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THE PRESIDENT AND IMMIGRATION FEDERALISM

Pratheepan Gulasekaram^{*}
S. Karthick Ramakrishnan^{**}

Abstract

This Article lays out a systematic, conceptual framework to better understand the relationship between federal executive action and state-level legislation in immigration. Prior immigration law scholarship has focused on structural power questions between the U.S. federal government—as a unitary entity—and the states, while newer scholarship has examined separation of powers concerns between the President and Congress. This Article builds on both of these traditions, focusing on the intersectional relationship between the federal Executive and subfederal lawmaking, which is an important yet overlooked dynamic in the resurgence of immigration federalism. First, this Article explains the relationship between presidential action and state reaction in the immigration field, deriving a typology from historical examples of curtailing, co-opting, and catalyzing state action. Next, it uses that tripartite framework to explicate the ways that the Obama Presidency has deepened presidential power through immigration federalism, sometimes in unintentional ways. As an example of an unintended consequence of presidential action, this Article provides a novel explanation for the rise

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This Article complements ideas discussed in our book, *The New Immigration Federalism* (Cambridge Univ. Press 2015), and is the third in a series of articles using a multidisciplinary approach to evaluate immigration federalism. The first two articles in the series are *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074 (2013), and *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431 (2012).

of state driver’s license laws for unauthorized immigrants. This Article’s analysis concludes that the President wields significant influence to bring coherency to immigration enforcement and instantiate a de facto national policy, using states to entrench his vision. In some circumstances, however, states may resist presidential action, thereby functioning as Congress’s proxy in separation of powers battles over immigration policy.

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INTRODUCTION

The President's constitutional authority over immigration policy is one of the most divisive and contested subjects in political discourse, courts, legal academia, and newspaper op-eds. In June 2014, as news coverage focused on the surge of unaccompanied minors at the U.S.–Mexico Border and legislative efforts to reform immigration law stalled in the U.S. House of Representatives,¹ President Barack Obama announced, “I’m beginning a new effort to fix as much of our immigration system as I can on my own, without Congress.”² Within five months, the President carried out his intentions, enacting a series of measures under the “Immigration Accountability Executive Actions” that included expanding his 2012 Deferred Action for Childhood Arrivals (DACA) program, creating the Deferred Action for Parental Accountability (DAPA) program, and shifting executive agency enforcement priorities at the U.S.–Mexico Border and in the interior.³

President Obama's 2012 implementation of DACA and more recent actions on immigration have generated vigorous and contentious debates. Most of these discussions, however, have unfolded in too narrow a context, focusing primarily on questions related to separation of powers: Was the President overstepping his authority and usurping congressional power? Was he merely exercising the discretion that the U.S. Constitution and federal law allow on immigration? Or, perhaps still, was the President using executive discretion chiefly as a means to prod Congress to pass legislation? Largely missing from these narratives, though, were the potential effects of executive action on state-level policy making and the potential feedback effects from states on separation of powers concerns. As this Article shows, exploring this nexus between executive action and immigration federalism offers a new vantage point to better understand power struggles between the President and Congress, and reveals how states can play an important role in resisting or entrenching the Executive's national policy vision.

Although largely ignored, the connections between presidential action and state and local responses should have been evident. As unaccompanied, undocumented children migrated in significant numbers

1. P.J. Tobia, *No Country for Lost Kids*, PBS: NEWSHOUR (June 20, 2014, 2:18 PM), <http://www.pbs.org/newshour/updates/country-lost-kids/>.

2. Barack Obama, President of the United States, Remarks by the President on Border Security and Immigration Reform (June 30, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/30/remarks-president-border-security-and-immigration-reform>.

3. Press Release, The White House, Fact Sheet: Immigration Accountability Executive Action (Nov. 20, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>; *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Apr. 15, 2015), <http://www.uscis.gov/immigrationaction>.

in early 2014, the Obama Administration had to determine where to house and transport them.⁴ A few target communities, such as Murrieta, California, saw protests by residents and elected officials.⁵ At the same time, other cities, such as Atlanta, Boston, Chicago, and Los Angeles welcomed these same populations.⁶ California pledged money to help pay for pro bono legal services in state court proceedings, where a state judge might deem the child to fall within a status that triggers immigration benefits.⁷ Similarly, New York City allocated significant funds to its public defenders for immigrant defense⁸ and unaccompanied minor representation.⁹

This same pattern—presidential action on immigration prompting new dynamics in state–federal relations—was also present in the Obama Administration’s DACA program. Much of the attention following DACA’s announcement in June 2012 focused on the political and legislative ramifications of the program.¹⁰ Politically, the announcement galvanized Latino voters in advance of the 2012 election.¹¹ Legislatively, many thought the move would spur Congress to consider comprehensive reform or at least pass the DREAM Act.¹² Although neither scenario played out at the national level, DACA had significant legislative and

4. Nick Valencia, *More Children Crossing U.S.-Mexico Border Alone*, CNN (May 21, 2014, 9:14 AM), <http://www.cnn.com/2014/05/19/us/mexico-border-children/index.html>.

5. Matt Hansen & Mark Boster, *Protesters in Murrieta Block Detainees’ Buses in Tense Standoff*, L.A. TIMES (July 1, 2014, 9:39 PM), <http://www.latimes.com/local/lanow/la-me-ln-immigrants-murrieta-20140701-story.html>.

6. Jeremy Redmon, *Atlanta Mayor Joins Effort Welcoming Unaccompanied Immigrant Children*, ATLANTA J.-CONSTITUTION (Oct. 1, 2014, 10:46 AM), <http://www.ajc.com/news/news/state-regional-govt-politics/atlanta-mayor-joins-effort-welcoming-unaccompanied/nhY6r/>.

7. See Melanie Mason & Kate Linthicum, *Gov. Brown Urges \$3 Million in Legal Aid for Immigrant Children*, L.A. TIMES (Aug. 21, 2014, 9:00 PM), <http://www.latimes.com/local/la-me-immigration-funds-20140822-story.html>.

8. Deepti Hajela, *NYC’s New Immigrant Public Defender Program Is 1st in U.S.*, NBC 4 N.Y. (Sept. 7, 2014, 3:44 PM), <http://www.nbcnewyork.com/news/local/New-NYC-Immigrant-Public-Defender-Program-Is-1st-in-US-274268751.html>.

9. Press Release, N.Y.C. Council, *New York City Council Initiative Ensuring All Unaccompanied Minors in NYC Have Lawyers* (Mar. 24, 2015), <http://council.nyc.gov/html/pr/032415um.shtml>.

10. See, e.g., Andres Gonzalez & Alicia A. Caldwell, *Deferred Action for Childhood Arrivals, Obama Immigration Program, Begins Taking Applications*, HUFFPOST: POL. (Aug. 15, 2012, 11:28 AM), http://www.huffingtonpost.com/2012/08/15/deferred-action-for-childhood-arrivals_n_1778834.html.

11. Adrian D. Pantoja, *Latino Voters Strongly Reject House Republic Proposal on Border Crisis*, LATINO DECISIONS (Aug. 1, 2014), <http://www.latinodecisions.com/blog/2014/08/01/latino-voters-reject-house-gop-border-proposal/>.

12. See, e.g., *DACA—Deferred Action for Childhood Arrivals*, LATINO/A EDUC. ACHIEVEMENT PROJECT WASH., <http://www.leapwa.org/Downloads/DACA%20%E2%80%A2DREAM%20Act.pdf> (last visited Feb. 27, 2016).

policy effects at the state level. In the months immediately following the initiation of the program, the number of states offering driver's licenses to undocumented immigrants—not just DACA beneficiaries—rose to thirteen, with other states considering similar action.¹³ Strikingly, while DACA has granted temporary relief to a portion of the undocumented population, the state driver's license laws that followed inure to the benefit of the entire population,¹⁴ with no set expiration date. The cascade and momentum of state driver's license availability continues to be a surprising and unintended byproduct of a federal executive decision.

It may be tempting to think of the DACA–driver's license dynamic as *sui generis* or an exceedingly rare event. Yet, a similar relationship between presidential action and state-level responses is evident in historical examples starting from the late 1800s and throughout the twentieth century.¹⁵ Additionally, the scope of executive action and state policy making need not be limited to large-scale administrative policies such as DACA. Take, for instance, executive decisions to sue, or refrain from suit, when states enact immigration-related policies. The decision to sue Arizona for enacting its immigration enforcement scheme, SB 1070, was a discretionary one lodged with the President and his Department of Justice (DOJ), with major consequences for a then-burgeoning state-level trend.¹⁶ Many state policies were overturned or severely curtailed, with policy momentum switching to more integrationist trends.¹⁷ In addition, the Executive Branch has designed federal enforcement programs to

13. See Karthick Ramakrishnan & Pratheepan Gulasekaram, *Understanding Immigration Federalism in the United States*, CTR. FOR AM. PROGRESS (Mar. 24, 2014), <https://www.americanprogress.org/issues/immigration/report/2014/03/24/86207/understanding-immigration-federalism-in-the-united-states/> [hereinafter Ramakrishnan & Gulasekaram, *Understanding Immigration Federalism*]. It is worth clarifying here that this Article does not claim that the Obama Administration knew that state license policy would change or that it implemented DACA with the intent of changing state policies in this way.

14. See *Driver's License Map*, NAT'L IMMIGRATION LAW CTR., <https://www.nilc.org/issues/drivers-licenses/drivers-licenses-map/> (last updated July 1, 2015).

15. See, e.g., *Reconstruction*, HISTORY, <http://www.history.com/topics/american-civil-war/reconstruction> (last visited Feb. 27, 2016).

16. See *Arizona v. United States*, 132 S. Ct. 2492, 2497, 2510 (2012) (enjoining three out of the four challenged provisions of Arizona's immigration enforcement scheme on grounds that they were unconstitutional). That decision led to the invalidation of most challenged provisions in then-pending suits regarding other state and local immigration enforcement laws in several federal circuits. See Alyssa McLendon & Curt Merrill, *At a Glance: Supreme Court Decision on Arizona's Immigration Law*, CNN, <http://www.cnn.com/interactive/2012/06/us/scotus-immigration/> (last visited Feb. 27, 2016) (noting state statutes with similarities to the challenged Arizona laws).

17. See *Deferred Action for Childhood Arrivals: Federal Policy and Examples of State Action*, NAT'L CONFERENCE OF STATE LEGISLATURES (Nov. 18, 2014), <http://www.ncsl.org/research/immigration/deferred-action.aspx> (discussing various state actions after President Obama issued DACA).

include state and local participation.¹⁸

Together, these instances form a specific executive–state dynamic that legal commentary in the immigration field has, thus far, largely ignored. Outside of immigration law, Professor Bradford Clark reinvigorated discussion of the relationship between federalism and separation of powers, arguing that the difficulty of passing federal law can help preserve federalism.¹⁹ Other scholars have focused on federalism dynamics specific to presidential or administrative action. For example, Professor Gillian Metzger has explored the federalism dimensions of an ever-expanding administrative state,²⁰ and Professor Jessica Bulman-Pozen has extensively queried the role of states in turf battles between the President and Congress.²¹ Indeed, a recent article by Professor Bulman-Pozen highlights the general dynamic we explore here.²² Even these projects, however, would benefit from the more systematic understanding of the Executive’s role in immigration federalism in particular that this Article provides.

Within immigration scholarship, a significant volume of literature—including our prior work—focuses on immigration federalism generally, mostly treating the federal government as a singular entity vis-à-vis the states.²³ There is also a new, slowly growing literature on immigration law pertaining to separation of powers concerns between the President and Congress. For example, scholarship by Professors Adam Cox and Cristina Rodriguez specifically explicates the relationship between the President and Congress in creating immigration policy, noting the ways

18. See, e.g., *A Guide to the Immigration Accountability Executive Action*, AM. IMMIGRATION COUNCIL (Mar. 13, 2015), <http://www.immigrationpolicy.org/special-reports/guide-immigration-accountability-executive-action>.

19. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324 (2001).

20. See generally Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567 (2011) (arguing that President Obama has increased state involvement in federal programs and regulations); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008) (arguing that administrative law can reinforce federalism and help protect the role of states in federal government).

21. See Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1922–23 (2014) [hereinafter Bulman-Pozen, *Afterlife of American Federalism*] (arguing that states act as staging grounds for fights between political parties and thus can be marshalled in power contests between the President and Congress); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1079–83 (2014) [hereinafter Bulman-Pozen, *Partisan Federalism*] (arguing that states provide additional and alternate fora for partisan contests).

22. Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. (forthcoming 2016).

23. See, e.g., Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431 (2012).

in which the President has exercised independent, expressly delegated, and implicitly delegated control over immigration policy.²⁴

While one might have expected the federalism and separation of powers literatures to speak to each other in the immigration field, especially given their contemporaneous growth in the realms of immigration law and policy, they have so far mostly remained on separate tracks (see Figure 1). What limited attention immigration scholars have given to executive–state dynamics has tended to focus on the doctrinal question of preemption,²⁵ without an account of the myriad other ways in which presidential action affects state outcomes. One notable movement in this regard is Professor David Rubenstein’s developing theory of “immigration structuralism,” which urges the consideration of both federalism and separation of powers concerns when evaluating decisions about structural power allocation between states and the federal government.²⁶

This Article scrutinizes the crossroads between two areas of significant concern in immigration law: federalism analysis and separation of powers concerns. This Article seeks to explore this intersection in a systematic manner, opting to set out institutional arrangements and their possibilities for interaction, rather than a piecemeal approach that abstracts from a few contemporary examples. Indeed, a more systematic view of this intersection of executive branch action and state-level response reveals additional examples that fit into this institutional framework (see Figure 2). Thus, this Article takes a broad view of executive powers, focusing on a variety of executive actions—making treaties, decisions to litigate, agency directives—that affect state and local decision-making. Although this Article’s analysis begins in past eras of executive action, its primary purpose is to explore contemporary executive policies in this current era of sustained congressional stalemate and the expanded exercise of presidential power.

24. Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015); Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 460–62 (2009); Cristina M. Rodriguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787, 1789–90 (2010).

25. See, e.g., Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 33 (2013) (noting that *Arizona* is “as much a case about separation of powers as [it is] about federalism”); Catherine Y. Kim, *Immigration Separation of Powers and the President’s Power to Preempt*, 90 NOTRE DAME L. REV. 691, 692 (2014) (exploring separation of powers issues raised in the immigration context, specifically in the context of preemption of state law).

26. David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL’Y 81, 83–84 (2013).

By concentrating on this under-theorized aspect of both separation of powers and immigration federalism in legal and political science scholarship, this Article aims to provide a richer understanding of contemporary developments in immigration policy. This analysis is critical in light of emerging federalism models from scholars, such as Professor Bulman-Pozen, who argue that in the current system, states can sometimes act as either another executive or legislative branch, thereby making any discussion of federalism inherently an implicit discussion of separation of powers.²⁷ Thus, for example, state-level pushback might mitigate concerns about the inability of Congress to check executive authority; conversely, the possibility of state and local entrenchment of the Executive's policy goals might ease concerns about the practical reach or permanence of federal executive action.

This Article proceeds in three Parts. Part I situates the role of the President in immigration federalism. In doing so, it focuses on past examples of presidential power to uncover the relationship between those presidents and state-level dynamics. Specifically exploring responses to the Burlingame Treaty, the Bracero Program, and presidential use of refugee and parole authority, this Part showcases the federalism dimensions attendant to those exercises of executive power. From these antecedent examples, this Part develops a tripartite typology of executive immigration federalism: presidential actions that (1) are intended to curtail state-level trends, (2) co-opt state-level action, and (3) catalyze state-level policy making consistent with the Administration's policy. This Part also notes that presidential action can sometimes generate substantial state-level resistance as states attempt to set the immigration agenda in opposition to executive policy.

Part II then pivots to the present-day relationship between the Executive and state policy, considering ways in which the expanded use of presidential authority redounds to immigration federalism. Specifically, it shows that President Obama's promulgation of enforcement priorities and strategic use of litigation has helped curtail state lawmaking; his management of federal enforcement programs—such as Secure Communities (S-Comm) and 287(g) agreements, which result from Section 287(g) of the Immigration and Nationality Act (INA)—have co-opted state resources and agencies; and his use of large-scale deferred action programs has catalyzed state policy making. Thus, Part II argues that President Obama has used immigration federalism to deepen his executive power, although this expansion has also met some occasional limits, with notable examples of resistance from states and localities.

27. Bulman-Pozen, *Afterlife of American Federalism*, *supra* note 21, at 1935–46.

Transitioning from the primarily historical and descriptive narratives of the first two Parts, Part III considers the doctrinal, pragmatic, and theoretical implications of presidential action on state-level immigration policies. It shows how the responsiveness of state-level policies to executive action on immigration (and vice versa) opens new ground for separation of powers battles and serves as the new immigration nationalism.²⁸ Part III first assesses the doctrinal impact on preemption jurisprudence of the more conspicuous presence of the Executive's role in immigration policy. It then examines the ways in which states and localities can potentially check executive power, relying on strategies that range from invoking Congress's will to asserting states' rights. Finally, this Article concludes by discussing ways in which the President can utilize federalism to entrench her regulatory vision, creating de facto national policy and making it more difficult for Congress to uproot or change it through subsequent legislation.

Before proceeding, three clarifications are necessary. First, it is important to clarify this Article's use of "the President" or "the Executive." One way of thinking about this reference to the President is to distinguish it from any actions undertaken by Congress, the branch typically at issue in questions of federalism. This leaves both the Executive Branch and the administrative state as potential sources of federal policy that might interact with state-level policies. As various theoretical models have taught, the expansion of the administrative state has meant the concomitant expansion of presidential power.²⁹ These scholarly inquiries also instruct that high-level policy directives issued by high-ranking agency officials under the President's control are attributable to the President.³⁰ As such, this Article intends to refer to the actions of the President himself in directing policy and setting national agenda priorities, as well as cabinet officials and other political appointees of the President in executive agencies. There is a growing body of literature that suggests distinguishing the President from agency action and, further still, dissecting relationships within and among

28. This terminology and idea is borrowed from the theme of a recent feature by Professor Heather Gerken. See Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1917–18 (2014).

29. See, e.g., Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1033 (2013); Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 344–48 (2010) (documenting a trend in presidential use of administrative agency action from Presidents Ronald Reagan through Barack Obama); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001) (examining a dramatic transformation in the relationship between the President and the administrative state); Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1383–85 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010)).

30. See, e.g., Andrias, *supra* note 29, at 1034, 1040; Kim, *supra* note 25, at 694–95.

agencies themselves. For this Article's purposes, however, agencies under presidential control are commensurate with the Executive Branch, and this Article only focuses on high-level appointees responsible for policy setting.³¹

Second, and relatedly, this Article's definition of executive action includes actions often taken with some congressional involvement. In other words, this Article is concerned with more than purely unilateral presidential decisions.³² Many executive actions are situated within a constitutional or legislative framework that requires some legislative approval. For example, the Burlingame Treaty of 1868 was a presidential immigration policy,³³ but the Constitution mandates that every treaty receive Senate consent.³⁴ Similarly, in other instances, Congress may have subsequently endorsed presidential action through law or prefigured substantial executive discretion and control into a statute itself. Especially in the immigration sphere, Congress has delegated expansive policy making authority to the Executive Branch.³⁵ Accordingly, this Article's notion of executive action encompasses decisions and policies that the Administration initiated or for which the Administration bears primary

31. For purposes of this Article, this refers to the actions of a limited universe of actors—the President, the Secretary of State and the State Department, the Attorney and Solicitor Generals and the Solicitor General within the Department of Justice (DOJ), and the Secretary of Homeland Security and the Director of Immigration and Customs Enforcement (ICE) within the Department of Homeland Security. This Article excludes the actions and decisions of career civil service employees and individual officials, such as line attorneys at the DOJ or field officers for ICE. Indeed, this Article notes that ICE officers attempted to sue the Secretary of Homeland Security over their disagreement with the Secretary's—and hence, the President's—prioritization of their immigration enforcement responsibilities. See *Crane v. Napolitano*, 920 F. Supp. 2d 724, 743 & n.6 (N.D. Tex. 2013), *aff'd sub nom. Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015). We also acknowledge that this line-level dissent and discord is an underappreciated aspect of administrative law scholarship. See Joseph Landau, *Bureaucratic Experimentation and Immigration Law*, 65 DUKE L.J. (forthcoming 2016) (arguing that “bottom-up” influences within administrative agencies might shape policies).

32. See generally Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999) (developing a theory of unilateral presidential action taken without the consent of Congress).

33. See *Milestones: 1866-1898—The Burlingame-Seward Treaty*, U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1866-1898/burlingame-seward-treaty> (last visited Feb. 27, 2016).

34. U.S. CONST. art. II, § 2.

35. Kim, *supra* note 25, at 714–19; see also HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 46–50 (2014) (discussing how the Executive Branch has significant control in enforcing immigration laws and forming immigration policy); Cox & Rodriguez, *supra* note 24, at 463, 511 (expanding on the concept of de facto delegation).

political accountability and responsibility,³⁶ including executive actions taken in the shadow of a federal statute or other congressional action.

Finally, this Article does not address whether broad executive power in immigration law is normatively desirable. Instead, it starts from two less conflicted propositions. First, as detailed in Section I.A below, the President has, since the beginning of federal regulation of immigration, played a distinct role in forging or advancing immigration policy at times. Second, the discussion in Parts II and III assumes that the current legal landscape leaves significant room for presidential involvement in immigration matters. Here, the starting premise is that the present legal landscape, featuring significant congressional delegation of enforcement authority to the Executive Branch combined with limited funding for such enforcement, inevitably requires energetic and conspicuous presidential involvement.³⁷

I. IMMIGRATION AT THE CROSSROADS OF FEDERALISM AND SEPARATION OF POWERS

Prior legal scholarship has focused on two important dynamics in immigration law that largely have developed along parallel tracks—immigration federalism and the boundary between the Executive’s immigration authority and Congress’s. Section I.A examines the relationship between the federal political branches in the context of immigration and distinguishes the President’s role. Section I.B dives deeper into examples of presidential action on immigration to tease out the federalism interactions that have largely been ignored. Finally, Section I.C culls from those antecedent examples of executive–state relationships three general categories of presidential action vis-à-vis state-level policy making: presidential actions that curtail, co-opt, or catalyze state and local policy making. This causal arrow can be reciprocal; at times, states have exerted significant influence on federal, and specifically executive, action.³⁸

36. See generally Andrias, *supra* note 29, at 1070–1102 (arguing that the President and high-level officials should prominently disclose reasons for taking executive actions and claim responsibility for them).

37. See *id.* at 1045 (arguing that “enforcement *vel non* matters . . . [because t]he law on the books is different from the law in action,” making executive enforcement decisions “a vital part of law’s identity as law”). But see Zachary Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 673–77 (2014) (suggesting limits to exercises of executive enforcement discretion). This Article does not take a position as to what, if any, actions by Congress might regulate or constrain executive participation in immigration regulation. See, e.g., Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 225–30 (reviewing HAROLD J. KENT, *PRESIDENTIAL POWERS* (2005) and laying out four potential theories of when and how Congress might curtail the exercise of presidential power).

38. Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112

To be clear, this Article does not claim that the substantive policy responses between the national government and subfederal governments necessarily change when the federal entity in question is the Executive Branch. In many instances, states may be reacting to a policy because it is federal in origin, regardless of whether it involves Congress or the Presidency. At the same time, there are several structural and institutional reasons why the Executive's role is different from that of Congress, including the nimbleness with which the Executive can instantiate, modify, or even reverse existing administrative policies.³⁹ Thus, there are reasons to believe that some state-level responses to executive action will take advantage of these institutional distinctions. And, as Part III argues, in times of extended congressional gridlock, states become critical actors in separation of powers disputes, acting either as checks on executive power in the federal legislature's stead or as instruments of legislative power, entrenching the President's will despite an uncooperative Congress.⁴⁰

First, the President has myriad means to affect state-level policy making. As with the general tide of power accretion in the rise of the administrative state,⁴¹ the President and agencies under the President's control wield significant authority in the immigration realm. Arguably, this is especially true in immigration law, where Congress structured the INA to provide substantial discretionary authority to the President and his delegates, and where the "law on the books" might be less meaningful than the law in practice.⁴² As this Article explains, this power accretion in immigration has left the Executive Branch with several different methods at its disposal to alter state-level dynamics—without accompanying federal legislation—including decisions to litigate, the power to calibrate enforcement efforts, and the authority to set agency priorities.

