* \*

Our stylized trilemma does not advocate for suboptimal scenarios, or, indeed, for any set of tradeoffs that might ensue. Rather, it brings the potential costs and benefits to the same ledger. Due to immigration exceptionalism's common-root system of putative rationales, reasons offered in favor or against exceptionalism in one doctrinal context may spill into others. Normative accommodations, whether and however made, will almost certainly be necessary.

We leave open the possibility that a mix of exceptional structural doctrines may deliver a second-best regime, given that rights normalization may not be in the cards. We also fully appreciate that, under certain political conditions, the structural immigration doctrines up for grabs may bode well for undocumented immigrants. Because this population is generally removable by federal statute,<sup>325</sup> undocumented immigrants stand to benefit from the combined effects of a gridlocked Congress, an Executive Branch that deprioritizes enforcement against certain categories of potentially removable immigrants, and a robust preemption doctrine that prevents state and local governments from filling the enforcement gap. Still, as a means to these and related ends, federalism and separation of powers exceptionalism come with a major limitation: any promise they hold is politically contingent.

#### V. A NEW FOUNDATION FOR IMMIGRATION THEORY

This Article calls for a shift in how theorists, advocates, and jurists engage questions about immigration exceptionalism moving forward. Context-specific treatments are important but inherently limited precisely because they do not account for the dynamism between constitutional contexts. Our suggested reframing spans across myriad constitutional dimensions to capture how the Court's various doctrines interact with each other and with politics in ways that impact the whole system.

The latent tradeoffs in this integrated system can only be appreciated by expanding the frame to look. This Article's purpose has been to scaffold a new infrastructure to capture those tradeoffs in the first place. From this new starting position, future thinking might move in any number of directions. In what follows, we offer some preliminary thoughts to advance those projects, all of which are related.

---

<sup>325</sup> See 8 U.S.C. §§ 1182(a)(6)(A)(i), 1227(a)(1)(A)–(B) (2012).

First, the possibility of doctrinal spillovers means that immigration exceptionalism will almost certainly require normative tradeoffs. Theorists and advocates should account for this *prior* to backing exceptional arrangements or doctrines. Immigration constitutional doctrine tends to be sticky—in ways often unfavorable to immigrant interests and difficult to undo.<sup>326</sup>

A nagging question is how to account for the political and doctrinal dynamics of immigration exceptionalism. On the issue of constitutional rights, scholars heavily discount the federal government's ability to self-regulate its mostly unchecked plenary power. And for good reason: throughout history, the federal government has demonstrated its propensity to use its immigration power in disquieting, if not abhorrent ways. Yet the calculation appears remarkably different when the conversation turns to federalism and separation of powers. As to these structural arrangements, some scholars put significant faith (or perhaps hope) in the federal government's capacity or incentive to self-regulate its broad power. For now, we pass no judgment on these tactics and strategies. However, we emphasize that if consequences matter, then appreciation for the doctrinal and political dynamics limned in this Article is essential to any fair calculation. If nothing else, the doctrinal and political dynamics attending immigration exceptionalism counsel for pragmatic skepticism about whether and how to summon immigration's special qualities. Doctrines that may look good under certain conditions may be dubious in other political contexts.

Second, the tradeoffs inhering in an integrated regime of exceptionalism may be adjustable and contingent, depending on how exceptionalism's root system of supporting rationales is tapped. Though empirically untested, we hypothesize that the likelihood of doctrinal spillovers into adjacent doctrinal contexts may increase as the breadth of the exceptionalism rationale expands. Conversely, as the rationale for or against exceptionalism contracts, the likelihood of doctrinal spillovers may correspondingly abate. If so, scholars and advocates seeking to vindicate justice and opportunity for immigrants might try to leverage this insight when pressing for the right mix of doctrinal spillovers.

