

Arizona v. United States: The Unitary Executive's Enforcement Discretion as a Limit on Federalism

Roderick M. Hills Jr.*

When can state governments compete with the president to enforce federal law? A plain reading of the Constitution might seem to offer a simple answer: "Never." Article II, after all, provides that "[t]he executive Power shall be vested in a president of the United States of America," not in 50 states. When state officials attempt to help enforce federal law against the wishes of the president, one might think that all presumptions favoring federalism evaporate, replaced by a presumption in favor of the unitary executive's taking charge of federal statutes' implementation. As Justice Antonin Scalia noted for the majority in *AT&T v. Iowa Utilities Bd.*, "If there is any 'presumption' applicable to this question [concerning the implementation of federal statutes], it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange," such that "appeals to what might loosely be called "'States' rights' are most peculiar."¹

Congress can, of course, delegate enforcement responsibilities to states through statutory provisions the enforcement of which are overseen by the president. Such delegations of implementing authority occur, for instance, whenever federal statutes call for states to submit an implementation plan to some federal agency the approval of which will authorize the state to carry out the federal law within the state's territory. Statutory "cooperative federalism" does not interfere with the president's Article II prerogatives, because it is the president—through federal agency officials answerable to the constitutional chief executive—who oversees the states' carrying out of the federal scheme. Absent such an express statutory delegation of

* William T. Comfort III Professor of Law, New York University Law School.

¹ 525 U.S. 366, 378 n.6 (1999).

power to state officials to carry out a federal statute, however, one might believe that state officials' only duty in carrying out federal law is to obey the president's instructions—including the instruction to butt out.

This simple model of the federal unitary executive's Article II authority, however, overlooks both a formalistic fix and a paradox. The formalistic fix is that a state legislature can simply incorporate the federal standard into a corresponding state law. State enforcement of that incorporated standard would thereby sidestep the simple model's Article II limit on state enforcement of formally federal law while practically accomplishing precisely such enforcement. The paradox is that the president could use the simple model's Article II monopoly to undermine federal statutes by asserting their supremacy over state law. The paradox arises from the president's ability to adopt an executive policy of *not* enforcing a federal statute and to preempt state officials' efforts at enforcing the federal standard by relying on the exclusivity of presidential enforcement powers. If Congress really wanted to delegate exclusive enforcement powers to the president, then there is no tension between such preemption and the faithful execution of federal law. But suppose that the president's nonenforcement actually undermines congressional intentions: Allowing the president to preempt state enforcement efforts not only limits state power but also Congress's power, by depriving Congress of an alternative agent for carrying out federal laws when the president's refusal to execute the laws runs counter to Congress's will.

Arizona v. United States seemed to vindicate such an extraordinary presidential prerogative to monopolize the enforcement of federal law and thereby arguably obstruct its faithful execution. At issue in *Arizona* was whether the federal Immigration and Naturalization Act or the Immigration Reform and Control Act preempted an Arizona statute (commonly known as "S.B. 1070," after its state senate title) authorizing or requiring state and local law enforcement officials to arrest, detain for questioning, or impose state-defined penalties on persons suspected of violating these federal laws. The Obama administration claimed that federal immigration statutes implicitly authorized the president to trump such state enforcement of federal statutes with presidential discretion *not* to enforce federal immigration law. In effect, the president claimed that his Article II power to exercise prosecutorial discretion in enforcing federal immigration law created

federal policies that were “Laws of the United States” under the Supremacy Clause of the U.S. Constitution’s Article VI—executive-fashioned “Laws”—that not only preempted states’ Tenth Amendment reserved powers but also set aside legislation enacted by Congress under Article I.

As I explain below, *Arizona v. United States* illustrates two recurrent problems with defining when presidents can use their prosecutorial discretion to oust state officials from enforcing federal statutes. First, statutory text and purpose provide very little guidance in resolving these issues of institutional authority. Congress generally does not say much about such second-order questions of rival elected officials’ jurisdiction, and, when it does, it speaks out of both sides of its collective mouth. Second, the courts fill in the statutory gaps with structural presumptions for which they give perfunctory defenses and definitions. For instance, Justice Anthony Kennedy’s majority opinion adopted a presumption that, because immigration constitutes an aspect of foreign relations over which the president had special authority, the federal statute should presumptively be construed to preserve the president’s Article II discretion to veto state enforcement efforts. He said little, however, about how to define this area of foreign relations in which the president can oust state law with nothing more than an exercise of prosecutorial discretion.