Second, different political factors are at work in creating federal executive or administrative policy versus congressional legislation. The President responds to a national electorate and is not constrained by intrastate constituencies or primary contests that force extremist positions on immigration.⁴³ Perhaps because of this national focus and the ability

COLUM. L. REV. 459, 478 (2012) [hereinafter Bulman-Pozen, *Federalism as Safeguard*].

39. See John D. Leshy, *Shaping the Modern West: The Role of the Executive Branch*, 72 COLO. L. REV. 287, 304 (2001).

40. See *infra* Part III.

41. Andrias, *supra* note 29, at 1033; Kagan, *supra* note 29, at 2345 & n.381; see also Gilman, *supra* note 29, at 345–47 (discussing various presidential uses of executive power over the last several decades).

42. See Cox, *supra* note 25, at 55–56.

43. See Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2108–17 (2013) [hereinafter Gulasekaram &

to transcend parochial prejudices, presidents throughout U.S. history have been much more capacious in their attitudes toward immigrants and immigration than has Congress.⁴⁴ Thus, their policies, such as President Obama's recent declarations,⁴⁵ often reflect a more inviting and less prosecutorial stance than do congressional statutes.

In addition, some forms of executive action are protected from federal court oversight in a way that congressional legislation is not.⁴⁶ For example, the Supreme Court has found an administrative agency's refusal to exercise enforcement authority to be presumptively unreviewable.⁴⁷ Moreover, five U.S. circuit courts of appeals dismissed suits from states seeking greater immigration enforcement and monetary compensation for the fiscal burdens they allegedly incurred because of federal immigration policy.⁴⁸ And generally, plaintiffs in suits against discretionary executive actions are likely to suffer standing defects as well.⁴⁹ Suits against congressional and state-level legislation, however, are commonplace in federal courts.

Ramakrishnan, *Reappraisal*]; S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L. J. 1431, 1442–46 (2012) [hereinafter Ramakrishnan & Gulasekaram, *Importance of the Political*].

44. See, e.g., JOHN F. KENNEDY, *A NATION OF IMMIGRANTS* 102–07 (1964) (outlining policies to liberalize immigration statutes); Cox, *supra* note 25, at 63–64 (listing examples of pro-immigration actions taken by Presidents Chester Arthur, Woodrow Wilson, Harry Truman, John Kennedy, and Lyndon Johnson but also noting that President Arthur did sign the anti-immigrant Chinese Exclusion Act).

45. See *supra* text accompanying note 2.

46. However, a recent district court opinion suggests otherwise. In *Texas v. United States*, the district court found that Texas had standing to challenge the Obama Administration's DAPA program. 86 F. Supp. 3d 591, 643–44 (S.D. Tex. 2015), *stay denied*, 787 F.3d 733 (5th Cir. 2015). On the merits, the court found that DAPA violated the Administrative Procedures Act. *Id.* at 677–78.

47. *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985) (declining to judicially review a decision by the Federal Drug Administration to not enforce certain regulations in the context of lethal injections).

48. *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997); *California v. United States*, 104 F.3d 1086, 1094–95 (9th Cir.), *cert. denied*, 522 U.S. 806 (1997); *Arizona v. United States*, 104 F.3d 1095, 1096 (9th Cir.), *cert. denied*, 522 U.S. 806 (1997); *New Jersey v. United States*, 91 F.3d 463, 470 (3d Cir. 1996); *Padavan v. United States*, 82 F.3d. 23, 29–30 (2d Cir. 1996) (dismissing claims from New York officials); *Chiles v. United States*, 69 F.3d 1094, 1097 (11th Cir. 1995) (dismissing Florida officials' claims as presenting nonjusticiable political questions).

49. E.g., *Arpaio v. Obama*, 27 F. Supp. 3d 185, 207 (D.D.C. 2014) (dismissing a suit by Maricopa County Sheriff Joe Arpaio against President Obama's deferred action policies for lack of standing), *aff'd*, 797 F.3d 11 (D.C. Cir. 2015); *Crane v. Napolitano*, 920 F. Supp. 2d 724, 743, 747 (N.D. Tex. 2013) (dismissing claims of line ICE agents for lack of standing), *aff'd sub nom.* *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015).

Next, the President is not fettered by the same procedural obstacles and vetogates that attend congressional lawmaking.⁵⁰ As such, presidential action can be both more nimble in its creation and responsive in its modification than legislative action. The existence of several procedural obstacles such as filibusters, committee holds, and other legislative vetoes creates incentives for the use of executive action to effect national policy in the first place.⁵¹ Certainly, within administrative agencies, notice and comment requirements for rule making present hurdles to executive agency action.⁵² However, in cases such as litigation decisions or enforcement discretion, the President need not—or at least has not—utilized formal administrative rule making, instead proceeding through guidance memoranda.⁵³ Moreover, the potentially greater procedural obstacles in Congress also structure the ways in which states and localities may react. Lobbying the Executive Branch to change its course of action is a more streamlined process than lobbying Congress to change legislation.⁵⁴

Finally, the President lacks the legislative power to actually change legal status or permanently alter rights and benefits of unlawfully present migrants.⁵⁵ At the federal level, only Congress has that authority,⁵⁶ and Congress has previously responded to executive action by either rejecting or approving the President's actions. This limitation reveals the importance of immigration federalism to questions of executive power. In this current era of extended federal legislative stalemate, states and localities are responsible for accommodating those whom the President chooses to allow to remain in the country. Policies involving driver's licenses, welfare provision, professional licensing, and in-state tuition fall within the purview of those state and local governments. Although, as this Article elaborates in Part III, these state and local policies are not substitutes for congressional action, they nevertheless can have the effect of entrenching the President's policy vision in many parts of the country, making it more difficult for Congress to dislodge or uproot those policies.

50. Professor Bradford Clark has argued that this difficulty of passing federal law helps preserve federalism. *See* Clark, *supra* note 19, at 1324.

51. Andrias, *supra* note 29, at 1070.

52. *See id.* at 1043.

53. *See id.* at 1042.

54. *See, e.g.,* Julie Hirschfeld Davis, *Behind Closed Doors, Obama Crafts Executive Actions*, N.Y. TIMES (Aug. 18, 2014), <http://www.nytimes.com/2014/08/19/us/politics/behind-closed-doors-obama-crafts-executive-actions.html>.

55. *See, e.g.,* Daniel I. Morales, *Immigration Reform and the Democratic Will*, 16 U. PA. J.L. & SOC. CHANGE 49, 59 (2013) (noting President Obama's provisional grant of legal status to "young and educated undocumented immigrants").

56. *Id.* at 57.

A. *Distinguishing the Executive from Congress in Immigration Policy*

Most commentary on immigration federalism typically portrays the federal government as a singular locus of power engaged in a turf battle with state and local authorities over the exclusivity vel non of immigration policy.⁵⁷ That view of the interplay between various levels of governmental authority, however, is a stylized one. As Professors Cox and Rodriguez have ably shown, that categorization is too broad because the President has wielded significant independent immigration authority since the federal government's ascendancy as the prime regulating authority in the immigration field.⁵⁸

Indicative of this elision between the political branches are the foundational Supreme Court cases in immigration law. In *Chy Lung v. Freeman*,⁵⁹ one of the Supreme Court's first significant immigration federalism cases, the Court struck down a California law allowing a state immigration commissioner to make discretionary decisions regarding admissions at state ports.⁶⁰ In so doing, the Court first iterated that immigration regulation was a congressional responsibility vis-à-vis the states but then seemed to coningle the competencies of both political branches: "The passage of laws which concern the admission of [foreign] citizens . . . to our shores belongs to Congress, and not to the States. . . . [T]he responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government."⁶¹

Although the Court noted congressional exclusivity in passing laws, the next sentence lumped Congress with the Executive, collectively describing the responsibility of the "national government."⁶² That framing matters because the manner of execution of any immigration law primarily would be within the constitutional and statutory authority of the President, not Congress.

More than a decade after *Chy Lung*, in *Chae Chan Ping v. United States* (the *Chinese Exclusion Case*),⁶³ the Court articulated the principle of federal plenary power over immigration policy. In upholding the Chinese Exclusion Act, the Court declared that "[t]he power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution . . . cannot be granted away or restrained

57. See sources cited *supra* notes 19–26 and accompanying text.

58. See Cox & Rodríguez, *supra* note 24, at 463, 511.

59. 92 U.S. 275 (1875).

60. *Id.* at 280–81.

61. *Id.* at 280.

62. *Id.*

63. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889).

on behalf of any one.”⁶⁴ That language again frames the political branches as a unitary entity. Although the case focused on the constitutionality of a federal statute, the Court’s reasoning relied on the national government’s competence in determining the nation’s foreign affairs, a subject over which the President has concurrent, if not predominant, responsibility.⁶⁵

Despite these characterizations, the opportunities for divergent action, or even tension and conflict, between the two branches clearly exists and has defined several important developments in immigration law since the late 1800s. Clarifying the division of responsibility between Congress and the President has profound consequences for the viability of state and local immigration laws.⁶⁶

Professors Cox and Rodriguez detail this tension between the legislature and the executive, noting that the President has exercised immigration authority in a number of situations.⁶⁷ Their study focuses on two main historical examples of executive power: the Bracero Program and the Caribbean migrant crisis.⁶⁸ As they explain, President Franklin D. Roosevelt initially negotiated the Bracero Program—which allowed temporary labor migration of Mexican workers to address wartime labor shortages—without explicit congressional approval, instead funding the Program through discretionary executive department funds.⁶⁹ In their other example, five different administrations, in responding to the various Haitian and Cuban crises over the past four decades, utilized authority delegated to it by federal statute to parole thousands of migrants into the United States.⁷⁰ As a practical matter, this repeated and mass use of parole authority constructed a broad-scale immigration policy for Caribbean migrants.⁷¹

These examples reveal the distinction between the Legislative and Executive Branches on immigration matters and the ability of the Executive to use power at his disposal to instantiate federal immigration policy. In both instances, the executive action forced Congress’s hand, leading to legislation harmonious with the Executive’s vision.⁷² While

64. *Id.* at 609.

65. *See id.* at 590, 604–05.

66. *See infra* Section III.A.

67. Cox & Rodriguez, *supra* note 24, at 484–85.

68. *See id.* at 485.

69. *Id.* at 485–89.

70. *See id.* at 492–97.

71. *See id.* at 497.

72. *See infra* Section I.B. After the initial creation of the Bracero Program, the President sought and gained congressional approval and funding, a pattern that repeated itself again when Congress’s period of approval expired and the President sought to renew the Program. Cox & Rodriguez, *supra* note 24, at 488–89. In those instances, Congress was sometimes a less-willing

Congress, on its own accord, may not have acted—or may have significantly delayed acting—in both situations, these exercises of executive authority created policy momentum that tied the hands of federal lawmakers.

In addition to these historical examples, presidents can also deem certain groups to have temporary protected status⁷³ to shield from removal foreigners from certain countries with troubled conditions resulting from political strife or natural disasters.⁷⁴ Additionally, Presidents throughout U.S. history have granted other varying forms of temporary relief to a variety of groups depending on the political, economic, or humanitarian exigencies of the period.⁷⁵ These include, for example, Presidents Ronald Reagan and George H.W. Bush's "Family Fairness" orders in 1987 and 1990, which allowed the family members (who were ineligible for statutory relief) of many recipients of legalization under Congress's 1986 immigration law to remain in the United States.⁷⁶

Many of these are not unilateral executive exercises of authority. In this model of accreted executive power, three factors—(1) Congress's passing of harsher and more complex immigration regulations, which, along with increased labor mobility, creates (2) a growing and sizable

partner, with several members reluctantly acquiescing to the President's Program. *See generally* KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 42–72 (1992) (describing the conflicts between the Executive Branch and Congress over the Bracero Program). Congress eventually dismantled the Program in 1964. Cox & Rodriguez, *supra* note 24, at 490. Professors Cox and Rodriguez's second example is the discretionary use of parole authority—the power to allow a person into the country without legally admitting them—to respond to humanitarian and political needs. *See id.* at 502. Reaching a zenith in the 1970s and 1980s, a significant number of migrants from the Caribbean made their way to the United States in their attempts to leave unstable or unfavorable political and economic situations in their home countries. *See id.* at 492–93, 493 n.106. In response, multiple presidents used their discretionary power to parole groups of arriving migrants from these countries into various locales within the United States. *See id.* at 494–97. This mass use of parole authority to address the influx of Cubans and Haitians highlighted the need for a more systemic policy and initially led to Congress passing the Refugee Act of 1980. *See id.* at 503. Further migration and executive parole use throughout the 1980s led to legislation that specifically provided for status normalization of the groups allowed entry into the United States through parole. *Id.* at 508.

73. 8 U.S.C. § 1254a (2012).

74. *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/temporary-protected-status> (last updated Feb. 19, 2016).

75. *See* AM. IMMIGRATION COUNCIL, *EXECUTIVE GRANTS OF TEMPORARY IMMIGRATION RELIEF 1956-PRESENT* 1–2 (2014), http://www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final.pdf.

76. *Reagan-Bush Family Fairness: A Chronological History*, IMMIGRATION POLICY CTR. (Dec. 9, 2014), <http://www.immigrationpolicy.org/just-facts/reagen-bush-family-fairness-chronological-history>.

undocumented population, and (3) the President's constitutional responsibility for and control over the immigration enforcement apparatus—inevitably produce a situation wherein Congress has effectively delegated significant back-end policy making power to the President.⁷⁷ Using tools such as prosecutorial discretion and enforcement prioritization, the President exercises substantial control over those who have found their way into the country either through congressionally sanctioned channels or by clandestine entry.⁷⁸ Such executive intervention has come to define federal immigration policy. As Professor Kate Andrias argues, enforcement decisions constitute a “vital part of law’s identity as law.”⁷⁹

However, providing a full-throated defense of the constitutionality of presidential authority in immigration law is not the intention of this Article. This Article simply notes that some presidential control over immigration policy is inevitable⁸⁰ and leaves normative arguments over the propriety of specific exercises of executive authority for other scholarly work. Instead, this Article proceeds to dissecting these instances of presidential control in search of previously unexplored federalism interactions.

B. *Executive Action and States: Historical Antecedents*

While it is clear that the President exercises power over aspects of immigration policy, the President's distinct role in federalism remains unexplored. Over the past 150 years, federal executive action on immigration has had unstudied effects on state-level policy. At times, this has taken the form of the Executive attempting to staunch a state-level trend, or vice versa, with states attempting to counter federal policy. At other times, state responses have facilitated federal executive action, either by placing greater pressure on Congress to act or by effectively working around federal legislative constraints to effectuate de facto national immigration policy.⁸¹

This Section sets the stage for the contemporary exploration of state and local interaction with the Executive that comprises Parts II and III by

77. See Cox & Rodriguez, *supra* note 24, at 528–33. See generally Adam B. Cox & Eric Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 814–22 (2007) (discussing examples of policy preference priority for immigration and types of procedures to carry those policies out).

78. See *Understanding Prosecutorial Discretion in Immigration Law*, AM. IMMIGRATION COUNCIL (Sept. 9, 2011), <http://www.immigrationpolicy.org/just-facts/understanding-prosecutorial-discretion-immigration-law>.

79. Andrias, *supra* note 29, at 1045.

80. See U.S. CONST. art. II, § 3; Andrias, *supra* note 29, at 1034, 1054.

81. See *infra* Part II.

examining historical examples of the President's effect on and role in subfederal immigration policy. This Section examines these examples of executive exercises of immigration authority to uncover the attendant federalism aspects.⁸² It explicates the immigration federalism aspects of the period before and after the Burlingame Treaty, the state response to the Bracero Program, and reactions to the use of parole and enforcement actions against Caribbean and Central American migrants. It explores these examples because they represent prominent, high-profile assertions of executive power initially taken either without congressional assent or in times of congressional inaction, and they inspired substantial state-level responses. Additionally, these examples clearly illustrate the range of ways in which the Executive interacts with state policy, leading to the typology explicated in Section I.C that follows.

1. The Burlingame Treaty and California's Reaction

The Burlingame Treaty, signed during President Andrew Johnson's Administration and under the direction of Secretary of State William Seward,⁸³ provides an early example of federal executive action that both responded to and galvanized opposition from states and localities. Prior to the years following the Civil War, the policies of several states stood in as immigration policy for a nation that had few federal immigration laws.⁸⁴ On the West Coast, those regulations took on a strident anti-immigrant, anti-Chinese tone.⁸⁵ Starting in the 1850s, after significant numbers of Chinese and other Asian immigrants began arriving mainly to work in mining, California enacted several policies intending to deter and exclude the Chinese from immigrating to or remaining in the state.⁸⁶

82. See *infra* Table 1.

83. John Schrecker, "For the Equality of Men—For the Equality of Nations": Anson Burlingame and China's First Embassy to the United States, 1868, 17 J. AM.-E. ASIAN REL. 9, 20, 26 (2010).

84. On the East Coast, several states with major ports of entry maintained significant admissions controls at those ports. These jurisdictions excluded convicted criminals and enacted "poor laws" intended to include those who might become a drain on the public fiscal by becoming public charges. See Gerald Neuman, *The Lost Century of Immigration Law 1776-1875*, 93 COLUM. L. REV. 1833, 1841-48 (1993). They also maintained laws restricting the movement of slaves and free blacks. *Id.* at 1865-69. Other laws protected against public health problems, excluding nonresidents who arrived with communicable diseases. See *id.* at 1859-60; Anna O. Law, *19th Century Immigration Federalism* (on file with authors).

85. California, specifically San Francisco, other western territories, and new states were the epicenter of anti-Chinese sentiment and laws. See Earl M. Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the 14th Amendment*, 17 HARV. J. L. & PUB. POL'Y 223, 224-25 (1994). At the same time, it would be a mistake to believe that such sentiment only existed on the West Coast. See *id.* at 249.

86. For example, soon after gaining statehood, California maintained a "foreign miner's tax" requiring noncitizen miners—at that time, predominantly Chinese—to pay to work. Lin Sing

Despite these state laws, in response to business interests and foreign policy prerogatives, the Executive encouraged labor migration during the mid-1800s.⁸⁷ The first major federal foray into the regulation of admission was not a congressional statute; rather, it was a treaty between the United States and China negotiated by the Johnson Administration.⁸⁸ Although treaties must receive Senate approval, the political force behind it was the Executive Branch's desire to bolster relations with China during a time of deep partisan divide in a Reconstruction-era Congress.⁸⁹

Indeed, many in Congress desired to rescind the Treaty after its implementation but failed in their first attempt to do so.⁹⁰ Amidst growing domestic anti-Chinese sentiment and resentment of the migration patterns emerging after the Treaty, Congress passed the Fifteen Passenger Bill in 1879 that would have restricted steamships from bringing more than fifteen Chinese passengers to the United States.⁹¹ President Rutherford Hayes, however, vetoed the bill on the grounds that it would contravene the goals of the Burlingame Treaty, thereby thwarting Congress's will.⁹²

The Burlingame Treaty of 1868 also exposed the distinctions between the Executive and state preferences with regard to Chinese immigration.⁹³

v. Washburn, 20 Cal. 534, 536 (1862). The tax was initially three dollars per month but gradually increased to twenty dollars per month by 1870, the year it was struck down. *The Chinese Experience in 19th Century America: Some State of California and City of San Francisco Anti-Chinese Legislation and Subsequent Action*, UNIV. OF ILL., http://teachingresources.atlas.illinois.edu/chinese_exp/resources/resource_2_4.pdf (last visited Feb. 27, 2016). The state also took a stab at Chinese exclusion by passing an 1858 "Act to prevent the further immigration of Chinese or Mongolians to this state," which was later contested in court. *Lin Sing*, 20 Cal. at 538 ("This act has never been repealed; but we have been informed from the bench that an attempt was made to execute it; and that the Supreme Court in an opinion which has never been reported, declared [the state's 1858 law, an Act to prevent the further immigration of Chinese or Mongolians to this state,] unconstitutional and void."). Like with the foreign miner's tax, lower federal courts and the California Supreme Court struck down this state exclusion bill and many other similar laws. *See id.* at 580 (striking down as unconstitutional an 1862 state tax intended to protect white labor from competition by Chinese labor); *In re Ah Chong*, 2 F. 733 (C.C.D. Cal. 1880) (striking down a state law prohibiting the Chinese from obtaining fishing licenses as a violation of the U.S. Constitution); *In re Tiburcio Parrott*, 1 F. 481, 517, 521 (C.C.D. Cal. 1880) (striking down a state law imposing criminal sanctions on anyone employing a Chinese or Mongolian person). Nevertheless, courts upheld other state taxes and restrictions on foreign workers.

87. *See* Peter J. Duignan, *Making and Remaking America: Immigration into the United States*, HOOVER INST. (Sept. 15, 2003), <http://www.hoover.org/research/making-and-remaking-america-immigration-united-states>.

88. Schrecker, *supra* note 83, at 20, 26.

89. *Id.* at 11–12, 20, 26–27; *see also* Maltz, *supra* note 85, at 229 (highlighting the conflict between U.S. Senators and the President concerning Chinese people's rights under the Burlingame Treaty).

90. Maltz, *supra* note 85, at 249.

91. *See id.* at 249 & n.154.

92. *Id.* at 249.

93. *See* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*,

The Treaty provided for the unfettered migration of Chinese laborers, who were necessary for construction of the transcontinental railroad, and reassured China that its citizens would not be discriminated against in the United States.⁹⁴ By its text, the Treaty purported to accord citizens of China residing in the United States the same status and treatment “enjoyed by the citizens or subjects of the most favored nations.”⁹⁵ The purpose of that provision was to reassure China about the safety and treatment of its citizens in the face of the rising tide of anti-Chinese state and local laws, particularly in California.⁹⁶

However, far from protecting immigrants from discriminatory state and local laws, the Burlingame Treaty instead galvanized significant backlash, ranging from violent rioting against the Chinese in California to state legislative efforts to oppose the federal policy and mitigate its effects.⁹⁷ In 1870, the state passed an anti-kidnapping and importation law intended to prevent Asian women, presumed to be prostitutes, from immigrating and working against their will.⁹⁸ Accompanying the anti-kidnapping law, the state also passed an anti-coolie law intended to target Chinese male laborers.⁹⁹ California then amended the anti-kidnapping law in 1874 to require a bond for immigrating passengers who were convicted criminals or presumed prostitutes.¹⁰⁰ All three enactments were attempts to reassert state authority over its borders as a way of controlling what it considered to be the detrimental effects of demographic and cultural change within its borders wrought by the Executive Branch’s

15 COLUM. L. REV. 641, 650–51 (2005).

94. CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA 98 (1994).

95. Maltz, *supra* note 85, at 229. In fact, partially in response to California’s treatment of Chinese immigrants, Congress also passed the Civil Rights Act of 1870, which in one of its provisions directed states to provide all “persons” the same protections as “white citizens” with regard to certain enumerated rights. Civil Rights Act of 1870, ch. 114, §§ 16–17, 16 Stat. 140, 144 (1870) (codified as amended at 42 U.S.C. § 1981 (2012)); *see also* Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL’Y 1, 9–10 (2013) (arguing that the Civil Rights Act of 1870 enshrines an equality norm in federal statutes that should be considered when evaluating the preemptive effect of federal laws on restrictive immigration regulations such as Arizona’s SB 1070). Notably, however, the *Chy Lung* case discussed herein did not rely on the Civil Rights Act of 1870, and the Act has not by itself been dispositive in any immigration federalism case.

