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The Constitutional Dimension of Immigration Federalism

Clare Huntington

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The Constitutional Dimension of Immigration Federalism

Clare Huntington*

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INTRODUCTION

In Farmers Branch, Texas, the city council enacted a measure to fine landlords who rent their premises to unauthorized migrants,¹ and in Arizona, the state legislature passed a law imposing stiff penalties on employers who intentionally or knowingly hire unauthorized migrants.² In San Francisco, the board of supervisors passed a measure that bars law enforcement officers from inquiring into the immigration status of an individual in the course of a criminal investigation.³ In Alabama and Florida, state officials have entered into agreements with the federal government permitting state law enforcement officers to arrest and detain non-citizens on immigration charges.⁴ Other examples of non-federal involvement in immigration abound.⁵ Although these efforts vary in type and political orientation, increased state and local involvement in immigration—often referred to as “immigration federalism”⁶—is one of the most important developments in immigration policy.

1. See Farmers Branch, Tex., Ordinance 2903 (May 12, 2007), available at <http://www.ci.farmers-branch.tx.us/Communication/Ordinance%20No%202903.doc> (setting forth this restriction and others). The ordinance was temporarily enjoined in June 2007. *Villas at Parkside v. City of Farmers Branch*, 496 F. Supp. 2d 757, 760 (N.D. Tex. 2007).

2. ARIZ. REV. STAT. ANN. § 23-212 (2007).

3. See S.F., CAL., ADMIN. CODE § 12H.2 (2007) (prohibiting the use of “any city funds or resources to assist in the enforcement of federal immigration law or to gather or disseminate information regarding the immigration status of individuals in the City and County of San Francisco unless such assistance is required by federal or State statute, regulation, or court decision”); § 12H.21 (“[N]o officer, employee or law enforcement agency . . . shall stop, question, arrest or detain any individual solely because of the individual’s national origin or immigration status.”). Other cities have similar measures. See Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1466-75 (2006) (describing similar “sanctuary policies” adopted by numerous major cities including Denver, Houston, Los Angeles, and New York).

4. See Fact Sheet: Section 287(g) Immigration and Nationality Act, U.S. Immigration and Customs Enforcement 2 (Aug. 16, 2006), available at <http://www.ice.gov/doclib/pi/news/factsheets/060816dc287factsheet.pdf>. The federal government has signed similar agreements with agencies in Arizona, California, and North Carolina. See *id.*

5. In 2007, states enacted 240 immigration-related laws covering topics ranging from public benefits to education to identification requirements. NAT’L CONFERENCE OF STATE LEGISLATURES, 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION (2007), available at <http://www.ncsl.org/programs/immig/2007Immigrationfinal.htm>.

6. See Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1627 (1997) (crediting Hiroshi Motomura with the term “immigration federalism”); see also

The legality and propriety of immigration federalism has sparked a vigorous debate among legal scholars. The vast majority of scholars decry it. Some scholars express concern that state and local governments are more likely to engage in discrimination against non-citizens.⁷ Others fear that giving state and local law enforcement officers a role in the enforcement of federal immigration law will discourage non-citizens from reporting crimes⁸ and encourage racial profiling.⁹ On the other side of the debate, some scholars welcome the assistance of state and local officers as the “quintessential force multiplier,” noting benefits for national security and enforcement of immigration law generally.¹⁰ Finally, other scholars acknowledge the inevitability of immigration federalism and find a potential silver lining.¹¹

Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1361 (1999) (defining immigration federalism as “states and localities play[ing a role] in making and implementing law and policy relating to immigration and immigrants”).

7. See Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 515-18 (2001) (describing discriminatory state laws passed pursuant to a federal law permitting states to determine eligibility of non-citizens for public benefits and anticipating more such laws in the next economic downturn).

8. See Kittrie, *supra* note 3, at 1450-55 (describing disincentives for unauthorized migrants to report crimes to the police). Scholars also have questioned the authority of state and local governments to enforce federal immigration law. See Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1088-95 (2004) (arguing that state and local police have no “inherent authority” to enforce federal immigration laws and that any enforcement authority they may have has been preempted by federal law).

9. See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CINN. L. REV. 1373, 1400-01 (2006) (“[I]f local authorities start enforcing immigration laws without proper training, they are prone to engage in racial profiling or other abuses of authority.”); Wishnie, *supra* note 8, at 1102-15 (describing concern of racial profiling with increased use of state and local enforcement of federal immigration law).

10. See Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 183-99 (2006) (listing situations in which immigration-based arrests by state and local officials have been crucial). Policymakers have made this argument as well. See Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL’Y REV. 323, 327-29 (2005) (describing the need for state and local enforcement of federal immigration law).

11. See Spiro, *supra* note 6, at 1628-46 (describing possible benefit of immigration federalism’s “steam valve” function, whereby states with strong anti-immigrant sentiment pass state legislation embodying these views and do not seek federal legislation that would impose such views on the entire nation; also noting the potential reasons why immigration federalism may not lead to a race to the bottom in anti-immigrant legislation); see also Victor C. Romero, *Devolution and Discrimination*, 58 N.Y.U. ANN. SURV. AM. L. 377, 381-85 (2002) (arguing that devolution will not cure racist immigration policies, but that it could benefit same-sex partners if federal immigration law, contrary to the Defense of Marriage Act, recognized same-sex unions sanctioned by states).

A comprehensive assessment of the constitutionality of immigration federalism has only just begun. In addition to this Article, two other recent articles address federal exclusivity in

Immigration federalism also has become a central political issue of our time. Legislators at all levels of government are engaged in a rancorous debate over the propriety of immigration federalism, and the issue has led to numerous confrontations between the political branches of governments.¹² As with the debate among legal scholars,¹³ emotions run high.¹⁴

Finally, the legality of immigration federalism is the subject of increasing litigation in the federal courts. Several lawsuits have been filed challenging state and local enactments,¹⁵ and trial courts are

immigration. See Cristina Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571-72, 609-17 (2008) (arguing against federal exclusivity because, as a functional matter, all levels of government operate as an integrated system to manage immigration and particularly assimilation); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 57-92 (arguing against federal exclusivity, also as a functional matter, at least with respect to three areas of immigration policy—employment-based admissions, criminal justice, and employer sanctions—and noting that states, even immigrant-receiving states with large populations of unauthorized migrants, can be more generous than the federal government). For earlier assessments, see Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 121-78 (1994) [hereinafter Spiro, *Demi-Sovereignties*] (addressing federal exclusivity largely from the perspective of international law), and Wishnie, *supra* note 7, at 527-58 (arguing against immigration federalism in any form).

12. See, e.g., Jason DeParle, *Star of the Right Loses His Base at the Border*, N.Y. TIMES, Aug. 29, 2006, at A1 (describing downturn in political fortunes of Mike Pence, U.S. Representative, R-Ind., who, after seeking compromise on a federal immigration bill, has become the object of scorn among conservatives); see also Joseph Lelyveld, *The Border Dividing Arizona*, N.Y. TIMES, Oct. 15, 2006, § 6 (Magazine), at 40 (describing the ongoing battle between Republican Arizona state legislator Russell Pearce, who has helped pass nine laws to discourage illegal immigration, and Democratic governor Janet Napolitano, who has vetoed each bill on “fiscal and constitutional grounds, urging [Pearce] and his Republican supporters to stop playing ‘political games’”). This battle occurred before Arizona passed legislation that the governor signed. See *infra* note 60 (describing the legislation and quoting the governor’s reasons for signing it).

13. See Kobach, *supra* note 10, at 227-33 (assailing arguments asserted by Professors Wishnie and Pham as “bizarre,” containing “crucial mistakes,” “unsustainable,” and “selective and untenable”); Wishnie, *supra* note 7, at 497-98 (“[A] number of states already have accepted the federal invitation to discriminate . . . Moreover, there will come a time when state budgets are not so flush, and when episodic American nativism returns. Then, more states will try to balance their budgets on the backs of indigent immigrants.”).

14. See Tony Horwitz, *Immigration—and the Curse of the Black Legend*, N.Y. TIMES, July 9, 2006, at D13 (quoting U.S. Representative Tom Tancredo, R-Col., and then-chair of the House Immigration Reform Caucus, describing illegal immigration as “a scourge” abetted by “a cult of multiculturalism” that has “a death grip” on this nation, and further contending that “[w]e are committing cultural suicide . . . [t]he barbarians at the gate will only need to give us a slight push, and the emaciated body of Western civilization will collapse in a heap”). The issue is also pulling apart communities. See Alex Kotlowitz, *Our Town*, N.Y. TIMES, Aug. 5, 2007, § 6 (Magazine), at 30 (describing community-wide schisms in Carpentersville, Illinois, over immigration and the appropriate response to it).

15. See, e.g., Complaint at 10-11, *Vasquez v. City of Farmers Branch*, No. 3-0CV2376-R (N.D. Tex. filed Dec. 26, 2006), available at <http://www.aclu.org/immigrants/discrim/27794lg120061226.html> (alleging, inter alia, that the regulation violates the Supremacy Clause because it attempts to regulate a matter exclusively reserved to the federal government, and that

beginning to issue opinions.¹⁶ In these early decisions, courts are reaching conflicting conclusions.¹⁷

This debate and these initial court decisions misunderstand the nature of federal exclusivity in immigration. As a descriptive matter, the federal government alone establishes the content of “pure” immigration law—the rules governing the admission and removal of non-citizens. Courts and scholars, however, widely accept this description of federal dominance as constitutionally mandated, believing that the Constitution commits authority over immigration law solely to the federal government.¹⁸ This is the structural preemption view of immigration authority: an understanding that the Constitution withdraws immigration authority from the states and grants it to the national government.¹⁹

it additionally violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment); Complaint at 14-15, 18-20, *Garret v. City of Escondido*, No. 06 CV 2434 (S.D. Cal. filed Nov. 3, 2006), available at http://www.cooley.com/files/tbl_s5SiteRepository/FileUpload21/927/Federal%20lawsuit.pdf (asserting largely the same causes of action); Complaint at 38-47, *Lozano v. City of Hazleton*, No. 6-cv-56-JMM (M.D. Pa. filed Oct. 30, 2006), available at <http://www.aclu.org/immigrants/discrim/272201gl20061030.html> (same); see also Complaint at 10-15, *Valle del Sol, Inc. v. Goddard*, 2:07-cv-02518-SMM (D. Ariz. filed Dec. 12, 2007), available at http://www.aclu.org/pdfs/immigrants/valledelsol_v_goddard_complaint.pdf (same).

16. See *Ariz. Contractors Ass'n v. Candelaria*, Nos. CV07-02496-PHX-NVW, CV07-02518-PHX-NVW, 2008 WL 343082, at *5-15, *17-21 (D. Ariz. Feb. 7, 2008) (denying motion for preliminary injunction of the Legal Arizona Workers Act, and finding the Act not preempted by federal law and not violative of the Due Process Clause); *Gray v. Valley Park*, No. 4:07CV00881 ERW, 2008 WL 294294, at *31 (E.D. Mo. Jan. 31, 2008) (granting defendant's motion for summary judgment on the basis that the challenged local employment and housing laws are not preempted by federal law and also do not violate the Equal Protection and Due Process Clauses); *Villas at Parkside v. City of Farmers Branch*, 496 F. Supp. 2d 757, 774-76 (N.D. Tex. 2007) (issuing preliminary injunction on basis that local ordinance is preempted by federal law because it is a regulation of immigration, which the Constitution commits exclusively to the federal government; further finding ordinance unconstitutionally vague and therefore void); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 517-55 (M.D. Pa. 2007) (permanently enjoining enforcement of local ordinance and finding it expressly preempted by federal law and violative of procedural due process; also addressing other claims under state and federal law); *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1054-59 (S.D. Cal. 2006) (finding local ordinance likely preempted by federal law and a violation of procedural due process).

17. See *supra* note 16.

18. See, e.g., *Motomura, supra* note 6, at 1364 (endorsing federal exclusivity); Hiroshi Motomura, *Whose Immigration Law?: Citizens, Aliens, and the Constitution*, 97 COLUM. L. REV. 1567, 1596-1601 (1997) (reviewing GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996)) (arguing that immigration authority should rest exclusively at the federal level); Pham, *supra* note 9, at 1381 (arguing that immigration authority is exclusively federal); Wishnie, *supra* note 7, at 530-31 (same). *But see* Rodríguez, *supra* note 11, at 609-17 (challenging federal exclusivity); Schuck, *supra* note 11, at 57-92 (same, at least with respect to circumscribed areas).

19. Cf. Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1251-52, 1298 & n.252 (1996) (proposing a reconceptualization of federal common law that rests upon an understanding that at least some federal common law stands upon firmer constitutional ground because the rules are passed in areas of “structural preemption”—defined

This Article challenges the structural preemption argument, contending that the constitutional mandate for federal exclusivity over pure immigration law is far more contestable than the traditional debate would suggest. The text and structure of the Constitution allow for shared authority. Until the late nineteenth century, states enacted immigration laws, and nothing in Supreme Court precedent clearly supports a claim of structural preemption.

How we understand the nature of federal power over pure immigration law matters for at least two important reasons. First, it is directly relevant to questions concerning the delegation of federal authority and the existence of inherent state and local authority to enforce immigration laws. Second, it is central to the broader question of state and local authority to enact laws that affect non-citizens in the United States. As explained below,²⁰ concluding that the Constitution precludes state and local authority over pure immigration law casts a long shadow on *any* state or local conduct concerning immigration, even conduct that falls short of pure immigration law. With an understanding that authority over pure immigration law is shared among levels of government, state and local involvement in immigration is far less suspect, and it becomes possible to engage in a more nuanced debate over the proper allocation of authority.

In most areas of governmental action, core debates about federalism inform our understanding of the respective roles of the national and subnational governments. The proposition that the Constitution has committed immigration authority exclusively to the federal government, however, takes immigration out of such debates. Thus, the structural preemption view of federal exclusivity renders conventional federalism debates irrelevant, or at least not particularly resonant.

Rejecting structural preemption as the basis for federal dominance in immigration, this Article argues that immigration is more like areas of constitutional law that involve a mix of federal and state authority. To be sure, the Supremacy Clause gives the federal government the authority to preempt state and local conduct.²¹ But this statutory preemption differs fundamentally from a rule of structural preemption, which reserves little, if any, role for state and local governments.

as situations where the structure and relationships created by the Constitution remove certain subjects from "the legislative competence of the states").

20. See *infra* Parts II.C, IV.

21. See U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

Once it is clear that the Constitution allows a role for subnational polities in immigration, the conventional and contested values of federalism become operable. There is much to be learned from subjecting state and local regulation of immigration to federalism debates. These debates are centrally concerned with questions that are directly relevant to immigration federalism, such as balancing uniformity with experimentalism and participation with parochialism. The values of federalism thus have a productive role to play in the immigration debate by providing varied approaches to immigration-related matters, and the different experiences of subnational governments will help to elucidate the larger questions of how best to formulate a national immigration policy. Additionally, classic federalism arguments provide tools that allow us to balance competing interests and determine the appropriate allocation of authority among levels of government.

Continued adherence to structural preemption obscures the robust role that all levels of government play in the regulation of immigration.²² And from a theoretical perspective, it denies the benefits of analyzing the practice through the larger federalism conversation. Debates over federalism draw on a rich mine of competing values, and the controversy over state and local involvement in immigration would benefit from the debate concerning these values. In short, assessing state and local involvement through a federalism lens provides much-needed evaluative and normative tools.

Bringing immigration into the constitutional mainstream would not mean that all state and local regulation is constitutionally permissible. Where the line should be drawn, for example, between the need for uniformity and an interest in fostering experimentalism is far from obvious.²³ But structural preemption denies the basic relevance of the question.

Further, focusing on the values of federalism does not mean that individual rights are unimportant. The Constitution is centrally concerned with structural issues—the relationships among the branches of the national government and between the national and subnational governments—and individual rights. The arguments in this Article primarily address issues of structure and the allocation of authority. As discussed below,²⁴ this allocation can be informed by

22. See Rodríguez, *supra* note 11, at 576-609 (describing this role).

23. Additionally, as noted at various points throughout this Article, see, e.g., *infra* text accompanying note 90, if the federal government concludes that certain state and local regulation runs afoul of national interests and it wishes to prevent such action, statutory preemption is always available to the federal government.

24. See *infra* Part III.C.

assessing which level of government will best protect individual rights. Federalism and individual rights, however, are fundamentally different issues. Immigration scholars tend to concentrate on questions of individual rights, not structural issues,²⁵ leaving a gap in our understanding of the Constitution's commitments regarding immigration. This Article begins to fill this gap by unpacking the structural issues related to immigration.

To these multiple ends, Part I of this Article begins with a description of the current dominance of federal authority over immigration. It then explains the recent reemergence of immigration federalism, describing the range and types of state and local involvement in immigration matters. Finally, this Part offers several reasons for this trend.

Part II challenges the claim that the authority to establish pure immigration law—narrowly defined as the admission and removal of non-citizens and not encompassing broader regulations affecting non-citizens in the country—is constitutionally committed to the federal government alone. This Part acknowledges that federal exclusivity is an accurate description of immigration law but challenges the constitutional basis for this federal exclusivity. It identifies three types of preemption—structural, statutory, and dormant—and argues that, although conventional wisdom embraces a structural preemption view of federal immigration authority, the text of the Constitution, the institutions created by the Constitution, and historical practice all support a statutory preemption view. This Part also examines Supreme Court decisions, arguing that Supreme Court precedent does not foreclose a statutory preemption view of federal authority. This Part concludes with a brief explanation of why the constitutional underpinnings of federal exclusivity matter.

With a view of shared authority firmly in place, Part III explores how difficult questions posed by state and local involvement can be assessed through a federalism lens. This Part first identifies the values associated with federalism and then examines those values in the context of immigration. This examination demonstrates the considerable analytical benefit of assessing state and local conduct through a federalism lens. This Part also addresses questions of individual rights and sets forth a series of questions for further exploration.

Part IV explores the implications of the statutory preemption view of federal exclusivity. It examines how a statutory preemption

25. See, e.g., Wishnie, *supra* note 7, at 504-09 (discussing Supreme Court decisions applying equal protection analysis to immigration issues).

view deeply affects our understanding of the constitutionality of the three central types of state and local involvement in immigration: the delegation of federal immigration authority, the state and local enforcement of federal immigration laws in the absence of a delegation, and the enactment by state and local governments of laws that affect non-citizens. This Part also demonstrates the value of the federalism lens by applying it to these difficult questions.

This Article thus establishes a new approach to immigration federalism. It demonstrates that a federalism lens is a particularly fine tool for determining the proper allocation of immigration authority among levels of government and is vastly superior to the blunt tool of structural preemption. Using a federalism lens, courts, policymakers, and legal scholars can begin to engage in a far more productive debate about immigration federalism.

I. STATES, LOCALITIES, AND IMMIGRATION

For more than a hundred years, the federal government has been the dominant force in immigration. Recently, states and localities have begun to assert an increasingly important and visible role in this field. This Part describes the respective roles of the various levels of government today. This description is an essential backdrop for understanding the theoretical and normative arguments concerning immigration federalism discussed later in the Article.

A. *The Legal Backdrop: Federal Dominance*

Immigration law traditionally has been understood to encompass the rules governing the admission and removal of non-citizens.²⁶ For more than a hundred years, immigration law in this narrow sense has been almost exclusively federal with no, or only a limited, role for state and local governments.²⁷ A complex federal law, the Immigration and Nationality Act (“INA”),²⁸ sets forth the terms of admission of non-citizens as well as the circumstances under which

26. See *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948) (defining immigration law to concern “what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization”).

27. See *infra* note 175 (describing how federal law takes cognizance of state laws regarding, for example, marriage and criminal convictions).

28. See Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

non-citizens will be removed from the country.²⁹ Today, states and localities play no direct role in establishing what this Article terms “pure” immigration law.