Third, scholars and advocates may also consider ways to theorize around the conventional rationales of immigration exceptionalism. If so,

---

<sup>326</sup> Cf. Victor C. Romero, *Devolution and Discrimination*, 58 N.Y.U. ANN. AM. L. 377, 378 (2002) (“Despite calls among many to dismantle it, Congress’s plenary power over immigration, and the Executive’s concomitant authority to enforce it, are likely here to stay . . . .” (footnote omitted)). See generally Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001) (“[C]ourts’ early resolutions of legal issues can become locked-in and resistant to change.”).

then perhaps the doctrinal dynamics treated here can be replaced or complemented with others. Cox and Rodríguez’s “two-principals” model of congressional–executive policymaking may be an example or attempt at this.<sup>327</sup> Essentially, by grounding their arguments in the structure of the INA and its vast delegations (including “de facto delegation”),<sup>328</sup> they attempt to distance their two-principals model from more conventional exceptionalism rationales.

However, even assuming that Cox and Rodríguez’s approach frees initiatives like DAPA/DACA from exceptionalism’s grip, the sorts of cross-dimensional questions showcased here would still persist. For instance, how would (or should) their dynamic separation of powers model interface with Rodríguez’s functional model of immigration federalism? On the one hand, their separation of powers account puts a premium on energized and efficient executive power. On the other hand, Rodríguez’s federalism model contemplates a more robust state role in immigration, including a relaxed federal preemption doctrine.<sup>329</sup> Considered together, do nonbinding enforcement policies have preemptive effect if states try to resist? Those types of bundled questions will still need answers, even when attempting to escape the trappings of exceptionalism.

Fourth, theorists, advocates, and jurists might work to develop a coherent and workable theory of immigration exceptionalism. When they do, the parameters and limitations developed in this Article will serve as important benchmarks. For jurists, in particular, working toward doctrinal coherence may be especially important. That is not to suggest that immigration exceptionalism must be an all-or-nothing proposition. But the lack of judicial reasons for the extant patchwork of mainstream and exceptional doctrines is, itself, an undertheorized phenomenon that courts may be best positioned to fix.

At the same time, however, jurists, advocates, and theorists might consider whether coherence is even worth the candle. All else equal, doctrinal coherence is generally something our system prizes. But, in immigration, coherence can entail very different things. For instance, it can mean coherence between immigration and the rest of constitutional law. Alternatively, coherence might entail consistency within immigration (which might entail across-the-board exceptionalism or normalization). As

---

<sup>327</sup> See Cox & Rodríguez, *Redux*, *supra* note 158, at 159–73.

<sup>328</sup> See *id.* at 130–35.

<sup>329</sup> See Rodríguez, *supra* note 194, at 573 (“[T]he functional account I provide, in addition to undermining the article of faith that state and local immigration regulation is constitutionally preempted, should occasion some shifts in the doctrine governing statutory preemption, primarily by leading courts to assess potential conflicts between federal and state law without giving extra weight to an overriding national interest in immigration regulation.”).

long as consequences matter, coherence—at either level—may be a value worth considering, but only among other values.

Fifth, the foregoing triggers an overarching question of whether the immigration system, as a whole, would be better off moving toward exceptionalism or normalization. Future studies—empirical or theoretical—might pursue which of these poles is preferable.

Finally, a perennial debate in immigration scholarship is whether historic strands of immigration exceptionalism are *dead or alive*.<sup>330</sup> Most commonly, these diagnostic treatments focus on the plenary power doctrine and the related exclusivity principle. Looking ahead, however, more attention should be paid to whether new forms of immigration exceptionalism are being *born*. Should the immigration system embrace new forms of exceptionalism? If so, which ones? Why some but not others?

This Article's core insights are directed at precisely these sorts of issues. Emerging or new forms of immigration exceptionalism can have any number of effects on the system as a whole. As explained and illustrated throughout this Article, *any* form of exceptionalism might reify rights exceptionalism—depending in part on underlying rationales. On the other hand, new forms of exceptionalism might offset or compensate for other forms of exceptionalism, both old and new.

#### CONCLUSION

Immigration exceptionalism has been, and will continue to be, a centerpiece of immigration law and theory. Thus far, however, most treatments of immigration exceptionalism have approached the concept in disjointed and disaggregated ways. This Article's key insight is that the immigration system simply does not work that way. Scholars, advocates, and jurists have a choice between context-specific approaches to immigration exceptionalism on the one hand, and holistic treatments on the other. This Article advances a positive case for the latter, and with it, a new foundation on which to build.

---

<sup>330</sup> See *supra* notes 117–19, 155–57, 182–84 and accompanying text.