96. *See* Schrecker, *supra* note 83, at 29–30; *see also* Maltz, *supra* note 85, at 229 (noting that the antidiscrimination provision angered Senators who saw it as a threat to several existing state policies).

97. LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 9–14 (Thomas A. Green & Hendrik Hartog eds., 1995).

98. Abrams, *supra* note 93, at 674–75.

99. *Id.* at 675.

100. *Id.* at 676–77.

foreign policy toward China.

The Supreme Court in *Chy Lung* cut short California's foray into the regulation of Chinese immigration.¹⁰¹ Despite the Court's rebuke of the state's admission regulations, California's reaction illustrates the interaction between federal executive action and state policies. Even after *Chy Lung* stripped California of its power to undermine the entry of Chinese immigrants into its jurisdiction, the state continued to put political pressure on federal officials. Cities such as San Francisco continued to enact restrictive policies intending to target Chinese businesses, work opportunities, and cultural practices.¹⁰²

In 1876, the California legislature passed "An Act concerning the Burlingame Treaty," dedicating public money for sending a delegation to Washington, D.C. to lobby for modification of the Treaty to prevent immigration of certain classes of Chinese persons.¹⁰³ Then in 1877, California passed "An Act to ascertain and express the will of the people of the State of California upon the subject of Chinese immigration," which called for a vote by the people of the state to voice their sentiments on the topic of Chinese immigration.¹⁰⁴ In the following legislative sessions, the state then adopted four anti-Chinese resolutions, two of which directly called for the modification or repeal of the Burlingame Treaty.¹⁰⁵

Finally, and perhaps the most dramatic state action on immigration, California held a constitutional convention that for the first time encoded discrimination against Chinese immigrants in the state constitution, forbidding their employment by corporations or governments and empowering "incorporated cities and towns of this State for the removal of Chinese."¹⁰⁶ Importantly, this constitutional moment in California was part of a more general mood in the state of the need for radical reform and served as a model for other states to follow.¹⁰⁷ Oregon, for example,

101. *See id.* at 677–78.

102. Notable examples included bans on the use of "yeo-ho" poles across shoulders to transport goods on city sidewalks and on gongs at theatrical performances, various laundry ordinances directed at Chinese-owned businesses, and a "queue" ordinance requiring the cutting of Chinese prisoners' hair upon arrival at the county jail. *See, e.g.*, S.F., Cal., General Orders of the Board of Supervisor Order 1587 §§ 27, 42, Order 1588 § 11(3), Order 1589 § 10(L), Order 1599 § 8 (1870) (banning or limiting the beating of gongs in performances; banning use of poles across backs to carry baskets).

103. 1876 Cal. Stat. 906.

104. 1877 Cal. Stat. 558.

105. 1878 Cal. Stat. 439, 440; 1877 Cal. Stat. 439, 440.

106. *See* CAL. CONST. art. XIX (1879).

107. Harry N. Scheiber, *Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution*, 17 HASTINGS CONST. L.Q. 35, 36–37 (1989) ("[M]any advocates of reform joined in this call for California to fulfill its special destiny as 'a model for all other States.'" (quoting *California Leadership*, SACRAMENTO BEE, May 17, 1878, at 2)).

prohibited the hiring of Chinese on municipal projects in 1872.¹⁰⁸

Thus, the Burlingame Treaty, an executive-led action that was meant in part to curtail the discriminatory effects of state actions against Chinese immigrants, provoked a new round of state legislation resisting Chinese immigration and integration. After the signing of the Treaty, state and local actions served as an oppositional response to the Executive's vision, thereby acting as a substitute for Congress's inattention or inability to respond to popular sentiment. Eventually, Congress responded with laws that substantially resembled California's efforts, providing a national voice to the state sentiment.¹⁰⁹ Following the Page Act of 1875, Congress passed the Chinese Exclusion Act of 1882, abrogating parts of the Burlingame Treaty and accomplishing precisely what California had intended to do years earlier.¹¹⁰ Ultimately, these federal laws succeeded in achieving California's underlying goal of undoing the preferences of the Executive in negotiating and maintaining the Burlingame Treaty.

2. The Bracero Program and State Responses

One of the most consequential immigration policies spearheaded by the President—with effects still felt today in the ongoing debate over unauthorized migration—was the Bracero Program, a temporary worker program designed to bring in seasonal migratory labor from Mexico to satisfy U.S. labor needs.¹¹¹ The Bracero Program showcases multiple examples of state-level responses to executive action. In some instances, such as Texas's reassessment of its antidiscrimination efforts, executive decisions helped bring about significant changes to state policy; in other instances, such as the creation of state migratory labor commissions, the state-level policies helped facilitate the executive action by dealing with

108. David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 222 (1999).

109. The first congressional regulation of immigration—the Page Act of 1875—addressed the specific issue of the migration of Chinese women and concerns over prostitution. Abrams, *supra* note 93, at 643. It excluded, through federal law, the same group against whom California's "anti-kidnapping" law of 1870 was directed. *See id.* at 643–44, 674.

110. *See id.* at 695.

111. *See* CALAVITA, *supra* note 72, at 1. Prior to the Bracero Program of the 1940s to 1960s, the United States also ran a temporary worker program—mainly for Mexican laborers—from 1917 to 1921, in the wake of World War I. *See* JOYCE VIALET & BARBARA MCCLURE, CONG. RESEARCH SERV., TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES 6 (1980). This first major program was started in 1917, and the majority of migrant workers arrived for farming work in California, Texas, Arizona, Colorado, Utah, and Idaho. *Id.* The program was only officially active through 1921. *Id.* However, the law allowed for extending the program beyond that date in particular cases. *Id.* President Woodrow Wilson utilized this policy of exceptions and so did President Warren Harding to continue migration of agricultural workers beyond the presumed end of the program. *Id.*

its consequences.¹¹²

President Franklin D. Roosevelt initially conceived and created the Bracero Program as a stopgap, emergency response to the significant labor shortage caused by the United States' participation in World War II.¹¹³ As early as 1940, farming and agricultural interests in Arizona, California, and Texas requested that the federal immigration service allow them to bring in Mexican laborers.¹¹⁴ The agency denied these requests, but by 1942, labor needs and shortages appeared much more urgent to the federal administrative agencies regulating labor, agriculture, and immigration.¹¹⁵ Under pressure to provide for those labor needs, the President negotiated a bilateral agreement with the Mexican government to provide for seasonal migration of Mexican workers¹¹⁶—the so-called “braceros.”¹¹⁷ The Bracero Program processed over 4.6 million workers during its over two decades of operation.¹¹⁸

Like the Burlingame Treaty, the Bracero Program eventually elicited congressional response.¹¹⁹ Despite the eventual congressional

112. See Otey M. Scruggs, *Texas and the Bracero Program, 1942-1947*, 32 PAC. HIST. REV. 251, 263 (1963).

113. Cox & Rodríguez, *supra* note 24, at 462, 540 (noting President Roosevelt's lack of congressional authorization before implementing his worker shortage initiative).

114. CALAVITA, *supra* note 72, at 19.

115. *Id.*

116. See Agreement Between the United States of America and Mexico Respecting the Temporary Migration of Mexican Agricultural Workers, E.A.S. No. 278, 56 Stat. 1759, 1763–64 (1942). The major studies of this Program have focused on two critical aspects. First, scholars have focused on the way in which the Bracero Program created, and then influenced, patterns and networks of cyclical migration across the southern border, eventually contributing to the unlawful immigration flows that continued after the Program ended. See, e.g., MOTOMURA, *supra* note 35, at 45. Second, scholars have scrutinized the relationship between unilateral presidential action and congressional response, with its attendant separation of powers concerns. See Cox & Rodríguez, *supra* note 24, at 490–91.

117. CALAVITA, *supra* note 72, at 1.

118. Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and the Democracy Deficit*, 10 J. GENDER RACE & JUST. 27, 46 (2006).

119. See CALAVITA, *supra* note 72, at 22 (noting that “on April 29, 1943, Congress enacted Public Law 45, officially endorsing the Bracero Program”). Initially conceived as a one-time temporary labor fix, the Program was subsequently reauthorized several times. In 1943, Congress “quietly authorized the program” seven months after it had already begun. *Id.* at 18. Congressional reauthorization of the “wartime” Bracero Program ended in 1947. *Id.* at 25. Despite this lapse of congressional approval, executive agencies continued the Program until 1951, while the Administration renegotiated a new agreement with Mexico. See *id.* at 25, 30, 39. Kitty Calavita does not interpret this period as necessarily showcasing executive dominance in running the Bracero Program. See *id.* at 25. Rather, she argues that this period reflected an understanding between Congress and the administrative agencies in charge of the Program. See *id.* She argues that Congress and the Executive Branch were not at loggerheads during this time but rather were operating under a tacit agreement that the Program should continue under administrative guidance if Congress was unwilling or unable to legislate. See *id.* Only after 1951 did Congress provide

endorsement, the Bracero Program is nevertheless fairly characterized as a program driven chiefly by the prerogatives of multiple presidential administrations and the agencies within their control.¹²⁰ As noted sociologist Kitty Calavita put it, “the Bracero Program was in fact a series of programs initiated by administrative fiat, subsequently endorsed by Congress, and kept alive by executive agreement whenever foreign relations or domestic politics threatened their demise.”¹²¹ In 1950, complaints about the Program from domestic labor groups and unions were brought not to Congress but rather to the President’s Commission on Migratory Labor, an executive committee established by President Harry S. Truman.¹²²

The Bracero Program created state-level legislative effects, as some states and localities responded to the increased and consistent presence of migrant workers in their midst.¹²³ First, braceros did not spread evenly throughout the country; instead, migrant workers concentrated in Arizona, California, and Texas—states that required significant agricultural labor.¹²⁴ For federalism concerns, Texas’s situation is worth greater scrutiny because Mexico was wary of Texas’s record of discrimination and excluded Texas farms from participation in the Program.¹²⁵ While discrimination was an issue for Mexican migrants all over the country, Mexican officials were particularly sensitive about what many considered to be the overt and consistent discrimination experienced in Texas.¹²⁶

clear support for the Program after nearly a decade of its existence by passing Public Law 78, which institutionalized the Program with a more permanent status. *See id.* at 43.

120. *See id.* at 25.

121. *Id.* at 1–2.

122. *See id.* at 19, 29.

123. *See, e.g.,* Scruggs, *supra* note 112, at 255.

124. *See* ROBERT C. MCELROY & EARLE E. GAVETT, U.S. DEP’T OF AGRIC., AGRIC. ECON. REPORT NO. 77, TERMINATION OF THE BRACERO PROGRAM: SOME EFFECTS ON FARM LABOR AND MIGRANT HOUSING NEEDS 15–16 (1965). After 1951, foreign workers spent about ninety-five percent of their total labor time in eight states: Arizona, Arkansas, California, Colorado, Florida, Michigan, New Mexico, and Texas. *Id.* at 15. Over the course of the Bracero Program, the vast majority of migrants found work in Arizona, California, and Texas. *Id.* at 15–16. As with the influx of Chinese laborers in the mid- to late nineteenth century, California received the largest number of workers during the “wartime” Bracero years of 1942 to 1947. *See id.* Eventually, Texas became a top destination as well, and throughout the Program, the overwhelming majority of braceros ended up in either California or Texas. *See id.* at 16.

125. Scruggs, *supra* note 112, at 254. Although Texas farmers were blacklisted from recruiting braceros through official channels, they were still able to find workers through unauthorized channels or by sidestepping the bilateral agreement between the countries. *See id.* at 253–55. During the initial years of the Program, Texas was the destination for the largest number of undocumented laborers. *Id.* at 251.

126. *Id.* at 254.

During the time when Texas was a banned destination for bracero labor, the Executive Branch did not mount serious opposition to the Mexican government's stance. Although the U.S. State Department urged Mexico to reconsider its ban after the onset of the Program, it never insisted.¹²⁷ To the contrary, State Department officials urged immigration officials at the Texas–Mexico border to shut down the border recruitment process that was allowing Texas growers to circumvent the Mexican government's blacklisting by hiring undocumented workers.¹²⁸

Furthermore, the bilateral agreements between the executive departments of both countries guaranteed nondiscriminatory treatment of Mexican nationals.¹²⁹ As such, it appears that the U.S. Executive Branch was also worried about Texas's dismal reputation undermining the State Department's foreign policy efforts with Mexico.¹³⁰ As a result, the State Department was not overly concerned with Texas having to take additional steps to bring the state in line with the image of cooperation and nondiscrimination that the Executive Branch aimed to promote.¹³¹ Perhaps most importantly, the differential treatment of Texas from all other states did not derail or otherwise cause the United States to back out of entering the general executive agreement covering the migration program.¹³² In other words, the Administration appeared willing to use Mexico's ban to help leverage changes in state policy that it considered advantageous to its foreign policy prerogatives.

In response to being cut out of the Program, Texas officials tried to show that they had addressed the discrimination cited as the reason for the ban.¹³³ Texas Governor Coke Stevenson prodded the state legislature to pass the "Caucasian Race" resolution in May 1943, which was intended to "affirm[] the right of all Caucasians[—including Mexicans—]within the state to equal treatment in public places of business."¹³⁴ Despite this action, the Mexican government announced that it still would not authorize braceros for Texas based on the report of its consuls in the

127. *See id.* at 256, 258.

128. *See* CALAVITA, *supra* note 72, at 23–24. However, this alternative channel was not shot down, partly because of the support of congressional members from the border regions. *See id.*

129. *See* Scruggs, *supra* note 112, at 262.

130. *See id.* at 258–60.

131. *See id.* at 255–56, 259; *see also* RICHARD B. CRAIG, THE BRACERO PROGRAM: INTEREST GROUPS AND FOREIGN POLICY 39–40 (1971) (discussing the initial negotiations for the wartime Bracero Program and noting that "[t]he State Department's primary concern was the possibility that the fledgling Good Neighbor Policy might suffer a severe setback if Mexican nationals were exploited or discriminated against during their stay in this country").

132. *See* Scruggs, *supra* note 112, at 262.

133. *See id.* at 260.

134. *Id.* at 255.

state.¹³⁵ This recalcitrance from Mexico galvanized the government of Texas to more conspicuously address the issue. Soon after Mexico's announcement, Governor Stevenson "departed on a 'good will' tour of Mexico" and promised that state law enforcement officials would address cases of discrimination.¹³⁶ Finally, Governor Stevenson convened the Good Neighbor Commission to more acutely study and remedy those concerns.¹³⁷ Indeed, as historian Otey M. Scruggs concludes:

Mexico's policy of using the braceros as a lever to force Texas to take steps to end discrimination against Mexicans was not devoid of results. More than any other factor, it was responsible for the creation of the Good Neighbor Commission, which in 1947 became a permanent agency of the Texas government.¹³⁸

As part of the commission's work, Governor Stevenson and the Mexican foreign minister outlined steps to ameliorate discrimination.¹³⁹ Eventually, in 1947, Mexico discontinued its blacklisting and began allowing lawful worker migration to Texas, albeit under a separate agreement than that which applied to other states.¹⁴⁰

Beyond the specific example of Texas's policy change, more broadly, the Bracero Program initiated a time of significant migratory labor movement, both foreign and domestic.¹⁴¹ The Program's cycle of seasonal migrant labor from Mexico also affected domestic labor migration, as domestic workers began seeking work in non-Bracero states.¹⁴² This period of large-scale international labor migration, as well

135. *Id.*

136. *See id.* at 255–56.

137. *Id.* at 263.

138. *Id.*

139. *Id.* at 255.

140. *See id.* at 261–62. The separate agreement for Texas admissions reminded officials and workers in both Mexico and the United States that the Mexican government was still especially cautious about conditions within Texas. *See id.* at 262.

141. CRAIG, *supra* note 131, at 31; *see also* CALAVITA, *supra* note 72, at 141 (noting that "Texas was both the largest importer and the largest exporter of migrant labor"); Ellis W. Hawley, *The Politics of the Mexican Labor Issue 1950–1965*, 40 *AGRIC. HIST.* 157, 166 (1966) (discussing arguments made by non-Bracero states against the ability of Bracero states to import cheap labor and noting that "[c]omplaints from the Northwest virtually ceased after the growers there learned that Mexican labor in California would add to the supply of domestic migrants in Washington and Oregon").

142. *See* Elizabeth W. Mandel, *The Bracero Program 1942–1964*, 4 *AM. INT'L J. CONTEMP. RES.* 171, 178 (2014). As an example, in the 1950s, domestic labor migrants who had been coming to California began bypassing the state in favor of other states due to the California's increasing reliance on bracero labor. *See* Mark Ellis, *Reinventing US Internal Migration Studies in the Age of International Migration*, 18 *POPULATION SPACE & PLACE* 196, 200 (2012).

as disruptions in domestic labor migration, caused several states to address the concerns attendant to these displacements. First, some states began dealing with the increased presence of a migrant labor source and its attendant concerns. Whether those migrants were domestic citizen migrants, domestic migrants who were lawful immigrants, foreign undocumented migrants, or foreign temporary workers, states and localities were forced to confront everyday concerns such as housing, health care, and education for this work force. For example, in 1953, Colorado enacted its Migrant Children Educational Act, intended to “facilitate the education of migrant children.”¹⁴³ Other laws, such as Colorado’s 1953 statute concerning the health inspection of immigrants, authorized the state health department to inspect immigrants for “cholera or other dangerous communicable diseases” and to treat them for it through local boards of health.¹⁴⁴ Similarly, Wisconsin enacted a law intended to license and monitor migrant labor camps, which employers built for use by seasonal or migrant workers and their dependents.¹⁴⁵

Second, states began creating administrative agencies to facilitate migratory movement and relocation. A 1964 U.S. Department of Labor publication listed the various state and local community-based efforts to integrate or at least ameliorate living conditions for this migratory labor supply.¹⁴⁶ Relevant to this Article’s study of federalism concerns, the publication highlights the creation of state committees on migratory labor in twenty-eight states.¹⁴⁷ States created these committees for the purpose of coordinating programs for migrants at the state level, noting that well-functioning state committees effectively promoted action on a state level and promoted programs on a local level, such as summer school, health clinics, and integration programs.¹⁴⁸

Finally, state lobbying to Administration officials regarding immigration enforcement efforts during the Bracero period reflected

143. 5 COLO. REV. STAT. §§ 123-30-1, -3 (Supp. 1953). Recognizing the increased presence of a transitory labor supply that did not reside full time within the school district, the law was geared toward finding workable educational solutions so that this demographic would not be excluded from state school systems altogether. *See id.* § 123-30-3. The law defined “migrant child” as a child of school age who was the child of, or in the custody of, a migrant agricultural worker. *Id.* § 123-30-2(c). The law further defined “migrant agricultural worker” as “an individual engaged in agricultural labor in this state who is residing in a school district which is not his regular domicile during the performance of such agricultural labor.” *Id.* § 123-30-2(d).

144. *E.g.*, 3 COLO. REV. STAT. § 66-3-4 (1953).

145. 1 WISC. STAT. § 146.19 (1957).

146. W. WILLARD WIRTZ & ARTHUR W. MOTLEY, U.S. DEP’T OF LABOR & BUREAU OF LABOR STANDARDS, WELCOME STRANGER! GOODBYE FRIEND: A GUIDE TO COMMUNITY EFFORTS TO IMPROVE CONDITIONS FOR AGRICULTURAL MIGRANTS 1–2 (1964).

147. *Id.* at 7.

148. *Id.* at 7–8.

distinct state-by-state preferences. Several states during the Bracero period were interested in limited immigration enforcement. For example, Texas officials pushed the immigration service to maintain flexibility in border rules so that the state could bypass the official Bracero Program during the time that Mexico banned Texas from the Program.¹⁴⁹ More generally, in states such as Arizona, California, Idaho, and Nevada, and state agencies and state representatives wanted the Immigration and Naturalization Service (INS) to forbear from immigrant apprehensions and deportations during times of labor shortage, as farming interests desired both braceros and unauthorized migrant labor.¹⁵⁰

3. Paroled and Unauthorized Migrants and Local Responses

State and local reactions to the Executive Branch's response to the influx of Caribbean and Central American migrants during the 1970s and 1980s represents a third example of presidential immigration federalism. In this instance, states and localities pushed back against enforcement efforts, forcing the Executive to reconsider its prosecutorial stance, and ultimately helped urge Congress toward providing relief for large swathes of the undocumented population. Several factors—including the advent of the Cold War, the dismantling of the Bracero Program, the post-1965 numerical restrictions on Western Hemisphere migration, and civil and political unrest in several Caribbean and Central American countries—led to increased numbers of migrants from those areas seeking to unlawfully enter the United States, arriving with the hopes of receiving refugee assistance, or both.¹⁵¹ The Executive Branch was forced to respond.

Multiple presidential administrations dealt with these arrivals by using their executive power to parole the migrants into the country.¹⁵² Although not lawfully admitted with any permanent immigration status, once inside the country, many of these migrants became embedded in local communities. State and local responses to these exercises of mass parole helped set the national enforcement and legislative agenda to resist increased enforcement against these groups and created momentum

149. See Fred L. Koestler, *Bracero Program*, TEX. STATE HISTORICAL ASS'N (June 12, 2010), <https://tshaonline.org/handbook/online/articles/omb01>.

150. See CALAVITA, *supra* note 72, at 33–36. As a prime example, in 1953, two House of Representative members representing southern California agricultural areas actively lobbied the administration officials to limit enforcement efforts against undocumented Mexican immigrants. *California Seeks More "Wetbacks,"* N.Y. TIMES, Sept. 6, 1953, at 1. As the New York Times reported, Representative Robert C. Wilson "complained about the border patrol's 'over-zealousness' in enforcing the immigration laws." *Id.* at 14.

151. See Cox & Rodriguez, *supra* note 24, at 503–06.

152. *Id.* at 492–93.

toward legislative accommodations that helped regularize the status of these migrants.

Haitian refugee arrivals presented a particular enforcement problem for the Administration. During the 1970s, the increasing number of Haitian arrivals began to create a processing backlog for immigration officials.¹⁵³ The INS generally detained the migrants for short periods before eventually paroling them into the United States with work authorization.¹⁵⁴ As the number of arriving migrants began to increase during the course of the decade, federal, state, and local officials—especially in South Florida—began to voice concerns over the effect, in local jurisdictions, of this continued influx.¹⁵⁵ In response, the INS began to develop protocols for streamlining the removal process for Haitian arrivals.¹⁵⁶ Advocacy groups attacked this “Haitian Program” in court, claiming that the revised and targeted procedures violated the Administrative Procedures Act and due process guarantees.¹⁵⁷

The Administration’s policies toward arriving Cubans diverged from its treatment of Haitians. In 1980, in response to mass Cuban arrivals—the result of the Mariel boatlift—President Jimmy Carter, along with the INS, paroled large numbers of Cubans into the country, many of whom would receive permanent residency.¹⁵⁸ For a short time after the boatlift, Congress eased the path for both Haitian and Cuban migrants to gain permanent residency through measures such as the Cuban–Haitian Entrant Program.¹⁵⁹ However, after President Reagan took office in 1981, his Administration’s treatment of Haitians took a decidedly less-welcoming turn. In addition to the further streamlining of the removal process for Haitian arrivals,¹⁶⁰ the Reagan Administration also instituted interdiction programs to attempt to preemptively prevent Caribbean migrants’ arrival on U.S. shores.¹⁶¹ In addition, the INS under President Reagan resumed the use of mass exclusion hearings and prolonged detention of Caribbean migrants.¹⁶²

153. *Id.* at 494.

154. *Id.*

155. *Id.*

156. *Id.*

157. *See* *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 511 (S.D. Fla. 1980) (finding that some government procedures violated migrants’ due process rights), *modified sub nom.* *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

158. *See* Cox & Rodriguez, *supra* note 24, at 507–08.