A separate body of law, commonly thought of as alienage law, determines the rights and obligations of non-citizens while in the country. When the federal government enacts alienage laws, courts subject the laws to rational basis review.³⁰ By contrast, although

29. When the political branches of the federal government enact and enforce immigration laws, they receive wide latitude from the judiciary. Under the plenary power doctrine, courts are reluctant to hear constitutional challenges regarding the laws governing the admission and removal of non-citizens. See, e.g., Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-60 (1990) (describing plenary power doctrine and relevant cases). The plenary power doctrine has long been the subject of criticism, see, e.g., Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 6-7 (1998) (arguing that the doctrine allows racial discrimination in immigration law), and some scholars doubt its continuing vitality, see, e.g., Motomura, *supra*, at 564-75 (arguing that the Supreme Court has undermined the plenary power doctrine by rendering “subconstitutional” decisions in statutory interpretation cases); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 339-41 (2002) (explaining how two Supreme Court decisions “point the way to the abandonment of plenary power”). Of course, the idea that decision-making by the political branches is insulated from judicial review does not necessarily mean the political branches are free from constitutional constraint. See Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1, 32-40 (arguing that the plenary power doctrine is best understood as a doctrine of “institutional deference” in the immigration context, with the Court underenforcing constitutional norms, not announcing a separate set of substantive norms); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218-20 (1978) (discussing underenforced constitutional norms). Whether the political branches can, in fact, be relied upon to restrain themselves, however, is another question. See generally Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005) (arguing that the “actual practices” of the political branches, and particularly the executive branch, raise serious doubts as to the claim that the executive branch can provide an independent assessment of constitutional obligations).

An interesting question that need not be resolved in this Article is whether a state or local pure immigration law would receive the same level of deference. This case is unlikely to come before the Supreme Court because of the federal dominance in pure immigration law, but, in light of the arguments I advance in this Article, arguably such enactments also should enjoy similar judicial deference. In other words, if the Constitution permits all levels of government to enact pure immigration law, then all enactments should receive judicial deference. On the other hand, as I elaborate below, state and local authority over pure immigration law is premised on state and local authority over matters of local concern, not foreign affairs. And the relationship between immigration and foreign affairs is one of the main justifications for judicial deference.

30. See *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) (finding no violation of the Equal Protection Clause in federal rule that limited Medicare to citizens, and stating that “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens”); *id.* at 85 (“Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are non-citizens as far as the State’s interests in administering its welfare programs are concerned. Thus, a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by

states and localities have some authority to enact alienage laws,³¹ when they use this authority to restrict economic benefits provided to non-citizens lawfully in the country, courts usually subject the laws to strict scrutiny review.³² Strict scrutiny does not attach to all state and local alienage laws. For example, in *Plyler v. Doe*, the Supreme Court rejected the claim that unauthorized migrants are a suspect class, even as to state laws.³³ The Court also has found strict scrutiny inappropriate in reviewing state laws concerning membership in the political community.³⁴ Apart from Equal Protection claims, courts often find state and local alienage laws to be preempted by federal law.³⁵ The precise nature of this preemption is discussed below.³⁶

the Federal Government is a routine and normally legitimate part of its business.”); see also Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1645 (2007) (“When Congress has denied benefits to aliens that it grants to citizens, it has had to justify its denial by articulating an immigration purpose in order to avoid heightened scrutiny on an equal protection challenge.”).

31. For example, in a series of cases, the Court recognized the power of a state to restrict the devolution of real property to non-citizens based on a state’s broad authority to regulate real property within its borders. See *Frick v. Webb*, 263 U.S. 326, 333-34 (1923) (noting that the exercise of such power does not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment); *Webb v. O’Brien*, 263 U.S. 313, 321-22 (1923) (same); *Porterfield v. Webb*, 263 U.S. 225, 232-33 (1923) (same); *Terrace v. Thompson*, 263 U.S. 197, 216-18 (1923) (same). The Court also has broadly recognized state authority to regulate areas traditionally of state concern, even when the regulation might touch upon immigration. See *DeCanas v. Bica*, 424 U.S. 351, 355-56 (1976) (“California has sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country; even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve. Thus, absent congressional action, § 2805 would not be an invalid state incursion on federal power.”); see also *id.* at 356 (“States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen’s compensation laws are only a few examples.”).

32. See *Graham v. Richardson*, 403 U.S. 365, 371-72, 376 (1971) (finding alienage a suspect class, prompting strict scrutiny of two states’ discriminatory laws concerning economic benefits for legal permanent residents); see also *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419-20 (1948) (finding state regulation limiting commercial fishing licenses to persons ineligible for citizenship to violate Equal Protection); *Truax v. Raich*, 239 U.S. 33, 43 (1915) (finding state employment restrictions on immigrants to violate Equal Protection); *Yick Wo v. Hopkins*, 118 U.S. 356, 369-74 (1886) (finding Equal Protection to apply to non-citizens because the use of the term “person” in the Fourteenth Amendment should be read literally to include all people within the territory of the United States).

33. 457 U.S. 202, 219 n.19, 223 (1982).

34. *Cabell v. Chavez-Salido*, 454 U.S. 432, 438-39 (1982).

35. See, e.g., *Toll v. Moreno*, 458 U.S. 1, 17 (1982) (finding Maryland statute denying children of certain non-citizens in-state tuition violated the Supremacy Clause because it contradicted the federal government’s determination that such non-citizens were permitted to establish domicile after legal admittance into the country); *Hines v. Davidowitz*, 312 U.S. 52, 68-

The categories of immigration law and alienage law are not watertight.³⁷ In particular, the Court has not clearly embraced the dual category approach,³⁸ and the two often overlap as a practical matter. For example, alienage laws barring non-citizens from certain public benefits likely affect immigration by discouraging some non-citizens from coming to the United States and encouraging others to leave.³⁹ Conversely, immigration laws making the conviction of certain crimes the basis for removal likely affect non-citizens' behavior while they are in the country.⁴⁰

There is a similar blurring of immigration and alienage in the relationship between the national and subnational governments. Although state and local governments are understood to possess no authority over immigration law, federal action or inaction with respect to immigration can profoundly affect states and localities. Indeed, recent state and local involvement often is attributed to the perceived need to address unauthorized migration in the face of the federal government's failure to do so.⁴¹ This point has been bolstered by the multiple suits brought by states seeking to require the federal government to enforce federal immigration law, thus alleviating the perceived burden of unauthorized migration on states and localities.⁴²

74 (1941) (finding Pennsylvania statute requiring aliens to register annually invalid and in conflict with similar federal legislation).

36. See *infra* Part II.B.

37. See Linda Bosniak, *Varieties of Citizenship*, 75 *FORDHAM L. REV.* 2449, 2451-52 (2007). Bosniak argues that the distinction between alienage and immigration law is highly problematic and that the fight to categorize a regulation as one or the other carries tremendous weight, given that the categorization greatly affects how the regulation will be treated. She further notes that

[u]nderstanding this interplay helps us to understand the push and pull of some of our current debates over the status of immigrants, from drivers' licenses to disaster relief to local police enforcement of immigration law. These debates are invariably structured by disagreements over the legitimate scope of the national border as a regulatory domain. At stake is the question of how far into the lives of aliens the border can, and should extend.

Id.

38. See Wishnie, *supra* note 7, at 526 (discussing this distinction and noting that it is not dispositive in case law).

39. See Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 *VA. J. INT'L L.* 201, 203 (1994) (arguing that a distinction between immigration law and alien law is "more formal than real" because of the overlap in practice).

40. See *id.*

41. See *infra* text accompanying notes 60, 71.

42. In the mid-1990s, six states sued the federal government seeking reimbursement for state expenses incurred in providing services to unauthorized migrants and seeking to require the federal government to enforce federal immigration laws. Each suit was dismissed. See *Texas v. United States*, No. B-94-228 (S.D. Tex. Aug. 7, 1995), *aff'd* 106 F.3d 661 (5th Cir. 1997) (citing a lack of judicial authority to review plaintiff's claims); *New Jersey v. United States*, No. 94-CV-03471 (D.N.J. Aug. 3, 1995), *aff'd* 91 F.3d 463 (3d Cir. 1996) (dismissing the claim as a

The line between immigration law and alienage law is important in reinforcing the notion that the Constitution grants sole authority to determine the content of pure immigration law to the federal government—a notion contested below—while leaving some room for state and local conduct falling short of pure immigration law.⁴³ Put differently, the distinction clarifies, consistent with the structural preemption view of federal exclusivity, that the federal government alone controls immigration law, whereas states and localities may play at least some role, consistent with the Equal Protection Clause, in the regulation of non-citizens once they are in the country.

B. The Current Resurgence of State and Local Regulation

Since the mid-1990s and particularly since the terrorist attacks of September 11, 2001, state and local involvement in immigration-related matters has been on the rise.⁴⁴ This involvement falls into three basic categories: the delegation of federal immigration authority, the state and local enforcement of federal laws in the absence of a delegation, and the enactment of state or local laws that affect non-citizens.

Federal delegation. Federal law delegates immigration authority to states and localities in two notable provisions, both enacted in 1996. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress enacted a new section 287(g) of the INA.⁴⁵ Section 287(g) authorizes the Secretary of Homeland

nonjusticiable political question); *Arizona v. United States*, No. 94-0866 (D. Ariz. Apr. 18, 1995), *aff'd* 104 F.3d 1095 (9th Cir. 1997) (relying on the reasoning in *California v. United States*, 104 F.3d 1086 (9th Cir. 1997)); *Padavan v. United States*, No. 94-CV-1341 (N.D.N.Y. Apr. 18, 1995), *aff'd* 82 F.3d 23 (2d Cir. 1996) (finding no case law, constitutional, or statutory support for plaintiff's complaint); *California v. United States*, No. 94-0674-K (S.D. Cal. Mar. 3, 1995), *aff'd* 104 F.3d 1086 (9th Cir. 1997) (dismissing due to lack of authority to review agency actions and failure to state a Tenth Amendment cause of action); *Chiles v. United States*, 874 F. Supp. 1334 (S.D. Fla. 1994), *aff'd* 69 F.3d 1094 (11th Cir. 1995) (dismissing the claim as a nonjusticiable political question). In November 2006, voters in the state of Colorado approved a referendum requiring the state to file suit against the United States to demand enforcement of federal immigration laws. See COLO. REV. STAT. § 24-19.8-101 (2006). That suit was dismissed as well. See *Suthers v. Gonzales*, No. 07-cv-00478-LTB-MJW, 2007 WL 2788603 (D. Colo. Sept. 21, 2007) (dismissing the claim for numerous reasons, including lack of jurisdiction because the claim presented a nonjusticiable political question).

43. See *infra* Part II.A.

44. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 5, at 1 (describing increase in rate of state laws: in 2007, over 1500 pieces of legislation were introduced and 240 were enacted, nearly triple the number of similar laws enacted in 2006).

45. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009 (codified at 8 U.S.C. § 1357(g) (2000)).

Security to enter into agreements with state and local governments to enforce federal immigration law.⁴⁶ The delegated authority includes the power to arrest and detain non-citizens for immigration violations, investigate immigration violations, and collect evidence and prepare immigration cases to be brought before an immigration judge.⁴⁷ Although the number is in flux,⁴⁸ several states and localities have entered into such agreements with the federal government.⁴⁹ The agreements typically set forth training requirements for state and local officers and provide for some oversight by federal immigration officials.⁵⁰

A similar cooperation provision is found in the administration of federal benefit programs. In the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Congress authorized states to determine immigrant eligibility for specified federal benefit programs, including Medicaid and Temporary Assistance to Needy Families.⁵¹ Without this federal authorization, a state law hinging eligibility for state benefits on immigration status would be subject to strict scrutiny, at least with respect to non-citizens

46. *Id.* Specifically, section 287(g) provides that

The [Secretary of Homeland Security] may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the [Secretary] to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

Id.

47. See 8 U.S.C. § 1357(a)-(d) (enumerating the powers of immigration officers and employees).

48. Compare Katie Zezima, *Massachusetts Set for Its Officers to Enforce Immigration Law*, N.Y. TIMES, Dec. 13, 2006, at A24 (describing outgoing Massachusetts Governor Mitt Romney's agreement with the federal government under section 287(g), but anticipating that incoming governor, Deval Patrick, might revoke the agreement), with Katie Zezima, *Massachusetts Rescinds Deal on Policing Immigration*, N.Y. TIMES, Jan. 12, 2007, at A17 [hereinafter *Zezima, Massachusetts Rescinds Deal*] ("Gov. Deval L. Patrick said Thursday that as expected, he had rescinded a new agreement between Massachusetts and federal officials that empowered the state police to arrest illegal immigrants on charges of violating immigration law.").

49. See Fact Sheet, *supra* note 4, at 2 (stating that Florida, Alabama, and agencies in Arizona, North Carolina, and California have entered into 287(g) agreements); see also Kobach, *supra* note 10, at 197 (noting that Florida became the first state to enter into such an agreement, effective July 7, 2002).

50. See, e.g., Kobach, *supra* note 10, at 198.

51. See Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") of 1996, Pub. L. No. 107-171, §§ 571-77, 116 Stat. 134 (codified at 8 U.S.C. § 1612(b)(1)) (authorizing states to determine eligibility of certain immigrants for specified federal benefit programs, including Medicaid and Temporary Assistance to Needy Families).

who are lawfully in the country.⁵² The constitutionality of this kind of delegation, however, remains contested. Courts have reached conflicting conclusions on the level of review applicable to such federally authorized state eligibility requirements, with some courts finding that strict scrutiny applies even with the federal delegation.⁵³

Inherent enforcement authority in the absence of delegation. Some states and localities have asserted a role in the enforcement of federal immigration regulations even without a delegation of federal authority. The legal authority for such enforcement has been analyzed by the Department of Justice's Office of Legal Counsel ("OLC").⁵⁴ The subject of considerable controversy,⁵⁵ the OLC opinion found that states and localities possess inherent authority to enforce both the criminal and civil provisions of the INA.⁵⁶ The OLC opinion contemplated assistance in the form of state or local law enforcement officials arresting non-citizens and delivering them to federal officials. The authority recognized in the OLC opinion contrasts to the

52. See *supra* Part I.A.

53. Compare *Aliessa v. Novello*, 754 N.E.2d 1085, 1098-99 (N.Y. 2001) (finding New York eligibility provision authorized by PRWORA to be subject to strict scrutiny because Congress cannot authorize the states to discriminate between non-citizens and citizens, and therefore striking down the provision as a violation of Equal Protection), with *Soskin v. Reinertson*, 257 F. Supp. 2d 1320, 1325-27 (D. Colo. 2003) (finding state law determining non-citizen eligibility pursuant to PRWORA subject to rational basis review because the provision was sanctioned by federal law and the program was dually funded by both the federal and state governments, and thus distinct from the state-only program in *Aliessa*).

54. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to the Attorney General, Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations 7-8 (Apr. 3, 2002) [hereinafter OLC Opinion], <http://www.aclu.org/FilesPDFs/ACF27DA.pdf> (withdrawing "the 1996 OLC Opinion's advice that federal law precludes state police from arresting aliens on the basis of civil deportability"). In the interest of full disclosure, I note that I worked on the opinion when I was an attorney-advisor in the Office of Legal Counsel.

55. See Eric Schmitt, *Administration Split on Local Role in Terror Fight*, N.Y. TIMES, Apr. 29, 2002, at A1 (describing conflict, including the White House's disagreement with the opinion); Eric Schmitt, *Two Conservatives Tell Bush They Oppose Plan for Police*, N.Y. TIMES, June 2, 2002, at A24 ("Two leading conservatives have joined a chorus of police officials and immigrant rights advocates in opposing a Justice Department proposal to allow state and local law enforcement agencies to track down illegal immigrants as a way to fight terrorism."). Several groups, including La Raza and the ACLU, successfully sued the Department of Justice to disclose its 2002 OLC Opinion. *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 352 (2d Cir. 2005) (affirming district court order to disclose OLC memorandum); see *supra* note 54.

56. See OLC Opinion, *supra* note 54, at 2-4 (finding that "such arrest authority inheres in the States' status as sovereign entities"). This opinion reversed an earlier OLC opinion finding that states and localities could enforce only the criminal provisions. See *Assistance by State and Local Police in Apprehending Illegal Aliens*, 20 Op. Off. Legal Counsel 26, 32 (1996) (finding "that state and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability, as opposed to a criminal violation of the immigration laws or other laws").

authority contemplated by section 287(g) in that the state or local officer is drawing on inherent state or local authority, not delegated federal authority, to make the arrest. Further, the action by the state or local officer is more limited than the kind of enforcement undertaken pursuant to section 287(g), which includes, for example, the authority to prepare removal cases in anticipation of a hearing before an immigration judge.

Although some states use their inherent authority to enforce federal immigration law, other states restrict and, at times, forbid such enforcement.⁵⁷ This is true of local governments as well.⁵⁸

Immigration-related lawmaking. States and localities are enacting laws that seek to influence non-citizens and immigration. Arizona has enacted the most far-reaching law—the Legal Arizona Workers Act—which imposes heavy penalties, including the loss of an operating license, on businesses that intentionally or knowingly hire unauthorized migrants.⁵⁹ When she signed the law in July 2007, the Democratic governor contended that Arizona had to take some action in light of the federal government's failure to curb unauthorized migration.⁶⁰ Some localities also have enacted laws that discourage

57. For example, Alaska, Maine, New Mexico, Oregon, and the District of Columbia have policies restricting local law enforcement of federal immigration law. OR. REV. STAT. § 181.850(1) (2005); H.J. Res. 22, 23rd Leg., 1st Sess. (Alaska 2003); Governor of New Mexico, Bill Richardson, Exec. Order No. 2005-019, Clarifying Victim and Witness Protections in New Mexico (Apr. 7, 2005); Governor of Maine, John E. Balducci, Exec. Order, An Order Concerning Access to State Services By All Entitled Maine Residents (Apr. 9, 2004) (as slightly modified by Governor of Maine, John E. Balducci, Exec. Order, An Order Amending the Order Concerning Access to State Services By All Entitled Maine Residents (Feb. 25, 2005)); Mayor's Memorandum 84-41 (D.C. 2003).

58. Counties in California and North Carolina have entered into section 287(g) agreements with the federal government, *see* Fact Sheet, *supra* note 4, at 2, whereas San Francisco, Detroit, and numerous other cities have enacted laws prohibiting such enforcement, *see* NAT'L IMMIGRATION LAW CTR., LAWS, RESOLUTIONS AND POLICIES INSTITUTED ACROSS THE U.S. LIMITING ENFORCEMENT OF IMMIGRATION LAWS BY STATE AND LOCAL AUTHORITIES (2007), http://www.nilc.org/immlawpolicy/LocalLaw/locallaw_limiting_tbl_2007-10-11.pdf.

59. H.B. 2779, 48th Leg., 1st Reg. Sess., 2007 Ariz. Sess. Laws. 279 (codified in scattered sections, including ARIZ. REV. STAT. § 23-212 (LexisNexis 2007)).

60. The governor's transmittal letter stated that "[i]mmigration is a federal responsibility, but I signed House Bill 2779 because it is now abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reforms our country needs." Letter from Janet Napolitano, Governor of Ariz., to Jim Weiers, Speaker of the House, Ariz. House of Representatives (July 2, 2007), http://azgovernor.gov/dms/upload/NR_070207_HB%202779%20Statement.pdf. The letter went on to say:

Because of Congress' failure to act, states like Arizona have no choice but to take strong action to discourage the further flow of illegal immigration through our borders. I renew my call to Congress to enact comprehensive immigration reform legislation. Now that Arizona has acted, other states are likely to follow. For our country to have a uniform and uniformly enforced immigration law, the United States Congress must act swiftly and definitively to solve this problem at the national level.

the presence of unauthorized migrants. For example, localities in California, Georgia, and Texas have passed ordinances that prohibit landlords from renting premises to non-citizens unlawfully in the United States.⁶¹ Other local ordinances sweep more broadly, prohibiting businesses from “knowingly . . . aiding and abetting illegal aliens,” including the employment of unauthorized migrants and the provision of goods and services to a day labor center that does not verify the status of all clients.⁶² Finally, some states have incorporated immigration-related violations into their own penal codes by, for example, imposing criminal sanctions for transporting unauthorized migrants.⁶³

In contrast to these more punitive measures, some states and localities have enacted laws that benefit non-citizens, including unauthorized migrants.⁶⁴ For example, numerous states currently

Id.