I will suggest below that this presidential power to use prosecutorial discretion to bar state enforcement of federal law ought to be narrowly construed. Allowing states to enforce federal law when the president refuses to do so normally helps insure the faithful execution of the laws by multiplying the agents on which Congress can rely to carry out its will. When one agent fails to implement a statutory command, then the other agent’s implementation can highlight the “slacker’s” shortcomings, reducing the cost to Congress of monitoring executive officials’ performance. *Arizona v. United States*’ prohibition on such competition between states and the president, therefore, weakens not only federalism but also Congress’s power to insure that its statutes are actually implemented.

The best normative argument for *Arizona*’s holding is that the enforcement of immigration law against aliens themselves presents special dangers of private and governmental abuse of aliens. In such a context, the presidential monopoly on enforcement of the laws allows the president to use prosecutorial discretion to protect a

vulnerable population from oppression. *Arizona* itself contains hints that it is best construed as an effort to enlisting separation of powers to advance libertarian and egalitarian values that courts would be unwilling to enforce directly. So construed, *Arizona's* otherwise sweeping theory of preemption can be safely limited to a narrow context where it is most beneficial to individual liberty and least harmful to the constitutional authority of both states and Congress.

I. What's Congress's Intent Got to Do with It? Reading Executive Discretion into Statutory Text and Purpose

Arizona contains numerous statements to the effect that the Court is simply carrying out Congress's intent as reflected in the words of federal immigration statutes. As I suggest below, these statements are implausible: The textual evidence of any specific congressional intent or purpose to exclude state enforcement of federal immigration standards is thin. This is not to say that *Arizona* erred in its holding but rather to note that the relevant statutes were ambiguous on the question that the Court was seeking to answer. The basis for the holding, therefore, would have to be found elsewhere than in the usual textual or extra-textual indicators of congressional or statutory purpose.

The United States challenged four aspects of Arizona's S.B. 1070 as preempted by federal immigration laws.² Two of the law's provisions added state sanctions to existing federal prohibition: Section 3 made any failure to comply with federal alien-registration requirements a state misdemeanor, while Section 5(C) made it a misdemeanor for an unauthorized alien to seek or engage in work in the state. Two other provisions authorized or required state and local officers to make arrests of, or verify information about, undocumented aliens. Section 6 authorized state and local officers to arrest without a warrant a person "the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States," while Section 2(B) required officers conducting

² The United States initially challenged two other provisions of S.B. 1070, as well as arguing that the law as a whole had to fall. The district court ruled for Arizona on these points, however, *United States v. Arizona*, 703 F.Supp.2d 980 (D. Ariz. 2010), and the United States did not appeal. Most of S.B. 1070 has thus been in effect since July 2010.

a stop, detention, or arrest to make efforts, in some circumstances, to verify the person's immigration status with the federal government. *Arizona* held that Sections 3, 5(C), and 6 were all implicitly preempted by either "conflict" or "field" preemption. Only with Section 3's regulation of alien registration did the *Arizona* Court invoke the idea of "field preemption," and here the Court defined the relevant "field" narrowly—not to include all of "immigration law" writ large but rather just the "field of alien registration."³ Section 3's sanctioning of aliens' failure to register with federal authorities was held to be preempted because it interfered with federal law's "mak[ing] a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the nation's borders."⁴ Sections 6 and 5(C), by contrast, were preempted not because of their subject matter but rather because federal law's provisions on state-federal cooperation and unlawful employment of aliens were held to be exclusive. In particular, section 6's authorizing warrantless arrests of aliens suspected of deportable offenses was preempted by the Immigration and Naturalization Act's specific authorization of state-federal cooperation "under limited circumstances" defined in 8 U.S.C. § 1357(g): By expressly providing for state and local officers to cooperate pursuant to formal "§ 287(g) agreements," federal law implicitly excluded other less formal sorts of cooperation.⁵ Likewise, Section 5(C)'s sanctions on aliens seeking or engaging in unauthorized employment were preempted by the implied exclusivity of the Immigration Reform and Control Act's sanctions on employers: The expressly authorized sanctions for employers who illegally hired aliens were held to preclude implicitly any additional sanctions on employees.⁶ Only Section 2(B) escaped preemption—but not unscathed, given that the Court upheld state and local officers' obligation to verify immigrant status only on its face, on the assumption that the obligation would not lengthen the duration of detention or otherwise affect the treatment of any aliens whose status was thus verified.⁷

³ *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012).

⁴ *Id.*

⁵ *Id.* at 2506.

⁶ *Id.* at 2504.