159. *See, e.g., id.*; U.S. CITIZENSHIP & IMMIGRATION SERVS., CUBAN-HAITIAN ENTRANT PROGRAM (CHEP), <http://www.uscis.gov/humanitarian/humanitarian-parole/cuban-haitian-entrant-program-chep> (last visited Feb. 27, 2016).

160. Cox & Rodriguez, *supra* note 24, at 497–98.

161. *See* Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981).

162. Gilbert Loescher & John Scanlan, *Human Rights, U.S. Foreign Policy, and Haitian*

It was in this atmosphere of heightened and unequal executive immigration enforcement against Haitian migrants that some states and localities began passing early versions of the sanctuary ordinances that are still in force today. In response to the Executive's decision to detain and mass deport Haitian migrants, some cities—Brookline and Cambridge, Massachusetts, and Oakland, California—passed local “non-cooperation” ordinances, declaring themselves sanctuaries for migrants, including Haitian migrants and other vulnerable groups, in spite of federal immigration authorities.¹⁶³

Beyond the Haitian context, the 1980s witnessed the burgeoning of the broader sanctuary movement aimed at Central American migrants.¹⁶⁴ The civil and political unrest in countries such as Guatemala, Honduras, and El Salvador during the 1980s resulted in significant migration to the United States.¹⁶⁵ Due to restrictions on legal migration, the majority of those migrants entered unlawfully through the southern border of the United States, escaping detection by the INS and border patrol.¹⁶⁶ The increasing number of unlawfully present Central American migrants within the country led to calls for the Administration to step up its domestic deportation enforcement against this group.

In response, local and state jurisdictions across the country passed sanctuary ordinances aimed at hindering the Executive's enforcement efforts and facilitating the continued presence—regardless of lawfulness—of these migrants.¹⁶⁷ Throughout the mid- to late 1980s and through present day, several dozen state and local jurisdictions have affirmed and reaffirmed their intent to remain sanctuaries and limit cooperation with federal enforcement efforts.¹⁶⁸ These places may have

Refugees, 26 J. INTERAMERICAN STUD. & WORLD AFF. 313, 345 (1984).

163. Brookline, Mass., Ordinance Res. Concerning Sanctuary for Refugees from El Salvador, Guatemala, and Haiti, Art. 24 (1985); Cambridge, Mass., Res. Declaring the City a Sanctuary 3 (Apr. 8, 1985), http://www.factcheck.org/UploadedFiles/City_of_Cambridge_1985_Sanctuary_Resolution.pdf; Oakland, Cal., Ordinance Res. 63950 (July 8, 1986).

164. See Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 252–53 (2012); Rose Cuison Villazor, *What Is a Sanctuary?*, 61 SMU L. REV. 133, 138–43 (2008).

165. Villazor, *supra* note 164, at 137, 140 & n.38.

166. See Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POLICY INST. (Apr. 1, 2006), <http://www.migrationpolicy.org/print/4621>.

167. See, e.g., House of Representatives of the State of New Mexico, A Memorial Requesting Consideration for the Refugees from El Salvador, 37th Legis., 1st Sess. House Mem. 5 (1985); N.Y. State Assembly, Resolution: Sanctuary for Guatemalans and Salvadorans, Res. 95147-03-06 (June 3, 1986); EXECUTIVE DEPARTMENT OF THE COMMONWEALTH OF MASSACHUSETTS, REFUGEE POLICY, EXEC. ORDER NO. 257, ART. IV (1985).

168. See, e.g., Sara Gaiser, *Supervisor Campos Moves to Reaffirm Sanctuary City Status*, S.F. APPEAL (Sept. 22, 2015, 11:02 PM), <http://sfappeal.com/2015/09/supervisor-campos-moves-to-reaffirm-sanctuary-city-status/>; Steve Hendrix, *Takoma Park Stays Immigrant ‘Sanctuary,’*

preferred not to have hundreds of refugees, parolees, or other unauthorized migrants in their midst, but given the enforcement structure and decisions that landed them there, these states and localities responded by recognizing the migrants' presence and acquiescing to their continued stay.¹⁶⁹ Indeed, partly in response to the intractability of the problem of several hundred thousand unlawful migrants from Central American countries remaining in the United States, Congress eventually responded with a mass legalization program as part of its 1986 Immigration Reform and Control Act and other relief measures.¹⁷⁰

C. *Prior Executive Action and Immigration Federalism: General Themes*

Reexamination of the antecedent examples discussed above helps uncover a pattern of state-level effects and responses to executive-led immigration action. Although the specific instances yielded a variety of ways in which executive branch decision-making interacted with state-level policies, the interactions comprise three basic categories: (1) the Executive's power to curtail or counteract state-level policy making; (2) executive action designed to co-opt state policies and possibly obviate them; and (3) executive action that catalyzes state-level policy making, either intentionally or unintentionally. In addition, there is a potential fourth theme—that of state and local reactions intended to counteract or express displeasure with presidential action. This reciprocal state and local feedback is often baked into the three primary themes, as a reaction to either ongoing or impending federal executive action. Part II applies these categories to contemporary presidential action, providing a systemic conceptual framework within which to understand current forms of executive influence on immigration federalism dynamics.

The initial impetus for the Burlingame Treaty demonstrates the type of action that the Executive takes to curtail state and local policies. Recall that at the time the Treaty was signed, several cities within California, as well as the state itself, were creating explicitly anti-Chinese policies. The Treaty attempted to override those policies by announcing a general nondiscriminatory policy toward the Chinese in the United States, as negotiated between officials in both countries.¹⁷¹ As detailed below with

WASH. POST (Oct. 30, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/29/AR2007102902241.html>.

169. See Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297, 308–10 (1989).

170. Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359, 3359 (1986) (codified as amended at 8 U.S.C. § 1324a (2012)); see also Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2160, 2193 (1997) (codified as amended at 8 U.S.C. §§ 1101, 1255).

171. See *supra* Subsection I.B.2.

contemporary examples, this type of executive action that cuts against the grain of a subfederal movement might not fully staunch the state and local trend. In the case of the Burlingame Treaty, state and local governments in California attempted to continue their anti-Chinese campaign in new forms despite the Treaty. As such, this form of executive action can create virulent backlash from states.

Examples of the Executive attempting to co-opt state agencies or placate state-level policy preferences appear in the transition to federal immigration control after *Chy Lung* and again with the Bracero Program.¹⁷² Despite ousting state control over immigration matters, the first federal immigration laws in 1882 kept state structures intact, relying on state commissions to continue their screening duties, but now with oversight by executive branch officials.¹⁷³ Later, when the federal government created its own administrative structures, those federal agencies recruited state immigration officials to staff them, thus allowing state input into federal immigration enforcement.¹⁷⁴

Similarly, one year before the Bracero Program began, facing impending labor shortages, growers and officials from large farm states petitioned the immigration service to directly import Mexican workers.¹⁷⁵ Farmers in border states had begun recruiting undocumented Mexican workers to help address their labor needs.¹⁷⁶ The initial Bracero agreement attempted to obviate unilateral actions by local interests within states with large agricultural sectors.¹⁷⁷ Relatedly, executive decisions to temper immigration enforcement efforts so as to ensure non-apprehension of unauthorized workers helped quell pressure from federal

172. Examples of Congress engaged in this dynamic of attempting to co-opt and obviate state action abound in immigration law. The 1875 Page Law and the 1882 Chinese Exclusion Act are notable historical examples, with each largely adopting state prerogatives and obviating the need for state action by federalizing state objectives. See Abrams, *supra* note 93, 690–92, 695. As a more recent example, Professor Peter Spiro argues that the enactment of 1996 federal immigration laws creating harsher removal consequences for immigrants was a federalization of state objectives contained in California’s failed Proposition 187. Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1632–33 (1997).

173. An Act to Regulate Immigration, ch. 376, 22 Stat. 214 (1882) (leaving state commissioners and officers in charge of examining and screening incoming passengers from ships and levying a fifty-cent head tax on all immigrants at U.S. ports); Hidetaka Hirota, *The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy*, 99 J. AM. HIST. 1092, 1099 (2013).

174. *E.g.*, Hirota, *supra* note 173, at 1105–07 (noting that many of the state officials who created and ran robust state immigration agencies in New York and Massachusetts were recruited into the federal immigration bureaucracy and helped mold the development of federal policy).

175. CALAVITA, *supra* note 72, at 19.

176. *Id.* at 28–29.

177. *See id.* at 19.

representatives of several farming states.¹⁷⁸

Both the Bracero Program and the Caribbean and Central American migrant surges of the 1970s and 1980s illustrate the third category of executive action—that which catalyzes state and local policies. With the Bracero Program, the State Department expressly included nondiscrimination provisions in its bilateral agreements and was keen not to undermine its fledgling Good Neighbor Policy with Mexico.¹⁷⁹ The Executive's seeming acquiescence to Mexico's blacklisting helped prod Texas to reconsider its enforcement history and then to create policies and agencies to bring the state in line with the Administration's vision for its relationship with Mexico.¹⁸⁰ As another example, the significant numbers of both foreign and domestic migrant workers who became a persistent reality during the mid-twentieth century also galvanized state and local action. The various state committees on migratory labor attempted to focus on areas of concentrated migrant populations, providing social services and integration services for that population.¹⁸¹

Similarly, states and localities also responded to the influx of Caribbean migrants, many of whom executive action paroled into the country, and the significant numbers of Central American migrants who unlawfully entered.¹⁸² The sanctuary movement saw local jurisdictions and local organizations in certain migrant-friendly parts of the country offering a safe haven to these populations.¹⁸³

II. THE OBAMA PRESIDENCY: DEEPENING EXECUTIVE POWER THROUGH IMMIGRATION FEDERALISM

This Article's exploration of some of the latent federalism concerns in prior episodes of executive immigration action reveals broader themes of executive action and immigration federalism. This Part examines these present-day assertions of presidential power within the tripartite framework derived from Part I's exploration of past instances of executive action. In doing so, this Part describes the breadth of presidential decision-making that creates immigration federalism consequences, including deciding to litigate, changing agency enforcement priorities, leveraging federal resources into coercing or disciplining state action, and administratively creating a class of lawfully present persons. Importantly, this framework allows for clearer consideration of the doctrinal and political consequences of, and potential for, presidential power in immigration federalism that Part III discusses.

178. *See id.* at 32–33.

179. CRAIG, *supra* note 131, at 39–40.

180. Scruggs, *supra* note 112, at 255.

181. *See* WIRTZ & MOTLEY, *supra* note 146, at 7.

182. Cox & Rodriguez, *supra* note 24, at 487–89.

183. *See supra* text accompanying notes 163–68.

These possibilities are most evident with regard to the third type of presidential action, which focuses on the opportunities for the Executive to galvanize state-level policy making.

A. *Counteracting State-Level Policy Making: Litigation and Enforcement Prioritization*

The President may significantly curtail state-level policy by using her discretionary executive authority to initiate or weigh in on litigation against state or local enactments that the President believes undermines her preferred vision of immigration policy and enforcement. While the Executive Branch might counteract state policies in other ways, inviting the federal court system to do so is a powerful tool at the Executive's disposal, one that the Executive has rarely employed in immigration matters until recently. It is also a uniquely executive function because Congress does not control the federal litigation apparatus.¹⁸⁴ Further, as *Arizona v. United States*¹⁸⁵ teaches, this ability to legally attack state-level immigration lawmaking is chiefly premised on the President's power to set agency priorities within the Department of Homeland Security (DHS).¹⁸⁶ This Section analyzes these two related actions—participating in litigation and establishing enforcement priorities that become important in litigation—in turn.

Although litigation is a tool many administrations have used in numerous regulatory areas to stop state-level trends or a particular subfederal policy, it has only been used sparingly in the immigration context. Thus, the recent and repeated appearance of the Obama Administration's DOJ in several suits challenging state and local regulations represents a particularly "robust effort" by the Executive to control the immigration debate and channel the direction of present-day immigration policy.¹⁸⁷ In recent years, the Executive's decision to enter or abstain from litigation has been the subject of presidential politics, with significant consequences for subfederal policy in several regulatory areas.¹⁸⁸

184. See Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 570 (2003).

185. 132 S. Ct. 2492 (2012).

186. See *id.* at 2507.

187. Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2103 (2014).

188. For example, several scholars have noted the substantial decrease in prosecutions in certain regulatory areas during the George W. Bush Administration. See, e.g., Andrias, *supra* note 29, at 1060–63; Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL'Y 77, 80–81 (2009).

In immigration federalism cases, parties challenging the state or local regulation have mainly argued preemption, contending that the state-level policy must yield to federal law.¹⁸⁹ But the Executive's decision to become the litigating party in such cases is not predetermined or required, even when the legal claim is based on the supremacy of federal power. In fact, in the overwhelming majority of immigration federalism cases, the Executive Branch has refrained from initiating suits even when it had a plausible structural power claim on which it could prevail. In most cases, beginning in the late 1800s, private plaintiffs aggrieved by state policies raised preemption claims on their own without the federal government's presence as a litigating party.¹⁹⁰ The same was true in the litigation challenging Arizona's SB 1070. Separate from the federal government's landmark suit, individuals and advocacy groups filed six other complaints asking a court to strike down the law.¹⁹¹ Those suits also presented preemption claims, arguing that Arizona was intruding upon federal authority over immigration¹⁹²—the same claim made by the federal government.

Since 2010, however, this turn toward the involvement of the federal government as a litigating party has formed an exceptional and noteworthy trend.¹⁹³ Consistent with general empirical findings outside the immigration context, this Article's examination of immigration federalism cases from the late 1800s through the present day reveals the importance of this type of executive decision in curtailing state policies. Of immigration federalism cases reaching the Supreme Court or circuit courts of appeals since 1875, the federal government was the suing party in only a handful of instances, with almost all of them arising in the past four years as challenges to state enforcement schemes in Alabama,

189. See, e.g., *Arizona*, 132 S. Ct. at 2497.

190. See, e.g., *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 763 & n.1 (C.D. Cal. 1995), *aff'd in part and dismissed in part* by 131 F.3d 1297 (9th Cir. 1997); Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States*, 9 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 8 & n.32 (2013).

191. *Friendly House v. Whiting*, 846 F. Supp. 2d 1053, 1054–55 (D. Ariz. 2012), *aff'd sub nom. Valle Del Sol Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013); *Nat'l Coal. of Latino Clergy & Christian Leaders v. Arizona*, No. 2:10-cv-00943-SRB, slip op. at 2, 17 (D. Ariz. Dec. 10, 2010) (dismissing the case); *Escobar v. Brewer*, No. 4:10-cv-00249-SRB, slip op. at 2, 9 (D. Ariz. Aug. 31, 2010) (dismissing the case for lack of standing); *Frisancho v. Brewer*, No. 2:10-cv-00926-SRB, slip op. at 6 (D. Ariz. Aug. 24, 2010) (dismissing the case for lack of standing); *League of United Latin Am. Citizens v. Arizona*, No. 2:10-cv-01453-SRB, slip op. at 10–11 (D. Ariz. May 31, 2010) (staying the case until final rulings in *Friendly House* and *Arizona*); Complaint, *Salgado v. Brewer*, No. 2:10-cv-00951-SRB (D. Ariz. Apr. 29, 2010).

192. See, e.g., First Amended Complaint for Declaratory and Injunctive Relief at 34, 36, 42, *Friendly House*, 846 F. Supp. 2d 1053 (No. CV 10-1061-PHX-SRB), 2011 WL 5367286.

193. See MOTOMURA, *supra* note 35, at 81; Cox, *supra* note 25, at 31–32; Rodriguez, *supra* note 187, at 2103.

Arizona, and South Carolina.¹⁹⁴ Additionally, all the immigration federalism suits in which the DOJ challenged state enforcement schemes resulted in wins for the federal government.¹⁹⁵

At the district court level, the federal government has brought suit a few more times, but it is still an exceedingly rare event. Notably, in 1906, President Theodore Roosevelt sued the San Francisco School Board for its policy of segregating Japanese schoolchildren into Chinese schools, but the Administration's entering into a new agreement with Japan settled that dispute.¹⁹⁶ More recently, in 2009, the United States prevailed in federal district court in a suit challenging an Illinois law prohibiting employers from enrolling in e-Verify.¹⁹⁷ The federal government also prevailed as the defendant in two immigration federalism suits, successfully fending off New York City's request for a declaratory judgment that the city's policy to prohibit communication with federal immigration authorities did not violate federal law and California's claim that the federal enforcement policy fiscally harmed it.¹⁹⁸

In short, federal intervention makes a difference in immigration federalism litigation. Admittedly, immigration cases present too small of a sample from which to draw significant conclusions. Yet, broader studies of federal government participation support the thesis as well. An empirical study of the Rehnquist Court's preemption decisions suggests that the DOJ's participation either for or against preemption correlates with an increase in the chances of that position prevailing.¹⁹⁹ Also, the federal government's appearance as a party significantly affects results in cases before the Supreme Court.²⁰⁰ In any case, the federal government's

194. MOTOMURA, *supra* note 35, at 81.

195. *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012); *United States v. South Carolina*, 720 F.3d 518, 533 (4th Cir. 2013); *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013). Certainly, all these cases left intact portions of the state laws at issue. *See, e.g., Arizona*, 132 S. Ct. at 2510 (holding that "it was improper . . . to enjoin § 2(B)" of SB 1070). Nevertheless, the results can be fairly characterized as wins for the federal government and losses for states.

196. *See* MOTOMURA, *supra* note 35, at 36.

197. *United States v. Illinois*, 92 Empl. Prac. Dec. (CCH) 43,510, 2009 WL 662703 (C.D. Ill. Mar. 12, 2009).

198. *City of New York v. United States*, 179 F.3d 29, 37 (2d Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000); *California v. United States*, 104 F.3d 1086, 1095 (9th Cir. 1997), *cert. denied*, 522 U.S. 806 (1997).

199. Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 73–74 (2006).

200. *See id.*; *see also* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 773 (2000) (noting that amicus support by the Solicitor General influences the Supreme Court); Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505, 505 (1998) (noting the advantages the U.S. government holds when litigating before the Supreme Court).

presence as a party sends a powerful symbolic message in preemption cases. The party most likely to understand the complex ways in which state laws interfere with or otherwise intrude into federal prerogatives and processes is the federal government.²⁰¹

Aside from directly bringing suit, the DOJ may participate in less conspicuous ways but with nearly the same effect. The federal government has participated as amicus curiae in immigration federalism litigation before federal courts of appeals and the Supreme Court on five occasions.²⁰² In three of the five immigration federalism cases in which the federal government weighed in as amicus, courts unequivocally ruled in favor of the party supported by the United States.²⁰³ The rulings in the remaining two cases were not “wins,” but the courts’ opinions nevertheless showcased the power of the Executive’s intervention.²⁰⁴ This small sample size of immigration federalism case filings is consistent with general studies of amicus filings similarly demonstrating the influence of the DOJ when the federal government weighs in on a case.²⁰⁵

In one of the two cases that did not result in a clean win for the Executive, *Plyler v. Doe*,²⁰⁶ two presidential administrations took differing positions on the Texas state law that allowed public primary schools to exclude undocumented students.²⁰⁷ The Carter Administration supported the undocumented children, but the Court did not resolve the case by the end of President Jimmy Carter’s term.²⁰⁸ The Reagan Administration’s brief later argued that Texas’s law allowing public

201. This seems especially so when part of the federal government’s preemption argument relies on the DOJ’s parsing of the manner in which the Executive has chosen to enforce congressional laws as written. For instance, the Solicitor General’s brief to the Supreme Court in *Arizona* relied on memoranda issued by ICE, in which the ICE Director spelled out his instructions as to how to utilize agency enforcement resources. See Brief for the United States at 4–5, *Arizona v. United States*, 132 S. Ct. 249 (2012) (No. 11-182).

202. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1979 (2011) (U.S. amicus brief for the party challenging state law); *Plyler v. Doe*, 457 U.S. 202, 204 (1982) (U.S. amicus brief for the State of Texas), *reh’g denied*, 458 U.S. 1131 (1982); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 411 (1948) (U.S. amicus brief for party challenging state law); *Hines v. Davidowitz*, 312 U.S. 52, 56 (1941) (U.S. amicus brief for party challenging state law); *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 533 (5th Cir. 2013) (en banc) (U.S. amicus brief for party challenging local law).

203. *Takahashi*, 334 U.S. at 422 (striking down a state law on commercial fishing); *Hines*, 312 U.S. at 74 (striking down a state alien registration scheme); *Villas at Parkside Partners*, 726 F.3d at 525 (striking down a local rental ordinance).

204. See *Chamber of Commerce*, 131 S. Ct. at 1979, 1986; *Plyler*, 457 U.S. at 204.

205. See, e.g., *Kearney & Merrill*, *supra* note 200, at 789–90.

206. 457 U.S. 202 (1982).

207. *MOTOMURA*, *supra* note 35, at 5.

208. *Id.*

primary schools to exclude undocumented students was neither structurally preempted by the federal government's exclusive control over immigration nor statutorily preempted by the INA.²⁰⁹ However, the brief also clarified that the DOJ considered undocumented students to be "persons" within the meaning of the Fourteenth Amendment's Equal Protection Clause and expressly declined to take a position on whether the state law was an equal protection violation.²¹⁰ The *Plyler* Court, consistent with the Solicitor General's brief, found that the Equal Protection Clause protected undocumented children and, further, that the Texas law violated it.²¹¹ At least one DOJ official—Chief Justice John Roberts in his former position as Special Assistant to the Attorney General—interpreted the result as a missed opportunity; he suggested that if the Solicitor General had more firmly supported the state law, the Court would have upheld it.²¹²

The other case in which the Executive chose to file an amicus brief also demonstrates the impact of federal involvement in litigation, albeit in an odd manner.²¹³ Although the federal government was not a party to *Chamber of Commerce v. Whiting*,²¹⁴ the Court invited the federal government to submit an amicus brief supporting the Chamber's challenge to the state law penalizing employers for hiring unauthorized workers.²¹⁵ Ironically, however, a revelation in the DOJ's filing became a key part of the majority opinion upholding the Legal Arizona Workers' Act, denying the Chamber's preemption claim.²¹⁶ Specifically, the DOJ's

209. Brief for the United States as Amicus Curiae at 10–20, *Plyler*, 457 U.S. 202 (Nos. 80-1538, 80-1934), 1981 WL 390001.

210. *Id.* at 24–27.

211. *See Plyler*, 457 U.S. at 227 n.22, 230.

212. Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 972 (2014).

213. In the suit challenging the Legal Arizona Workers' Act, which required all employers within Arizona to use the federal e-Verify database, the U.S. Chamber of Commerce, a private business association, sued the state of Arizona. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1976–77 (2011). The suit alleged preemption, relying on a provision of federal law that "expressly preempt[ed] 'any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens.'" *Chamber of Commerce*, 131 S. Ct. at 1975 (omission in original) (quoting 8 U.S.C. § 1324a(h)(2) (2012)). Citing federal regulations that only made database use voluntary for most businesses, the Chamber argued that the mandatory use of the system would burden the federal government in a manner not contemplated or provided for by the federal scheme. *Id.* at 1986. Relatedly, the Chamber maintained that mandatory use of the database within a state would overwhelm federal resources unaccustomed to responding to the verification requests of every business within a state. *Id.*

214. 131 S. Ct. 1968 (2011).

215. Brief for the United States as Amicus Curiae Supporting Petitioners at 1–2, *Chamber of Commerce*, 131 S. Ct. 1968 (No. 09-115), 2010 WL 3501180 [hereinafter U.S. Amicus Curiae Brief].