61. See Farmers Branch, Tex., Ordinance 2903 (May 12, 2007) (“The owner and/or property manager shall require as a prerequisite to entering into any lease or rental arrangement, including any lease or rental renewals or extensions, the submission of evidence of citizenship or eligible immigration status for each tenant family”); Cherokee County, Ga., Ordinance 2006-003 (Dec. 5, 2006) (stating that “to let, lease, or rent” or “suffer or permit the occupancy” of a dwelling unit by an “illegal alien” is prohibited and “shall be deemed to constitute harboring”); Escondido, Cal., Ordinance 2006-38 R § 3 (Oct. 18, 2006) (declaring it unlawful for the owner of a dwelling unit to “harbor” an “illegal alien,” and defining “harboring” as “to let, lease, or rent a dwelling unit to an illegal alien” or “[t]o suffer or permit the occupancy of the dwelling unit by an illegal alien”). These laws are not faring well. As noted above, the Farmers’ Branch ordinance has been temporarily enjoined, see *supra* note 1; similarly, the Escondido ordinance has been preempted by state law, see CAL. CIV. CODE § 1940.3 (West 2007) (effective Jan. 1, 2008) (prohibiting local governments from passing laws requiring landlords to monitor tenants’ immigration status), after it, too, was temporarily enjoined, *Garrett v. Escondido*, 465 F. Supp. 2d 1043, 1060 (S.D. Cal. 2006).

62. See Hazleton, Pa., Ordinance 2006-40 (Dec. 26, 2006) (“Illegal Immigration Relief Act Implementation Amendment”—amending Ordinance 2006-18 by adding § 7, “Implementation and Process”); Hazleton, Pa., Ordinance 2006-18 (Sept. 8, 2006) (“City of Hazleton Illegal Immigration Relief Act Ordinance” as amended); Hazleton, Pa., Ordinance 2006-13 (Aug. 15, 2006) (Tenant Registration Program ordinance). The Hazleton ordinances are the subject of current litigation. See *supra* notes 15-16 and accompanying text. Importantly, some state measures limiting eligibility for public benefits are sanctioned by the federal government in the Personal Responsibility and Work Opportunity Act of 1996, which authorized states to establish their own non-citizen eligibility criteria for specified public benefits. See *supra* text accompanying note 51.

63. E.g., Oklahoma Taxpayer and Citizen Protection Act of 2007, H.B. 1804, 51st Leg., 1st Sess. § 3 (Okla. 2007) (codified at OKLA. STAT. tit. 21, § 446 (effective Nov. 1, 2007)); see also COLO. REV. STAT. § 18-13-127(b)(3) (2007) (forbidding trafficking in persons and upgrading the offense for trafficking in adults who “are illegally present in the United States”).

64. On this point in general, see Peter H. Schuck, *Some Federal-State Developments in Immigration Law*, 58 N.Y.U. ANN. SURV. AM. L. 387, 389-90 (2002) (noting that the anticipated “race to the bottom” has not occurred and instead numerous states, including those with large immigrant populations, have restored benefits on the state level that had been lost at the federal level, in some instances providing new benefits, including Medicaid). But see Daniel C. Vock,

provide in-state tuition rates for some unauthorized migrants attending state universities.⁶⁵ New York offers health care for unauthorized migrants without health insurance who are diagnosed with cancer,⁶⁶ and New Haven and San Francisco have issued municipal identification cards to all residents, regardless of immigration status, to ensure that residents have access to local services and to “help overcome reluctance to report crimes.”⁶⁷ Further, as with the states and localities that refuse to cooperate with federal efforts to enforce immigration laws, Illinois enacted a law forbidding businesses from using a federal database to verify the immigration status of potential employees.⁶⁸

With Feds Stuck, States Take on Immigration, STATELINE.ORG, Dec. 13, 2007, <http://www.stateline.org/live/details/story?contentId=264483> (noting that “laws restricting the rights or benefits of illegal immigrants outnumbered laws benefiting them by a 2-1 ratio”).

65. New Mexico has the most generous law, providing that “[a]ny tuition rate or state-funded financial aid that is granted to residents of New Mexico shall also be granted on the same terms to all persons, regardless of immigration status.” N.M. STAT. ANN. § 21-1-4.6(B) (West 2007). Other states extend in-state tuition to unauthorized migrants with minor conditions attached. See CAL. EDUC. CODE § 68130.5(a)(4) (West 2007) (providing an exemption from nonresident tuition for unauthorized migrant students who swear by affidavit that they have applied for legal immigrant status or will do so as soon as eligible); 110 ILL. COMP. STAT. §§ 305/7e-5(a)(5), 520/8d-5(a)(5) (2008) (same, although not specifying that the rule applies to unauthorized migrants and instead appears to apply to anyone who is not a citizen or legal permanent resident); KAN. STAT. ANN. § 76-731a(b)(2)(C) (2006) (similar rule as in California); N.Y. EDUC. LAW §§ 355(2)(h)(8), 6206(7)(a) (Consol. 2007) (same); OKLA. STAT. ANN. tit. 70, § 3242(B)(2) (West 2007) (same); TEX. EDUC. CODE ANN. §§ 54.052, 54.053(3)(B) (same); UTAH CODE ANN. § 53B-8-106(2) (West 2007) (same); WASH. REV. CODE ANN. § 28B.15.012(2)(e) (West 2004) (same); WIS. STAT. ANN. § 36.27(2)(a)(6) (West 2007) (allowing length of time in state requirements to be met by intermittent work in the state). Nebraska has the strictest rule. See NEB. REV. STAT. § 85-502(5) (2007) (requiring proof of prior application for legal immigration status).

66. See Sarah Kershaw, *New York, Faulting U.S., Says It Will Pay for Cancer Care for Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at B3 (“Federal health officials have told New York State that they will no longer help cover the cost of chemotherapy for illegal immigrants with cancer because it does not qualify under an emergency Medicaid program. But yesterday, state health officials said they would cover all the costs no matter what the federal government does.”).

67. See Community Services, *New Haven’s Elm City Resident Cards—Fact Sheet*, http://cityofnewhaven.com/pdf_whatsnew/municipalidfactsheet.pdf (last visited Feb. 10, 2008) (“Providing residents who otherwise have no proof of ID with a municipal identification card will help overcome reluctance to report crimes they may suffer or witness and also provide identification to law enforcement and other officers if required.”); S.F., Cal., Ordinance 274-07 (Nov. 20, 2007), available at http://www.sfgov.org/site/bdsupvrs_page.asp?id=73995, (authorizing County Clerk to issue municipal identification cards upon request to residents).

68. See 820 ILL. COMP. STAT. ANN. § 55/12 (LexisNexis 2008) (prohibiting employers from “enrolling in any Employment Eligibility Verification System, including the Basic Pilot program” until the Social Security Administration and Department of Homeland Security “are able to make a determination on 99% of the tentative nonconfirmation notices issued to employers within 3 days”). The federal government has challenged this law as statutorily preempted. See Press Release, Dep’t of Justice, *Justice Department Seeks to Invalidate Illinois Law Flouting*

* * *

In all three categories and for a variety of reasons, state and local involvement in immigration is on the rise.⁶⁹ The heightened political salience of unauthorized migration is one factor that has led to increased state and local action. Because the cost of unauthorized migration is perceived to be spread unevenly across levels of government,⁷⁰ subnational lawmakers have expressed frustration with enforcement failures at the national level and thus see a need to take their own action.⁷¹ In addition to enacting laws that discourage

Federal Immigration Efforts (Sept. 24, 2007), available at http://www.usdoj.gov/opa/pr/2007/September/07_civ_757.html ("Today's lawsuit seeks to invalidate an Illinois state law that frustrates our ability to assist employers in making sure their workforce is legal, and in doing so conflicts with federal law.").

69. For example, although section 287(g) agreements have been possible since 1996, no state had entered into an agreement with the federal government until after September 11, 2001. See U.S. Immigration & Customs Enforcement, Partners, http://www.ice.gov/partners/287g/Section287_g.htm (last visited Feb. 10, 2008) (describing the process for developing a law enforcement partnership). Since September 11, 2001, Florida, Alabama, and agencies in Arizona, North Carolina, and California have entered into such agreements. See Fact Sheet, *supra* note 4, at 2; see also Kobach, *supra* note 10, at 180-82 (describing the various steps federal administrators have taken as a result of September 11, 2001, to encourage greater local involvement in the enforcement of immigration policy). Similarly, local law enforcement "sanctuary policies," which specify that officers should refrain from asking questions or acting in a way that may contribute to an unauthorized alien's removal from their locality, also have been on the rise since September 11, 2001. Kittrie, *supra* note 3, at 1455.

70. There are two issues at play: the net economic impact of immigration and the distribution of that impact. Addressing the second issue, conventional wisdom maintains that there is a "large and systematic mismatch . . . between the revenues that immigrants generate for [the federal] government and the expenditures that [state] governments make on behalf of immigrants." Schuck, *supra* note 64, at 390. Addressing both issues, a study conducted by the University of Arizona found that immigrants (defined as all foreign-born individuals, regardless of status, including naturalized citizens) produce a net economic benefit within Arizona. See JUDITH GANS, UDALL CTR. FOR STUDIES IN PUB. POLICY, UNIV. OF ARIZ., IMMIGRANTS IN ARIZONA: FISCAL AND ECONOMIC IMPACTS 3-6 (2007), http://udallcenter.arizona.edu/programs/immigration/publications/immigrants_in_arizona.pdf (finding net fiscal impact of immigrants in 2004 positive, with tax revenues equaling \$2.4 billion and fiscal costs totaling \$1.4 billion; further finding \$44 billion in total economic output attributable to immigrants). The study did not separately address the economic costs and benefits of unauthorized migration, but it did note that the majority of immigrants in Arizona were there unlawfully (an estimated 450,000 to 500,000 of the total 830,900 foreign-born population), that these individuals were largely of working age, and that they were primarily low-skilled workers, filling an important economic niche in Arizona's economy. See *id.* at 61. For further discussion of this issue, particularly for sources finding a negative fiscal and economic impact, see *infra* note 126.

71. See, e.g., Ralph Blumenthal, *Texas Lawmakers Put New Focus on Illegal Immigration*, N.Y. TIMES, Nov. 16, 2006, at A22 (quoting Texas State Representative Burt R. Solomons as saying that the surge in Texas anti-immigrant laws is attributable to "[a]bsolute frustration" with the federal government's failure to "do what they're supposed to do" to control the border with Mexico). Unauthorized migration itself has been fueled by larger forces such as federal

unauthorized migrants from coming into the state or locality, numerous states have sued the federal government seeking to recoup costs allegedly associated with unauthorized migration and to require the federal government to enforce current laws.⁷²

A second factor leading to increased state and local involvement is the changing immigration patterns that have brought non-citizens to new parts of the country, such as the Rocky Mountain West and the southeast, and to suburban and rural areas.⁷³ In this regard, it is notable that the more punitive immigration measures often, although not always, are enacted in areas new to receiving significant populations of non-citizens.⁷⁴

A third factor leading to increased state and local involvement is the perceived connection between national security and immigration.⁷⁵ Since the terrorist attacks of September 11, 2001, the federal government has actively sought the law enforcement assistance of states and localities.⁷⁶

subsidies for certain crops, particularly corn, which leads to the overproduction of those crops followed by the sale of the excess in Mexico, a possibility facilitated by the North American Free Trade Agreement. According to one article, this process has led to the unemployment of two million Mexican farmers and agricultural workers, some portion of whom then come to the United States unlawfully seeking work. See Michael Pollan, *You Are What You Grow*, N.Y. TIMES, Apr. 22, 2007, § 6 (Magazine), at 15 ("The flow of immigrants north from Mexico since Nafta is inextricably linked to the flow of American corn in the opposite direction, a flood of subsidized grain that the Mexican government estimates has thrown two million Mexican farmers and other agricultural workers off the land since the mid-90s.").

72. See *supra* note 42 (describing these lawsuits).

73. See CONG. BUDGET OFFICE, A DESCRIPTION OF THE IMMIGRANT POPULATION 8, 15 (2004), available at <http://www.cbo.gov/ftpdocs/60xx/doc6019/11-23-Immigrant.pdf> (documenting three-fold increase in immigrant population in North Carolina, Georgia, and Nevada and significant increases in other states, including Arkansas, Utah, Tennessee, Nebraska, Colorado, Arizona, and Kentucky); *Comprehensive Immigration Reform: Impact of Immigration on States and Localities: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 77-78 (2007) (statement of Dr. Audrey Singer, Immigration Fellow, Brookings Institute) [hereinafter *Comprehensive Immigration Reform Hearing*], available at <http://judiciary.house.gov/media/pdfs/printers/110th/35452.pdf> (describing shift in immigrant presence from urban areas to suburban and rural areas).

74. See *Comprehensive Immigration Reform Hearing*, *supra* note 73, at 75 (testimony of Dr. Audrey Singer, Immigration Fellow, Brookings Institute). Even in states with a more significant history of immigration, such as Arizona, the recent surge in immigration is notable. See GANS, *supra* note 70, at 9 (describing a 200 percent increase in the population of non-citizens in Arizona between 1990 and 2004, and noting that the number of unauthorized migrants approximately doubled between 2002 and 2005, from between 250,000 and 350,000 to 500,000 individuals).

75. See Kobach, *supra* note 10, at 180-99 (discussing the value of local law enforcement to effective immigration law and, therefore, to more effective national security).

76. See *id.* (identifying federal measures intended to engage state and local authorities in enforcing immigration law); Sessions & Hayden, *supra* note 10, at 327-29 (arguing in favor of state and local law enforcement participation in immigration law enforcement, particularly with respect to identifying and apprehending "alien absconders").

As noted, these varied examples of state and local involvement in immigration-related matters have sparked significant scholarly and popular debate. What this debate has lacked, however, is a thorough assessment of the constitutional underpinnings of federal exclusivity.

II. THE CONSTITUTION AND FEDERAL EXCLUSIVITY

The constitutionality of state and local involvement in immigration-related matters turns on the question of federal exclusivity with respect to pure immigration law—the narrow category of rules governing the admission and removal of non-citizens. As a descriptive matter, the federal government alone defines the content of this narrow category. But this positive description does not answer the underlying question whether the Constitution *requires* such federal exclusivity. This Part establishes that there is no such constitutional mandate.

The following discussion addresses federal exclusivity over immigration law as narrowly defined. The recent involvement of states and localities falls short of pure immigration law.⁷⁷ But how we understand the nature of federal exclusivity over pure immigration law informs our understanding of how careful we should be in precluding states and localities from engaging in the conduct that they have been undertaking. As discussed in Part IV, if the Constitution allocates authority over pure immigration law solely to the federal government, then we may be suspect of a delegation of that authority and more reluctant to recognize inherent enforcement authority in states and localities. Further, a constitutional mandate for federal exclusivity over pure immigration law creates skepticism of state and local regulations that fall short of pure immigration law. By contrast, if immigration authority is viewed like other areas of regulation, then the proper allocation of that authority can be assessed using the traditional arguments of federalism. In short, how we understand the nature of federal exclusivity over pure immigration law has considerable consequences for assessing the constitutionality of immigration federalism. For this reason, the following extended discussion is needed, despite the absence of contemporary state and local regulation of pure immigration law.

77. See *supra* Part I.B (describing “alienage” law, meaning laws concerning non-citizens in the United States, and further describing the blurring of, and contested line between, the categories).

A. A Taxonomy of Preemption

For more than a century, the federal government has dominated immigration law, preempting any role for state and local governments. But the constitutional basis of this federal preemption is unclear. There are three analytically distinct categories of preemption: structural, dormant, and statutory.⁷⁸ Determining which type of preemption underlies federal exclusivity is essential to assessing the constitutionality of immigration federalism.

In the first category, structural preemption, the Constitution commits authority over a subject to the federal government alone, foreclosing a role for states and localities. Structural preemption may have a clear textual basis, such as the exclusive federal authority over patent,⁷⁹ copyright,⁸⁰ and bankruptcy,⁸¹ or it may draw on the

78. It is also true that in some instances the Constitution precludes a role for the federal government and authorizes only state regulation. See *United States v. Morrison*, 529 U.S. 598, 618 (2000) (“The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”). This type of constitutional allocation of authority is not at issue here.

79. U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing, for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries . . .”). In an interesting parallel to this Article, despite what may appear to be a clear textual command for structural preemption, a closer examination of patent and copyright law reveals a long struggle to define the boundaries of federal versus state control. See EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 435-76 (2002) (examining the relationship between federal and state government with respect to intellectual property rights enforcement). According to Walterscheid, while the “states clearly had power to issue patents and copyrights prior to the ratification of the Constitution,” it was unclear whether the federal Patent and Copyright Acts of 1790 and subsequent amendments precluded states from continuing to do so. *Id.* at 468-69. In 1812, New York’s Court for the Correction of Errors, in dicta, indicated “that state and federal patent and copyright power were concurrent, i.e., the grant of patent and copyright power to Congress in the intellectual property clause was not exclusive.” *Id.* at 469 (paraphrasing *Livingston v. Van Ingen*, 9 Johns. 507, 560 (N.Y. 1812)). The U.S. Supreme Court did not address this issue until more than one hundred and fifty years later. In cases from 1964 through 1973, the Court seesawed between suggesting federal preemption and foreclosing federal preemption. See *id.* at 470. Even after Congress, in 1976, revised copyright law to “broadly preempt[], with narrow exceptions, all state laws bearing on material subject to federal copyright,” *id.* at 472, the Court muddied the waters again in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989). Walterscheid observes that “[i]f a fundamental purpose of the [intellectual property] clause is to promote uniformity with regard to intellectual property, as the Court states [in *Bonito*], then it is unclear to what limited extent, if any, the states retain any concurrent jurisdiction over patents and copyrights.” WALTERSCHEID, *supra*, at 472.

80. U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . .”). See discussion *supra* note 79 (describing ambiguity of federal exclusivity for patent and copyright).

81. U.S. CONST. art. I, § 8, cl. 4 (“To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . .”). As with patent and copyright, there is also an argument that federal authority over bankruptcy is concurrent with, and not exclusive of, state authority. See *Hanover Nat’l Bank v. Moyses*, 186 U.S. 181 187-88 (1902) (stating that “the

structure and relationships created by the Constitution.⁸² In the latter case, the typical argument is that dual regulation of the topic would raise such difficult governance issues that intergovernmental relations must be structured to preclude any role for subnational governments.⁸³ The authority over foreign affairs traditionally is understood to fall into this category.⁸⁴ But there are dissenters on this point, and a Supreme Court opinion suggests that states may play a circumscribed role.⁸⁵

In the second category, dormant preemption, the Constitution forbids subnational regulation on a certain topic, even absent federal regulation, but permits regulation pursuant to federal authorization. Importantly, when the federal government authorizes a state to regulate in these areas, it is not delegating federal authority, but instead is activating an underlying *state* authority. There are two

states, in surrendering the power, did so only if Congress chose to exercise it, but in the absence of congressional legislation retained it”).

82. See Clark, *supra* note 19, at 1251-52, 1298 & n.252 (describing structural preemption).

83. See, e.g., *id.* at 1298 & n.252 (discussing “structural preemption” of state law in the context of foreign affairs); see also *Gilbert v. Minnesota*, 254 U.S. 325, 336-38 (1920) (Brandeis, J., dissenting) (raising the argument, although not using this exact term, that structural preemption precluded state regulation of speech bearing upon a national issue, such as World War I).

84. See, e.g., *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (striking down state law, not because it violated the Supremacy Clause or the prohibitions on state conduct in Article I, Section 10, but rather because the law was “an intrusion by the state into the field of foreign affairs which the Constitution entrusts to President and the Congress”); *United States v. Pink*, 315 U.S. 203, 233 (1942) (“Power over external affairs is not shared by the States; it is vested in the national government exclusively.”); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (“[I]n respect of our foreign relations generally, state lines disappear. As to such purpose the state . . . does not exist.”); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 150 (2d ed. 1996) (“At the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, the states ‘do not exist.’”); Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 304 (“Our Constitution assigns to the federal government a virtual monopoly over international relations.”).