⁷ *Id.* at 2507–09.

Both the “field” and the “conflict” preemption relied on a background assumption that, where federal statutes are silent, Congress must have implicitly conferred on the president broad discretion to suppress state enforcement. This assumption was not embedded in the semantics of the statute’s specific language or any extrinsic evidence of congressional intent.

A. Field Preemption of Section 3

Consider, first, the “field preemption” of state laws intruding into the “field of alien registration.” The Court cited *Hines v. Davidowitz*⁸ for the proposition that Congress had occupied the alien-registration field to the exclusion of any state supplementary sanctions. At issue in *Hines* was Pennsylvania’s 1940 statute requiring every alien 18 or older to register with the state’s department of labor and industry and carry around a state-issued identification card on penalty of fines and imprisonment. *Hines* had held that this state law was preempted because of the specific burdens it imposed on aliens that Congress had very deliberately refrained from imposing. Unlike Pennsylvania’s 1940 statute, Congress’s 1939 registration law did not require aliens to carry their papers with them and imposed no sanction except for willful failure to register.⁹ Noting that states’ extra burdens on aliens could endanger the nation’s foreign relations,¹⁰ the Court concluded that “[a]ny concurrent state power that may exist [to regulate aliens] is restricted to the narrowest of limits”¹¹ and held that the federal law’s registration requirements excluded any additional requirements imposed by states.

Hines, in short, had the flavor of both conflict and field preemption (and the *Hines* Court used those phrases interchangeably¹²). The gist

⁸ 312 U.S. 52 (1941).

⁹ *Id.* at 73–74.

¹⁰ *Id.* at 65–66 (“Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens—such as subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials . . . bears an inseparable relationship to the welfare and tranquillity of all the states, and not merely to the welfare and tranquillity of one”).

¹¹ *Id.* at 68.

¹² *Hines*, 312 U.S. at 67 (“This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked

of the opinion, however, was that the specific requirements of the federal statute precluded additional state requirements. Nothing in *Hines* suggested that some simple, bright-line rule excluded state officials from ever entering the “field” of alien registration. Indeed, *Hines* observed that “[t]here is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress.”¹³

One might think, therefore, that Arizona’s law was easily distinguishable from Pennsylvania’s, because Arizona had not added any new registration requirements to federal law. By penalizing what the federal government already penalized and largely (albeit not entirely¹⁴) to the same extent, Section 3 effectively did nothing more than provide a legal basis in state law for state personnel to help enforce existing federal law. How could *Hines*, with its emphasis on Pennsylvania’s *divergence* from federal legal standards, justify preemption of Arizona’s law that *adopted* the federal standard?

The *Arizona* Court reasoned that federal immigration laws entitled the president not only to under-enforce federal registration requirements but also to suppress any state enforcement policy more complete than the president’s. “Were § 3 to come into force,” the majority reasoned, “the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.”¹⁵ The “policies” to which the Court referred could not be Congress’s policies (for Arizona was enforcing only standards already

formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania’s law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”).

¹³ *Id.* at 67.

¹⁴ The majority opinion noted that Section 3 had slightly harsher sanctions than federal law; the former did not include probation as a sanction. The *Arizona* Court treated the difference between the state and federal sanctions as “a further intrusion upon the federal scheme,” *Arizona*, 132 S. Ct. at 2503, that provided an alternative basis for the Court’s holding that Section 3 was preempted.

¹⁵ *Arizona*, 132 S. Ct. at 2503.

contained in the statutes enacted by Congress) but rather the enforcement policies of the federal *executive*. On *Arizona's* reading, the president could promulgate a purely executive policy of exempting certain groups from a statute the text of which plainly covered those groups, force state officials to follow the president's enforcement policy, and then declare that the state law was being preempted by the very statute that the president refused to enforce.

What federal law authorized the president to impose his enforcement priorities on state officials? The *Arizona* Court could cite no specific statutory language suggesting that additional enforcement of Congress's own rules by state officials, above the enforcement desired by the president, would "conflict with the careful framework Congress adopted."¹⁶ Instead, the Court cited precedents describing *Hines* as imposing field preemption¹⁷—but these precedents all involved laws that added state regulations (on insurance or sedition against the federal government) to existing federal rules. The Court also cited *Wisconsin Dept. of Industry v. Gould Inc.*, which held that states could not impose their own special sanctions on companies for labor practices that violated federal law.¹⁸ But *Gould* was rooted in the principle that the National Labor Relations Act, with its complex administrative provisions defining adjudication of unfair labor practices by the National Labor Relations Board, precluded alternative sanctions and enforcement—not only states' supplementary enforcement but even supplementary enforcement by the president himself.¹⁹ Likewise, the Court cited *Buckman Co. v. Plaintiffs' Legal Committee* for the principle that "States may not impose their own punishment for fraud on the Food and Drug Administration."²⁰ As with field preemption under the NLRA, *Buckman's* field preemption of state-law "fraud-on-the-FDA" claims was rooted in "various [statutory] provisions aimed at detecting, deterring, and punishing false

¹⁶ *Id.* at 2502.