216. *See Chamber of Commerce*, 131 S. Ct. at 1979–80.

brief mentioned that DHS was encouraging greater e-Verify use and had attested that Arizona employers' mandatory use of e-Verify would not overly burden it.²¹⁷ While that position alone did not resolve the preemption claim, the majority's decision expressly relied on that representation, using the DOJ's statement to bolster the argument that the state law would not undermine federal enforcement efforts.²¹⁸

Related to the power to litigate is the President's ability to determine how to execute immigration law²¹⁹—a decision that had dispositive consequences for the enforcement-heavy state and local policies of the last ten years. A key feature of the Government's argument in *Arizona* was its reliance on ICE memoranda that laid out immigration enforcement priorities.²²⁰ In other words, that portion of the Administration's argument was based on enforcement calibration decisions promulgated by administrative agency officials and blessed by the Executive. The argument highlights another aspect of executive power to curtail state and local activity. The President and the agencies under his control may issue memoranda that set agency priorities.²²¹ The creation of these priorities, in turn, influences the viability of state immigration policies through their use in immigration federalism cases and policy debates.

In recent years, under the Presidencies of Bill Clinton, George W. Bush, and Barack Obama, ICE and its predecessor agency have issued memoranda setting the Administration's enforcement priorities in investigation and removal cases. These memoranda suggest that ICE's enforcement resources should be deployed in a manner consistent with the threats posed by unlawfully present persons.²²² To be clear, not all of

217. See U.S. Amicus Curiae Brief, *supra* note 215, at 34.

218. *Chamber of Commerce*, 131 S. Ct. at 1986 (“Whatever the legal significance of [the] argument [that mandatory state e-Verify laws would overwhelm the federal system], the United States does not agree with the factual premise.”).

219. *Arizona v. United States*, 132 S. Ct. 2492, 2522 (2012).

220. Brief for the United States, *supra* note 201, at 4–8.

221. *E.g., id.*

222. See, e.g., Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf't, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enf't Priorities of the Agency for the Apprehension, Detention, & Removal of Aliens to Field Office Dirs., Special Agents in Charge, and Chief Counsel of U.S. Immigration & Customs Enf't (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, on Civil Immigration Enf't: Priorities for the Apprehension, Detention, & Removal of Aliens to Employees, U.S. Immigration & Customs Enf't (Mar. 2, 2011), <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>; Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigration & Customs Enforcement, on Prosecutorial Discretion to Chief Counsel of Office of the Principal Legal Advisor (Oct. 24, 2005), <http://shusterman.com/pdf/prosecutorialdiscretionimmigration1005.pdf>.

these memoranda were expressly promulgated in response to state and local lawmaking. Indeed, the oft-cited memorandum from INS Commissioner Doris Meissner predated both the September 11 attacks and the rise of state and local regulations since the mid-2000s.²²³

More recent DHS guidelines were clearly directed to the several state enforcement interventions of the mid-2000s. For example, the 2012 DHS *Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters* expressly stated that “[i]n light of laws passed by several states addressing the involvement by state and local law enforcement officers in federal enforcement of immigration laws, DHS concluded that this guidance would be appropriate to set forth DHS’s position on the proper role of state and local officers in this context.”²²⁴ It went on to specify the manner and limitations of state and local immigration enforcement desired by the Executive Branch.²²⁵

The timing of other agency enforcement memoranda during the Bush and Obama Administrations was coincident with the rise in state and local enforcement efforts, although they did not directly address those subfederal enactments. In response to a crushing litigation load from removal proceedings, ICE’s principal legal advisor encouraged the use of prosecutorial discretion in late 2005²²⁶—the same year that witnessed a significant spike in state and local restrictionist legislation.²²⁷ Subsequent ICE memoranda in 2010 and 2011 clarified the agency’s priority order for investigation and apprehension, and counseled the use of prosecutorial discretion, detention, and enforcement consistent with those priorities.²²⁸ Again, those dates are significant moments in immigration federalism as they represented continued high levels of state and local enactments, such as SB 1070 in 2010 and its copycat legislation in other

223. Memorandum from Doris Meissner, Comm’r, Immigration & Naturalization Serv., on Exercising Prosecutorial Discretion to Reg’l & Dist. Dirs., Chief Patrol Agents, and Reg’l & Dist. Counsel of the Immigration & Naturalization Serv. (Nov. 17, 2000), <http://www.legalactioncenter.org/sites/default/files/docs/lac/Meissner-2000-memo.pdf>.

224. U.S. DEP’T OF HOMELAND SEC., GUIDANCE ON STATE AND LOCAL GOVERNMENTS’ ASSISTANCE IN IMMIGRATION ENFORCEMENT AND RELATED MATTERS 1, <http://www.dhs.gov/guidance-state-and-local-governments-assistance-immigration-enforcement-and-related-matters> (last updated July 9, 2015).

225. *See id.* at 10.

226. *See* Memorandum from William J. Howard to Chief Counsel, *supra* note 222.

227. *See* MICHAEL JONES-CORREA, MIGRATION POLICY INST., CONTESTED GROUND: IMMIGRATION IN THE UNITED STATES 10 (2012), <http://www.migrationpolicy.org/pubs/TCM-UScasesstudy.pdf>.

228. Memorandum from John Morton to Field Office Dir., Special Agents in Charge, and Chief Counsel, *supra* note 222; Memorandum from John Morton, Assistant Sec’y, U.S. Immigration & Customs Enf’t, on Civil Immigration Enf’t: Priorities for the Apprehension, Detention, & Removal of Aliens to Employees of U.S. Immigration & Customs Enf’t (June 30, 2010).

states soon thereafter.

These agency interventions have significant federalism consequences because state and local arrests and information regarding unlawfully present persons increases the volume and alters the characteristics of those in removal proceedings. As Professor Hiroshi Motomura persuasively argues, the arrest authority of state and local enforcement officers turns out to be the “discretion that matters” in immigration proceedings.²²⁹ In the end, the agency guidance memoranda did more than simply express an opinion about the effects of the state and local restrictionist trend. Although the federal agency memoranda could only control the actions of federal officers, the prominence of those agency priorities in *Arizona* helped curtail subfederal lawmaking. The majority of the Supreme Court accepted the premise, proffered by the U.S. Solicitor General, that state and local restrictionist laws, such as SB 1070, interfere with the priorities of federal immigration authorities and the manner in which those authorities chose to enforce immigration law.²³⁰ In other words, those state and local laws tend to conflict or interfere with the way in which the Executive decided to execute congressional law, not with a federal statute as written.²³¹

Contemplating counterfactual possibilities further illustrates this power to seriously curtail or otherwise counteract state-level lawmaking. Consider that if Senator John McCain had won the Presidency in 2008, the federal government likely would not have sued Arizona for its immigration enforcement law. During his time as an Arizona Senator and during his presidential campaign, Senator McCain praised and defended SB 1070.²³² Further, it is not clear that a McCain Administration would

229. Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1822 (2011) (“In immigration law, however, the decision to make an arrest has been the discretion that matters.”). Because those state and local agents are not subject to oversight and control by ICE and federal enforcement agencies—and therefore not subject to administrative guidance and enforcement priorities—their apprehensions can load the immigration removal system with candidates that would not fit the Administration’s priorities. As such, even though the agency memoranda never expressly mention state and local enactments, it would appear that the concerns about the volume and characteristics of those placed in removal proceedings voiced in those memoranda were intended, at least in part, to blunt the effect of increased state and local enforcement policies.

230. See *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012).

231. See Bulman-Pozen, *Afterlife of American Federalism*, *supra* note 21, at 1935–40 (arguing that federalism cases are often separation of powers battles, with states either siding with the Executive or Congress).

232. Mike Sunnucks, *McCain Voices Support for Immigrant Trespassing Bill*, PHX. BUS. J. (Apr. 19, 2010, 1:25 PM), <http://www.bizjournals.com/phoenix/stories/2010/04/19/daily3.html>; see also Gulasekaram & Ramakrishnan, *Reappraisal*, *supra* note 43, at 2114 n.180, 2114–15 (discussing forces that push one-time GOP moderates on immigration, such as Senator McCain, to positions more ideologically aligned with the rest of the party).

have produced the types of enforcement priority memoranda that informed the Government's argument in *Arizona*. In this alternate universe, without the federal government, the case would have looked quite different. Of course, it remains quite possible that the Court would have reached the same decision if one of the other challenges from private parties and advocacy groups had wound its way through the trial and appeals process. But here, the President decided to bring to bear the resources and gravitas of the DOJ, with an argument that relied on executive agency priority setting, and helped increase the likelihood of success on the preemption claim against the Arizona law. Moreover, separate from litigation, a McCain or Romney Administration might have requested that Congress withhold funding from jurisdictions that resisted the federal government's enforcement methods and may have taken a more favorable stance toward state and local enforcement cooperation by, for example, authorizing more or expanded 287(g) agreements.²³³

B. *Co-opting and Obviating the Demand for State Action: Secure Communities and 287(g)*

In addition to stepping in to stop a state-level trend, the Executive may also co-opt state actors, at times with the possibility of placating them and obviating further decentralized policy making. Enforcement programs used by the Obama Administration, such as Secure Communities (S-Comm) and 287(g) agreements, integrate states and localities into the federal enforcement scheme. By doing so, the Executive is able to co-opt state and local agencies for its own purposes, mitigating informational deficits and leveraging greater enforcement resources. In addition, the Executive might use such programs as a way of placating states and localities to try to stop them from independently enacting subfederal restrictionist policies beyond the Executive's control. At the same time, however, the co-optation of states and localities can also limit federal power; the integration of subfederal agencies and officials into executive enforcement schemes provides critical opportunities for states and localities to push back against presidential policies.

Illustrative of these dynamics is the now-superseded S-Comm program. S-Comm was an agency prerogative initially launched by President Bush's DHS in 2007.²³⁴ The program was designed to include

233. Under Section 287(g) of the INA, DHS can choose to authorize an agreement for a state or local agency to "receive delegated authority for immigration enforcement within their jurisdictions." See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act: Fact Sheet*, U.S. IMMIGRATION & CUSTOMS ENF'T, <http://www.ice.gov/factsheets/287g> (last visited Feb. 27, 2016).

234. Editorial, *The 'Secure Communities' Illusion*, N.Y. TIMES (Sept. 5, 2014), <http://www.nytimes.com/2014/09/06/opinion/the-secure-communities-illusion.html>.

state and local law enforcement officials in immigration enforcement.²³⁵ S-Comm was neither created by Congress nor specifically provided for in any federal statute. It was a purely administrative measure concocted by executive branch officials to leverage the superior information and manpower of state and local law enforcement agencies.²³⁶ Fundamentally, S-Comm integrated state and local enforcement agencies into the federal immigration enforcement scheme, but it did so on terms acceptable to the Executive's enforcement apparatus and priorities.

Although it is clear that S-Comm was not solely a response to state and local activity, its timing is instructive. Initially introduced as a pilot program in 2008, the Executive developed S-Comm in the context of the exponential uptick in state and local restrictionist legislation.²³⁷ State and local involvement began in earnest in 2005 and increased in frequency and scope for several years, culminating with the passage of Arizona's SB 1070 in 2010 and copycat legislation in other states.²³⁸ One of the hallmarks of such state legislation was the increased involvement of local law enforcement in the investigation and apprehension of unauthorized migrants in efforts to bolster federal enforcement efforts. Soon after, the Administration, through DHS Secretary Janet Napolitano, clarified that S-Comm was a mandatory program that it would roll out to every jurisdiction in the United States, without the opportunity for state and local opt-out.²³⁹

235. Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 93 (2013).

236. *See id.* at 88 (noting that ICE implemented the program). As per the program, every time a local law enforcement official entered the name of a person in her custody into federal crime databases to check for criminal history or outstanding warrants, that information was automatically forwarded to immigration databases. *Id.* at 94. That immigration database query then notified local law enforcement and ICE regarding whether the person in custody was potentially unlawfully present. ICE retained the option to prosecute the individual. *Id.* at 94–95. To assist the federal enforcement effort, ICE would generally request that the local jurisdiction hold the individual for some period of time awaiting his transfer into federal custody. *Id.* at 95.

237. *See* AARTI KOHLI ET AL., CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 1 (2011); *see also* Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1770–73 (2015) (describing S-Comm as a “no citizenship list”).

238. *See* Gulasekaram & Ramakrishnan, *Reappraisal*, *supra* note 43, at 2108–12 (presenting a politicized model to explain subfederal policy proliferation on immigration); Ramakrishnan & Gulasekaram, *Importance of the Political*, *supra* note 43, at 1442–48 (illustrating a new theory explaining state and local involvement in immigration regulation).

239. Julia Preston, *States Resisting Program Central to Obama's Immigration Strategy*, N.Y. TIMES (May 5, 2011), <http://www.nytimes.com/2011/05/06/us/06immigration.html> (noting that DHS Secretary Janet Napolitano clarified that S-Comm is mandatory); *see also* Interview with a national immigrant advocacy organization with access to White House Strategy meeting (Jan. 22, 2015) (notes and interview audio recording on file with authors); Memorandum from Riah Ramlogan, Deputy Principal Legal Advisor, U.S. Immigration & Customs Enf't, on Secure

Indeed, the Executive seems to have designed S-Comm with state enforcement schemes in mind. First, S-Comm enabled the Administration to co-opt state enforcement systems on federal terms, favoring prioritized enforcement over more universal enforcement schemes advanced by Arizona.²⁴⁰ In addition, senior administration officials saw S-Comm as blunting momentum for more state enforcement legislation after Arizona by satisfying state and local demands for greater immigration enforcement.²⁴¹ Although the implementation of S-Comm did not stop all subfederal attempts at immigration enforcement, it may have slowed the drive for state and local enforcement in other jurisdictions that were considering their own responses to unauthorized migration.

If the rise of S-Comm tells a story about the Executive Branch's attempt to control and manage a state-level trend, while also leveraging local resources, S-Comm's recent demise illustrates the reciprocal dynamic of state-level influence over executive enforcement decisions. As S-Comm rolled out and covered nearly every jurisdiction in the country, several counties and states resisted its implementation.²⁴² Although they could not refuse to share information regarding unlawfully present persons in their custody, these jurisdictions nevertheless refused to honor ICE requests to hold those individuals while awaiting transfer to federal custody.²⁴³ State TRUST Acts and county detainer-resistance policies limited the number and nature of crimes for which any ICE holds would be honored.²⁴⁴ This state and local resistance left its mark.

As part of his executive actions on immigration, President Obama dismantled S-Comm in November of 2014 and replaced it with the

Cmtys.—Mandatory in 2013 to Beth N. Gibson, Assistant Deputy Dir., U.S. Immigration & Customs Enf't (Oct. 2, 2010) (indicating that S-Comm will be mandatory in 2013).

240. Interview, *supra* note 239.

241. See MOTOMURA, *supra* note 35, at 79 (“Express federal authorization has significantly expanded the state and local role in direct enforcement of federal immigration law. This trend has helped to satisfy state and local pressures to get tough on unauthorized migration by getting directly involved in immigration enforcement, even if the vehicles for a state and local role are limited and seem to leave federal authorities in the driver’s seat.”); see also David Martin, Principal Deputy Gen. Counsel, U.S. Dep’t of Homeland Sec., U.S.-Mexico Migration Dialogue: Migration, Repatriation, and Protection: Policies and Options (Nov. 17, 2010).

242. Preston, *supra* note 239; Jessica Vaughn, *Obama’s Catch-and-Release Policies Blunt Secure Communities*, CTR. FOR IMMIGRATION STUDIES (May 8, 2012), <http://www.cis.org/vaughan/obamas-catch-and-release-policies-blunt-secure-communities>.

243. See Vaughn, *supra* note 242.

244. See, e.g., California TRUST Act, A.B. 4, 2013–2014 Leg., Reg. Sess. (Cal. 2013) (requiring certain conditions to be met before honoring ICE requests); SANTA CLARA CTY. BD. OF SUPERVISORS POLICY MANUAL 121–22 § 3.54 (2012) (detailing the circumstances under which the county of Santa Clara would honor ICE requests).

Priority Enforcement Program (PEP).²⁴⁵ Two aspects of this policy change are significant. First, DHS Secretary Jeh Johnson specifically referenced the tide of state and local resistance to S-Comm in his memorandum discontinuing the program: “Governors, mayors, and state and local enforcement officials around the country have increasingly refused to cooperate with the program, and many have issued executive orders or signed laws prohibiting such cooperation.”²⁴⁶ According to the memo, although DHS still believed in the program’s goals, state and local resistance had irreparably tarnished S-Comm’s image.²⁴⁷

Second, the enforcement program that replaced S-Comm shares some aspects of the state-level TRUST Acts enacted to resist the Executive Branch’s co-optation of state and local enforcement agents with S-Comm. The PEP program enumerates categories of crime for which the federal enforcement agency will seek transfer of custody from a local agency, and it replaces requests for detention with requests for notification from the local law enforcement of the pending release of an individual.²⁴⁸ The dependence of the Executive on these state-level agencies for critical information regarding unlawfully present aliens allowed those state-level agencies to successfully challenge and change the Executive’s enforcement strategy. The nimbleness of an executive branch enforcement system—as opposed to a congressionally mandated one—allowed the President to respond accordingly. It remains unclear, however, if the programs operate differently in practice given that they both require local agents to supply information to federal enforcement authorities.²⁴⁹

Similarly, 287(g) agreements provide opportunities for the Executive to integrate states and localities into immigration enforcement, thereby obviating the impetus for independent subfederal activity.²⁵⁰ Unlike S-Comm or PEP, the Executive Branch did not initiate the 287(g) program; rather, it is a congressional creation.²⁵¹ However, the statutory section

245. NAT’L. IMMIGRATION LAW CTR., PRIORITY ENFORCEMENT PROGRAM: WHY ‘PEP’ DOESN’T FIX S-COMM’S FAILINGS 1 (2015), <http://www.nilc.org/PEPnotafix.html>.

246. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., on Secure Cmty. to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t (Nov. 20, 2014).

247. *Id.*

248. *See Priority Enforcement Program*, U.S. IMMIGRATION & CUSTOMS ENF’T, <https://www.ice.gov/pep> (last visited Feb. 27, 2016).

249. *See* Aura Bogado, *Goodbye, Secure Communities. Hello, Priority Enforcement Program*, COLORLINES (Nov. 21, 2014, 8:57 PM), http://colorlines.com/archives/2014/11/goodbye_secure_communities_hello_priority_enforcement_program.html.

250. *See* 8 U.S.C. § 1357(g) (2012).

251. MATT A. MAYER, HERITAGE FOUND., WHITE HOUSE TAKES WRONG STEP WITH IMMIGRATION ENFORCEMENT 1 (2012), <http://www.heritage.org/research/reports/2012/02/>

provides a critical role for the Executive. As per the scheme, local jurisdictions desirous of aiding immigration enforcement may enter into an agreement with the federal government.²⁵² On the federal side, the Attorney General and the DOJ have the discretion to broker and enter into the agreement.²⁵³ The agreement provides for federal training of local officers and authorizes those officers to engage in certain forms of immigration enforcement.²⁵⁴ Importantly, the Executive always retains the discretion over whether to enter into, extend, or rescind its agreements with state and local law enforcement.²⁵⁵

Although enacted in 1996, the provision and agreements pursuant to it remained fallow until 2001.²⁵⁶ After September 11, 2001, the number of 287(g) agreements began to steadily increase.²⁵⁷ As the exponential rise in state and local restrictionist legislation began to proliferate in 2005, so did the Administration's willingness to enter into 287(g) agreements. Indeed, the DOJ touted the 287(g) program as the proper way for states and localities to participate in immigration enforcement.²⁵⁸ Also, the Executive can and has used 287(g) as a tool to either attempt to forestall state actions or to sanction states and localities for conduct ultra vires to the Executive's desired enforcement prerogatives. Indeed, one study of 287(g) implementation revealed that DHS had only approved forty-six percent of applications by 2008.²⁵⁹ More recently, the federal government has discontinued several of its agreements, including those with Arizona jurisdictions that acted out of step with the Administration's enforcement priorities and, in the DOJ's assessment, abused the terms of their participation.²⁶⁰ Thus, even though Congress created the 287(g) program, its implementation has left significant discretionary power in the hands of the Executive to manage and discipline state and local law enforcement

removal-of-287g-local-immigration-enforcement-weakens-immigration-policy.

252. *See* 8 U.S.C. § 1357(g)(1).

253. *Id.*

254. *Id.* § 1357(g)(2).

255. *See id.* § 1357(g)(1).

256. JESSICA VAUGHN & JAMES R. EDWARDS, JR., CTR. FOR IMMIGRATION STUDIES, THE 287(G) PROGRAM: PROTECTING HOME TOWNS AND HOMELAND 3–4 (2009), <http://www.cis.org/287greport>.

257. *See id.* at 4 (indicating that the 287(g) program became more prevalent after the September 11, 2001 terrorist attacks).

258. *See, e.g.*, Brief for the United States, *supra* note 201, at 45–46 (arguing in support of 287(g)).

259. *See* Tom K. Wong, *287(g) and the Politics of Interior Immigration Control in the United States: Explaining Local Cooperation with Federal Immigration Authorities*, 38 J. ETHNIC & MIGRATION STUD. 737, 746 (2012) (“Of the 89 counties that have applied, 41 have had their applications approved while 28 counties have been rejected.”).

260. *See* Jeremy Duda, *Homeland Security Revokes 287(g) Agreements in Arizona*, ARIZ. CAPITOL TIMES (June 25, 2012, 4:37 PM), <http://azcapitoltimes.com/news/2012/06/25/homeland-security-revokes-287g-immigration-check-agreements-in-arizona/>.

participation.

C. *Catalyzing State-Level Policy Making: Licensing and Deferred Action*

The third—and least appreciated, but perhaps most powerful—aspect of presidential immigration federalism is the manner in which executive action can catalyze state and local policy making. In doing so, states and localities may act as the legislative agents for the President’s policy vision. In this dynamic, the Executive harnesses the power of state and local lawmaking to bypass Congress in attempt to fashion a national immigration policy. In the dynamic highlighted here, state and local action enables and entrenches the Executive’s policy preference. However, as suggested in Part III, federal executive action may also spur state and local opposition, whereby federalism interactions become vital levers in disputes over excesses in exercises of executive power.

This Section describes two instances in which federal executive decisions under President Obama spurred state-level lawmaking. In the first instance, the DOJ intervened in a California state court lawsuit in a manner that influenced state legislation on professional licensing for unauthorized migrants. The second, more prominent example involves the ripple effects at the state level of the President’s DACA program. Specifically, DACA spurred a series of state-level policy conversations that quickly led to more wide-ranging changes on driver’s license programs and other policies affecting undocumented immigrants, including those not covered by DACA.²⁶¹

The first illustration of the dynamic of catalyzing local action is evidenced by the Executive’s involvement in and the state legislative response to *In re Garcia*.²⁶² At issue in the case was whether California’s Committee of Bar Examiners could admit an undocumented applicant to the state bar without violating federal law.²⁶³ The relevant federal statute prohibits states from providing any state or local benefit, such as a professional license, to an undocumented person unless the state provides

261. To be sure, there are instances in which executive action has spurred state-level action inconsistent with, and in opposition to, the executive vision. One instance already described was state responses to S-Comm, which contributed to the program’s discontinuance—at least under the name S-Comm. These are also a key part of the complete story of presidential immigration federalism, and the next Section addresses such resistance more fully by arguing that states may act as a check on the Executive Branch. But leaving aside instances of dissent and challenge to presidential authority for the moment, this Article’s focus here is more acutely on the types of executive action that have spurred state-level lawmaking consistent with the Executive’s vision for immigration policy.

262. 315 P.3d 117 (Cal. 2014).

263. *Id.* at 121.

for it by an affirmative enactment.²⁶⁴ Garcia argued that although the California legislature had not passed any law allowing undocumented persons access to the state bar, the California Supreme Court's ruling could substitute for the "enactment" necessary to satisfy the federal law's requirement.²⁶⁵

Although the DOJ was not a party, it submitted an amicus brief in response to an invitation from the California Supreme Court.²⁶⁶ Again, this form of federal–state interaction is distinctly executive. Not only is the decision to respond a discretionary one for the DOJ, the California Supreme Court could not similarly ask Congress to elaborate on the meaning of its statute. In its submission, the federal government opposed Garcia's application on the basis that the state could not grant a professional license to an unauthorized immigrant without an act of the California legislature.²⁶⁷ At oral argument, the court appeared solicitous of the federal government's view and sympathetic to its argument.²⁶⁸ Importantly, the DOJ's filing expressly noted that federal law provided California the opportunity to enact a law to confer a professional license to people such as Garcia.²⁶⁹

A scant three weeks after the oral argument and before the court rendered a decision, the California legislature passed a law that was precisely the type of affirmative legislative act on which the DOJ's brief focused.²⁷⁰ The new law expressly provided that the state may issue bar

264. 8 U.S.C. § 1621 (2012).