85. See MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 264-82 (2007) (arguing that the Framers did envision a role for the states in foreign affairs, as evidenced by the prohibitions on state involvement in specified matters in Article I, Section 10, by the Tenth Amendment, and by the Supremacy Clause, which, taken together, allow for at least some state activity affecting foreign affairs); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 394 (1998) (arguing that there may be some federalism-based limitations on the treaty power). *But see* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1279 (2000) (challenging this view). *But see* Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 99 (2000) (rebutting the claims of Professor Golove). As discussed below, the Supreme Court has acknowledged that states may be able to regulate foreign affairs insofar as this is an incidental effect of regulation that otherwise falls within traditional state competence. See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 419-20 (2003).

areas of constitutional law that reflect dormant preemption.⁸⁶ Under the Commerce Clause, states are prohibited from interfering with or discriminating against interstate commerce,⁸⁷ but pursuant to a federal statutory grant of authority, states may do so.⁸⁸ Additionally, the Compact Clause reflects this understanding: the Constitution prohibits states from undertaking specified conduct absent a federal grant of permission.⁸⁹ Both the dormant Commerce Clause and the Compact Clause involve congressional grants of permission to exercise state authority that, but for the congressional approval, would be contrary to the constitutional design.

In the third category, statutory preemption, the Constitution permits the national and subnational levels of government to share authority over a subject, but it also authorizes the national government to preempt, through federal statute, a state or local role, pursuant to the Supremacy Clause.⁹⁰ As discussed below, depending on the subject of regulation and, in particular, whether it is a subject of traditional state competence, such as health and safety, Congress

86. Courts sometimes refer to a dormant foreign affairs preemption. See *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 52-55 (1st Cir. 1999) (finding state law preempted by dormant foreign affairs power), *vacated*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000) (declining to reach dormant foreign affairs claim). As Jack Goldsmith argues, "dormant preemption operates like statutory preemption without a statute." Jack L. Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 203-05. For an argument against dormant foreign affairs preemption, see RAMSEY, *supra* note 85, at 275-82.

87. See *Am. Trucking Ass'n v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) ("Our Constitution was framed upon the theory that the peoples of the several states must sink or swim together. Thus, this Court has consistently held that the Constitution's express grant to Congress of the power to 'regulate Commerce . . . among the several States,' contains a further, negative command, known as the dormant Commerce Clause, that creates an area of trade free from interference by the States. This negative command prevents a State from jeopardizing the welfare of the Nation as a whole by placing burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." (internal citations and quotations omitted)). For an excellent discussion of the dormant commerce clause and interstate relations more broadly, see generally Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007).

88. See *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339-40 (1982) ("It is indeed well settled that Congress may use its powers under the Commerce Clause to confer upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." (internal quotation omitted)).

89. U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State . . ."). *But see* Michael S. Greve, *Compacts, Cartels, and Congressional Intent*, 68 MO. L. REV. 285 (2003) (describing cases in which federal courts appear not to enforce the Compact Clause).

90. See Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 131 (2004) ("Preemption doctrine . . . starts from the proposition that the states and the Nation share power in an area; its central preoccupation is the management of conflicts that inevitably arise in such situations.").

must speak with varying degrees of specificity to preempt state action.⁹¹ The shared authority view embodied in statutory preemption governs much of public law, including civil rights, environmental regulation, antitrust, and securities regulation.

There are alternative ways to approach the unpacking of federal exclusivity. For example, it is possible to conceive of this as a question of what default rules should allocate authority between the federal and state governments. The first question is which level of government has initial regulatory authority over an area. In this regard, there are typically four options: both the federal and state governments could possess initial authority to regulate, neither could possess the authority to regulate, only the federal government could possess the authority to regulate, or only the state governments could possess the authority to regulate. Conventional wisdom is that only the federal government possesses the authority to regulate immigration. My argument, developed below, is that both the federal and state governments possess initial authority over this subject.

The second question is whether and how one level of government can affect the regulatory authority of another, particularly how the actions of the federal government affect the regulatory authority of the states. Assuming concurrent initial authority, the federal government can preempt state authority, pursuant to the Supremacy Clause. Even if the states possess no initial authority to regulate (a view I reject below), the federal government might authorize such regulation pursuant to a delegation of authority.

B. The Category Error

With this taxonomy in mind, it is possible to assess the basis for federal exclusivity in immigration law. Conventional wisdom holds that immigration authority falls into the first category of preemption: structural preemption.⁹² Some Supreme Court cases appear to support this understanding,⁹³ and the vast majority of immigration scholarship is built on a structural preemption understanding of federal exclusivity.⁹⁴ But the conventional wisdom is wrong. As I demonstrate, there is no clear commitment in the text or institutional

91. See *infra* Part IV.D.

92. See, e.g., Wishnie, *supra* note 7, at 530-52 (explaining Supreme Court jurisprudence on the exclusivity of the federal immigration power).

93. See *infra* Part II.B.1.c.

94. See *supra* note 18.

structures of the Constitution to federal exclusivity, and historical practice supports a statutory preemption view. Moreover, the Supreme Court cases that appear to espouse a structural preemption view of federal authority do not definitively adopt this view. In short, federal exclusivity is better understood to rest on statutory preemption.

1. Structural Preemption

a. Text

Unlike most other areas of law understood to be exclusively federal, the text of the Constitution does not grant sole authority over immigration to the federal government.⁹⁵ Instead, the Constitution refers only to a uniform rule of naturalization.⁹⁶ The authority of the federal government to regulate immigration has been found in other sources, including the authority inherent in sovereignty,⁹⁷ the authority to conduct foreign affairs,⁹⁸ and the authority to regulate foreign commerce,⁹⁹ but not in the words of the Constitution.

The Constitution does explicitly forbid the states from engaging in certain kinds of activities, including specific matters relating to foreign affairs, such as entering into treaties or alliances.¹⁰⁰ This list of prohibited activities, however, does not include regulating immigration.

Although it could be argued that this textual silence is evidence of the Framers' intent to share immigration authority among levels of government, the silence is understood better as a politically expedient hedge. The institution of slavery was an incendiary and divisive

95. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 81-83 (2002) (describing, with a few minor and contested exceptions, the constitutional silence "regarding governmental control over aliens," and noting that "[t]he constitutional text does not expressly address authority to regulate immigration").

96. U.S. CONST. art. I, § 8, cl. 4 (authorizing Congress "[t]o establish a uniform Rule of Naturalization . . . throughout the United States").

97. See *Chinese Exclusion Case*, 130 U.S. 581, 631 (1889) (finding the power to exclude foreigners to be an incident of sovereignty belonging to the government).

98. See, e.g., *id.* (locating federal authority to regulate immigration in the foreign affairs power).

99. See, e.g., *Head Money Cases*, 112 U.S. 580, 591-93 (1884) (finding immigration to be a subset of "commerce with foreign nations" and therefore within Congress's exclusive power to regulate); *Henderson v. New York*, 92 U.S. 259, 270-71 (1876) (invalidating state-imposed tax on debarking immigrants as conflicting with federal power to regulate commerce with foreign nations).

100. See U.S. CONST. art. I, § 10.

subject during the Constitutional Convention,¹⁰¹ and any discussion of immigration would have implicated slavery.¹⁰² Reluctant to address the issue, the Framers simply remained silent on the topic.¹⁰³ Thus, although it is true that the text of the Constitution does not grant exclusive authority over immigration to the national government, this textual silence is not dispositive.

b. Institutional Structure

The institutional structures created by the Constitution lend the greatest support to the claim of structural preemption. There are two particularly salient arguments in this regard. First, the traditional argument is that although the Constitution created a federal system, subnational governments cannot exercise immigration authority because to do so necessarily implicates national interests. A uniform rule of immigration is necessary to serve those interests because, for example, immigration law raises matters of international concern. Thus, the United States must speak with one voice on such matters, as unilateral state laws could be antithetical to the interests of the union.¹⁰⁴ As sometimes described by the Supreme Court, the danger inherent in the Balkanization of immigration law is that one state, for its own parochial reasons, has the power to embroil the United States in an international conflict that may affect the entire nation.¹⁰⁵ In this way, immigration authority is analogous to the

101. See DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 214-46 (2d ed. 2005) (noting that “[p]ublic attacks on . . . slavery began as early as the 1750s,” and describing the heated debates during the Convention between supporters and opponents of slavery).

102. See Cleveland, *supra* note 95, at 98 (describing fear of southern states “that free blacks from the North and West Indies would provoke dissension and revolt among the slaves in their territories,” and “[b]ecause free blacks were citizens in some northern states, slaveholding states felt that they could maintain the right to exclude free blacks only by asserting the power to exclude all persons deemed dangerous or injurious to their interests”); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1866-67 (1993) (describing an argument made by historians that a primary cause of the federal government’s failure to adopt qualitative restrictions on immigration before the Civil War was the slave states’ jealous insistence on maintaining power over the movement of free blacks as a state’s right).

103. See ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 78 (2006).

104. See *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, 280 (1875) (same); Spiro, *Demi-Sovereignities*, *supra* note 11, at 134-44 (describing this argument).

105. See *Hines*, 312 U.S. at 64 (discussing the importance of protecting rights of a country’s own nationals when those nationals are in another country); *Chy Lung*, 92 U.S. at 279 (“[I]f citizens of our own government were treated by any foreign nation as subjects of the Emperor of China have been actually treated under this law, no administration could withstand the call for a demand on such government for redress.”). The Court gave the example of international

foreign affairs power, over which the federal government traditionally is understood to enjoy exclusive authority as a matter of structural preemption.¹⁰⁶

Second, it has been argued that immigration law concerns what some scholars have called “self-definition.”¹⁰⁷ A self-definition view of immigration law holds that immigration is related to our understanding of who we are as a nation.¹⁰⁸ Because of the connection between immigration and naturalization,¹⁰⁹ immigration laws allow existing citizens to select new citizens, thus effectively weighing in on who can be an American.¹¹⁰ A self-definition view of immigration law does not allow a role for states and localities because self-definition is understood as a national process.¹¹¹

This line of argument elevates the national interest in self-definition over the state and local interest in “self-preservation.” Immigration law as self-preservation is the view that immigration can threaten the well-being of a polity, and therefore the polity must have the ability to deny admission to some people and remove others. This rationale arguably underlies many immigration laws, such as the laws precluding the admission of a non-citizen who will become a public charge,¹¹² who poses a public health threat,¹¹³ or who has committed specified crimes.¹¹⁴ A self-preservation view of immigration law recognizes a role for states and localities because immigration directly implicates their interests.¹¹⁵ The self-definition line of argument

treaties that safeguard the rights of aliens while in other countries and found that one state’s effort to protect its own interests might run afoul of this international obligation, thus embroiling the entire country in an international dispute. *Hines*, 312 U.S. at 62-66.

106. See *supra* note 84 (describing the dominant view that federal exclusivity in foreign affairs rests upon structural preemption). But see *supra* text accompanying note 85 (describing dissenting views); *infra* text accompanying notes 122-124 (discussing dissenting views on this subject and Supreme Court’s decision in *Garamendi*).

107. Motomura, *supra* note 18, at 1591. For more on the relationship between immigration law and national self-definition, see ZOLBERG, *supra* note 103.

108. See Motomura, *supra* note 18, at 1591 (“[I]mmigration decisions give citizens the chance to choose new citizens and decide who ‘we’ are as Americans. Immigration decisions also give citizens the chance to establish and apply basic principles of government and public life. So viewed, immigration is a process of national self-definition.”).

109. See *id.* at 1594 (noting the significance of the Naturalization Clause of the Fourteenth Amendment in federalizing immigration law).

110. *Id.* at 1591.

111. *Id.*

112. 8 U.S.C. § 1182(a)(4) (2000).

113. *Id.* § 1182(a)(1).

114. *Id.* § 1182(a)(2).

115. See Schuck, *supra* note 64, at 390 (noting the “very important” problem of the “large and systematic mismatch . . . between the revenues that immigrants generate for [the federal] government and the expenditures that [state] governments make on behalf of immigrants”). But

acknowledges these interests but maintains that the self-definition aspect of immigration law should take primacy over the self-preservation aspect.¹¹⁶

Despite their seeming appeal, these arguments concerning institutional structure do not hold up. To begin with the self-definition rationale for structural preemption, the dichotomy between self-definition and self-preservation is not sufficiently clear that it can bear the weight of a constitutional mandate for federal exclusivity. Although there is a connection between immigration and naturalization, many non-citizens living long term in the United States do not become naturalized citizens.¹¹⁷ States and localities maintain an interest in determining which non-immigrants (or even immigrants who do not intend to become citizens) may be welcome and which may not.¹¹⁸ Further, the Constitution does not clearly require only a *national* process of self-definition.¹¹⁹ A citizen may form an identity not just from being an American but also from being an Idahoan, New Yorker, or Texan. Whether the Constitution permits

see supra note 70, (discussing a University of Arizona study finding positive fiscal and economic impact from “immigrants,” defined as all foreign-born individuals, although comprising largely unauthorized migrants).

116. *See* Motomura, *Whose Immigration Law?*, *supra* note 18, at 1592 (arguing that self-definition has emerged not only as a coequal to self-preservation, but also as being “uniquely within federal competence”).

117. To begin, only legal permanent residents are eligible for citizenship. 8 U.S.C. § 1427(a). Of the approximately twenty million non-citizens living long term in the United States in 2005 (not counting non-citizens here on short-term visas, such as students and temporary workers), nearly ten million were here unlawfully and therefore could not become citizens. *See* STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, IMMIGRANTS AT MID-DECADE: A SNAPSHOT OF AMERICA’S FOREIGN-BORN POPULATION IN 2005, at 23 (Dec. 2005), *available at* <http://www.cis.org/articles/2005/back1405.pdf> (estimating between 9.6 and 9.8 million illegal immigrants in the United States in 2005); NANCY F. RYTINA, OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION AND POPULATION ELIGIBLE TO NATURALIZE IN 2004, at 3 (Feb. 2006), *available at* <http://www.dhs.gov/xlibrary/assets/statistics/publications/LPRest2004.pdf> (presenting estimates of numbers of legal permanent residents eligible and ineligible to naturalize). Additionally, many of the legal permanent residents who are eligible to naturalize chose not to do so, although the percentage choosing to naturalize has been increasing. *See* JEFFREY S. PASSEL, PEW HISPANIC CTR., GROWING SHARE OF IMMIGRANTS CHOOSING NATURALIZATION 1 (2007), *available at* <http://pewhispanic.org/files/reports/74.pdf> (reporting increase in naturalization rate to 52% as of 2005).

118. *See* Spiro, *Demi-Sovereignities*, *supra* note 11, at 125-26 (explaining that tensions arise between states when burdens associated with immigration fall unevenly among the states).

119. It could be argued that self-definition can occur at a regional level. In the context of unauthorized migration, states are taking very different approaches to such migrants, with eight states offering in-state tuition to unauthorized migrants on the one hand, *see supra* note 65, and Arizona enacting a particularly punitive law to discourage unauthorized migration on the other, *see supra* text accompanying notes 59-60. Thus, to use a short hand, it could well be that the same individual is an “unauthorized migrant” in some states but an “illegal alien” in others, reflecting various degrees of hostility and welcome to non-citizens.

this regional self-definition is a determination best made using the federalism lens, as I propose in Part III.

Turning to the claim that involvement by subnational actors risks compromising national interests, an important starting point is the observation that national exclusivity over immigration is not an essential component of a federal system. Other countries with strong central governments allow subnational governments to control immigration.¹²⁰ It is possible for subnational units of government to determine the content of admission laws without compromising the interests of the national government.¹²¹ In this way, the institutional structure of the Constitution does not require federal exclusivity, as a functional matter.

The invocation of foreign affairs also is unpersuasive. There is a plausible argument that the Constitution does not prohibit all state involvement in foreign relations, but instead prohibits states from engaging in certain actions, such as making treaties and declaring war.¹²² In this view, the Constitution confers broad powers on the national government to preempt state laws that interfere with national prerogatives, but state authority does exist. Foreign affairs and federalism are competing values, and the federal government must decide when state conduct may adversely affect national interests such that it should be preempted by federal action.¹²³

120. See Neuman, *supra* note 102, at 1840 n.34 (arguing that federal exclusivity “is neither natural nor inevitable in United States federalism or in federalism generally, as illustrated by Canada and Germany, where federal sub-units still have immigration responsibilities”); see also Schuck, *supra* note 64, at 387-88 (describing immigration federalism developments in Canada, Germany, and Switzerland); Spiro, *Demi-Sovereignties*, *supra* note 11, at 122 (arguing that federal exclusivity “is not a structural necessity”).

121. See Spiro, *Demi-Sovereignties*, *supra* note 11, at 122 (“[M]any, if not most, foreign nations have come to understand fully the nature of American federalism. They understand that where an individual state acts, the federal government bears no instigatory responsibility and, indeed, that Washington is powerless to work its reversal as either a legal or a political matter.”).

122. See U.S. CONST. art. 1, § 10; RAMSEY, *supra* note 85 (arguing that the Framers envisioned a role for the states in foreign affairs, as evidenced by Article I, Section 10’s prohibitions on state involvement in specified matters, by the Tenth Amendment, and by the Supremacy Clause, which, taken together, allow for at least some state activity affecting foreign affairs); Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT’L L. 675, 676-79 (1998) (finding a constitutional balance between state and federal implementation of international obligations); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1423 (1999) (challenging the legitimacy of a “structural” preemption” argument in the area of foreign relations).

123. See Bradley & Goldsmith, *supra* note 122, at 677 (“This institutional arrangement treats foreign relations and federalism as competing values and largely leaves it to the federal political branches to decide when a state act has sufficiently adverse effects on foreign relations to require preemption.”); see also Neuman, *supra* note 102, at 1897 (noting that the federal government alone can make treaties and negotiate with other countries, so it makes sense for the

A Supreme Court opinion, discussed below, lends some support to this view. In *American Insurance Association v. Garamendi*, the Court found the particular state law at issue to be “preempt[ed] by executive conduct in foreign affairs” but acknowledged that states, when regulating matters of traditional state concern, could enact legislation that touched on foreign affairs.¹²⁴ Comparing immigration authority to the foreign affairs powers, then, does not mean that states and localities can play no role in immigration law. It means that there are competing interests to balance.

Further, foreign affairs and immigration are related but not completely analogous. In the context of foreign affairs, state and local interests may be more attenuated.¹²⁵ By contrast, state and local governments are affected substantially by immigration and possess an undeniable economic and social stake in immigration. For example, although exact numbers are contested, there is evidence to suggest that state and local governments bear a disproportionate cost in absorbing the consequences of immigration.¹²⁶ Moreover, state and local governments play a central role in the integration and assimilation of non-citizens. As Cristina Rodríguez has argued, one of the central functions of state and local governments is to assimilate

federal government to regulate immigration, but that this does not necessarily mean that state regulation is unconstitutional).

124. 539 U.S. 396, 419-20, 428 (2003). For purposes of this Article, it is unnecessary to wade into the substantial criticism of the case but for one example, see RAMSEY, *supra* note 85, at 288-99.

125. For example, the law at issue in *Crosby v. National Foreign Trade Council* arguably was an expression of Massachusetts’ views of the military regime in Myanmar. See 530 U.S. 363, 378-80 (2000). The law was not intended to protect the health or safety concerns of the state, but rather was an attempt to sanction the regime for its acts in Myanmar. The residents of Massachusetts may well feel strongly about the political state of affairs in Myanmar, but, as that case suggests, the residents’ views are best expressed as national views, at least to the extent the national government has already expressed a view.