¹⁷ *Id.* at 2502 (citing *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003) and *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956)).

¹⁸ 475 U.S. 282 (1986).

¹⁹ See *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996) (NLRA preempts president's power to exclude contractors from receiving federal contracts because they permanently replaced striking workers).

²⁰ *Arizona*, 132 S. Ct. at 2503 (citing *Buckman, Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347–48 (2001)).

statements made during [drug] approval processes” with which “the FDA pursues difficult (and often competing) objectives,” such as avoiding “intruding upon decisions statutorily committed to the discretion of health care professionals.”²¹

The *Arizona* Court could cite no similarly elaborate statutorily defined immigration procedures governing arrest and prosecution of immigrants who violated federal registration requirements. The provisions of the Immigration and Naturalization Act cited by *Arizona* all dealt with the substantive duties of registration imposed by federal law on aliens: None of these statutory provisions defined any federal enforcement procedures that might exclude additional state remedies.²² Nothing cited by the Court suggested that Congress had in mind any especially “comprehensive” administrative mechanism for arresting aliens who had failed to register with the federal government, akin to the NLRB’s system of adjudicating and sanctioning unfair labor practices or the FDA’s procedures for detecting misleading statements by manufacturers. The Court’s invocation of “congressional intent” seems, therefore, less like an investigation of some actual intent of the enacting Congress and more like the Court’s using the statute as a sock puppet through which the Court mouths its own judicial preferences for “a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation’s borders.”²³

B. Conflict Preemption of Sections 5(C) and 6

The *Arizona* Court’s argument for the “conflict preemption” of S.B. 1070, Sections 5(C) and 6 are similarly dependent on judicial preferences for a presidential monopoly over enforcement of immigration laws that cannot be situated in any statutory text. Section 5(C) regulated the employment relationship by imposing sanctions on aliens who sought or engaged in work that they were not authorized to perform under federal law. Finding preemption of state employment law was not easy to justify given the Court’s precedents upholding apparently similar laws. *De Canas v. Bica* had stated that “States possess broad authority under their police powers to regulate

²¹ Buckman, 531 U.S. at 349–50.

²² *Arizona*, 132 S. Ct. at 2502 (describing “[t]he present regime of federal regulation”).

²³ *Id.*

the employment relationship to protect workers within the State” and thus upheld California’s sanctions on employers who hired aliens not authorized to work in the United States.²⁴ Immediately preceding the 2011 term, *Chamber of Commerce v. Whiting* had upheld Arizona’s sanctions on employers who employed undocumented aliens on the theory that the term “licensing and similar laws” in the Immigration Reform and Control Act of 1986 unambiguously included Arizona’s suspension of such businesses’ right to do business in the state.²⁵ Citing *De Canas* approvingly, *Whiting* had stressed that, unlike “uniquely federal areas of regulation” like foreign affairs, maritime law, or patent law, “[r]egulating in-state businesses through licensing laws has never been considered such an area of dominant federal concern.”²⁶

Field preemption, therefore, was foreclosed to the *Arizona* Court, which instead relied on an alleged conflict between IRCA and Section 5(C)’s sanctions on aliens to preempt the latter. *Arizona* distinguished *De Canas* simply by noting that IRCA had not been enacted when *De Canas* was decided.²⁷ The Court noted that Congress itself had deliberately refrained from enacting such sanctions on employees. As Justice Scalia noted in dissent, however, Congress’s decision not to punish some behavior did not automatically imply a congressional decision to bar other levels of government from punishing that behavior.²⁸ Just the preceding term, *Williamson v. Mazda Motor* had held that an agency’s decision to leave auto manufacturers unregulated in some respect did not automatically preempt states’ power to prohibit those manufacturers from making a choice that federal law permitted.²⁹ Instead, the *Mazda* Court had painstakingly examined the federal purpose for leaving the private behavior unregulated.

The *Arizona* Court purported to find a purpose to exclude state as well as federal sanctions from legislative history showing that Congress did not want to “mak[e] criminals out of aliens engaged

²⁴ 424 U.S. 351, 356 (1976).