265. See Opening Brief of Applicant at 2, 15, 18–21, *In re Garcia*, 315 P.3d 117 (No. S202512) (arguing that the California State Bar's rule to carry out an amendment to the California Bar Act satisfied § 1621).

266. Order, *In re Garcia*, 315 P.3d 117 (No. S202512) (en banc), www.courts.ca.gov/documents/5-16-order-issuing-OSC.pdf; Application & Proposed Brief for Amicus Curiae the United States at 1, *In re Garcia*, 315 P.3d 117 (No. S202512) [hereinafter United States' *Garcia* Amicus Brief].

267. United States' *Garcia* Amicus Brief, *supra* note 266, at 14. The Solicitor General's filing rejected Garcia's contention that the California Supreme Court ruling would meet the requirement. See *id.* at 9.

268. See Oral Argument at 52:00–57:00, *In re Garcia*, 315 P.3d 117, <https://www.youtube.com/watch?v=uZEgYFN-EEk> (colloquy between Justice Goodwin Liu and an attorney for the United States).

269. United States' *Garcia* Amicus Brief, *supra* note 266, at 12 ("Moreover, as this Court noted in its Order, Congress has accommodated state interests by allowing States to enact measures that would provide benefits to unlawfully present aliens, and the State could do so here." (citations omitted)).

270. See A.B. 1024, 2013–2014 Leg., Reg. Sess. (Cal. 2013) (codified as amended at CAL. BUS. & PROF. CODE § 6064 (West 2015)); Adriana Maestas, *Analysis: California Bills Point to Broader Inclusion of Undocumented Immigrants*, NBC LATINO (Sept. 14, 2013, 10:35 AM), <http://nbc-latino.com/2013/09/14/victory-for-immigrants-in-california-legislature-bills-to-license-undocumented-lawyers-and-drivers-pass/> (noting bipartisan support of the bill).

licenses to unauthorized migrants.²⁷¹ In the wake of the new law, the DOJ's supplemental briefing confirmed the Executive's position that federal law no longer precluded the state's conferral of a bar license.²⁷² In its ruling a few months later, the California Supreme Court granted Garcia's application.²⁷³ In the wake of California's legislative move to expressly comply with the federal statute and the DOJ's position, the Florida legislature followed suit.²⁷⁴ With a similar action from an undocumented bar applicant, the Florida legislature also passed a law clarifying that undocumented bar applicants may receive professional licenses.²⁷⁵ Since the *In re Garcia* decision, California has moved beyond just bar membership. Recently, California Governor Jerry Brown signed laws stating that unauthorized immigrants could receive state licenses in several professions.²⁷⁶

In recognizing the role of the Executive Branch in state decisions on professional licensing, one should be careful not to overclaim. There is no indication that the President necessarily preferred to have states provide professional licenses to unauthorized migrants; his first preference likely would have been broader congressional legislation. At the same time, this preferred solution was not an option given the congressional stalemate on immigrant legalization. One also should be careful not to overstate the federal government's role in producing a state response. It is possible that the state legislature was considering such a move well before oral argument.²⁷⁷ However, the DOJ's briefing and apparent influence in oral argument seems, at a minimum, to have

271. CAL. BUS. & PROF. CODE § 6064(b).

272. See Letter from Daniel Tenny, Counsel for the United States, to Frank A. McGuire, Clerk, Sup. Ct. of Cal. (Nov. 12, 2013).

273. *In re Garcia*, 315 P.3d at 134.

274. See Jan Pudlow, *Governor Signs Undocumented Attorney Bill*, FLA. BAR NEWS (June 1, 2014), <http://www.floridabar.org/DIVCOM/JN/JNNNews01.nsf/RSSFeed/52B54E465C469EE785257CDD0044AFD4>.

275. FLA. STAT. § 454.021(3) (2015); see also Pudlow, *supra* note 274 (reporting that the Florida Supreme Court opinion initially denying the bar license a few months earlier had specified that if the Florida legislature mimicked California's legislative efforts, then the applicant would be eligible for admission). It is worth noting that in New York, however, the high court ruled that the state court's ruling on bar admission would suffice to meet the "affirmative enactment" requirement of federal law and did not require the state legislature to enact a separate law. *In re Vargas*, 10 N.Y.S.3d 579, 582, 585 (N.Y. App. Div. 2015).

276. Alexia Fernández Campbell, *How California Is Making Life Easier for Undocumented Immigrants*, NAT'L J. (Nov. 18, 2014), <http://www.nationaljournal.com/population-2043/How-California-Is-Making-Life-Easier-Undocumented-Immigrants>.

277. In fact, California Assembly Bill 1024 was initially introduced in February 2013, a few months before briefing and argument in *In re Garcia*. See *AB-1024: History*, CAL. LEGISLATIVE INFO., http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201320140AB1024 (last updated Oct. 5, 2013).

provided urgency to such state action.²⁷⁸

Perhaps the most dramatic and consequential example of presidential action catalyzing state-level lawmaking is the ripple effect caused by DACA. Announced by President Obama in a Rose Garden ceremony in Summer 2012²⁷⁹ and implemented by U.S. Citizenship and Immigration Services, DACA is unmistakably associated with the Obama Administration and the President personally.²⁸⁰ As per the program, unauthorized immigrant youth who fit several criteria may apply for three years of deferred prosecution from federal authorities.²⁸¹ Those who receive DACA status are also eligible to receive an Employment Authorization Document (EAD), allowing them to seek employment without violating federal law.²⁸² As a purely administrative program, DACA recipients are lawfully present for the period of deferred action, but they are not granted lawful status, which only Congress can provide through legislation.²⁸³

At the time the Obama Administration conceived DACA, it does not appear that the Administration was purposefully attempting to change state-level policy. Indeed, federalism considerations appeared nowhere near the Executive's radar.²⁸⁴ As contemporary observers note, the

278. Activity on Assembly Bill 1024 accelerated considerably after the oral argument in *In re Garcia*. Within a week of argument, the bill was referred from the appropriations committee to the originating committees and, from there, passed on to the assembly for a vote. *See id.*

279. *See* Obama, *supra* note 2.

280. Indeed, the program faces a legal challenge from rank and file members of ICE who argue that the agency priority memoranda and DACA violate federal law. According to their suit, federal law obligates them to enforce immigration laws against all unauthorized persons they encounter, regardless of whether those individuals fall within the Administration's priority categories or designation of DACA recipients. The court dismissed the claims for lack of subject matter jurisdiction, and the Fifth Circuit affirmed, concluding that neither the ICE agents nor the State of Mississippi proved concrete or particularized injury to give them standing in the suit. *Crane v. Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013), *aff'd sub nom.* *Crane v. Johnson*, 783 F.3d 244, 247 (5th Cir. 2015).

281. Memorandum from Jeh C. Johnson, Sec'y, U.S. Dep't of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents to León Rodriguez, Dir., U.S. Citizenship & Immigration Servs. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

282. *DHS Extends Eligibility for Employment Authorization to Certain H-4 Dependent Spouses of H-1B Nonimmigrants Seeking Employment-Based Lawful Permanent Residence*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Feb. 24, 2015), <http://www.uscis.gov/news/dhs-extends-eligibility-employment-authorization-certain-h-4-dependent-spouses-h-1b-nonimmigrants-seeking-employment-based-lawful-permanent-residence>.

283. *See* Memorandum from Jeh C. Johnson to León Rodriguez, *supra* note 281.

284. The lack of attention to state legislative consequences of DACA was also confirmed in our interviews with national pro-integration organizations invited to White House strategy sessions. Interview with federated organization (Jan. 23, 2015) (notes and recording of interview

primary reasons for the President's move on DACA lay squarely at the national level, including a mix of political and policy concerns. The political rationale for DACA related to the 2012 election: the President was contending with low voter enthusiasm among Latino voters, and DACA held the promise of increasing the President's approval ratings among this key reelection constituency.²⁸⁵ The policy rationale behind DACA was to induce congressional legislation on immigration.²⁸⁶

Prior to DACA's implementation, Congress had considered but never passed either comprehensive immigration reform or stand-alone immigration measures on several different occasions during the George W. Bush and Obama Presidencies.²⁸⁷ In 2010, the DREAM Act—proposed federal legislation that would have benefited the same population as DACA and would have included a pathway to lawful status—was defeated in Congress.²⁸⁸ Finally, even a pared-down version of the DREAM Act (one championed by Senator Marco Rubio that would have provided work authorization but no pathway to citizenship) failed to gain congressional support in early 2012.²⁸⁹

The desire to prod Congress into legislative solutions was clearly on the President's mind when he announced the DACA program. After the President mentioned the key features of DACA, he noted:

on file with authors); Interview with national organization (Jan. 10, 2015) (notes and recording of interview on file with authors).

285. On the electoral pressures and protest tactics by DREAM activists, see John Ingold, *Immigration Activists Stage Sit-in at Denver Obama Office*, DENVER POST (June 5, 2012, 9:47 PM), http://www.denverpost.com/ci_20791243/immigration-activists-stage-sit-at-denver-obama-office. Surveys after DACA validated the political benefits that President Obama received from DACA. See, e.g., Elizabeth Llorente, *Latinos Give Obama Higher Ratings on Immigration*, Fox News Latino Poll Says, FOX NEWS LATINO (Sept. 20, 2012), <http://latino.foxnews.com/latino/politics/2012/09/20/latinos-give-obama-higher-ratings-on-immigration-fox-news-latino-poll-says/>.

286. See Rebecca Kaplan, *Obama to Immigration Critics in Congress: "Pass a bill,"* CBS NEWS (Nov. 20, 2014, 8:30 PM), <http://www.cbsnews.com/news/obama-move-to-shield-millions-from-deportation-is-lawful/>.

287. Mark Knoller, *The Last President Who Couldn't Get Congress to Act on Immigration*, CBS NEWS (Nov. 21, 2014, 6:00 AM), <http://www.cbsnews.com/news/the-last-president-who-couldnt-get-congress-to-act-on-immigration/>; Chuck Todd, Mark Murray & Carrie Dann, *Why Immigration Reform Died in Congress*, NBC NEWS (July 1, 2014, 9:09 AM), <http://www.nbcnews.com/politics/first-read/why-immigration-reform-died-congress-n145276>.

288. See Obama, *supra* note 2.

289. Neil King, Jr., *Rubio Says Own Dream Act Derailed for Now*, WALL ST. J.: WASH. WIRE (June 18, 2012, 1:42 PM), <http://blogs.wsj.com/washwire/2012/06/18/rubio-says-own-dream-act-derailed-for-now/>; Marco Rubio Talks Immigration, Dream Act, Amnesty, CBS NEWS (June 15, 2012, 9:17 PM), <http://www.cbsnews.com/news/marco-rubio-talks-immigration-dream-act-amnesty/>.

Precisely because this is temporary, Congress needs to act. There's still time for Congress to pass the DREAM Act this year, because these kids deserve to plan their lives in more than two-year increments. And we still need to pass comprehensive immigration reform that addresses our 21st-century economic and security needs²⁹⁰

Despite the President's policy wishes, DACA failed to induce congressional action. In 2013, the Senate passed its version of a comprehensive immigration reform bill, but the Senate bill floundered in the House.²⁹¹ Since then, Congress has taken no action on immigration, with the exception of several members questioning and criticizing the President's DACA program and approach to immigration enforcement. In fact, key members of Congress have reassured the public that the federal legislature will not act on immigration as long as Obama is President.²⁹²

Although DACA has thus far failed to spur congressional immigration reform, it has nonetheless catalyzed significant changes in state-level policy.²⁹³ Moreover, the integrationist momentum in subfederal policy making galvanized by DACA appears to be the precise policy outcome opposed by the congressional members who defeated the several comprehensive reform proposals and DREAM Act attempts over the past fourteen years. The starkest example of this policy shift is state driver's license policies post-DACA. Federal law in the form of the REAL ID Act of 2005 maintains minimum standards for state-issued licenses and identification cards if individuals are going to use those cards for particular purposes, such as access to federal buildings or certain public

290. Barack Obama, President of the U.S., Remarks by the President on Immigration (June 15, 2012), <https://www.whitehouse.gov/photos-and-video/video/2012/06/15/president-obama-speaks-department-homeland-security-immigration-an#transcript>.

291. See Aaron Blake, *Boehner Closes Door on House-Senate Immigration Panel*, WASH. POST (Nov. 13, 2013, 5:03 PM), <http://www.washingtonpost.com/news/post-politics/wp/2013/11/13/boehner-closes-door-on-house-senate-immigration-panel/>.

292. See Michael C. Bender, *Boehner Stalls on Immigration with Focus on Obamacare*, BLOOMBERG BUS. (Feb. 7, 2014, 12:00 AM), <http://www.bloomberg.com/news/articles/2014-02-06/boehner-stalls-immigration-bill-citing-lack-of-trust> (“[I]t will be difficult to pass a bill this year because fellow Republicans don’t trust President Barack Obama, whose term ends in 2017, to enforce the changes.”).

293. As discussed below, factors such as state partisanship and share of the Latino electorate can help explain where driver's licenses beyond DACA licenses ultimately passed. However, these factors do not explain the timing of why driver's license efforts remained dormant until 2013. Other factors, such as changes in funding from national philanthropies, followed the announcement of DACA and, in some significant ways, was related to helping ensure successful implementation of DACA across all states. See PRATHEEPAN GULASEKRAM & S. KARTHICK RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM* 144–45 (2015).

benefits, or for airline travel.²⁹⁴ REAL ID has yet to be fully implemented nationwide, but most states comply with its prohibitions on providing licenses to those without lawful status.²⁹⁵ In the wake of DACA, nearly every state clarified its policies to include DACA recipients' eligibility for driver's licenses.²⁹⁶ This consequence is not too surprising, however, given that REAL ID already provided some leeway to states to provide licenses to recipients of deferred action.²⁹⁷ Using this statutory discretion, even prior to 2012, many states maintained a policy of allowing undocumented persons with deferred action and an EAD to apply for a driver's license.

More notable and surprising, however, is the broader momentum created by DACA on state driver's licenses. Unauthorized immigrants without deferred action or EADs were not eligible for driving privileges in the overwhelming majority of states in early 2012.²⁹⁸ In the several years leading up to DACA's announcement, most of the states that previously issued licenses to undocumented persons repealed those policies under the combined weight of popular outcry following the September 11 attacks and implementation of REAL ID.²⁹⁹ From 2003 to 2010, seven of the ten states that previously granted driving privileges to

294. See REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified as amended in scattered sections of 8 and 49 U.S.C. (2012)).

295. See JANICE KEPHART, CTR. FOR IMMIGRATION STUDIES, REAL ID IMPLEMENTATION EMBRACED BY 41 STATES (2011), <http://cis.org/real-id-terrorist-abuse>.

296. *Access to Driver's Licenses for Immigrant Youth Granted DACA*, NAT'L IMMIGRATION LAW CTR., <http://www.nilc.org/dacadriverslicenses2.html> (last updated May 31, 2015). Notably, two states—Arizona and Nebraska—bucked that trend, although their attempted denial of licenses to DACA recipients was subsequently challenged in federal court. *Id.* In Arizona's case, it was in fact later struck down, and the U.S. Supreme Court denied Arizona's application for stay on appeal. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1058 (9th Cir. 2014) (granting a preliminary injunction to petitioners and ruling that plaintiffs demonstrated a likelihood of success on their claim that Arizona's denial of licenses to DACA recipients violated the Equal Protection Clause), *stay denied*, 135 S. Ct. 889 (2014). In January 2015, the district court permanently enjoined the state's policy of denying licenses to DACA recipients. *Access to Driver's Licenses for Immigrant Youth Granted DACA*, *supra*. Nebraska initially resisted the trend, spurring a lawsuit challenging that resistance. *Id.* However, in May 2015, the legislature—over the Governor's veto—changed its policy to allow DACA recipients to receive licenses. *Id.* Currently, DACA recipients in all fifty states and the District of Columbia are eligible to apply for driver's licenses. *Id.*

297. REAL ID Act, § 202(c)(2)(B)(viii) (codified at 49 U.S.C. § 30301 note); see also GULASEKRAM & RAMAKRISHNAN, *supra* note 293, at 252 n.58 (“Importantly, the federal government has delayed full implementation of REAL ID, and has extended the deadline for state compliance several times. Several states have expressly stated their intention to continue resisting REAL ID requirements.”).

298. See KEPHART, *supra* note 295.

299. See *id.*

undocumented immigrants stopped doing so.³⁰⁰

The Obama Administration's implementation of DACA helped reverse that trend. In the two years following DACA's implementation, twelve states, along with Washington, D.C. and Puerto Rico, changed their policies to provide licenses regardless of lawful immigration status.³⁰¹ Of those fourteen jurisdictions, nine changed their policies in the first eighteen months following DACA, at least partly as a response to the changed policy climate created by the presidential policy.³⁰² Further, New York, Pennsylvania, and Massachusetts are considering a similar change.³⁰³

Some might explain this reversal by pointing to the growing political clout of Latino voters or Democrats' increasing control of state governments. However, our statistical analysis of these changes in state policies on driver's licenses indicates that neither played a decisive role. First, many states that expanded driver's license access (including Connecticut, Vermont, Maryland, and Washington) did not have sizable Latino electorates.³⁰⁴ Additionally, while nearly all the states that expanded access to driver's licenses had Democrat-controlled legislatures, these same states had Democrat-controlled legislatures prior to 2012 but did not pass legislation granting driver's licenses to unauthorized immigrants.³⁰⁵ Once states began the process of allowing

300. States that repealed their policies granting undocumented immigrants' driver's licenses from 2003 to 2010 include California, Hawaii, Maine, Maryland, Michigan, Oregon, and Tennessee. MICHAEL CSERE, CONN. OFFICE OF LEGISLATIVE RESEARCH, ISSUANCE OF DRIVER'S LICENSES TO UNDOCUMENTED IMMIGRANTS 3 (2013), <https://www.cga.ct.gov/2013/rpt/pdf/2013-R-0194.pdf>.

301. States and jurisdictions currently allowing, or preparing to allow, undocumented persons to apply for driver's licenses are California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maryland, New Mexico, Nevada, Puerto Rico, Utah, Vermont, and Washington. See *State Laws Providing Access to Driver's Licenses or Cards Regardless of Immigration Status*, NAT'L IMMIGRATION LAW CTR., <http://www.nilc.org/document.html?id=979> (last updated July 2015). Note that New Mexico, Utah, and Washington already permitted the practice prior to the enactment of DACA in 2012. *Id.*

302. *Id.* (showing the date signed and effective date for each state law providing access to licenses regardless of lawful immigration status). The Obama Administration enacted DACA on June 15, 2012. *Frequently Asked Questions: The Obama Administration's Deferred Action for Childhood Arrivals*, NAT'L IMMIGRATION LAW CTR., <http://old.nilc.org/FAQ/deferredactionyouth.html> (last updated Aug. 14, 2015).

303. Notably, Oregon, during the 2014 midterm elections, rejected a driver's license proposal in a referendum after the legislature had initially passed the bill. Stephen Dinan, *Oregon Voters Reject Licenses for Illegals; Immigration a Losing Issue for Dems in 2014 Elections*, WASH. TIMES (Nov. 5, 2014), <http://www.washingtontimes.com/news/2014/nov/5/immigration-losing-issue-democrats-2014-midterm-el/>.

304. Statistical analysis on file with authors and can be requested from Karthick Ramakrishnan.

305. *Id.*

driver's licenses to DACA beneficiaries, however, it became less of a stretch to extend that privilege to other state residents without lawful status.

The case of California is perhaps most emblematic of how DACA tipped the balance in favor of expanded driver's license policies. Governor Brown signaled his opposition to driver's licenses for undocumented immigrants as late as February 2012, even as Democrats controlled both chambers of the legislature and the Governor's office.³⁰⁶ Very soon after the implementation of DACA, however, Governor Brown's position began to shift. He signed legislation in September 2012, extending driver's licenses to DACA beneficiaries,³⁰⁷ and one year later, he signed a bill granting driver's licenses to unauthorized immigrants more generally.³⁰⁸ Importantly, the political context internal to California did not shift appreciably between February 2012 and October 2013—the Democrats controlled the governorship and both houses of the California legislature during the entire period,³⁰⁹ and Latinos had a strong presence in the electorate and the legislature.³¹⁰ DACA was the catalyst that changed the policy dynamic on driver's licenses, breaking an impasse that had been in place for more than a decade.

More broadly, in contexts beyond driver's licenses, state and local policies have become much more integrationist since DACA's implementation. Continuing a trend that started before DACA, more jurisdictions are providing or considering providing municipal identification cards for their residents, a policy primarily aimed at undocumented persons.³¹¹ States have continued the trend of easing educational access and financing for undocumented students attending institutions of higher learning.³¹² States and localities became bolder and more conspicuous in their attempts to resist federal enforcement and

306. Patrick McGreevy, *Assemblyman Tries Again on Licenses for Illegal Immigrants*, L.A. TIMES (Feb. 25, 2012), <http://articles.latimes.com/2012/feb/25/local/la-me-drivers-license-20120225> (“Gov. Jerry Brown has voiced opposition to such licenses.”).

307. A.B. 2189, 2012–2013 Leg., Reg. Sess. (Cal. 2012).

308. A.B. 60, 2013–2014 Leg., Reg. Sess. (Cal. 2013).

309. *Compare 2012 State and Legislative Partisan Composition*, NAT'L CONFERENCE OF STATE LEGISLATURES (Jan. 31, 2012), http://www.ncsl.org/documents/statevote/legiscontrol_2012.pdf (showing that the Democratic Party controlled California's legislature and politics), *with 2013 State and Legislative Partisan Composition*, NAT'L CONFERENCE OF STATE LEGISLATURES (Jan. 31, 2013), http://www.ncsl.org/documents/statevote/legiscontrol_2013.pdf (same).

310. See Seth Motel & Eileen Patten, *Latinos in the 2012 Election: California*, PEW RESEARCH CTR. (Oct. 1, 2012), <http://www.pewhispanic.org/2012/10/01/latinos-in-the-2012-election-california/> (“The Hispanic population in California is the largest in the nation.”).

311. See Ramakrishnan & Gulasekaram, *Understanding Immigration Federalism*, *supra* note 13 (listing several state and local integrationist trends).

312. *Id.*

decline to cooperate with federal immigration authorities.³¹³ Indeed, the state of New York even went so far to consider a state citizenship bill that would provide a form of state membership to state residents regardless of immigration status.³¹⁴

Thus, presidential action on immigration can have important knock-on effects on state legislation affecting immigrants. In some instances, such as the extension of driver's license privileges, the effects may be direct. In other cases, such as the extension of in-state tuition and health benefits, the effects may be more indirect, with presidential action serving more as a catalyst to action, thus tipping the scales at the state and local level toward those pushing for greater immigrant integration. Of course, more recent developments, such as state resistance to the resettlement of Syrian refugees,³¹⁵ shows that presidential action in the immigration field can also spark state resistance, a possibility that we explore in more detail in the next section (III.B).

III. THE IMPORTANCE OF THE PRESIDENT'S ROLE IN IMMIGRATION FEDERALISM

So far, this Article's exploration of the President's role in immigration federalism has described his distinct influence on state-level policies, both historically and in contemporary immigration policy. This Article focuses on the breadth and types of present-day executive action with state-level consequences because of the current political climate on immigration. For nearly two decades, Congress has not enacted significant immigration legislation.³¹⁶ In that time, however, the undocumented population of the United States has grown to the point where one out of every three noncitizens is potentially subject to deportation.³¹⁷ In our prior work, we theorized an in-depth political cause, embedded in party politics and the U.S. federalist system, for this

313. *Id.*

314. Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 905 (2015) (defending the constitutionality and desirability of a state citizenship bill).