126. See *The Budgetary Impact of Current and Proposed Border Security and Immigration Policies: Hearing on H.R. 4437 and S. 2611 Before the S. Comm. on the Budget*, 109th Cong. 4 (2006) (statement of Paul R. Cullinan, Chief, Human Resources Cost Estimates Unit of the Congressional Budget Office), available at <http://www.cbo.gov/ftpdocs/75xx/doc7511/08-30-Immigration.pdf> (“CBO’s review of the research on immigration found that over the long term, immigration tends to affect federal finances positively and state and local finances negatively.”). This is a hotly contested issue and a central subject in current debates over immigration. For a variety of views and a review of the research, see *Comprehensive Immigration Reform Hearing*, *supra* note 73. One of the most widely cited, but now somewhat dated, sources on this issue is NAT’L RESEARCH COUNCIL, *THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION* (James P. Smith & Barry Edmonston eds., Nat’l Acad. Press, 1997). See also Spiro, *Demi-Sovereignties*, *supra* note 11, at 125-26 (noting that the “fiscal downside” of illegal immigration is not spread evenly across state lines, and discussing “three discrete types of costs to state governments”). But see *supra* note 70, (discussing University of Arizona study finding positive fiscal and economic impact from “immigrants,” defined as all foreign-born individuals, although most were unauthorized migrants).

non-citizens, thus allowing the country as a whole to adapt to the demographic changes that immigration brings.¹²⁷

The reliance on the foreign affairs rationale for structural preemption of immigration authority is losing persuasiveness over time. When nation states were the only actors on the international stage, a state inserting itself into pure immigration law could have interfered with national interests.¹²⁸ But with the rise of actors other than nation states,¹²⁹ there is less reason to prevent, as a constitutional matter, subnational governments from engaging in conduct that implicates foreign affairs.¹³⁰ Put differently, as other countries grow accustomed to multiple actors, there is less cause for concern about a state asserting its own interests in an international setting. Other countries can assess that assertion in context and understand that one state does not speak for the United States.¹³¹ Additionally, state and local governments have played an important role in bringing international rights into the domestic context and thus helping to shape American norms.¹³²

127. See Rodríguez, *supra* note 11, at 581-609 (arguing that the structures of the nation state struggle to capture the “diverse forms of membership needed to assimilate the effects of global trends” and that the participation of unauthorized immigrants is “facilitated through the market and through local communities, not through the national government”); see also Rick Su, *The Immigrant City* (bepress Legal Series, Paper No. 1688, 2006), <http://law.bepress.com/cgi/viewcontent.cgi?article=7930&context=expresso> (describing the potentially constructive role cities can play in the development of immigration policy).

128. See Spiro, *Demi-Sovereignties*, *supra* note 11, at 153.

129. See Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1 (2006) (describing emergence of twin phenomenon: interest of international actors in the relationship between national governments and cities, and cities’ “use of international institutions to redefine the scope of their domestic legal powers,” resulting in “international local government law”).

130. See *id.*; Spiro, *Demi-Sovereignties*, *supra* note 11, at 153-54, 161-74. Professor Motomura recognizes this argument as well, although he responds that the self-definition understanding of immigration law still weighs in favor of federal exclusivity. Motomura, *supra* note 6, at 1372-75.

131. See Spiro, *Demi-Sovereignties*, *supra* note 11, at 163-67 (discussing two examples where the international community was savvy about dealing with the federalist structure of the United States, targeting individual *states* rather than the nation as a whole: (1) a California unitary tax scheme that disadvantaged UK-based Barclays Bank, which triggered British retaliatory action only against corporations registered in California and other states with the unitary taxing scheme, and (2) Mexico’s response to the Proposition 187 ballot measure, which included lobbying and boycotts aimed at California and an official statement from the Mexican government which contained an “express recognition that the California law did not represent the policies of the federal government”).

132. See Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1626-52 (2006) (exploring the “intake of transnational rights” through state courts, city councils, state legislatures, mayors, and national organizations of local officials).

A final, related point: the INA already incorporates inconsistent state laws governing criminal conduct and marriage.¹³³ To be sure, the state laws matter only to the extent that the federal government recognizes them, but this indicates the ability of immigration law to withstand varying state-dependent rules.

Thus, the structural question is not simply how to preserve the national government's interests. Rather, the question is how to balance the Constitution's commitment to a federalist system against an intuited interest in a uniform rule of immigration. Framed this way, the commitment to federalism cannot be ignored. The implicit uniformity interest, if it exists, must first be found in the structure and relationships of the Constitution and then balanced against the explicit interests of federalism.

c. Historical Practice

Turning to historical practice, the federal government has dominated pure immigration law for the last century. Before the federal government asserted control over immigration with a series of exclusionary statutes beginning in 1875,¹³⁴ however, states actively controlled immigration in numerous ways.¹³⁵ These laws were not in the form we are familiar with at the national level today, but they

133. Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357, 360 (2003).

134. Most notably the Act of Mar. 3, 1875, ch. 141, 18 Stat. 477, and the Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882).

135. See Neuman, *supra* note 102, at 1841-83 (1993) (describing in general terms the kinds of state laws during the period, including "regulation of the movement of criminals; public health regulation; regulation of the movement of the poor; [and] regulation of slavery," and also noting that some state laws applied to international as well as interstate migration). As Professor Neuman explains, many of the early state statutes are not readily categorized as "immigration" statutes because when states regulated the movement of people, they often did not distinguish between citizens and non-citizens, instead drawing lines based on state citizenship. *Id.* at 1837. Certainly, some state statutes did apply to the movement of people across international borders. See, e.g., *id.* at 1842 & n.47 (discussing state statutes that prohibited the entry of convicts from outside the United States). As Professor Neuman summarizes the history,

[i]mmigration law prior to 1875 was a complex hybrid of state and federal policy. Federal decision-makers validated certain local policies. Congress gave explicit approval to state quarantine laws and state laws excluding black aliens; Supreme Court Justices assigned some categories of immigration regulation to state police power in language that indicated approval rather than indifference; and the Executive urged foreign governments to respect policies whose only statutory embodiment was in state law. The failure to enact uniform immigration policies at the national level resulted from a combination of forces—not just pro-immigration sentiment, but also a desire to keep migration policy within state authority. When slavery ceased to divide the nation, national immigration regulation became possible.

Id. at 1896-97. For another account of the state role in immigration, see ZOLBERG, *supra* note 103, at 1-23.

were immigration laws nonetheless.¹³⁶ Importantly, although the Supreme Court divided on the subject, opinions from the mid-nineteenth century, such as the *Passenger Cases*,¹³⁷ can be read as expressing approval of state immigration laws based on state police powers, particularly over crime, indigence, and disease.¹³⁸

This tradition of state involvement gave way to exclusive federal authority in the last quarter of the nineteenth century, in part because the abolition of slavery removed that contentious issue from the field of immigration and thus made it less politically explosive for the federal government to regulate immigration.¹³⁹ Additionally, the influx of Chinese immigrants on the West Coast, and the subsequent call for immigration restrictions to curb this influx, led to federal action. The issue required negotiations with another country and therefore could be resolved only at the national level.¹⁴⁰ In light of the Court's disagreement about federal exclusivity,¹⁴¹ it is highly unlikely that the movement toward federal regulation was perceived as constitutionally mandated.

This historical practice undermines the claims of structural preemption in important ways. It makes clear that the institutional structures created by the Constitution do not require federal exclusivity. The basic institutions did not change from the nineteenth century to the twentieth century. Instead, the need for uniform rules changed. The federal response to this need—to enact such uniform rules that, in effect, took over immigration from the states—does not reflect a different understanding of constitutional mandates. Instead, it simply reflects changing political forces.

136. See Neuman, *supra* note 102, at 1837, 1841; see also *id.* at 1837-38 ("For purposes of this Article, a statute regulates immigration if it seeks to prevent or discourage the movement of aliens across an international border, even if the statute also regulates the movement of citizens, or movement across interstate borders, and even if the alien's movement is involuntary.").

137. 48 U.S. (7 How.) 283 (1949).

138. See Cleveland, *supra* note 95, at 99-106 (discussing cases and concluding that they "brought little resolution of the power [of states] to restrict the entry and exit of aliens"); Neuman, *supra* note 102, at 1885-93 ("Even within this standard line of cases [read as developing the exclusive federal power over immigration regulation], there is a counterstory to be read that favors state authority.").

139. See Neuman, *supra* note 102, at 1896-97 ("When slavery ceased to divide the nation, national immigration regulation became possible.").

140. See *id.* at 1897-98.

141. See Cleveland, *supra* note 95, at 106 (concluding that, during the antebellum period, "[t]he Court was fiercely divided on the question" of federal exclusivity).

d. Precedent

At first glance, Supreme Court precedent appears to place authority over pure immigration law squarely into the category of structural preemption. *Chy Lung v. Freeman* is the seminal case.¹⁴² There, the Court found that a California statute, which required a bond for certain classes of passengers arriving from a foreign port, had the potential to incite an international incident. If this happened, the Court speculated:

Upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the Federal government? If that government has forbidden the States to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?

The Constitution of the United States is no such instrument. The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.¹⁴³

Taken alone, this language would appear to foreclose an argument that pure immigration authority is shared among levels of government. Indeed, this is the language that courts and scholars typically invoke as the source of structural preemption.¹⁴⁴

But courts and scholars oddly ignore the very next paragraph of the case, where the Court left open the door for state regulation:

We are not called upon by this statute to decide for or against the right of a State, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. When a State statute, limited to provisions necessary and appropriate to that object alone, shall, in a proper controversy, come before us, it will be time enough to decide that question. The statute

142. 92 U.S. 275 (1875).

143. *Id.* at 279-80.

144. See, e.g., *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 450 n.16 (1979); Hines v. Davidowitz, 312 U.S. 52, 63 (1941); Cleveland, *supra* note 95, at 109 (discussing *Chy Lung* and concluding that “the decision appeared motivated by a desire both to protect aliens seeking entry from unequal and arbitrary state treatment and to preserve national control over foreign relations”); Wishnie, *supra* note 7, at 530-32.

of California goes so far beyond what is necessary, or even appropriate, for this purpose, as to be wholly without any sound definition of the right under which it is supposed to be justified. Its manifest purpose, as we have already said, is, not to obtain indemnity, but money.¹⁴⁵

In this passage, the Court reserved the possibility that, in another case, federal interests would need to be weighed against state interests.¹⁴⁶ Indeed, had California's interests not been so patently mercenary, the Court might have addressed the question in *Chy Lung*.

Other cases during the same period recognized state power over immigration, narrowly defined, and expressed approval for state immigration laws based on state police power. For example, the Court noted that a state could regulate foreign commerce (a catchall understood to cover immigration law) to the extent the state was exercising its police power.¹⁴⁷

Later Supreme Court cases miss the point of *Chy Lung*. The typical modern case cites *Chy Lung* for the proposition that states and localities play no role in pure immigration law, but that states and localities may enact regulations falling outside of immigration law. For example, in *DeCanas v. Bica*, the Court stated that the "power to regulate [pure] immigration [law] is unquestionably exclusively a federal power."¹⁴⁸ But this statement was dictum. The statute in question did not regulate pure immigration law, as the Court then recognized in finding that "standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration."¹⁴⁹

The repeated statements of federal exclusivity over pure immigration law have made this proposition seem like a constitutional

145. 92 U.S. at 280 (emphasis added).

146. This type of balancing is precisely what I call for in *infra* Part III.

147. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203-06 (1824) (finding that conduct that could be regulated by Congress because it concerned foreign commerce could also be regulated by the states as an exercise of state police power, providing the state law did not conflict with the federal law). For a longer discussion of this and other cases, see Neuman, *supra* note 102, at 1885-93. This nineteenth century trend has modern echoes in dictum from the Supreme Court noting that states may regulate pursuant to their traditional authority even if that regulation touches upon foreign affairs. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 418-20 (2003) (reviewing several Court opinions addressing potential conflicts between state laws and federal authority over foreign affairs, and concluding that "it would be reasonable to consider the strength of the state interest . . . when deciding how serious a conflict must be shown before declaring the state law preempted").

148. 424 U.S. 351, 354 (1976).

149. *Id.* at 364-65 (upholding state statute that prohibited an employer from knowingly employing non-citizens without lawful residence status if such employment would have an adverse effect on lawful resident workers); see also *id.* at 355 ("[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised.").

inevitability,¹⁵⁰ but the cases do not address pure immigration laws. There has thus never been an occasion for the Court to explore the second excerpt from *Chy Lung*, which left open the possibility that states may have a role to play in pure immigration law. Indeed, states and localities have not enacted pure immigration laws since the end of the nineteenth century, and now the comprehensive INA statutorily preempts such enactments. Absent a radical change in immigration law, we are unlikely to see any cases raising this issue.

In short, the first excerpt from *Chy Lung* has become a third rail and has contributed to the belief that authority over pure immigration law is structurally committed to the federal government alone. But Supreme Court precedent does not ineluctably lead to this conclusion.¹⁵¹ Despite the traditional narrative of federal exclusivity over immigration, there is room for an alternative narrative.¹⁵² Instead of establishing a constitutional mandate for exclusive federal authority over immigration law, Supreme Court precedent embodies the tension between the national interest in a uniform rule and the states' interests in exercising their police power to protect their citizens.

150. In another example, the Court stated in *Hines v. Davidowitz* that it would rule on only one question, "expressly leaving open all of appellees' other contentions, including the argument that the federal power in this field, whether exercised or unexercised, is exclusive." 312 U.S. 52, 62 (1941). The Court then applied a statutory preemption analysis, finding that "the regulation of aliens is so intimately blended and intertwined with the responsibilities of the national government that where it acts, and the state also acts on the same subject, the act of Congress . . . is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." *Id.* at 66. Finding that the federal government's authority was "superior," and that Congress had enacted "a complete scheme of regulation," the Court found the state provision preempted. *Id.*

151. Although Professor Cleveland argues that "the Court's decisions between 1875 and 1886 rejected the possibility of an exclusive or concurrent state power over immigration and upheld an exclusive federal authority to impose head taxes and inspect immigrants," Cleveland, *supra* note 95, at 121, she also notes that at least one of the leading cases likely rested on statutory preemption, *see id.* at 109-10 (discussing *New York v. Compagnie Générale Transatlantique*, 107 U.S. 59 (1883), where the Court struck down a New York quarantine statute arguably because the federal government had enacted immigration legislation and the Court concluded that the state and federal statutes "cannot coexist"). The other central case from that time, *Henderson v. Mayor of New York*, 92 U.S. 259 (1875), did conclude that immigration authority was exclusively federal. *See id.* at 272-74 (finding that "this whole subject has been confided to Congress by the Constitution"). Although this would appear to foreclose the possibility of concurrent state authority, the Court handed down this decision and the decision in *Chy Lung*—with the language quoted in the text, which explicitly left the door open for at least some state regulation—on the same day. My argument is not that the decisions from this era clearly recognized concurrent state authority, but rather that the decisions did not completely foreclose the possibility of state authority to regulate immigration based on a state's police powers.

152. Neuman, *supra* note 102, at 1887.

2. Dormant Preemption

As a practical matter, federal exclusivity exists with respect to immigration law (as narrowly defined), but this practice is not constitutionally mandated. The text and structure of the Constitution do not require federal exclusivity and instead admit of a role for states and localities. This conclusion is supported by historical practice and is not foreclosed by Supreme Court precedent. Concluding that authority over pure immigration law does not fall into the structural preemption category leaves unanswered the question whether federal exclusivity rests on dormant preemption or statutory preemption.

Dormant preemption is exceedingly rare in constitutional law.¹⁵³ Unless explicitly embodied in the text of the Constitution, as with the Compact Clause, some scholars consider it a controversial notion because the dormancy creates the potential for judicial activism.¹⁵⁴ There is no reason to subject immigration authority to this dubious constitutional status. No textual mandate for dormant preemption exists. The institutional structures created by the Constitution do not indicate a need for a dormant power. There is no judicial recognition of such a power. And a dormant preemption view of immigration authority cannot account for the state immigration laws in force before the twentieth century.

3. Statutory Preemption

In contrast to both structural preemption and dormant preemption, a statutory preemption understanding of immigration authority gives greater constitutional coherence to the current reality of federal dominance in immigration law, as well as to the historical practice of state regulation.¹⁵⁵ It explains why states and localities

153. For a discussion of dormant preemption in general, and in the foreign affairs context in particular, see RAMSEY, *supra* note 85, at 273-82 (arguing against finding a broad dormant preemption of foreign affairs authority).

154. See, e.g., Robert Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 201 (1985) (observing that, when applying the dormant Commerce Clause in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670-76 (1981), "the Court retains the option either to defer to or to second-guess the legislative judgment," then "insist[s] on appearing to exercise both these choices").

155. A statutory preemption view of immigration authority still allows for national uniformity. For better or worse, statutory preemption precludes a role for the states on what may be important issues. See Young, *supra* note 90, at 130-31 ("The whole point of preemption is generally to force national uniformity on a particular issue, stifling state-by-state diversity and experimentation. And preemption removes issues within its scope from the policy agenda of state and local governments, requiring that citizen participation and deliberation with respect to those issues take place at the national level.").

have not asserted a role in immigration law, as narrowly defined, since the nineteenth century. Since then, the federal government has taken an increasingly active role in pure immigration law, preempting state and local immigration laws. The comprehensive INA, which is still in force today, statutorily preempts all state and local laws governing the admission and removal of non-citizens. This shift explains the difference between state and local involvement at the end of the nineteenth century and today: Our understanding of the constitutional commitment of authority over pure immigration law has not changed. Such authority always has rested simultaneously with the national and subnational governments. In the late nineteenth century, the national government had not yet preempted state and local laws. Today it has.

In sum, the Constitution allows the national and subnational governments to share immigration authority. To the extent that the federal government does not exercise its authority—that is, it does not statutorily preempt state and local laws—subnational governments are free to exercise their authority to regulate immigration. This authority rests on the subnational governments' police power to regulate health and safety.¹⁵⁶ Absent federal statutory preemption, state and local governments enjoy some residual authority. In other words, the Constitution does not foreclose a substantive role for state and local governments, but, as in all other areas of shared authority it does allow the federal government to take the lead—and sometimes to take over entirely. Immigration authority, then, is not so different from other areas of law and is best understood to be shared between the national and subnational governments. It stands apart only in the *degree* of federal statutory preemption.

C. Implications of Shared Authority

If states and localities have not enacted pure immigration laws in more than a hundred years,¹⁵⁷ it is fair to ask why it was necessary to determine the underpinnings of federal exclusivity. As I

156. It is uncertain whether the constitutional right to travel articulated in *Shapiro v. Thompson*, 394 U.S. 618 (1969), would prohibit state laws regulating the movement of non-citizens. As reinterpreted in *Saenz v. Roe*, 526 U.S. 489, 501, 503 (1999), the right to travel is grounded in the privileges and immunity clause, which protects only citizens. Chang, *supra* note 133, at 362 n.30.

157. One important exception is the incorporation of state criminal and marriage laws, on which immigration laws often turn. *Id.* at 360. To be sure, the state laws matter only to the extent that the federal government recognizes them, but, with regard to the delegation question discussed below, this incorporation of state laws typically is not seen as an unconstitutional delegation, perhaps telling us something important about the recognition of state authority.

demonstrate more fully in Part IV, the nature of the preemption makes all the difference in evaluating the constitutionality of the conduct that states and localities *are* undertaking. Placing authority over pure immigration law in the statutory preemption category informs questions of the delegation of federal authority and the existence of inherent state authority to enforce immigration laws. It also informs how courts assess the substantive laws that states and localities are enacting.

If we think authority over pure immigration law is structurally committed to the federal government alone, then we are deeply skeptical of any state and local conduct related to immigration and aliens because the categories of immigration law and alienage law bleed together and because we believe that the federal interests are paramount. By contrast, if we think the national and subnational governments have shared authority as a default constitutional matter, then we simply can ask the classic federalism questions set forth in Part III to determine the proper allocation of authority.

With an understanding that authority over pure immigration law is shared among levels of government, state and local involvement is far less suspect, and it becomes possible to engage in a more productive and refined debate over the proper allocation of authority. A statutory preemption understanding of pure immigration law thus leads to a more dynamic relationship between the national and subnational governments. As I argue in Part III, traditional federalism values provide useful tools for structuring the debate about the possible roles for each level of government.

Before turning to that argument, it is helpful to alter slightly the terms used to describe the laws and conduct at issue. Once it is understood that the claim of constitutionally mandated federal exclusivity over pure immigration law is highly contestable, it makes more sense to think about immigration law and alienage law as part of a continuum of immigration regulation. This conception better reflects the interplay between immigration laws and alienage laws and guards against the constitutionally unwarranted skepticism of a more robust role for state and local governments. It also means that we need not police the line between immigration law and alienage law too closely—all levels of government have authority over both types of regulation. This understanding opens the door to a debate, through a federalism lens, about the proper role state and local governments *should* play.