²⁵ 131 S. Ct. 1968 (2011).

²⁶ *Whiting*, 131 S. Ct. at 1983.

²⁷ *Arizona*, 132 S. Ct. at 2504.

²⁸ *Arizona*, 132 S. Ct. at 2519 (Scalia, J., dissenting).

²⁹ 131 S. Ct. 1131 (2011).

in unauthorized work” because such aliens were already vulnerable to employer exploitation.³⁰ But this congressional purpose to be lenient with federal sanctions did not answer the question of whether Congress also believed that state sanctions might be still appropriate: Perhaps Congress, wary of imposing federal burdens on vulnerable alien employees, nonetheless also wanted to accommodate states’ different views about the magnitude of the threat posed by labor competition from undocumented aliens. Given that IRCA included an express preemption clause barring states from imposing additional sanctions on *employers*, one might infer, as Justice Scalia noted, that states remained free to impose such sanctions on employees.³¹ Such preemption clauses did not foreclose “conflict preemption” of additional state sanctions, but, again as Justice Scalia argued, Congress’s express specification of one sort of preemption would seem to foreclose a general presumption of field preemption. Yet the Court repeatedly invoked the idea that, if Congress wanted to limit its own sanctions, then it must therefore also have a purpose of limiting state sanctions that Section 5(C) would frustrate.³² Absent clearer evidence about Congress’s—or, if one is semantically inclined, the statute’s—attitude toward state law, the majority’s inference from a purpose of federal self-limitation to a further purpose of federal preemption seemed either like a non sequitur or a smokescreen for field preemption that it claimed not to impose.

In contrast to the *Arizona* Court’s holding regarding Section 5(C), protecting the president’s enforcement discretion formed the heart of *Arizona*’s preemption of Section 6’s authorization of warrantless arrests. Citing a June 2011 memorandum on prosecutorial discretion issued by John Morton, the director of Immigration and Customs Enforcement, *Arizona* argued that Section 6 interfered with the statutory discretion of the attorney general to decide that an alien, although removable, ought not to be removed and, therefore, ought not to be arrested. The factors guiding such prosecutorial discretion were not contained in any federal statute: They were the creatures of executive policymaking, embodied in guidance documents like

³⁰ *Arizona*, 132 S. Ct. at 2504.

³¹ *Id.* at 2520.

³² *Id.* at 2505.

ICE's memorandum. Giving state officers authority to make warrantless arrests could undermine such executive enforcement policy by allowing state officers to arrest "some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed."³³

The *Arizona* Court's finding that Section 6 was preempted, therefore, rested critically on a judicial decision to allow executive enforcement discretion to trump state law. But what in the statute *itself* authorized such preemption by purely executive enforcement policies? Key members of Congress, after all, had lambasted Morton's memo as an executive usurpation of legislative power to add *de facto* exceptions to the otherwise unqualified category of removable aliens.³⁴ Even assuming that criteria written in a memo for the guidance of executive officials did not defy the federal statute itself, why infer that such informal policies constituted "Laws of the United States . . . made in Pursuance" of the Constitution that preempt rival state laws under the Supremacy Clause of Article VI of the United States Constitution? As Justice Samuel Alito noted in dissent, "a federal agency's current enforcement priorities . . . are not law. They are nothing more than agency policy. I am aware of no decision of this Court recognizing that mere policy can have preemptive force." Giving executive officials the power to invest mushy enforcement guidance with the preemptive of a federal rule of law, according to Justice Alito, "would give the Executive unprecedented power to invalidate state laws that do not meet with its approval, even if the state laws

³³ *Id.* at 2506.

³⁴ Morton's memorandum generated some anger on Capitol Hill, where Rep. Robert Aderholt (R-AL), the chair of the House Appropriations Subcommittee on Homeland Security, lambasted Morton for "[h]iding behind the excuse of limited resources" to "diminish and degrade ICE's immigration enforcement mission through abuse of prosecutorial discretion." See House Appropriations Subcommittee on Homeland Security, Hearing on the Proposed Fiscal 2013 Appropriations for the Homeland Security Department's Immigration and Customs Enforcement (March 8, 2012), available at http://www.micevhill.com/attachments/immigration_documents/hosted_documents/112th_congress/TranscriptOfHouseAppropriationsSubcommitteeHearingOnFY13ICEAppropriations.pdf. Another committee member complained that, "in our state the ability to set up to allow your prosecutor to have the expanded authority to make his own decision with directives usually comes out to some kind of criminal procedure that has been passed by some legislative body. There's nothing—and that this is just a department-driven prosecutorial discretion that should be done by statute and not otherwise." *Id.* at 11.