315. Pratheepan Gulasekaram & Karthick Ramakrishnan, *The Law is Clear: States Cannot Reject Syrian Refugees*, WASH. POST: POSTEVERYTHING (Nov. 19, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/11/19/the-law-is-clear-states-cannot-reject-syrian-refugees/>.

316. Scott C. Hodges, Note, *Twenty-Hour Detention Based on Reasonable Suspicion Is Not a "Minimal Intrusion": A Case For Amending Arizona's SB 1070*, 7 PHX. L. REV. 411, 418–19 (2013).

317. Cox, *supra* note 25, at 56; *see also* Andrea Caumont, *Unauthorized Immigration*, PEW RESEARCH CTR.: HISPANIC TRENDS (Sept. 23, 2013), <http://www.pewhispanic.org/2013/09/23/unauthorized-immigration/> (noting that "[u]nauthorized immigrants made up 28% of all U.S. immigrants in 2012").

congressional intransigence.³¹⁸ Thus, with dismal prospects for a congressional fix to the nation's immigration concerns, the President and the states become even more central to the definition of national immigration policy.

Part III begins with a preliminary exploration of the importance of the President's distinct role in immigration federalism. First, Section III.A considers the doctrinal consequences of increased presidential involvement in immigration federalism, including the concerns raised by *Arizona*. The Supreme Court's current doctrinal framework and stylized understanding of federalism are ill-suited to evaluate the increasingly robust executive presence in immigration federalism. Moreover, courts and commentators should pay closer heed to the possibility that immigration federalism in practice can operate as immigration separation of powers and immigration nationalism. To that end, Section III.B showcases the possibility that states and localities can provide a meaningful but limited check on executive power, making immigration federalism a key component of separation of powers disputes. Section III.C then considers the ways in which the President can utilize states to entrench policies, making it more difficult for Congress to uproot the Executive's vision and setting the stage for de facto national policy.

A. *Reevaluating Preemption*

In the first type of executive intervention—litigation attempting to curtail state-level activity—the President's immigration federalism power is twofold: First, he can calibrate federal enforcement priorities in a manner distinct from state and local authorities. Second, he can decide whether to bring the legal resources of the federal government to bear in a suit against state and local lawmaking. *Arizona* illustrates both concerns and suggests the inadequacy of current preemption theory to capture immigration federalism. Additionally, the second type of executive intervention—co-optation of subfederal enforcement resources—simultaneously increases state and local involvement in immigration while solidifying the federal authority necessary to prevail in immigration federalism suits.

The Executive's enforcement priorities and methodology appear to have been the dispositive difference in determining the validity of omnibus state enforcement schemes such as *Arizona's* SB 1070. In these cases, the execution of the laws—and not the statutory backdrop—played the central role, harkening back to *Chy Lung's* articulation that the federal government is responsible for both the “character” of immigration law and the “manner of its execution.”³¹⁹ The legal theory animating these

318. See Gulasekaram & Ramakrishnan, *Reappraisal*, *supra* note 43, at 2126–27.

319. *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875); see also *supra* Section I.A.

cases underscores the unique role of the Executive Branch and the inadequacy of the current doctrinal framework to capture the nature of immigration federalism.

In *Arizona*, the Court invalidated three of four provisions of the state's immigration enforcement law.³²⁰ The critical distinction between the majority and the partial dissents—the opinions concurring in part and dissenting in part that would have upheld other challenged provisions of the law³²¹—was their respective understanding of the President's role in setting federal immigration policy. Most notably, Justice Antonin Scalia's partial dissent focused on congressional exclusivity in defining the parameters of federal immigration policy. His reasoning, which mirrored the arguments advanced by the State in its written submissions, argued that federal law defined a broad class of persons as potentially removable.³²² State efforts to investigate, discover, and even prosecute individuals who fell within that group were entirely consistent with, if not beneficial to, congressional prerogatives.³²³ Neither resource constraints nor the policy priorities of the President, according to Justice Scalia, were sufficient to preempt state law as long as state law did not directly conflict with federal statutes as written by Congress.³²⁴

The majority, however, seemed to rely upon the importance of executive decision-making as constitutive of federal policy. Justice Anthony Kennedy, writing for the majority, framed the discussion of the specific provisions of Arizona law by noting that discretionary executive decisions are “principal” features of the enforcement system.³²⁵ On this

320. *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012).

321. *Id.* at 2515–22 (Scalia, J., concurring in part and dissenting in part).

322. *See id.* at 2515–17.

323. Dismissing the role of executive discretion as a constituent part of federal immigration policy for preemption purposes, Justice Scalia argued:

Of course there is no reason why the Federal Executive's need to allocate *its* scarce enforcement resources should disable Arizona from devoting *its* resources to illegal immigration in Arizona that in its view the Federal Executive has given short shrift. . . . But there has come to pass, and is with us today, the specter that Arizona . . . predicted: A Federal Government that does not want to enforce the immigration laws as written, and leaves the States' borders unprotected So the issue is a stark one. Are the sovereign States at the mercy of the Federal Executive's refusal to enforce the Nation's immigration laws?

Id. at 2520–21.

324. *Id.* at 2516–17, 2521.

325. As Justice Kennedy noted:

A principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. . . . The dynamic nature of relations with

view, the problem with state enforcement statutes is not that they interfere with federal statutes as written; instead, they tend to subvert or disrupt the President's enforcement priorities based on the Administration's discretionary use of enforcement resources and normative decisions regarding the appropriateness of immigration prosecution against any particular individual or group of individuals.³²⁶ The significance of *Arizona* is not its reification of the primacy of the federal government in immigration enforcement but rather the distinctive consolidation of immigration authority in the President as distinct from Congress.³²⁷

This reliance on nonbinding agency priorities and executive prerogatives also highlights the inadequacy of the current doctrinal framework for analyzing immigration federalism conflicts.³²⁸ In traditional preemption analysis, the Court has long maintained that the *intent of Congress* is the touchstone of any preemption decision, and traditionally only Congress has the authority to preempt state laws.³²⁹ As Professor Catherine Kim argues, the *Arizona* Court purported to apply ordinary preemption analysis, although it was clearly relying on the Executive's interpretation and reading of the legislative backdrop—an interpretation arguably at odds with congressional intent.³³⁰ She maintains that this friction between restrictionist state and local legislation, on the one hand, and presidential decisions to calibrate or focus enforcement, on the other, is uniquely poignant in the immigration preemption arena.³³¹ Professor Cox sharpened the point by noting that

other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy

Id. at 2499 (majority opinion) (citation omitted).

326. See Cox, *supra* note 25, at 57–58 (describing this gap “as a gap between *formal* deportability and *normative* deportability”).

327. *Id.* at 61; Eric Posner, *The Imperial President of Arizona*, SLATE (June 26, 2012, 12:04 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/the_supreme_court_s_arizona_immigration_ruling_and_the_imperial_presidency.html (“In fact, the ruling matters more for what it says about the advance of executive power in the United States”).

328. See MOTOMURA, *supra* note 35, at 5 (defending the idea that executive agency action, including enforcement laxity, should be understood as constituting immigration policy); Cox, *supra* note 25, at 55–56 (arguing that the Court's view about the preemptive power of presidential action in *Arizona* is defensible because the structure of immigration law is different from other areas); Kim, *supra* note 25, at 719–20.

329. *E.g.*, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see also Kim, *supra* note 25, at 696–98 (noting that “the Supreme Court continues to maintain that congressional intent remains the ‘touchstone’ of any preemption analysis”).

330. See Kim, *supra* note 25, at 705–09. Note that one could also argue that Congress intended the President to exercise large-scale discretionary enforcement decisions.

331. See *id.* at 708–09, 720–21.

outside of immigration law, enforcement redundancy between federal and state legislators and officials is a constitutional and well-accepted course of interaction.³³² Yet, this redundancy was the critical legal defect in the various state immigration enforcement laws. Both scholars note that in the immigration field, significant legislative delegation of enforcement authority to the Executive Branch and ever-present foreign affairs concerns have muddied the doctrinal background.³³³ *Arizona*, by squeezing these presidential immigration federalism concerns into the traditional preemption framework without explaining the unique features of executive action vis-à-vis state-level policies in immigration law, has introduced potential incoherence into the doctrine.³³⁴

A second, subtler evolution in preemption analysis arises from executive actions that co-opt state and local agencies. As state and local involvement become increasingly mediated by federal authorities, the Executive consolidates federal power, even as states and localities appear to be taking on a greater role. With programs such as S-Comm, PEP, and 287(g), federal executive-mediated and managed involvement remains the only way for states and localities to participate in immigration enforcement. This form of interaction between the federal and subfederal governments in immigration is not based on the independent authority of states but on interconnectedness dictated by the federal government. As Professor Abbe Gluck describes, in certain regulatory areas, Congress either builds in a concurrent state administration or includes implementation in the federal statutory scheme, a scheme she describes as “intrastatutory federalism.”³³⁵ She notes that this form of federalism occurs within federal laws in areas such as health care, environmental

332. See Cox, *supra* note 25, at 41–43 (noting that overlapping enforcement schemes are commonplace in other regulatory areas).

333. *Id.* at 64; Kim, *supra* note 25, at 709–10.

334. Other scholars have critiqued the Court’s imbuing of executive priority setting with preemptive power. See generally Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 360–61 (2010) (explaining why congressional decision-making about preemption is preferable to presidential preemption but noting the reality that agencies, and hence the President, substantially influence preemption decisions); Roderick M. Hills Jr., *Arizona v. United States: The Unitary Executive’s Enforcement Discretion as a Limit on Federalism*, 2012 CATO SUP. CT. REV. 189, 191 (“[P]residential power to use prosecutorial discretion to bar state enforcement of federal law ought to be narrowly construed.”); Rubenstein, *supra* note 26, at 87 (arguing that presidential directives cannot simultaneously be law for preemption purposes but not for separation of powers concerns).

335. Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists’ Gamble*, 81 FORDHAM L. REV. 1749, 1754 (2013); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of the Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 542–44 (2011) [hereinafter Gluck, *Intrastatutory Federalism*].

law, and telecommunications regulation.³³⁶

In immigration law, the INA provides leeway for states to participate in limited forms of immigration enforcement and delegates to the Executive Branch the authority and discretion to enter into agreements with state agencies for expanding local immigration enforcement through 287(g) agreements.³³⁷ Outside the scope of the INA, DHS's S-Comm program conscripted states and localities into aiding federal authorities to identify potentially deportable persons.³³⁸ PEP, S-Comm's replacement, functions similarly.³³⁹ In these arrangements, states and localities may enforce federal immigration laws and provide information to the federal immigration authorities, but they must do so primarily within the boundaries calibrated by executive branch officials.

This type of federalism arrangement is paradoxical because it consolidates and nationalizes immigration enforcement power, even as it ostensibly vindicates federalism values and appears to apparently respect the independent status of states.³⁴⁰ In short, programs such as 287(g) and S-Comm give the Executive a stronger claim to field preemption in any lawsuits challenging ultra vires state and local enforcement activity. On that score, the DOJ's brief for the United States in *Arizona* mentioned S-Comm as part of the federal government's comprehensive immigration framework that already incorporated state and local participation.³⁴¹ In these instances, states and localities, desirous of a greater role in immigration enforcement, have paradoxically further embedded executive primacy and lent more credence to the claim that subfederal immigration participation can solely be engaged on the federal government's terms.³⁴² Thus, the same tools that the Executive uses to permit state and local involvement in immigration enforcement become part of the legal basis for shutting down any independent exercises of subfederal authority that the federal government does not oversee.

336. Gluck, *Intrastatutory Federalism*, *supra* note 335, at 613–14.

337. 8 U.S.C. § 1252(c) (2012) (permitting state involvement with illegal reentry proceedings); *id.* § 1324(c) (permitting states to arrest persons smuggling illegal aliens into the United States); *id.* § 1357(g) (providing for agreements with local law enforcement agencies).

338. Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655, 667 (2014).

339. David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 411, 453 (2015).

340. See Gluck, *Intrastatutory Federalism*, *supra* note 335, at 565.

341. Brief for the United States, *supra* note 201, at 2–8.

342. Cf. Gluck, *Intrastatutory Federalism*, *supra* note 335, at 572 (arguing that incorporating states into the design of federal statutes helps the federal government “field claim” the area).

To be sure, these interdependent arrangements also provide opportunities for states to practice “uncooperative federalism.”³⁴³ States and localities have resisted these forms of co-optation into the Administration’s enforcement scheme; Section III.B explores these possibilities more fully. But, it is important to note that the overwhelming majority of jurisdictions in the United States have not entered into 287(g) agreements, and the number of such arrangements is dwindling.³⁴⁴ States and localities’ resistance to S-Comm ultimately led to its demise and rebirth in an apparently less robust form.³⁴⁵ But as a general matter, the Executive in recent years has used these programs to simultaneously conscript states and localities into remedying informational and capacity deficits for the federal government while limiting their participation to only that approved by the Executive Branch.

Looking forward, the incidence of the federal executive presence in immigration suits—as litigating party, originator of agency policy, and co-opter of state and local agencies—is more likely. The nearly unprecedented decision for the DOJ to sue Arizona and other restrictionist states, and the success of those interventions, would seem to incentivize the Executive Branch to continue to deploy this form of executive intervention and wield its litigatory power against state-level trends that it opposes in the future. When those suits arrive in federal courts, the analysis this Article presents can help guide them in their attempt to grasp the unique features of executive action in immigration federalism and supplement the theoretical defenses constructed by Professors Cox and Kim.³⁴⁶ Whatever its precise contours, judicial clarification of the distinct—even oppositional—role of the President in immigration federalism matters appears necessary, especially given the likelihood that federal immigration action in the near future is likely to spring from the President and not from Congress.³⁴⁷

343. See generally Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (discussing how “uncooperative federalism” might affect preemption analysis).

344. See *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENF’T, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Feb. 27, 2016) (listing the small number of law enforcement agencies that have 287(g) agreements).

345. See *supra* text accompanying notes 245–48.

346. See *supra* note 24 and accompanying text.

347. See Shoba Sivaprasad Wadhia, Response, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. 59, 62–64 (2013) (arguing that the Obama Administration’s handling of the DACA program was in line with the Take Care Clause); Memorandum from Karl R. Thompson, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel to the President, The Dep’t of Homeland Sec’y Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others (Nov. 19, 2014) (advising President Obama on the legality of proposed programs). *But see* Roberty J. Delahunty & John C.

B. *States as Checks on Executive Power*

Beyond subtly accreting executive power for preemption purposes, the Executive's co-optation of state and local resources and its catalyzing of certain forms of state resistance to federal action can provide opportunities for state contestation of executive policy.³⁴⁸ Here, this Article returns to the concern that motivated it: the contention that analyzing recent presidential action on immigration only by asking whether the President usurped Congress's role is too narrow a perspective. Accounting for state and local responses to certain executive actions reveals the possibilities of a federalist check on executive power, explored below, as well as the potential for federalist action to deepen and entrench presidential authority, explored in Section III.C that follows.

Traditional separation of powers analysis concerns itself with the checks and balances that the branches of the federal government use to limit each other's power. More nuanced theories attempt to consider the role of administrative agencies in this mutually disciplining structure.³⁴⁹ Only recently, however, have theorists considered how political partisanship—in particular, partisanship mediated through state and local jurisdictions—might also play a role in this system of governmental checks and balances, thereby meshing federalism and separation of powers analyses.³⁵⁰ Federalism, like the system of checks and balances, was at least in part conceived for the purpose of preventing too much power accretion in the federal government.

But in the specific dynamic identified here, the state-level actors sometimes specifically serve the purpose of casting doubt on the legality or legitimacy of presidential action specifically.³⁵¹ When states are able

Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 790, 853 (2013).

348. Professor Rubenstein approaches this connection as a "paradox." David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J. L. PUB. POL'Y 267, 268 (2015).

349. See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 574–75 (1984) (explaining the complex relationship between separation of powers and administrative agencies).

350. See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2321 (2006) (reexamining separation of powers concerns through the lens of political party competition); Bulman-Pozen, *Afterlife of American Federalism*, *supra* note 21, at 1922; Bulman-Pozen, *Federalism as a Safeguard*, *supra* note 38, at 500; Rubenstein, *supra* note 348, at 323–24. See generally Ramakrishnan & Gulasekaram, *Importance of the Political*, *supra* note 43 (offering a politicized account of state and local policy proliferation on immigration).

351. In a forthcoming paper, Professor Ming Hsu Chen frames a core concern with presidential action as a perception of its "legitimacy" and argues that state responses play a large role in constituting that legitimacy. Ming H. Chen, *Beyond Legality: Understanding the Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. (forthcoming 2016) (draft on file with author).

to enact legislation, engage in civil disobedience, or otherwise utilize federal dependence on state institutions to express disapproval with federal policies, they serve the role of checking federal power and, in immigration federalism in particular, cautioning the President.³⁵² Thus, asking whether DACA or DAPA, for example, exceeds the constitutional limits on executive authority by only looking at the relationship between the President and Congress is too narrow a focus. States and localities may also serve a checking function,³⁵³ which may be a sufficient safeguard in a functionalist analysis.

The idea of state and local action that serves to provide context and motivation for constitutionally appropriate or responsive presidential action is manifest in the examples already explored in this Article. The Executive's desire to encourage Chinese labor migration in the mid- to late 1800s prompted sustained oppositional reaction from California and other western states, which became especially significant when the President vetoed Congress's initial attempt to undo the Burlingame Treaty.³⁵⁴ Eventually, however, a new treaty was negotiated, and when that did not go far enough, the President finally yielded to the sustained state-level opposition to Chinese migration with the signing of the Chinese Exclusion Act.³⁵⁵

Similarly, the then-burgeoning state-level trend on enforcement laws from 2004 through 2011 was, if political rhetoric and legal briefs are any indication, a reaction to the manner in which the Executive Branch was "under-enforcing" immigration law. In turn, that trend led to DHS's creation of S-Comm as one way of placating those state and local impulses. Also, to turn the wheel one more time, the state and local resistance to S-Comm led to a modification of the program.³⁵⁶ This could be added to the list of the responses to the administrative decision regarding where to house the surge of unaccompanied child migrants

352. See Bulman-Pozen, *Federalism as a Safeguard*, *supra* note 38, at 486 (explaining how states serve as a check against executive power).

353. See *id.*

354. Joan Fitzpatrick & William McKay Bennett, *A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States*, 70 WASH. L. REV. 589, 589–90 (1995); see also *supra* Subsection I.B.1.

355. See Abrams, *supra* note 93, at 709–10.

356. These states did not challenge the forced information-sharing aspect of S-Comm; instead, they challenged the detainer aspect of it, arguing that they need not comply with any federal requests to detain individuals awaiting transfer to federal custody. Such a command, these jurisdictions argued, would amount to unconstitutional commandeering of state executive and enforcement structures by federal authorities. See Christine N. Cimini, *Hands off Our Fingerprints: State, Local, and Individual Defiance of Federal Immigration Enforcement*, 47 CONN. L. REV. 101, 131–34 (2014); see also *Printz v. United States*, 521 U.S. 898, 925 (1997) (striking down provisions of the federal Brady Handgun Violence Prevention Act that "commandeered" local enforcement officials).

from Central America, as public officials in some localities voiced their displeasure with accommodating them.³⁵⁷ States have attempted to deny driver's licenses to DACA recipients,³⁵⁸ and a coalition of states have filed suit against the President's latest grant of deferred action.³⁵⁹

In all of these circumstances, states and localities have taken up the mantle of resistance to presidential action typically expected from Congress, arguing that they are faithful agents of popular will against a President who flouts immigration law and public sentiment. In other words, as Professor Bulman-Pozen would perhaps argue, these states' resistance to the discretionary executive decisions utilizes the tropes of federalism to vindicate separation of powers concerns.³⁶⁰ In many instances, such checks will take on a partisan flavor, as "red" states and localities are more likely to challenge a "blue" President, and vice versa.³⁶¹ In this way, states can act as a type of check on federal executive authority when Congress is unwilling or unable to do the same.³⁶² The flexibility of executive prioritization and agency guidance, in return, allows for responsiveness to state-level resistance (if the Executive desires) in ways that Congress would be incapable of achieving.

This form of checks and balances in the guise of executive–state federalism can be one of the limited ways to challenge presidential action in the immigration field. The past three years have witnessed two significant exercises of presidential authority with both DACA and DAPA. In that time, Congress has not responded with any legislation, although it has attempted to do so. While some members of Congress—mostly, if not exclusively, Republicans—have decried the President's actions as a slap in the face, a dereliction of his constitutional duty, and an encroachment on legislative authority,³⁶³ they have no viable way of

357. See, e.g., Halimah Abdullah, *Not in My Backyard: Communities Protest Surge of Immigrant Kids*, CNN (July 16, 2014, 9:46 AM), <http://www.cnn.com/2014/07/15/politics/immigration-not-in-my-backyard/>; Associated Press, *Immigration Protest: Murrieta Latest Flashpoint in Debate*, FOX NEWS (July 4, 2014), <http://www.foxnews.com/us/2014/07/04/immigration-protest-murrieta-latest-flashpoint-in-debate/>.

358. See, e.g., *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1057–58, 1069 (9th Cir. 2014) (granting a preliminary injunction against an Arizona policy that prohibited DACA beneficiaries from obtaining driver's licenses by using EADs received as part of the program as proof of lawful presence), *stay denied*, 135 S. Ct. 889 (2014).

359. Inside Story Team, *Can Congress and States Stop the President's Immigration Action?*, AL JAZEERA ENG. (Dec. 5, 2014), <http://america.aljazeera.com/watch/shows/inside-story/articles/2014/12/5/what-tools-do-congressandstateshavetostopthepresident.html> (discussing a joint lawsuit by many states against the Executive's deferred action).

360. See Bulman-Pozen, *Partisan Federalism*, *supra* note 21, at 1098, 1100, 1125.

361. See Bulman-Pozen, *Federalism as Safeguard*, *supra* note 38, at 470, 489.

362. Bulman-Pozen, *Afterlife of American Federalism*, *supra* note 21, at 1940–46.

363. See Daniel Newhauser, *House Rebukes Obama for Immigration Executive Action*, NAT'L J. (Dec. 4, 2014), <http://www.nationaljournal.com/congress/2014/12/04/House-Rebukes->

challenging the action during Obama's Presidency. Passing any legislation is difficult because congressional Democrats support the President's actions or are not interested in opposing him; moreover, the President would likely veto any legislation that undermines his orders.³⁶⁴ Various problems with legal standing would likely prevent judicial challenges by individual federal legislators. In the end, Congress's ability to contest the President's actions would seem to be limited to funding measures that affect the President's programs (assuming again that the President does not veto them), non-operative resolutions,³⁶⁵ and the use of media and other platforms to argue the policy merits of the President's actions. Perhaps such attacks could weaken the President and his party, thereby facilitating the election of a Republican president who would have the power to undo President Obama's directives.

Republican congressional members might also look to friendly state legislatures or governors and seek ways to resist presidential action by tightening state policies with regard to immigrants.³⁶⁶ At the very least, state and local enactments or pronouncements can function as expressively significant lawmaking in opposition to the Executive's desired policy vision. Indeed, several states and members of state executive departments, led by the state of Texas, prevailed at the district court level in a lawsuit challenging the President's DAPA policy.³⁶⁷ The appellate court affirmed the district court's injunction,³⁶⁸ and even though the Supreme Court recently granted certiorari,³⁶⁹ the suing states have

Obama-Immigration-Executive-Action.

364. Justin Sink, *President Threatens Immigration Veto*, HILL (Nov. 20, 2014, 6:00 PM), <http://thehill.com/homenews/administration/224933-obama-threatens-gop-with-veto>.