III. THE VALUE OF THE VALUES OF FEDERALISM

Determining that federal exclusivity rests on statutory preemption does not end the debate over the proper allocation of immigration authority among levels of government, nor does it mean that state and local governments may play an unfettered role in immigration regulation. Instead, concluding that immigration authority may be shared among levels of government opens the door to weighing the interests and values traditionally implicated in debates over the respective roles of the national and subnational governments. This Part demonstrates that the federalism lens is a particularly apt tool for courts, policymakers, and scholars to use when examining the difficult questions posed by state and local involvement in immigration regulation.

A. Competing Values in Federalism

In light of the institutional structures created by the Constitution, in most areas of law there is a vigorous and longstanding debate about the proper allocation of authority among levels of government. This debate has yielded certain core values that scholars and courts use to try to answer questions of institutional structure and allocation of authority.

On one side, court decisions and scholars favoring devolution and decentralization cite four central benefits: First, decentralization is thought to encourage experimentation—creating the proverbial “laboratories of democracy.”¹⁵⁸ Such pluralism in turn encourages and lowers the cost of innovation.¹⁵⁹ Second, it is believed that efficiency and effectiveness are enhanced when state governments must compete for residents and resources.¹⁶⁰ Decentralization allows subnational

158. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (presenting a model of U.S. federalism as enabling national coordination of local solutions to various types of problems). Some commentators distinguish decentralization from federalism, e.g., Edward Rubin & Malcom Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 910-14 (1994), recognizing the potential benefits of the former in some instances while remaining critical of the latter, see *id.* at 914-26.

159. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“This federalist structure of joint sovereigns . . . allows for more innovation and experimentation in government.”).

160. See *id.* (arguing that state authority “makes government more responsive by putting the States in competition for a mobile citizenry”); Richard Briffault, “What about the ‘Ism?’” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1314 (1994) (describing the theoretical benefits of state competition within a federal system). The argument, as advanced by Charles Tiebout, is that sub-national governments can be conceived of as acting like private firms competing for profits, although the competition is for citizens. See

governments to respond to local preferences, and the possibility of exit encourages efficiency.¹⁶¹ Third, political accountability and participation are thought to be furthered because subnational governments are able to satisfy the interests of smaller groups and allow more individuals to participate in decisionmaking.¹⁶² Finally, devolution and decentralization are considered checks against national power, protecting both states' rights and individual rights.¹⁶³

Critics of devolution and decentralization cite a competing set of values. According to these commentators, a strong national government serves an interest in uniformity,¹⁶⁴ which furthers fairness and equality.¹⁶⁵ Additionally, a strong national government better serves economic interests because it is less likely to be captured

Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (“[T]he consumer-voter moves to that community whose local government best satisfies his set of preferences.”).

161. See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 21-29 (1970) (describing how exit helps organizations promote efficiency); Clayton Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 200-02 (2001) (arguing that the expansion of jurisdictional boundaries threatens the benefits of decentralization because, among other reasons, minority dissenters within larger jurisdictions have higher exit costs and therefore less credible threats of migration when local government does not account for their preferences).

162. See *Gregory*, 501 U.S. at 458 (noting that dual sovereignty “increases opportunity for citizen involvement in democratic processes”); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 91-106, 139 (1995) (“[O]ne of the stronger arguments for a decentralized political structure is that, to the extent the electorate is small, and elected representatives are thus more immediately accountable to individuals and their concerns, government is brought closer to the people, and democratic ideals are more fully realized.”); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Sovereignty Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 856 n.152 (1998) (“[B]y devolving power to territorially circumscribed states responsive to a local electorate, federal regimes allow groups smaller than a national majority to satisfy their preferences for public goods, multiply opportunities for political participation, and diffuse power in a way to promote electoral competition.”).

163. See *New York v. United States*, 505 U.S. 144, 181 (1992) (“[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.” (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))); *Gregory*, 501 U.S. at 458 (“Perhaps the principal benefit of the federalist system is a check on abuses of government power.”); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1448-51 (1987) (“[F]ederalism enabled the American People to conquer government power by dividing it. Each government agency, state and national, would have incentives to win the principal’s affections by monitoring and challenging the other’s misdeeds.”).

164. Dissenting opinions in Supreme Court decisions express these concerns, as well. See, e.g., *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 652 (1999) (Stevens, J., dissenting) (“It was equally appropriate for Congress to abrogate state sovereign immunity in patent infringement cases in order to close a potential loophole in the uniform federal scheme, which, if undermined, would necessarily decrease the efficacy of the process afforded to patent holders.”).

165. See SHAPIRO, *supra* note 162, at 138 (“[T]he moral and practical forces favoring equality look toward the virtues of uniformity not only as a cost-saver but as something approaching a natural right.”).

by economic interest groups,¹⁶⁶ can more easily correct for market imperfections and failures,¹⁶⁷ can guard against a regulatory race to the bottom,¹⁶⁸ and is more efficient.¹⁶⁹ Finally, a strong national government better protects the fundamental rights of individuals and groups, as evidenced by the history of race relations and the numerous Supreme Court decisions striking down state laws that infringed on freedom of speech, free exercise, and the rights of criminal defendants.¹⁷⁰

Arguments concerning these core values are well rehearsed and need not be repeated at length here.¹⁷¹ Instead, the relevant

166. *See id.* at 44-45 (describing Madison's argument that a strong centralized government offers economic benefits because, among other reasons, "the range of parties and interests that would exist within the territorial jurisdiction of such a large national government would be so wide that no single faction, or small group of factions, could exercise power for selfish purposes").

167. *See id.* at 42, 46 ("[W]hen market imperfections call for some regulatory action, social welfare is more likely to be maximized when such action is taken on a national level.")

168. *See id.* at 42-43 (describing the necessity for uniform national regulation to overcome states' economic incentives to compete by under-regulating).

169. *See id.* at 46-50 (presenting examples of problems more efficiently addressed on a national level because of its greater combined resources and/or centralized authority).

170. *See id.* at 50-56 (summarizing the history of federal protection of individuals and groups disfavored by state and local authorities); Harry N. Scheiber, *Constitutional Structure and the Protection of Rights: Federalism and the Separation of Powers*, in *POWER DIVIDED: ESSAYS ON THE THEORY AND PRACTICE OF FEDERALISM* 17, 26 (H. Schieber & M. Feeley eds., 1989) (noting benefits of federalism, but concluding that "the record of American federalism . . . represents tragic failure with regard to acting as a bulwark of liberty").

171. These competing, core values play out in four basic models of federalism: (1) dual federalism, *see Alden v. Maine*, 527 U.S. 706, 714-15 (1999); (2) cooperative federalism, *see New York v. United States*, 505 U.S. 144, 167-68 (1992); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001) ("In contrast to dual federalism, cooperative federalism envisions a sharing of regulatory authority between the federal government and the states that allows the states to regulate within a framework delineated by federal law."); (3) empowerment federalism, *see Erwin Chemerinsky, Theories of Federalism: Federalism Not as Limits, But as Empowerment*, 45 U. KAN. L. REV. 1219, 1239 (1997); *see also Erwin Chemerinsky, The Values of Federalism*, 47 FLA. L. REV. 499, 539 (1995) ("[F]ederalism can be reconceived not as about limiting federal power or even as about limiting state or local power. Rather, it should be seen as based on the desirability of empowering multiple levels of government to deal with social problems."); and (4) interactive federalism, *see Robert A. Schapiro, Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 243, 245 (2005) (arguing that the "interaction of national and state governments, rather than their separation, [is] the primary means of realizing the aims of federalism," and therefore arguing in favor of "polyphonic federalism[, which] does not divide state and federal authority, but instead seeks to harness the interaction of state and national power to advance the goals associated with federalism"). The extent to which each model protects or threatens these values is contested empirically and normatively, however.

One benefit of applying a federalism lens to immigration is that it allows us to draw upon the rich descriptive frameworks of the various models of federalism. Current state and local immigration regulation does not fall neatly into any one model of federalism but instead embodies strains of many of the models. For example, the enforcement of immigration law could be described as both cooperative federalism and dual federalism. The enforcement anticipated by

question is how these values may help structure the debate concerning the proper allocation of authority over immigration regulation among levels of government.

B. Immigration through a Federalism Lens

The federalism debate, raging for more than two centuries, provides a rich vocabulary and nuanced landscape against which to examine questions of the division of power. To date, this debate has not been applied in a systematic way in the immigration context. To be sure, some commentators have singled out certain federalism values, but the selection tends to be both outcome determinative and dependent on the substantive commitments of the commentator. Thus, commentators who believe that state and local enforcement of immigration law enhances national security identify decentralization values in immigration regulation—the importance of drawing on a wider array of law enforcement resources than those in the federal government.¹⁷² By contrast, commentators concerned about discrimination against non-citizens identify national uniformity as a goal that precludes a state role in immigration regulation.¹⁷³ In this Section, I do not take sides on the substantive issues, but rather demonstrate the relevance and robustness of traditional federalism debates to the novel questions raised by immigration federalism.

section 287(g) neatly fits the paradigm of cooperative federalism, with the federal government establishing the goals of enforcement and then permitting states and localities to take an active role on the ground, subject to federal supervision. Other types of state and local enforcement are better described as falling under the dual federalism model, with sub-national units drawing on their inherent authority to enforce federal law and doing so without federal oversight. In another example, immigration regulation increasingly embodies the interactive federalism model. State governments have sued the federal government to enforce federal immigration law, and the federal government is looking to states and localities for assistance in the enforcement of immigration law. Finally, federal laws such as the Personal Responsibility and Work Opportunity Reconciliation Act manifest elements of an empowerment federalism model. The federal government empowers the states to do what they otherwise could not do—discriminate on the basis of alienage.

One of the issues raised by shared authority will be to determine which model of federalism best furthers the interests of the various levels of government. As noted above, there are various elements of each model; it may not be strictly necessary to elevate one model over others, but over time it may become apparent which model best embodies and serves the multiple, and often divergent, interests at stake.

172. See Kobach, *supra* note 10, at 183-99 (describing the importance to national security of state and local enforcement of immigration regulations).

173. See Wishnie *supra* note 7, at 552-58 (arguing that “devolution would erode the antidiscrimination and anticaste principles that are at the heart of our Constitution and that have long protected noncitizens at the subfederal level”).

Uniformity versus experimentalism. Of all the competing values in the immigration context, uniformity and experimentalism are most clearly in tension. There are strong practical arguments for a uniform rule of pure immigration law. For example, although I argued above that the concern about a state embroiling the United States in an international conflict should not lead to a rule of structural preemption,¹⁷⁴ the concern is important. There are good reasons for preventing states from asserting themselves in the international arena, but this concern can be accounted for by weighing the interest in a uniform rule of pure immigration law more heavily than the interest in experimental immigration laws. The federal government, through statutory preemption, already has precluded a role for states and localities in pure immigration law.¹⁷⁵ Therefore, the federalism argument is simply a backstop.

Moving beyond pure immigration law and looking at immigration regulation more generally, a decentralized system has some advantages. In a world where some states are offering in-state tuition to unauthorized migrants¹⁷⁶ while the federal government is seeking to construct a wall along the southern border,¹⁷⁷ it is by no means clear that the national government will better protect the interests of non-citizens. At other points in history, however, the roles have been reversed. Indeed, all levels of government can and have expressed both hostility and openness to non-citizens. In short, there is no structural reason to believe that one level of government will be more or less welcoming to non-citizens and therefore, on this basis, to favor uniformity over experimentalism.

Decentralizing and devolving decisionmaking regarding non-citizens may accommodate, and reflect a greater variety of views on, non-citizens and perhaps even mitigate pressure on the federal government to enact legislation that reflects ardently held views of a small but vocal portion of the population.¹⁷⁸ Decentralization and

174. See *supra* Part II.B.1.b.

175. This is not completely true. Current federal immigration law incorporates state criminal and marriage laws and thus can lead to divergent results, depending on the location of the non-citizen. See Chang, *supra* note 133, at 360 (observing that divergent state marriage laws cause inconsistent immigration consequences). In other words, immigration regulation already is not uniform. Of course, the decision to incorporate divergent state laws was made at the national level, but it is some indication of the tolerance for nonuniformity.

176. See *supra* note 65.

177. See Secure Fence Act of 2006, Pub. L. No. 109-367 (2006) (codified at 8 U.S.C. §§ 1103 note, 1701 note).

178. See Spiro, *supra* note 6, at 1628-46 (“Those states desiring stricter enforcement of immigration laws could pursue that objective without imposing their preference on states in which immigration might be considered a neutral or positive factor.”). For an argument in favor

devolution might ensure, for better or worse, that the national government does not enact legislation reflecting extremes at either end of the political spectrum.

A system that allows states and localities to express divergent views on the benefits and costs of immigration would permit the development of a variety of policies, rather than a single, national policy, creating the proverbial laboratories from which the national government (or states and localities) can learn. This devolution also would allow for greater tailoring of immigration policy. For example, giving senators from Alaska a voice in determining the demographic make-up of the work force in the agricultural southwest dilutes the ability of those states and localities to shape immigration regulation to reflect their needs and interests.

State and local experiments in immigration regulation can lead to quick lessons. There is mounting evidence that the divergent state and local laws are affecting the movement of non-citizens. For example, after Colorado passed a spate of laws in 2006 making life more difficult for unauthorized migrants by requiring certain forms of identification and curtailing many public benefits,¹⁷⁹ the state saw a dramatic decrease in the number of migrant workers available to work on farms, to the great dismay of potential employers.¹⁸⁰ Riverside, New Jersey, had a similar experience, leading the town to repeal its anti-immigrant ordinance.¹⁸¹

of experimentalism in immigration, see Matthew Parlow, *A Localist's Case for Decentralizing Immigration Policy*, 84 DENV. U. L. REV. 1061, 1069-73 (2007) (observing that "local government experimentation in the immigration realm can lead to successes or failures that can inform federal policy-making").

179. See, e.g., COLO. REV. STAT. § 24-76.5-103(1) (2007) ("[E]ach agency or political subdivision of the state shall verify the lawful presence in the United States of each natural person eighteen years of age or older who applies for state or local public benefits or for federal public benefits for the applicant."); *id.* § 24-76.5-103(4) (allowing only specified forms of identification to establish immigration status, including a Colorado driver's license or identification card; a United States military card or a military dependent's identification card; a Native American tribal document; or an affidavit stating the individual is "otherwise lawfully present in the United States pursuant to federal law").

180. See Dan Frosch, *Inmates Will Replace Wary Migrants in Colorado Fields*, N.Y. TIMES, Mar. 4, 2007, at A1 (describing the severe shortage of agricultural workers in the wake of anti-immigrant laws and the efforts to replace those workers with inmates; also describing the decisions by potential workers to stay in New Mexico or other states, to the great chagrin of local farmers); see also Beth Potter, *Are State's Immigration Laws Chasing away Workers?*, DENV. BUS. J., Apr. 13, 2007, at A1 (describing the same shortage in agriculture and also finding anecdotal evidence that the anti-immigrant laws are affecting other industries, such as construction).

181. See Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at A1 (detailing how Riverside, New Jersey, repealed an ordinance "penalizing anyone who employed or rented to an illegal immigrant," and thus "join[ed] a small but growing list of municipalities nationwide that have begun rethinking such laws as their legal

Further, permitting states and localities to have a role in determining levels of immigration law enforcement would acknowledge the important economic and social stake that subnational governments have in immigration. To the extent that the national policy does not address these concerns, the subnational governments should be able to do so. If state and local governments discourage the presence of non-citizens to their economic and social detriment, this experimentalism should correct itself quickly.

On the other hand, emphasizing uniformity might lead to the conclusion that the federal government—and not Farmers Branch, Texas, or Escondido, California—should determine the appropriate level of enforcement of the country's immigration laws. If, for a variety of political, social, and economic reasons, the United States chooses not to remove all unauthorized migrants and not to seal the border completely, then this determination arguably should bind states and localities.

Efficiency and effectiveness. The experimentalism that would be fostered under devolution and decentralization might promote the values of efficiency and effectiveness. If one state determined that welcoming non-citizens was to its economic and social advantage, and this prediction held true, then that state would be rewarded by its immigrant-friendly policies. A state drawing a different conclusion might be rewarded when its prediction came true. Conversely, if the predictions were inaccurate, then the states would lose out economically and socially.

Allowing states and localities to encourage or discourage the presence of non-citizens also would allow these subnational governments to tailor their laws to their labor needs. For example, one state might want to encourage non-citizens to work in agriculture while another state might prefer to bolster the workforce in the technology industry. Indeed, the relationship between immigration law and the demands for labor has deep roots,¹⁸² and permitting experimentation simply would bring this connection to a local level, allowing for a more finely tuned supply and demand of labor.

On the other hand, these localized results and the potential efficiencies might run afoul of national interests. For example, if every state passed laws discouraging non-citizens' presence, admittance into

and economic consequences have become clearer" after "hundreds, if not thousands," of immigrants left the town).

182. See ZOLBERG, *supra* note 103, at 3-4 (describing the efforts of Thomas Jefferson, Alexander Hamilton, and James Madison to explore "the relationship between population, land, and labor to determine what immigration policy would best serve broader goals of nation-building and economic development").

the country from the national government might have little practical effect. A non-citizen could cross the border but would not be welcomed by any state. In this way, states and localities could thwart national immigration policy. Setting aside the constitutional aspect of unencumbered interstate travel,¹⁸³ the free movement of people may be essential to a robust economy. Permitting state and local governments to express varying degrees of welcome and hostility to non-citizens could discourage non-citizens from moving where they wish to go, perhaps in search of better economic opportunities.

For these reasons, a uniform rule may be more efficient and may ward off state and local parochialism that could threaten national interests. This latter argument often is advanced in favor of structural preemption. My point is that we need not set immigration law apart from mainstream constitutional law with a rule of structural preemption. Instead, we can account for these concerns through a federalism lens.

*Protection of individual rights.*¹⁸⁴ Although some commentators contend that non-citizens are at greater risk when the states take a more active role in the regulation of immigration,¹⁸⁵ this hypothesis has not always proven true as an empirical matter.¹⁸⁶ In light of the explicitly race-based federal immigration laws in effect as late as 1952, there is no particular reason to think that the federal government is better at protecting individual rights.¹⁸⁷ Some recent state and local laws explicitly have sought to protect non-citizens' individual rights: many major cities have "sanctuary laws" that prohibit law enforcement officers from specified conduct, such as

183. See *supra* note 156.

184. For a discussion of fundamental rights apart from their consideration in federalism debates, see *infra* Part III.C.

185. See Wishnie, *supra* note 7, at 515-18.

186. See Schuck, *supra* note 64, at 389-90 (noting that the anticipated "race to the bottom" has not occurred and instead numerous states, including those with large immigrant populations, have restored benefits on the state level that had been lost at the federal level, in some instances providing new benefits, including under Medicaid). As Professor Chang notes, instead of the laboratories of bigotry that Professor Wishnie hypothesizes, see Wishnie, *supra* note 7, at 553, "we might just as plausibly view federal authorization of divergent state policies as creating laboratories of *generosity* toward immigrants," Chang, *supra* note 133, at 363-64 (emphasis added). *But see* Vock, *supra* note 64 (noting that "laws restricting the rights or benefits of illegal immigrants outnumber laws benefiting them by a 2-1 ratio").

187. See Romero, *supra* note 11, at 383 ("[T]he bottom line appears to be this sad fact: if racism within immigration law and policy is systemic, then devolution will not cure the problem."); see also Chang, *supra* note 133, at 363-66 (arguing that a nondevolvability principle serves the interest of uniformity, but not necessarily antidiscrimination). Professor Chang further argues that it is conceivable that insisting on nondevolvability may lead Congress, in some instances, to enact laws more discriminatory than those that might be enacted pursuant to the devolution of federal authority. See *id.* at 364.

inquiring into a person's immigration status.¹⁸⁸ Although one of the goals of such policies is to encourage unauthorized migrants to report crimes without fear of detection, the policies also protect non-citizens from racial discrimination in the enforcement of laws.¹⁸⁹

Increased political participation and political accountability. A traditional argument is that political participation increases with the localization of government¹⁹⁰ but that such decisionmaking likely will be parochial, increasing the chance that negative externalities will be imposed on communities that cannot participate in the decisionmaking process.¹⁹¹ In the context of immigration, however, this traditional trade-off is complicated by the fact that non-citizens cannot vote at any level of government.¹⁹² To be sure, other forms of participation are available,¹⁹³ but direct participation is elusive, and therefore, the benefit of decentralization and devolution is not obvious. By contrast, the potential for imposing externalities on other communities remains strong. Through its regulation, a state or locality could affect patterns of immigration beyond its borders. Whether, in each case, the effect was a negative or positive externality would be a matter of debate, but the potential to affect others exists.