are otherwise consistent with federal statutes and duly promulgated regulations,” an inference of power that Justice Alito regarded as “fundamentally at odds with our federal system.”³⁵

To provide a statutory basis for the idea that federal executive officials’ exercise of discretion could preempt state law, *Arizona* relied on the INA’s express authorization for state and local cooperation in the enforcement of federal immigration laws pursuant to 8 U.S.C. § 1357(g). The Court reasoned that express statutory authorization of such “§ 287(g) agreements” between the federal government and state law enforcement officials under “limited circumstances” implicitly preempted unilateral arrest power. By specifically allowing specially trained and supervised state officials to assist in the enforcement of federal law, the statute implicitly preempted other less formal forms of state assistance.

Thus, *Arizona* embraced the oddity of using a statutory provision that empowered state officials as the vehicle for codifying preemption: Section 1357(g) became the only evidence that Congress embraced “the principle that the removal process is entrusted to the discretion of the Federal Government.”³⁶ Treating Section 1357(g) as a preemption clause posed a textual difficulty: The last sentence of Section 1357(g) provided that Section 287(g) agreements were not necessary “in order for any officer or employee of a State or political subdivision of a State . . . (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”³⁷ *Arizona*, however, construed “cooperate” narrowly to include only actions that had the express approval of federal officials—albeit approval short of the formality of a Section 287(g) agreement—such as state officials’ providing “operational support in executing a warrant” or “allow[ing] federal immigration officials to gain access to detainees held in state facilities.”³⁸ Unilateral state or local arrests of aliens did not, on this account, fit within the “savings clause” of Section

³⁵ *Arizona*, 132 S. Ct. at 2527 (Alito, J., dissenting).

³⁶ *Arizona*, 132 S. Ct. at 2507.

³⁷ 8 U.S.C. § 1357(g)(10)(B).

³⁸ *Arizona*, 132 S. Ct. at 2507.

1357(g)(10)(B) and, therefore, were preempted because they conflicted with the implicit grant of exclusive enforcement authority to federal officials.

* * *

In sum, the basis in statutory text or extra-textual evidence of Congress's intent was thin for the *Arizona* Court's inference that Congress itself authorized preemption of state law by executive enforcement policies. The Court repeatedly invoked Congress's choices in defending preemption, but these invocations seemed, if not threadbare, then fairly debatable. The real work of figuring out the relative power of president and states in implementing federal law was not really being done by any meaningful notion of "congressional intent." But then what was guiding the Court?

II. The Role of Executive Discretion in Immigration Law: Should Foreign Policy Be a Federalism-Free Zone?

The more persuasive basis for *Arizona's* preemption holdings was the Court's structural presumption about the importance of executive discretion in the area of immigration law. This presumption had nothing to do with any text or extra-textual evidence specific to the INA or the IRCA: It was, instead, a substantive canon baked into the statutes by legal and constitutional traditions defining foreign policy as the preeminent bailiwick of a unitary executive. This structural argument, however, was not exactly crisp: As I suggest below, the Court's "foreign policy" rationale for executive discretion did not define with any precision what brought an issue into the executive realm of "foreign policy," a realm in which a mere memo from a federal bureaucrat could trump state law.

A. "The Vast External Realm" of Presidential Power over Foreign Affairs

At the outset of the opinion, Part II(A) set forth the conventional account for why presidential power to preempt state laws should be presumed: Immigration law is a subpart of foreign relations more generally, and foreign relations require a single, flexible, and energetic executive. "[F]oreign countries concerned about the status, safety, and security of their nationals in the United States," *Arizona* declared, "must be able to confer and communicate on this subject

with one national sovereign, not the 50 separate States.”³⁹ As the Court concluded later, “[d]ecisions of this nature touch on foreign relations and must be made with one voice.”⁴⁰ Moreover, the complexity of removal policy required executive discretion: “A principal feature of the removal system is the broad discretion exercised by immigration officials,” discretion that “embraces immediate human concerns.”⁴¹ The requirement of executive discretion sprang both from the “many factors” affecting “[t]he equities of an individual case”—factors like the ties of an alien to the country or the danger that the alien posed to citizens—as well as from “[t]he dynamic nature of relations with other countries,” which “requires the Executive Branch to ensure that enforcement policies are consistent with this Nation’s foreign policy with respect to these and other realities.”⁴²