365. In the wake of the President's announcement, the House voted 219–197 (overwhelmingly along party lines) to pass a resolution to not implement the presidential action on immigration. Newhauser, *supra* note 363.

366. As examples, states could institute employer verification laws; deny undocumented immigrants access to public institutions of higher education; potentially deny all undocumented persons, including all recipients of deferred action, driver's licenses; implement stricter identification and verification requirements for state or local public benefits; institute state policies that preempt the ability of local jurisdictions to serve as sanctuary jurisdictions; and enact state policies that deny funding to localities that provide public assistance to undocumented persons.

367. *Texas v. United States*, 86 F. Supp. 3d 591, 603, 667–78 (S.D. Tex. 2015), *stay denied*, 787 F.3d 733 (5th Cir. 2015); David Montgomery & Julia Preston, *17 States Suing on Immigration*, N.Y. TIMES (Dec. 4, 2014), <http://www.nytimes.com/2014/12/04/us/executive-action-on-immigration-prompts-texas-to-sue.html>. As other states, governors, and attorneys general have joined the suit, the number of plaintiffs has risen to twenty-six. *Texas*, 86 F. Supp. 3d at 603. But, it is worth noting that some governors and attorneys general are suing in their own capacity, and thus it would be inaccurate to state that twenty-six states have sued.

368. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *cert. granted sub nom.* *United States v. Texas*, 136 S. Ct. 906 (2016).

369. Amy Howe, *Court Will Review Obama Administration's Immigration Policy: In Plain*

successfully stalled DAPA for most, if not all, of the remainder of the Obama Presidency.³⁷⁰ In addition, it presents a legal argument against executive action—similar to arguments voiced by Republican members of Congress—in a federal court and requires the DOJ to legally defend the President’s actions.³⁷¹ If the state lawsuit eventually succeeds, they will have dismantled some of the signature immigration achievements of the Obama Presidency without Congress enacting a single piece of legislation.

Finally, while the most recent example of state resistance to executive discretion on immigration has taken a partisan hue, resistance to presidential action will not necessarily emanate solely from the opposing party. Thus, for example, states and localities that pushed back on S-Comm were entirely in Democratic-heavy jurisdictions.³⁷² In these instances, partisanship would have had nothing to do with the question of whether mandatory detainers or attempts to resist them were constitutional. However, the ability of states and localities to influence executive discretion may indeed be easier when those lobbying efforts³⁷³ are conducted within the same party rather than across party lines. Thus, on the question of where state and local resistance to expanded executive authority are likely to be successful, the answer depends on whether the strategy is a constitutional one, to be resolved through courts, or an administrative one, to be resolved through efforts of persuasion, information-sharing, and direct lobbying of the Executive.

English, SCOTUSBLOG (Jan. 19, 2016, 4:39 PM), <http://www.scotusblog.com/2016/01/court-will-review-obama-administrations-immigration-policy-in-plain-english/>. Importantly, the Court’s order granting certiorari asked the parties to brief the constitutional issue whether DAPA violates the President’s duty to “faithfully execute” the law under Art. II of the Constitution. *Texas*, 136 S. Ct. at 906.

370. See Josh Gerstein & Adam B. Lerner, *Ruling Puts Obama’s Immigration Legacy in Jeopardy*, POLITICO (May 26, 2015), <http://www.politico.com/story/2015/05/barack-obama-executive-action-immigration-setback-appeals-court-118290> (commenting that a ruling on the *Texas* case will likely not come until June 2016).

371. See *Texas*, 86 F. Supp. at 613–14.

372. Preston, *supra* note 239 (describing primarily Democratic states’ resistance to S-Comm).

373. Because the Executive relies on state and local authorities to remedy its informational and investigatory deficiencies, these jurisdictions can leverage and influence enforcement decisions. These situations in which states utilize their status as federal agents or “servants” to contest federal policy can, as Professors Heather Gerken and Bulman-Pozen argue, provide powerful platforms for state contestation of national policy. See Gerken & Bulman-Pozen, *supra* note 343, at 1274–80 (providing examples).

C. States as Potentially Fertile Ground for Expanding Presidential Power

While states may find limited ways to successfully resist presidential action on immigration, the more powerful trend appears to be the way in which the President can use states to help entrench his policy vision on immigration, thereby gaining a stronger position vis-à-vis Congress. Relatedly, these state and local policies can constrain the policy choices politically available to a future group of federal legislators.

This was certainly true in the case of DACA, as actions by the Executive prompted most states to reexamine and modify their policies on driver's licenses, the overwhelming majority of which previously required proof of legal presence in the United States.³⁷⁴ Moreover, beyond licenses, other important state and local areas for immigrant integration, such as local identification cards, state tuition policies, public welfare provision, and even health care, have all witnessed accelerated momentum after DACA.³⁷⁵

This Article does not claim that the Obama Administration *intended* these state-level policy changes when it implemented DACA. Indeed, there is no mention of state driver's licenses in any of the federal government's documents outlining the contours of DACA or its effects on potential beneficiaries or state and local jurisdictions.³⁷⁶ At the same time, the administrative creation of a large class of persons who now are temporarily lawfully present despite their unlawful status virtually

374. See, e.g., Daniel C. Vock, *States Begin Giving Driver's Licenses to Young Immigrants*, GOVERNING: STATELINE (Dec. 12, 2012), <http://www.governing.com/news/state/sl-states-begin-giving-drivers-licenses-to-young-immigrants.html> (describing states' actions to change driver's license policies in response to DACA). Absent such modification, DACA recipients in these states might not have been able to obtain a driver's license to get to work, and they might very well have sued to gain that privilege. Indeed, such a lawsuit was filed against the state of Arizona which, along with Nebraska, tried to resist extending driving privileges to DACA recipients. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (ordering remand to the lower court with instructions to grant a preliminary injunction against the Arizona law that did not allow Plaintiff's DACA documents as proof of federal authorization to be present in the United States), *stay denied*, 135 S. Ct. 889 (2014). That Arizona lost in federal court attests to the ways in which certain types of presidential action can, if well crafted, limit room for maneuvering among states contemplating resisting or thwarting the successful implementation of those actions.

375. Ramakrishnan & Gulasekaram, *Understanding Immigration Federalism*, *supra* note 13 (documenting an integrationist state trend since 2012 and listing jurisdictions with these types of laws); S. Karthick Ramakrishnan & Allan Colbern, *The California Package: Immigrant Integration and the Evolving Nature of State Citizenship*, U.C. RIVERSIDE POL'Y MATTERS J., Spring 2015, at 1, 2–3, 5.

376. See John Goodwin, *Legally Present, but Not Yet Legal: The State Attorney General's Role in Securing Public Benefits for Childhood Arrivals*, 46 COLUM. HUM. RTS. L. REV. 340, 359–60 (2014).

necessitated some state-level response.³⁷⁷ With a group of a few hundred thousand DACA recipients openly attending schools and seeking employment, and needing transportation to take advantage of both,³⁷⁸ DACA helped ease the policy climate for states desirous of accounting for all residents, regardless of immigration status.

This process—an exogenous shock (this one prompted by the President’s decision on DACA) provoking a rash of changes in state policies on driver’s licenses—comports very closely with what Professors Frank Baumgartner and Bryan Jones have called a “punctuated equilibrium,” in which an exogenous development upends a status quo of policy inertia, which subsequently catalyzes processes that propel toward rapid change.³⁷⁹ The President’s action on DACA is exogenous because the Administration was not seeking to change state policy on driver’s licenses when it announced its policy in June 2012.³⁸⁰ Additionally, the policy reverberations from the 2012 executive action continue. As DACA recipients renew their status and continue to establish deep ties to their communities through education, work, and family ties, they appear more and more as a permanently non-deportable group. Thus, by regularizing, without legalizing, hundreds of thousands of previously unauthorized immigrants, the President’s action catalyzed states and localities into dealing with the everyday needs of these residents and their families.

Thinking more broadly from the perspective of presidential power in a federalism framework, states and localities provide potentially fertile grounds for the Executive Branch to entrench its policy vision, especially in jurisdictions led by officials of the same party as the President.³⁸¹ Unlike Congress, state legislatures cannot provide lawful status to

377. Karthick Ramakrishnan & Pratheepan Gulasekaram, *Driver’s Licenses for Undocumented Immigrants: How the Obama Administration’s Deferred Action Policy Paved the Way*, SAN JOSE MERCURY NEWS (Oct. 14, 2013, 9:32 AM), http://www.mercurynews.com/opinion/ci_24283776/.

378. See Zenen Jaimes Pérez, *How DACA Has Improved the Lives of Undocumented Young People*, CTR. FOR AM. PROGRESS (Nov. 19, 2014), <https://www.americanprogress.org/issues/immigration/report/2014/11/19/101868/how-daca-has-improved-the-lives-of-undocumented-young-people/>.

379. FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 1, 9–10 (1993).

380. Even though the Administration did not openly admit it, the conventional wisdom of the President’s action on DACA was that it was a politically calculated move intended to appeal to Latino voters in advance of the 2012 presidential election, especially in light of prominent and sustained protests by pro-immigrant advocates. See Miriam Jordan, *Anatomy of a Deferred-Action Dream*, WALL ST. J. (Oct. 14, 2012, 8:06 PM), <http://www.wsj.com/articles/SB10000872396390443982904578046951916986168> (“The policy has strengthened Mr. Obama’s standing among Hispanic voters.”).

381. See Bulman-Pozen, *Partisan Federalism*, *supra* note 21, 1125–26.

recipients of deferred action. However, their ability to legislate complementary policies on issues such as driver's licenses, in-state tuition, public assistance, and professional licensing help enable and entrench the President's policy. It is enabling because without this type of state action, recipients of deferred action and EADs would still find it difficult to attend schools or transport themselves to work.³⁸² Much like the state migratory commissions created in the wake of the Bracero Program, states and localities function as important places where welcoming policies can—and in some instances, can only—be instantiated.³⁸³ And, similar to past instances, presidential predilections toward immigrants are likely to be more generous and expansive than congressional attitudes.³⁸⁴

Further, state and local action is entrenching because as these policies become a part of the public policy of several states, future congressional measures on immigration will have to address and likely accommodate them. DACA and DAPA, as temporary forms of administrative relief from prosecution, apply only to a selected class³⁸⁵ and will not last beyond the renewal periods granted at the whim of subsequent presidential administrations. In contrast, state laws passed in the wake of DACA inure to a class of undocumented beneficiaries beyond the groups identified by the executive order. Further, they are state legislative enactments that will last until they are democratically rescinded at the state level or expressly preempted by federal legislation, even if a future administration rescinds DACA and DAPA. Therefore, they are highly likely to remain a part of state statutory schemes well beyond DACA and DAPA's time horizon, providing more "permanent" forms of legal protection and benefit. Importantly, these state laws also imbue enforcement relief with additional democratic legitimacy, since that relief

382. See, e.g., Adam Nagourney, Ian Lovett & Vinu Goel, *Turmoil over Immigration Status? California Has Lived It for Decades*, N.Y. TIMES (Nov. 23, 2014), <http://www.nytimes.com/2014/11/23/us/turmoil-over-immigration-status-california-has-lived-it-for-decades.html>; Christian M. Wade, *Questions Arise over Obama Decree*, NEWBURYPORT NEWS (Dec. 6, 2014, 3:45 AM), http://www.newburyportnews.com/news/local_news/questions-arise-over-obama-decree/article_96b72bf7-ba83-57cd-b04b-96e597eaebe8.html (detailing Massachusetts's efforts to determine how to accommodate beneficiaries of the President's executive action).

383. See Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 641 (2008) (arguing that localities are normatively desirable places for integrative subfederal action toward immigrants).

384. Cox, *supra* note 25, at 33, 63 (noting several examples of presidents taking expansionist and welcoming stances).

385. See Alicia Triche, *Caesar or Chavez? President Obama's Polarizing Executive Action on Immigration*, 62 FED. LAW. 10, 10 (2015) (noting that DAPA grants "temporary deferral of removal and employment authorization to certain parents of U.S. citizens (and permanent residents) who have continuously resided in the country since Jan. 1, 2010").

has the backing of several state legislative bodies even if it does not have the backing of Congress.

This dynamic of state and local officials seeking to provide more popular backing to executive action has also been evident in recent actions by large-city mayors. In the wake of the President's second large-scale deferred action program, more than twenty mayors (mostly, if not exclusively, from the Democratic Party) formed the Cities United for Immigration Action collective³⁸⁶ and met in New York City to discuss the implementation of inclusive, immigrant-friendly policies consistent with the President's actions.³⁸⁷ Not only do these mayors represent a "coalition of the willing" in support of executive action, consisting of forty-eight jurisdictions and more than 25 million residents,³⁸⁸ they also mark the building of a policy network that has the potential to outlast the Obama Presidency. As Professor Judith Resnick notes, these types of translocal governmental organizations can cross territorial lines to help shape and spread policies.³⁸⁹ In this way—and often with the help of policy entrepreneurs—federalism takes on a horizontal dimension,³⁹⁰ in addition to its vertical component and its separation of powers possibilities. This horizontal dimension from state to state and city to city can, and likely will, create feedback loops and inform the scope and substance of any future federal legislation.³⁹¹ Congress will be constrained to either accommodating these integrationist impulses at the state and local levels or attempting to override them at the cost of disregarding the political will of several dispersed jurisdictions.³⁹²

386. *Our Leaders*, CITIES UNITED FOR IMMIGRATION ACTION, http://www.citiesforaction.us/our_leaders (last visited Feb. 27, 2016).

387. Roque Planas, *Democratic Mayors Rally Support for Obama's Immigration Changes*, HUFFINGTON POST (Dec. 8, 2014, 12:43 PM), http://www.huffingtonpost.com/2014/12/08/mayors-immigration-reform_n_6288446.html.

388. See *Our Leaders*, *supra* note 386.

389. See Judith Resnik, *Federalism(s)' Forms and Norms: Contesting Rights, De-essentializing Jurisdictional Divides, and Temporizing Accommodations*, in *FEDERALISM AND SUBSIDIARITY* 363, 401–04 (James E. Fleming & Jacob T. Levy eds., 2014).

390. *Id.* at 403; see also Gulasekaram & Ramakrishnan, *Reappraisal*, *supra* note 43, 2108–12 (discussing the influence of restrictionist issue entrepreneurs in being able to spread enforcement-heavy policies across multiple jurisdictions).

391. Rodríguez, *supra* note 187, at 2128–29 (“[L]awmaking power at the state and local level can translate into influence at the national level, thus giving both minorities and dispersed majorities greater purchase on public debate and policy.”).

392. This cooperation between large-city mayors and the President stands in sharp contrast to the reactions of large cities to the unequal and increased enforcement efforts by the Reagan Administration. Those efforts prompted sanctuary laws in several jurisdictions in the early to mid-1980s aimed at protecting several particular groups from removal. See Gzesh, *supra* note 166. Federal laws passed after those enactments ended up providing pathways to regularizing the status

To extend the metaphor of the President seeking to entrench his policy vision, complementary state policies on immigration can help deepen the roots of executive action on immigration, making it far more difficult for Congress to eradicate or significantly alter such policies with subsequent legislation. Surely, this kind of “rooting” can also happen through other means, such as the mobilization of public opinion among policy beneficiaries³⁹³ and supportive actions by nonprofits.³⁹⁴ However, state complementary action can be stronger and more enduring than popular mobilization because the former is institutionalized through state legislation and policy implementation, while the latter must rely on private actors overcoming problems of collective action among potential beneficiaries. Also, state complementary action on presidential action is likely stronger than supportive actions by nonprofits, which do not have the same benefits of democratic legitimacy and accountability, the ability to raise revenues in a diffuse and predictable manner, the coercive force of law, or the ability to operate throughout a state rather than only in areas where immigrants are numerous.

CONCLUSION

This Article’s exploration of the President’s role in immigration federalism allows for a systemic understanding of the myriad ways in which executive action affects state-level policy. The Executive in our current political system can exercise several points of leverage on subfederal immigration activity, including curtailing such policy through litigation, co-opting it through integrated enforcement schemes, and seeking to catalyze it through executive authority that creates unavoidable state-level concerns. This last set of federalism dynamics holds interesting possibilities, especially as Congress remains deadlocked on immigration reform for the foreseeable future. While complementary action by states and localities provides many potential opportunities for the President to implement his policy vision, partisan dynamics and constitutional considerations nevertheless limit these opportunities. Importantly, however, these constraints also apply to state and local jurisdictions that seek to resist executive action on immigration. Indeed, the more powerful trend appears to be the ways in which the President can use states to entrench his policies and gain leverage vis-à-vis

of those groups who were the subject of such enforcement, as well as other undocumented immigrants who fell outside those specific populations. *See id.*

393. *See, e.g.*, ANDREA LOUISE CAMPBELL, HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE 74–78 (2003).

394. *E.g.*, TOM K. WONG ET AL., UNDOCUMENTED NO MORE: A NATIONWIDE ANALYSIS OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, OR DACA, CTR. FOR AM. PROGRESS (2013), <https://www.americanprogress.org/issues/immigration/report/2013/09/20/74599/undocumented-no-more/>.

Congress.

As a new round of executive policies on deferred action and modified enforcement policies goes into effect, it remains unclear what states and localities will do. Oppositional states should continue pursuing avenues to mitigate aspects of administrative relief, and sympathetic jurisdictions should continue the push to entrench and regularize the President's policy. Either way, the legal and political story here suggests that states and localities are not incidental players in what most conceive of as primarily a separation of powers battle between the President and Congress. Indeed, states and localities are important players in their own right—as responsive or resistive policy makers in federalism frameworks, critical mediators in power struggles between the President and Congress, or as political partisans—in immigration policy.

Table 1. Typology of Executive Actions and Their Federalism Outcomes

	Year(s)	Institutional Action	Primary Type of Federalism Effect	Outcomes (Intended or Unintended)
Burlingame Treaty ³⁹⁵	1868	Treaty	<i>Catalyzing</i>	Intention to override state restriction, instead provokes further state legislative action
Bracero Program (absent congressional authorization) ³⁹⁶	1942, 1948–1951	Bilateral agreement	<i>Catalyzing</i>	State legislation and state and local programs promoting integration services; direct lobbying of administration officials by states
Haitian and Central American migrant arrivals ³⁹⁷	1980–1986	Change in federal enforcement priorities	<i>Catalyzing</i>	State and local sanctuary ordinances in opposition to federal enforcement actions
Secure Communities (S-Comm) ³⁹⁸	2008–2014	Federal agency prerogative	<i>Co-opting</i>	Intention to make attempts at state immigration enforcement redundant and to bolster chances for immigration reform legislation in Congress
Arizona v. United States ³⁹⁹	2010–2012	Party to lawsuit	<i>Curtailling</i>	Limits on state immigration enforcement authority
In re Garcia ⁴⁰⁰	2012	Amicus brief	<i>Catalyzing</i>	State passage of affirmative legislative action as mentioned in amicus brief
Deferred Action for Childhood Arrivals (DACA) ⁴⁰¹	2012–Present	Change in enforcement priorities	<i>Catalyzing</i>	Prompts changes in state policies on driver's licenses

395. *See supra* Subsection I.B.1.396. *See supra* Subsection I.B.2.397. *See supra* Subsection I.B.3.398. *See supra* Section II.B.399. *See supra* Section II.A.400. *See supra* Section II.C.401. *See supra* Section II.C.

Priority Enforcement Program (PEP) ⁴⁰²	2014–Present	Federal agency prerogative	<i>Co-opting</i>	Responding to state and local resistance to S-Comm and incorporating new enforcement priorities based on state action
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402. See *supra* notes 245–48 and accompanying text.

Figure 1: Parallel Tracks in Immigration Law Scholarship

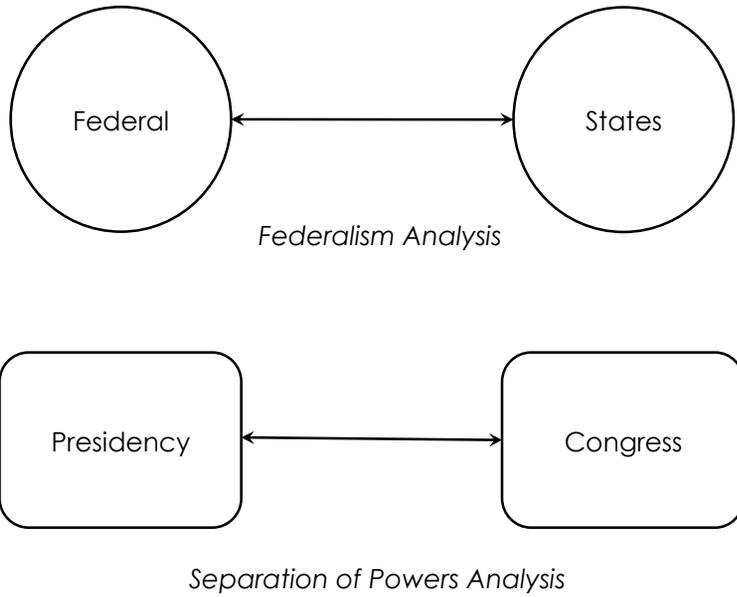
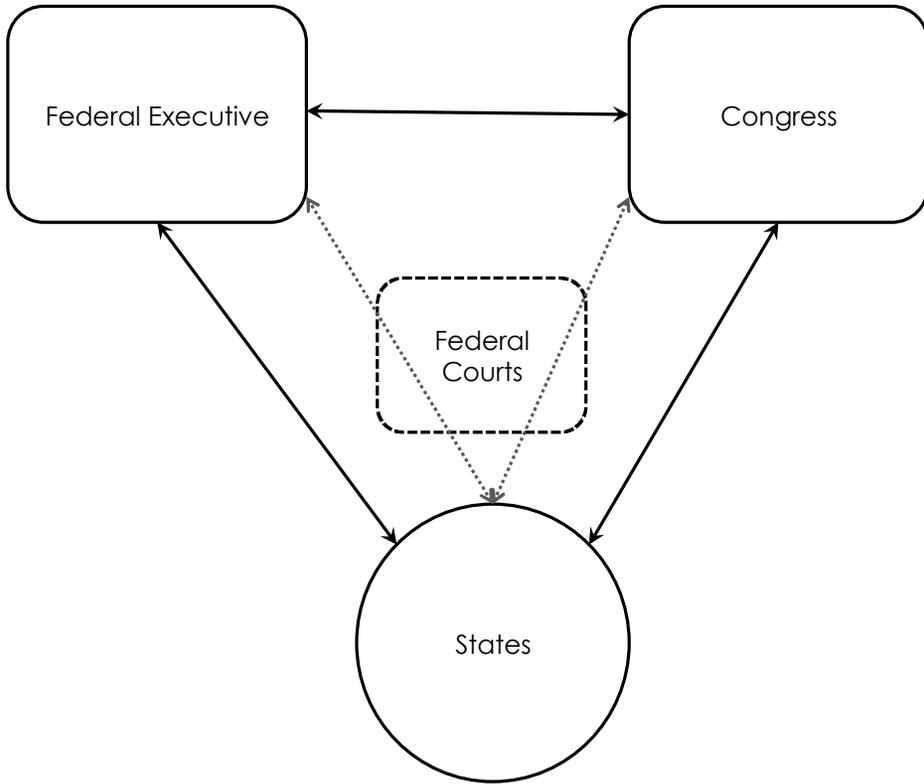


Figure 2: An Integrated Framework of Immigration Federalism⁴⁰³



403. By “Federal Executive,” we mean the President and high-level agency and cabinet officials under his control. In this Article, dealing with immigration matters, we refer to the actions of a limited set of actors— the President, the Secretary of State and the State Department, the Attorney General and the Solicitor General within the Department of Justice, and the Secretary of Homeland Security and the Director of Immigration and Customs Enforcement within the Department of Homeland Security. We recognize that executive agencies might be considered separately from the President and that this framework might also include administrative agencies as another institutional actor.