188. See Kittrie, *supra* note 3, at 1466-75 (describing "sanctuary policies" in effect in numerous large cities).

189. See *id.* at 1475-77 (observing that the "complexity of federal immigration law inevitably results in poorly trained local officials engaging in profiling by using race and ethnicity as proxies for immigration status").

190. See SHAPIRO, *supra* note 162, at 139 (arguing that the existence of state and local political power "serve[s] the important function of bringing democracy closer to the people").

191. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 429 (1990).

192. Under current law, non-citizens are unable to vote, at least in federal elections and in the vast majority of non-federal elections. This has not always been the case. Historically, at least twenty-two states and territories allowed non-citizens to vote. Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1393 (1993).

193. See, e.g., Oscar Avila, *Marchers Plan Their Next Step*, CHI. TRIB., May 3, 2006, at 3 (describing similar marches in Chicago with 100,000 people rallying on March 10, 2006, and over 400,000 on May 1, 2006); Christopher Hawthorne, *Architecture: Critic's Notebook*, L.A. TIMES, Dec. 31, 2006, at 1 (describing massive immigration-rights marches in Los Angeles that drew over a half a million marchers on March 25, 2006, and an additional several hundred thousand workers on May 1, 2006, calling these the largest political rallies outside of Washington, D.C., since the Vietnam era). Although some leaders called this the beginning of "the new civil rights movement," Jessie Mangaliman, *Immigration Rights Backers Marching On; Counterprotest Also Set Monday as Both Sides Seek to Send Message to Congress*, SAN JOSE MERCURY NEWS, Sept. 2, 2006, at B1, some scholars are skeptical of this prospect, see Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 101 (2007) ("We discern decidedly mixed signals about the possibility of such a movement. Despite signs of promise and potential, there are many formidable hurdles before the emergence of a new, multiracial civil rights movement.").

Federalism in the context of immigration will have to account for these peculiarities.

With regard to political accountability, there is no reason to believe that either the federal government or states and localities will be more accountable to non-citizens.¹⁹⁴ Again, non-citizens cannot vote at any level of government. The interests of non-citizens may be asserted by former non-citizens who have naturalized and thus can now vote. In light of the uneven distribution of former non-citizens around the country, some states and localities arguably will be more responsive to current non-citizens. Where former non-citizens make up a greater proportion of the population, they may have greater influence.¹⁹⁵

Further, the divergent standards set under the authority delegated by the PRWORA—with some states providing more generous benefits than those given by the federal government—is evidence that subnational levels of government are capable of responsiveness to the interests of non-citizens. Indeed, permitting states and localities to determine their own level of welcome to non-citizens might open the door for non-citizens to reward the more welcoming states and localities with their presence. Permitting states and localities to express their preferences also would help to inform non-citizens what to expect in a given location.

Check on federal power. The power sharing envisioned by the federal system was intended to ensure that the states were seen as legitimate sources of power and therefore would retain their citizens' loyalty, which would translate into the ability to check federal excesses in any field of regulation.¹⁹⁶ If authority over an important area like immigration were shared, it would make states and localities more important in the eyes of their citizens, thus serving a legitimating function.

Sharing immigration authority means that states and localities also will be able to counteract federal immigration regulation. Although the federal government could preempt state and local laws,

194. The federal government, in a way that states and localities simply are not, is accountable to other nations, which is one of the arguments for federal exclusivity. My point here concerns political accountability to individuals.

195. Other individuals besides former non-citizens will support measures that favor non-citizens, and certainly some former non-citizens will vote against measures that favor non-citizens. My point is not to predict with absolute certainty how individuals and groups will vote, but is, rather, the unremarkable observation that voting preferences vary by location.

196. See Amar, *supra* note 163, at 1448-51.

to the extent it has not done so, states and localities would remain free to enact laws that run counter to federal policies.¹⁹⁷

In the international context, allowing for a range of immigration regulation would let other countries know that there is a diversity of opinion among U.S. citizens with regard to non-citizens. Although this would mean that a state could send an anti-immigrant message to other countries, contrary to the views of the U.S. government, it also would mean that, in the face of a national anti-immigrant policy, a state could send a more positive message.

The need of the United States to speak with one voice would be served by the national government's ability to preempt state and local action.¹⁹⁸ In this way, the preemption function would serve as an important test of the strength of national policy: if the national government truly believes that a particular policy is essential for international relations, it can preempt contrary state and local legislation. The tolerance of divergent views by states and localities would be telling evidence of the strength of the national commitment to the policy.¹⁹⁹

* * *

In sum, once we recognize that federal exclusivity is not constitutionally mandated, classic federalism arguments work well in determining the appropriate allocation of authority among levels of government. Moreover, if the federal government wishes to prevent state and local governments from undertaking particular immigration regulations, it always can statutorily preempt specified conduct.

C. Individual Rights

A focus on federalism in the immigration context should not displace concern for individual rights. In addition to creating the federal structure, the Constitution also is concerned centrally with the rights of individuals. The issue of judicial review under the Equal

197. Depending on the particular politics in place at the time, the states and localities could be enacting laws that are pro-immigrant or anti-immigrant, but arguably there is value either way.

198. For example, when Illinois passed a law prohibiting employers in the state from using a federal database to verify the immigration status of potential workers, the federal government filed suit, claiming the state law was preempted by federal laws governing employee verification. See *supra* note 68 and accompanying text.

199. Of course, this issue is complex, and the absence of federal preemption will not always indicate a lack of commitment to a policy. But it would be *some* evidence.

Protection Clause raises questions that go far beyond federalism. Unlike almost any other area of shared authority, in the immigration context there is a two-tiered structure, with federal enactments subject to rational basis review and at least some state and local enactments subject to heightened scrutiny.²⁰⁰ The sharing of immigration authority among levels of government arguably calls for the unification of this standard, although it is not necessarily clear what such unification would look like.

The resolution of this difficult and important question will require greater debate and exploration than is possible in this Article. For now, I simply note that the protection of individual rights is an independent but related question to this Article's central concern.

IV. RETURNING TO IMMIGRATION FEDERALISM

The competing values in federalism are always the subject of debate and disagreement. But the above discussion demonstrates that it is quite possible to take cognizance of important immigration concerns within the framework—the language, arguments, and interests—of federalism. Federalism is, in important ways, germane to sound immigration policy concerns. Further, once we view immigration through a federalism lens, it becomes apparent that federalism concerns do not univocally support federal exclusivity. Indeed, there is ample room for disagreement about which way the competing values cut. This room for debate only underscores the need to subject immigration to traditional arguments over federalism, as opposed to setting immigration apart as structural preemption would counsel.

To see how this might work in practice and to demonstrate the implications of the constitutional argument that federal exclusivity rests upon statutory, not structural, preemption, I return to an examination of the three types of state and local conduct described above. For all three types, a structural preemption understanding of federal exclusivity precludes a role for state and local governments, or at least significantly impinges on such a role. By contrast, a statutory preemption understanding assumes that there is some role for subnational governments to play and thus invites a balancing of the interests of the national and subnational governments.

200. See *supra* text accompanying notes 30-34 (describing the heightened scrutiny of state and local laws that restrict economic benefits for non-citizens lawfully in the country).

A. Delegating Federal Immigration Authority

An increasingly common state and local activity is the exercise of delegated federal authority. Understanding federal exclusivity to rest on statutory preemption means that no deviation is necessary from traditional rules governing the constitutionality of federal delegations. In the typical case, the question is whether the conferral of authority is an impermissible delegation under Article I,²⁰¹ and whether non-federal actors are subject to “meaningful presidential control,”²⁰² an Article II concern.²⁰³ In other words, if the congressional delegation anticipates that the non-federal entity will fill in the interstices of the law such that the non-federal entity could be considered to be making law, this raises an Article I concern about an entity other than Congress determining the content of federal law. If the concern is that non-federal actors are implementing what is clearly established federal law, this raises the concern that such actors may not be acting pursuant to the direction of the President, thus threatening the unitary executive and undermining the President’s Take Care responsibility.

Current law contemplates at least two kinds of delegation. As described above, under section 287(g) of the INA, states and localities may enter into agreements with the federal government to enforce federal immigration law.²⁰⁴ Pursuant to the agreement, the federal government delegates its enforcement authority to the participating state or locality, subject to federal supervision. Under the PRWORA, the federal government delegates its authority to determine eligibility for federal benefits to states and localities.

Assessing these delegations is relatively straightforward and draws on the familiar constitutional tests set forth above. Under a

201. To the extent the exercise of discretion constitutes substantive lawmaking, there could be a challenge under Article I. The question is framed, traditionally, in terms of the Vesting Clause. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”). There is a difference between a delegation from Congress to federal agencies, which must involve no more guidance than an “intelligible principle,” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (citing *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)), and a delegation from Congress to a non-federal entity, which is a much stickier wicket, cf. Norman R. Williams, *Why Congress May Not “Overrule” the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 221-27 (2005) (“*Whitman* involved a delegation of rulemaking authority to a federal agency. The Court, however, has been far less permissive of the delegation of rulemaking power to nonfederal entities.”).

202. *Printz v. United States*, 521 U.S. 898, 922 (1997) (finding that “meaningful Presidential control” is essential to a constitutional delegation of federal authority to state entities).

203. See U.S. CONST. art. 2, § 2 (setting forth the President’s responsibility to “Take Care that the [federal] Laws are faithfully executed”).

204. See *supra* Part I.B.

statutory preemption understanding of federal exclusivity, because a state government can exercise the authority without a delegation (assuming there is no federal statutory preemption), there is no reason to think that the federal government cannot delegate its authority. The only relevant question is whether the federal government's greater leeway to regulate non-citizens follows the delegation.²⁰⁵ Courts have reached different conclusions on this issue,²⁰⁶ and it remains an open question.

By contrast, a structural preemption view of federal authority would cast doubt on the federal delegations. The structural question would be whether, if something is committed so clearly to one sovereign and not the other, the first sovereign can choose to share some of that authority with the second. The answer would be a qualified "no."

To begin with, the delegation of federal enforcement authority, such as section 287(g), structural preemption would mean that the national government could not delegate the authority to establish the content of pure immigration laws because the Constitution has given the sole authority to the national government. When it comes to the enforcement of federally established laws, however, the national government could delegate at least some enforcement authority to the states because it simply would be requesting assistance from state and local officials in what is decidedly a federal endeavor.

To differentiate these delegations, it is important to distinguish among types of enforcement within immigration law. Some enforcement activity, such as exercising arrest authority, arguably is routine, whereas other enforcement activity, such as determining who poses a national security threat, arguably requires the exercise of discretion. Under a structural preemption view of federal exclusivity, the constitutionality of the section 287(g) delegation would turn on the type of enforcement authority delegated. On the one hand, the national government could delegate the routine enforcement of immigration laws, such as the arrest of a non-citizen unlawfully crossing the border at a place other than a port of entry, because it involves little discretion.²⁰⁷ By contrast, if the federal government

205. As discussed above, when the federal government enacts an alienage law, that enactment is subject to judicial review under the rational basis standard. By contrast, when a state or locality does so, its enactment is subject to the strict scrutiny standard. *See supra* text accompanying notes 30-34.

206. *See supra* note 53.

207. Two interesting questions in this regard are whether the rise of "vigilantes" on the southern border is akin to private attorneys general in the private enforcement context, and whether Congress could similarly empower such individuals to enforce federal immigration law.

authorized Arizona to place officers all along its border, establishing mini ports of entry, and the state officers could make their own determinations about which non-citizens were inadmissible under the INA, the state initiative would run afoul of the structural commitments in the Constitution because it would verge on establishing substantive immigration law.²⁰⁸ For this latter type of delegation, it is a far closer question whether the federal government could delegate such authority, even if it provides constitutionally sufficient guidance and supervision. On the enforcement continuum, section 287(g) falls closer to the discretionary end because it authorizes state and local governments to exercise considerable discretion, such as preparing an immigration case.²⁰⁹

Next, as to the delegation of the authority to determine eligibility for federal benefits, such as the PRWORA, under a structural preemption view, the constitutionality of the delegation would not be in question because it falls outside pure immigration law. Thus, it is an authority shared with the states, albeit sometimes subject to greater scrutiny when states exercise the authority.²¹⁰ The only question would be whether the more lenient standard of review could be delegated.

In sum, the convoluted analysis necessitated by a structural preemption view of federal exclusivity is obviated by the conclusion that federal exclusivity rests on statutory preemption. Assessing the constitutionality is straightforward, and immigration remains in the constitutional mainstream.

B. Inherent Enforcement Authority in the Absence of Delegation

The next question is whether, absent a delegation of federal enforcement authority, states and localities possess inherent authority to enforce federal immigration laws.²¹¹ Once we understand that

See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1461-80 (2003) (analyzing the constitutional limits on delegation of governmental authority to private actors).

208. Today, the state-staffed port-of-entry hypothetical may well be “absurd,” Wishnie, *supra* note 7, at 566, and I use it simply for illustrative purposes. Moreover, I am not proposing a bright line rule to distinguish circumstances where the legal authority question should come out differently. I am simply pointing to a series of questions and noting that enforcement authority is not monolithic.

209. See *supra* notes 45-47 and accompanying text (describing conduct authorized by section 287(g)).

210. See *supra* notes 51-53 and accompanying text (discussing federal legislation like the Personal Responsibility and Work Opportunity Reconciliation Act and the scrutiny with which courts review its preemptive effects).

211. A related question is whether states and localities can choose not to enforce federal immigration regulations. See *Printz v. United States*, 521 U.S. 898, 920 (1997) (applying the

federal exclusivity rests on statutory preemption, the constitutionality of state and local enforcement is fairly straightforward. A statutory preemption view assumes that the Constitution does not exclusively authorize the federal government to control pure immigration law, but instead envisions some shared authority. Accordingly, because the Constitution envisions a secondary role for states and localities in the enactment of immigration law, this authority must include enforcement authority. The Constitution would not allow a state to enact an immigration law but forbid the state from enforcing it. The only question is whether this inherent enforcement authority has been statutorily preempted. The federal statutory preemption of state and local authority to *enact* pure immigration law does not automatically mean that the federal government also has preempted state and local *enforcement* authority of immigration law. Instead, this is a question of statutory interpretation.²¹²

By contrast, the structural preemption view of federal exclusivity would mean that state and local authority to enforce federal immigration laws, absent a delegation of authority from the federal government, is unclear. A nontrivial argument could be made that states and localities may enforce federal law to the extent that the federal law concerns a subject over which states and localities possess concurrent authority, such as criminal law. But where the states possess no authority to regulate, it is questionable whether they still could offer this assistance based on some idea of inherent authority to enforce federal law in general.²¹³

Rejecting structural preemption would open the door to a debate, based on federalism values, over the proper allocation of enforcement authority. To touch on just a few of the relevant federalism values, and without engaging in a complete analysis of the

anti-commandeering principle set forth in *New York v. United States*, 505 U.S. 144 (1992), to a law commandeering local law enforcement officers). For a discussion of this question, see Pham, *supra* note 9.

212. See OLC Opinion, *supra* note 54, at 3-4 (finding no statutory preemption of enforcement authority). Although there may be room for disagreement on this narrow statutory interpretation issue, Congress could clarify the matter, as it has already tried to do once. See Border Protection, Antiterrorism, and Illegal Immigration Control Act, H.R. 4437, 109th Cong. § 220 (2005) (stating that there is no statutory preemption of state arrest authority in the area of immigration).

213. The OLC Opinion, without specifically addressing the basis for federal exclusivity, concludes that states and localities do possess inherent enforcement authority, regardless of the subject matter. OLC Opinion, *supra* note 54, at 11-13. The opinion uses the example of a Canadian law enforcement officer arresting a non-citizen in Canada for a violation of United States immigration law and says that there is no reason to believe the United States federal government would deprive itself of this assistance. *Id.* at 3. But this example does not answer the underlying and separate question of the authority of the non-federal officer to arrest for a violation of a law of a separate sovereign.

application of a federalism lens to the question of state and local enforcement of immigration law, I note the following points.

Experimentalism is served by state and local enforcement of immigration laws because each level of government would learn from the various state and local experiences. For example, if one locality invested considerable resources in immigration enforcement, resulting in a substantial gain in the number of arrests for immigration violations, this would inform the national government about the value of such investments. If, however, the local enforcement also created significant problems, such as racial profiling, decreased reporting of crimes by non-citizens, and fewer arrests for other crimes, the national government might reconsider its enlistment of state and local officers and decide to preempt the conduct, and other localities might decide to focus on matters of more local concern.

Efficiency and effectiveness may favor the practice, at least in the view of those commentators who see state and local enforcement as a “force multiplier,”²¹⁴ enhancing both national security and the effective enforcement of immigration laws. However, this efficiency and effectiveness argument may be tempered by the lessons learned from the states and localities.

Weighing against the practice is the protection of individual rights. One of the central concerns about state and local enforcement of immigration laws is the potential for racial profiling by law enforcement officers who are not trained in immigration law and therefore focus on non-white individuals.²¹⁵ The differential standard of review for state and local laws would not apply here, although of course a non-citizen could bring a claim for a violation of her civil rights. These concerns thus may weigh against state and local enforcement.

The interest of uniformity may be disserved by the practice. Different states and localities will enforce federal immigration laws with varying degrees of vigor and resources, and some will continue to opt out of enforcement. Thus, non-citizens will be more or less vulnerable depending on where they live and travel. Despite these concerns, it is relevant that not all immigration law is uniform and that the national government can choose to tolerate this lack of

214. See *supra* note 10 and accompanying text.

215. Kittrie, *supra* note 3, at 1477 (citing Michael J. Wishnie, *Migration Regulation Goes Local: The Role of the States in U.S. Immigration Policy*, 58 N.Y.U. ANN. SURV. AM. L. 283, 291 (2002)).

uniformity (much in the way it has) by incorporating diverse state criminal laws into the criminal deportability grounds.²¹⁶

Finally, as discussed above, increased political participation and political accountability play out differently in the immigration context.²¹⁷ We cannot draw the conclusion that state and local enforcement of immigration laws necessarily reflects the views of those affected. As a result, this value may not weigh heavily in one direction or the other.²¹⁸

As even this brief analysis demonstrates, a federalism lens would advance our understanding of the proper allocation of enforcement authority among the levels of government. It leads to a more dynamic relationship among levels of government and a better appreciation and understanding of the interests at stake.

C. State and Local Laws Affecting Non-Citizens

Increasingly, state and local governments are enacting laws that affect non-citizens. As discussed above, some laws express hostility toward non-citizens, particularly unauthorized migrants, while others express welcome and generosity. A statutory preemption understanding of federal exclusivity would mean that courts would not be immediately skeptical of such laws simply because they concern non-citizens. Instead, a statutory preemption understanding begins with the assumption that such laws are constitutionally proper, at least to the extent that such actions accord with the authority of subnational governments to regulate health, safety, and other matters of local concern, and then asks whether Congress has preempted the conduct at issue.

To elaborate, concluding that the Constitution allows shared authority over pure immigration law does not mean that state and local governments may insert themselves into the international arena. Rather, state and local authority to enact pure immigration law is rooted in the authority over matters of local concern.²¹⁹ Thus, the question is whether, as the Supreme Court suggested in *American Insurance Association v. Garamendi*, the state or local law at issue

216. See 8 U.S.C. § 1227(a)(2) (2006) (setting forth deportability grounds, many of which turn on violations of state criminal laws).

217. See *supra* text accompanying notes 190-195.

218. Not all of the federalism values that I have identified are relevant to this analysis. For example, the value of providing a check on federal power provides less help in determining the legality of the practice. But this is often true. Not every value in federalism is implicated in every assertion of power by a state and local government.