Arizona, in other words, fits in a parade of precedents granting presidents extraordinary powers to define private rights where foreign relations are involved. “In this vast external realm, with its important, complicated, delicate and manifold problems,” the Court famously declared in *Curtiss-Wright Export Corp.*, “the President alone has the power to speak or listen as a representative of the nation.”⁴³ The president’s powers in “this vast external realm” include the power to enter into executive agreements resulting in the forfeiture of foreign nationals’ private property,⁴⁴ to declare and enforce arms embargoes against U.S. companies free from the trammels of the nondelegation doctrine or the doctrine of enumerated powers,⁴⁵ to revoke the passport of a U.S. citizen seeking to disclose the identities of American intelligence officers abroad,⁴⁶ and to limit states’ powers to discriminate with states’ own revenues against contractors doing business with nations deemed by states to be oppressive.⁴⁷ Sometimes, these exercises of presidential power had the

³⁹ *Arizona*, 132 S. Ct. at 2498.

⁴⁰ *Id.* at 2507.

⁴¹ *Id.* at 2499.

⁴² *Id.* at 1500.

⁴³ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

⁴⁴ *United States v. Belmont*, 301 U.S. 324 (1937).

⁴⁵ *Curtiss-Wright Export Corp.*, 299 U.S. at 315–22.

⁴⁶ *Haig v. Agee*, 453 U.S. 280 (1981).

⁴⁷ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 376 (2000).

vague imprimatur of Congress; sometimes the president acted solo. In every case, however, the Court strained to find that the president had the power to act, even when preempting state law, because the action took place in this “vast external realm.”

B. What Is the Scope of “Foreign Affairs” in Which Presidents Can Freely Preempt State Law?

It begs the question, however, to explain *Arizona’s* deference to presidential discretion simply by chanting the mantra of “foreign relations.” What, after all, defines the decision to refrain from enforcing immigration laws against resident aliens on American soil as an aspect of foreign policy? The answer cannot be simply that Arizona’s law affected aliens, because *Whiting* upheld Arizona’s sanctions against employers who hired aliens, brushing aside the idea that such sanctions implicated areas of uniquely federal concern. Moreover, the Court does not always show extraordinary solicitude for presidential power to engage in foreign relations at the expense of state law. In *Medellín v. Texas*, the Court refused to enforce the president’s memorandum calling for the implementation of a decision by the International Court of Justice defining the United States’ obligations under an international convention to which the United States was a party.⁴⁸ Despite appearing to be a decision squarely in that “vast external realm” of foreign affairs, the president’s memorandum calling for the Texas courts to give effect to international law did not, according to *Medellín*, preempt Texas’s procedural default rules under which Mexican nationals’ rights to consult with their nation’s consul were deemed waived. The president’s memorandum lacked authorization from Congress, because the treaty in question was deemed to be non-self-executing.⁴⁹ Lacking any congressional imprimatur, the president could not unilaterally “vindicate United States interests in ensuring the reciprocal observance of

⁴⁸ *Medellín v. Texas*, 552 U.S. 491 (2008). For a detailed exposition of the complexities of *Medellín*, see Ilya Shapiro, *Medellín v. Texas* and the Ultimate Law School Exam, 2007–2008 *Cato Sup. Ct. Rev.* 63 (2008).

⁴⁹ *Medellín*, 552 U.S. at 527 (“A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force. That understanding precludes the assertion that Congress has implicitly authorized the president—acting on his own—to achieve precisely the same result.”).

the Vienna Convention,” despite the fact that such interests “are plainly compelling,” because the president was not a lawmaker who could set aside state law with a mere memorandum lacking authorization from a statute.⁵⁰

One can, of course, distinguish *Arizona* from *Medellín* simply by observing that the former but not the latter decision found congressional acquiescence in the president’s decision. But, again, this simple distinction begs the question, because the acquiescence was inferred using different presumptions about presidential power. Neither the Senate’s ratification of the U.N. Charter creating the ICJ nor Congress’s ratification of the INA specified with crystalline clarity what powers the president would enjoy to implement either law. What, then, leads *Medellín* to demand clear evidence that the Senate intended to confer power on the president to implement ICJ judgments whereas *Arizona* presumes that Congress would want exclusive presidential enforcement of federal immigration laws? It also cannot be sufficient for *Medellín*’s narrow view of presidential powers that no bicamerally enacted statute authorized the president to preempt state criminal procedure:⁵¹ No such statute authorized the president’s executive agreement in *Belmont*, yet the Court upheld the president’s approval of the Litvinov Agreement even to the extent of allowing that agreement to eliminate rights of private property protected by New York law.⁵² Likewise, the distinction between *Medellín* and *Arizona* cannot rest on the difference between the legal status of President George W. Bush’s memorandum in *Medellín* as compared to ICE Director John Morton’s memorandum on prosecutorial discretion that, according to *Arizona*, embodied “federal pol- icy.” In both cases, the memoranda were merely informal guidance documents without any binding force of law—unless, of course, the Court chose to defer to them. Why was one document deemed to have Congress’s

⁵⁰ *Id.* at 526.