219. See *supra* Part II.B.1.b-d.

regulates a matter of traditional state concern, or whether the regulation is not based on a state interest and instead is concerned only with matters of national interest.²²⁰ As the Court advised, this assessment should focus on “the clarity or substantiality . . . [of] the traditional importance of the state concern asserted.”²²¹ This analysis is challenging and may lead to uncertainty, but it is the proper inquiry in light of the shared authority over immigration. A federalism lens would help structure the inquiry, balancing the interests of each level of government.

By contrast, a structural preemption view of federal exclusivity would distinguish immigration law from alienage law. In this view, states and localities may exercise some authority over non-citizens in the country but not over immigration.²²² By suggesting a core of inviolable federal authority, structural preemption clouds the issue at hand: the proper role, if any, of state and local governments. Moreover, under current doctrine, it is difficult to distinguish proper from improper state and local regulation. The Court has provided some guidance in stating that a law that “has some purely speculative and indirect impact on immigration . . . does not thereby become a constitutionally proscribed regulation of immigration.”²²³ This guidance still leaves a tremendous amount of legislative gray area. For example, although a state could not establish the number of employment-based visas to be granted in a year, and it could regulate the employment of specified non-citizens where such employment

220. See 539 U.S. 396, 419 n.11 (2003) (distinguishing state power over areas of a state’s “traditional competence” and federal power over areas affecting foreign policy).

221. *Id.* This analysis is similar to that in *Hines v. Davidowitz*, where the Court struck down a state alien registration act as preempted by a similar federal provision. 312 U.S. 52, 65-68 (1941). There, the Court acknowledged that the state may have possessed some authority to enact the provision absent federal action, *id.* at 66, but found that a state action that affected national interests might cross the line into impermissible state regulation, *id.* at 62-68. This balancing of state and national interests both would be constitutionally familiar and would better address the underlying concerns in the field of immigration. Such balancing would speak to both structural concerns regarding the appropriate balance of power between the national and sub-national levels of government, and the need to protect individual rights.

222. See *DeCanas v. Bica*, 424 U.S. 351, 355 (1976) (“[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”). Assuming the provision does not concern immigration as narrowly defined, the only question is whether the state or local law is preempted by federal law. See *Hines*, 312 U.S. at 65-68 (finding that the validity of the state alien registration statute turned on whether it was preempted by a similar provision in federal law).

223. *DeCanas*, 424 U.S. at 355-56.

would adversely affect legal permanent residents,²²⁴ the constitutionality of enactments that fall in between is unclear.

To demonstrate how a statutory preemption understanding of federal exclusivity works in practice, consider the laws restricting landlords from renting their premises to unauthorized migrants.²²⁵ Under a statutory preemption view of immigration authority, these laws would not be struck down simply because they affect immigration. Local governments share immigration authority with the other levels of government and thus may act absent federal statutory preemption.²²⁶

This approach would only be the beginning of the constitutional analysis. Using a federalism lens, courts, policymakers, and legal scholars could understand the issues at stake more fully and assess the constitutionality of the ordinances in a more refined manner. The competing values of federalism—uniformity, experimentalism, efficiency and effectiveness, protection of fundamental rights, increased political participation and political accountability, and a check on federal power—would guide the analysis.

The interest in national uniformity may weigh against these ordinances. The restrictions permit a locality to demonstrate a level of hostility toward certain non-citizens, which may run contrary to the interests of the national government in establishing at least some minimum level of welcome. On the other hand, the ordinances apply only to unauthorized migrants, not to legally present non-citizens. The national government already has determined that non-citizens who do not enter the country legally or who have overstayed their visas are deportable.²²⁷ In this way, the ordinances do not contradict national policy and, debatably, help reinforce that policy by making life more difficult for unauthorized migrants.

Alternatively, it could be argued that the national government purposefully has chosen to underenforce immigration laws and in this way has consented to the presence of the unauthorized migrants. Despite the political appeal of this argument, unauthorized migrants,

224. This was the state provision the Court upheld in *DeCanas*, which the Court found to present only a “purely speculative and indirect impact on immigration.” *Id.* at 355.

225. See *supra* text accompanying notes 1, 61.

226. I refer here only to federal immigration laws and do not determine whether other federal laws, such as the Fair Housing Act, may preempt these local ordinances. See 42 U.S.C. §§ 3604-06 (2000) (prohibiting discrimination by national origin in real estate rental, sales, or brokerage practices).

227. See 8 U.S.C. § 1182(a)(6)(A) (declaring generally “inadmissible” any alien who enters the United States “at any time or place other than as designated by the Attorney General”); *id.* § 1227(a)(1)(B) (declaring deportable any alien who is present in the United States illegally, any alien whose visa has been revoked, and any alien who has overstayed a legal visa).

in legal terms, are in the United States contrary to the will of the national government. The national government already has decided that the non-citizens affected by these ordinances should have no level of welcome whatsoever.²²⁸ Viewed in this light, the ordinances are simply a local expression of a national sentiment.²²⁹

Experimentalism may weigh in favor of these ordinances. Such laws help to inform states and localities about more and less effective means of encouraging and discouraging migration. If unauthorized migrants choose not to settle in localities with these ordinances, other localities would know that these laws are effective. Similarly, if, as in Colorado and Riverside, New Jersey, anti-immigrant laws thwart other interests, particularly economic interests,²³⁰ localities would learn about the costs of such measures before adopting them. Allowing these competing interests to be played out on a local, rather than national, level may be preferable. If the experiment is too costly in social and economic terms, it will not be repeated more widely, and the harm will have been limited geographically.

Similar arguments can be made about efficiency and effectiveness. The ordinances will help to inform other governments about the costs and benefits of these measures. The ordinances also will help to inform non-citizens about where they are welcome and where they are not, indicating this with finer distinctions than national or even state-level policies. For example, if a state were to provide health care to unauthorized migrants, as proposed in California,²³¹ this might encourage such non-citizens to settle anywhere in the state. But anti-immigrant local ordinances would tell a non-citizen in which part of the state the non-citizen should settle.

228. A contrary view could be found in the reasoning of *Plyler v. Doe*, which acknowledged the reality of the presence of a sizeable class of unauthorized migrants and expressed concern that this class was only growing over time. 457 U.S. 202, 218-19 (1982).

229. The heightened standard of judicial review under the Equal Protection Clause would not apply here, because that standard is used only for laws affecting non-citizens lawfully in the country. See *supra* Part I.A (discussing different degrees of scrutiny courts use in reviewing distinctions based on alienage). Thus, if a state or locality chose to enact a similar law affecting lawful non-citizens, the analysis would differ significantly.

230. See *supra* notes 180-181 (describing difficulties for employers in Colorado after the state passed anti-immigrant measures; also describing economic downturn experienced by Riverside, New Jersey, after it enacted anti-immigrant legislation, leading the town to repeal the legislation).

231. See Jennifer Steinhauer, *California Plan for Health Care Would Cover All*, N.Y. TIMES, Jan. 9, 2007, at A1 (describing a bill introduced by Governor Schwarzenegger that would guarantee health care coverage to California's thirty-six million residents, including one million uninsured unauthorized migrants). The proposal was later voted down by a state Senate committee, partly for budgetary reasons. See Jesse McKinley & Kevin Sack, *California Senate Panel Rejects Health Coverage Proposal*, N.Y. TIMES, Jan. 29, 2007, at A14.

Similarly, knowing which states provide in-state tuition to unauthorized migrants also would give non-citizens some sense of what to expect in that state, although not necessarily in any particular locality.

These laws may provide inadequate protection for individual rights. The differential standard of review under the Equal Protection Clause is unlikely to help because the ordinances do not involve economic benefits provided by the state. This value thus would appear to weigh against anti-immigrant ordinances. But for immigrant-friendly laws—such as the availability of municipal identification cards in New Haven and San Francisco, as well as the multiple in-state tuition laws—a rule respecting state and local enactments would protect the interests of non-citizens. In light of the diversity of state and local enactments, there can be no blanket rule about state and local enactments and individual rights.

Turning to increased political participation and political accountability, the landlord laws are excellent examples of how these values play out differently in the immigration context. We cannot assume that the laws reflect the views of those affected because the non-citizens could not participate in the process, at least not directly. Additionally, the laws carry a high potential for parochialism and imposing costs on neighboring communities.²³²

Finally, these ordinances may be a check on federal power in the following, somewhat unusual, manner. To the extent that the federal government's approach to unauthorized migration is disingenuous—passing laws prohibiting it but then not enforcing those laws in a manner that actually stops unauthorized migration—the ordinances enforce the national policy when the national government is unwilling to do so.

In sum, a statutory preemption view of federal exclusivity opens the door for this type of analysis, leading to a far more constructive and structured debate over the role for state and local governments. The federal government always can statutorily preempt particular state and local conduct, but to the extent that it has not,

232. See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1370-72 (2006) (discussing the danger of the "spillover" effect of a state law that "shifts costs and favors its own citizens while disproportionately affecting out-of-state interests"). Whether this decisionmaking should be devolved to the local level is another matter. Under the steam valve rationale, permitting smaller units of government to express anti-immigrant hostility may take the pressure off larger units of government. Spiro, *supra* note 6, at 1628-46. But the potential for these local governments to affect other localities adversely, particularly nearby, is great.

this kind of analysis will help to evaluate the propriety of the subnational regulation.

* * *

I offer this discussion not to predict the resolution of the particular conflicts. Instead, I offer it to demonstrate that the values of federalism provide a nuanced tool for examining the interests at stake. Further, this discussion shows that rejecting structural preemption does not necessarily mean that all actions by state and local governments are constitutionally permissible. In the current debate, there are only two options: first, adherence to structural preemption, which would cast a long shadow over any state or local involvement in immigration regulation; second, a complete rejection of structural preemption, which would open the door to all state and local regulation. My argument is that we need a more careful and appropriately tailored approach to evaluating state and local immigration regulation rather than these two stark choices. The federalism lens provides such an approach.

I recognize that weighing competing federalism values is not an easy task for any decisionmaker and is particularly challenging for courts.²³³ But this balancing is essential to capture the various interests at stake in immigration federalism. Moreover, courts appear to engage in similar balancing in many other areas of constitutional law, including determinations of the proper allocation of authority among levels of government.²³⁴ The likely alternative—leaving the

233. Cf. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978) (describing the difficulty of judicial resolution of “polycentric” disputes).

234. See *Gregory v. Ashcroft*, 501 U.S. 452, 457-64 (1991) (applying federalism principles in assessment of state law concerning mandatory retirement for judges); Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1047 (1978) (describing constitutional balancing tests as posing some concerns, but also arguing that they “provide[] an answer, or the way to an answer—sometimes the only answer—to what the Constitution means when the words do not say what it means, to many a constitutional tension or issue not readily resolved without it,” and that “[t]he flexibility it provides may have been an important ingredient in making judicial review work and rendering it acceptable”); see also Erwin Chemerinsky, *More Is Not Less: A Rejoinder to Professor Marshall*, 80 NW. U. L. REV. 571, 572-73 (1985) (“[T]he fact that there are not easy solutions or determinate answers does not explain why [balancing] is undesirable [C]ourts constantly choose between competing values in situations where no easy or determinate answers exist Upholding equality inevitably sacrifices liberty; ending discrimination eliminates someone’s liberty to discriminate. The examples are endless; it is difficult to even think of many important constitutional cases in which a difficult value conflict does not exist.”); cf. Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to “Private” Regulation*, 71 U. COLO. L. REV. 1263, 1307-08 (2000) (“[A]lthough it is certainly possible to criticize the use of balancing tests, such tests have the virtue of permitting courts to articulate essential values and principles while at the

federalism debate to the political arena and requiring courts to defer to reasonable political resolutions—presents its own difficulties. In light of this Article's argument that state and local immigration regulation is constitutionally permissible (if not otherwise preempted through the Supremacy Clause), competing political actors inevitably will reach conflicting resolutions on how to regulate immigration. Requiring courts to defer to the political process begs the question which political resolution should take precedence.²³⁵ Without the blunt tool of structural preemption, and in cases where there is no statutory preemption, courts will need to reach some resolution. The federalism lens proposed in this Article will aid their assessment.

D. Presumptions

A separate but related question is what type of statutory preemption should apply in the immigration context. The rules governing preemption counsel that, at least in matters traditionally regulated by the state there is a presumption against federal preemption.²³⁶ In such cases, congressional intent to preempt must be clear.²³⁷ This intent may be either express or implied.²³⁸ Implied preemption can be found when federal regulation is so comprehensive that the federal government is said to have occupied the field, leaving no room for state regulation²³⁹ and where a state law conflicts with the goals of or methods chosen by Congress.²⁴⁰

same time recognizing that applying these principles must necessarily depend on a nuanced examination of the circumstances of each case. As discussed previously, courts are educative and expressive institutions as well as adjudicative bodies; therefore articulating foundational principles can be as important as providing a fixed resolution to possible future cases.”).

235. If the federal government has not used the Supremacy Clause to override state and local conduct, it is far from clear that federal policies should prevail. RAMSEY, *supra* note 85, at 285-86 (describing the role of the Supremacy Clause not only in enhancing federal power but also in protecting state power by limiting federal supremacy to, *inter alia*, laws duly enacted).

236. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (holding that there is no presumption of federal exclusivity “in a field which the states have traditionally occupied”).

237. *Id.* (“[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”).

238. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203-04 (1983) (holding that, in the absence of explicit intent, courts may infer preemptive intent from the presence of extensive federal regulation).

239. *Id.*; *Santa Fe Elevator Corp.*, 331 U.S. at 230.

240. *Pac. Gas*, 461 U.S. at 203-04; *see also Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (“Even when Congress has not chosen to occupy a particular field, pre-emption may occur to the extent that state and federal law actually conflict.”).

In matters where the federal government traditionally has dominated, however, there is no presumption against preemption,²⁴¹ and courts grapple with whether the entire field should be found preempted because of superior federal interests.²⁴² This “field preemption” does not turn on a constitutional commitment to exclusive federal authority (a structural preemption argument); instead it turns on the extent to which the federal government has regulated the entire field and thus preempted a role for state and local action.²⁴³ In light of the federal interest in immigration, courts may be more willing to find field preemption, but this field preemption is a type of statutory preemption. The federal government is not ousting state and local authority based on exclusive federal authority; rather it is ousting state and local authority because of the thoroughness of federal statutory law.²⁴⁴

Although the Supreme Court often has found preemption in the immigration context,²⁴⁵ it has not stated categorically that there is no role for states to play. In *Hines v. Davidowitz*, the Court acknowledged some state authority, finding that the state law was “enacted in the exercise of powers not controverted.”²⁴⁶ But the Court found this authority preempted because of the comprehensive federal regulation.²⁴⁷

In the analogous foreign affairs context, the Court has acknowledged that it is possible to balance state and federal interests. In *American Insurance Association v. Garamendi*, the Court stated that it need not choose between field and conflict preemption in the context of foreign affairs.²⁴⁸ It noted that the two could be complementary: If a state regulated a matter on which it had no claim to be addressing an issue of traditional state concern, then “field preemption might be the appropriate doctrine” to reflect “the

241. See *United States v. Locke*, 529 U.S. 89, 108 (2000) (noting that there is no assumption against preemption when states regulate in areas with “a history of significant federal presence”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-31, at 1210 (3d ed. 2000) (“If the area is deemed ‘national,’ the Court is more vigilant in striking down what would amount to state incursions into subjects that Congress may have validly reserved to itself.”).

242. See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 419-20 (2006) (finding that the Court need not resolve whether the doctrine of field preemption should apply to foreign affairs, instead noting that the doctrines of field and conflict preemption may complement each other).

243. TRIBE, *supra* note 241, § 6-28, at 1172-73.

244. *Id.*

245. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 62-69, 72-74 (1941) (finding that the federal Alien Registration Act preempted a Pennsylvania statute requiring the registration of aliens).

246. *Id.* at 66 (quoting *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824)).

247. See *id.* at 69-74 (reviewing extensive reach of federal immigration law in areas in which Pennsylvania law attempted to regulate).

248. 539 U.S. 396, 419-20.

principle . . . that the Constitution entrusts foreign policy exclusively to the national Government.”²⁴⁹ But if a state acted within its area of “traditional competence,” even if the regulation affects foreign relations, courts should analyze the state law to see if there is a conflict with federal law, and the preemption should turn on “the clarity or substantiality . . . [of] the traditional importance of the state concern asserted.”²⁵⁰

The *Garamendi* approach provides considerable guidance in the immigration context. It acknowledges concurrent state authority but allows federal statutory preemption, even field preemption, when the state’s interests are more circumspect and fall outside its traditional domain. Thus, if a state tried to enact an immigration law that was intended to protect the health and safety of state residents, the fact that the regulation also affected immigration should be insufficient to find the state conduct preempted. Instead, a court would have to engage in the more careful balancing suggested in *Garamendi*, weighing the interests of the national and subnational governments.

CONCLUSION

The traditional understanding of pure immigration law—narrowly defined as the rules governing the admission and removal of non-citizens—is that state and local governments are structurally preempted from playing a role. This view is misguided. There is no such constitutional mandate. Instead, federal exclusivity in the admission and removal of non-citizens is better understood to rest on ordinary statutory preemption. The various levels of government share authority over immigration, subject to preemption by federal statute. A statutory preemption understanding of federal exclusivity is supported by the text and structure of the Constitution, best explains varied historical practices, and is not foreclosed by Supreme Court precedent.

249. *Id.* at 419 n.11.

250. *Id.* Applying this understanding retrospectively elucidates the reasoning in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). In that case, Massachusetts had enacted a law restricting state agencies from purchasing goods or services from companies that conducted business with Myanmar. *Id.* at 370-71. The Court struck down the law because it conflicted with federal law. *See id.* at 372-74 (finding the state law preempted, thus declining to decide whether field preemption applies to foreign affairs). Although the Court did not reach the distinction between field and conflict preemption, it did note that Massachusetts was inserting itself directly into the debate over the proper treatment of Myanmar, instituting a “state system of economic pressure against the Burmese political regime.” *Id.* at 376. Massachusetts was not, in other words, acting within an area of traditional state competence.

Concluding that the Constitution permits shared authority over pure immigration law lifts the shadow of constitutional skepticism currently cast over the immigration-related conduct of state and local governments. It also creates an opportunity for this conduct to be evaluated through traditional and familiar constitutional rules, including the application of a federalism lens to determine the proper allocation of authority.

Rejecting structural preemption does not validate all state and local immigration regulations. But instead of the blunt tool of structural preemption, we should use a federalism lens as an evaluative and normative tool for determining the proper allocation of immigration authority among levels of government. A federalism lens structures the debate and clarifies the issues at stake. It also better accounts for the divergent interests of all levels of government. Although the Constitution embodies competing values, immigration is not so different from other areas of law that it deserves its own set of constitutional rules. Instead, immigration should be brought back into the fold.

Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships

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“Who is a worker?” The answer often determines who receives legal protection or support, and who does not. Disputes over this question animate both feminist scholarship examining nonmarket work and labor law scholarship examining how labor market restructuring challenges legal definitions of employment. This Article brings together these two lines of inquiry. It shows how the legal category of employment relies on distinctions between market and nonmarket work, and does so well beyond the familiar context of family labor.

By examining prison inmates’ statutory employment law claims, I identify a previously unrecognized economic dimension to disputes over the employment relationship’s scope. This economic dimension is analytically distinct from the traditional control dimension rooted in agency law. Courts often hold that prisoners are not employees because their efforts are not economic in character, even though the work is done for pay. Throughout employment law, similar issues arise about work in welfare, educational, medical, and religious institutions. What unites these disputes over paid nonmarket work is that courts are torn between two rival accounts of what makes employment economic. The more restrictive one requires a market relationship; the more expansive one requires productive work. I show that neither approach is viable.

Understanding employment’s economic dimension requires a new approach to employment law. Employment law does not simply identify and regulate a relationship that exists independently in society. Instead, employment law helps to constitute employment as an economic relationship, to promote its coherence, its distinctiveness, and its location in the market economy. Employment law fosters the very divide between economic and noneconomic relationships to which it purports to respond.