⁵¹ *Medellín*, 552 U.S. at 516 (“Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances. U.S. Const., Art. I, § 7.”).

⁵² *Belmont*, 301 U.S. at 332 (“[O]ur Constitution, laws and policies have no extraterritorial operation unless in respect of our own citizens. [citation omitted]. What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here”).

authorization to displace a state statute, while the other was deemed to be an insufficient basis for displacing a state court's procedural default rule?

In short, rhetoric about the nation's speaking with one voice in "foreign relations" is not self-defining. *Whiting* and *Medellín* suggest that mere substantial effects on alien employees or the traducing of international tribunals are not sufficient to trigger a presumption that presidential enforcement discretion can preempt a state law. So what is sufficient? Legal doctrine being murky about the definition of presidential power, it is worthwhile to think about the practical consequences of a broad or narrow definition.

III. The Case for Narrowly Construing *Arizona's* Presumption of Presidential Preemption: Federalism as a Mechanism for Ensuring Faithful Execution of Federal Laws

There is a reason to worry about *Arizona's* presumption favoring presidential preemption of state law, quite apart from a desire to protect state power or federalism: Such a presumption poses a threat to Congress's power. Granting the president a monopoly on implementing a federal statute makes it more difficult for Congress to monitor its agents to ensure faithful execution of the laws that Congress enacts.

It is a familiar point that, absent some constitutional objection to a statute, the president has a constitutional duty to enforce statutes, even if he or she objects to them on grounds of policy.⁵³ It is, however, equally familiar that the president—indeed, any executive officer—enjoys broad prosecutorial discretion to determine whether to

⁵³ The president may have a right and, indeed, a duty to disregard a federal statute that the president believes to be unconstitutional. For a defense of such an obligation, see, e.g., Neal Devins & Saikrishna B. Prakash, *The Indefensible Duty to Defend*, 112 *Colum. L. Rev.* 507 (2012); Saikrishna B. Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 *Geo. L. J.* 1613 (2008). For objections to presidential "review" of unconstitutional statutes, see Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 *Vand. L. Rev.* 389, 391 (1987) (opposing executive nonenforcement); Seth P. Waxman, *Defending Congress*, 79 *N.C. L. Rev.* 1073, 1084–86 (2001) (opposing executive nonenforcement with limited exceptions for laws that arguably deprive the president of constitutionally guaranteed powers).

enforce a statute in a particular case.⁵⁴ Such discretionary non-enforcement is rooted in the scarcity of executive resources: Being constrained by limits on budget and personnel from prosecuting every single violation of a statute, the president focuses on the most egregious or dangerous violations. Choosing which case to prosecute is not a betrayal of the president's duty to "take Care that the Laws be faithfully executed,"⁵⁵ because courts read statutes with an implied gloss that prosecutors not be required to do the impossible.

The propriety of prosecutorial discretion, therefore, depends on the reasons for its exercise. An executive official's refusal to enforce a federal law in some set of circumstances because that official believes that the law ought, as a matter of policy, to have been written more narrowly is an impermissible—indeed, unconstitutional—betrayal of the duty to carry out the instructions of the Congress. Refusing to enforce a law in a particular case because one wants to reserve one's resources for other, more urgent cases is part of the routine business of being a prosecutor, one arguably reserved to presidents under principles of separation of powers.

Congress, however, is in an unfavorable position for assessing the president's reasons for nonenforcement. Congress itself cannot bring enforcement actions.⁵⁶ Yet information about the costs of enforcing a statute is generated largely through the process of enforcement: Executive officials have the personnel and experience to know how much it costs to investigate and prosecute cases because they are responsible for these actions. Against their claims that they lack resources to pursue some category of cases, Congress is relatively helpless. This asymmetry of information about the costs

⁵⁴ See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charges to file or bring before a grand jury, generally rests entirely in his discretion"); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379–83 (2d Cir. 1973) for a review of authorities upholding prosecutors' discretion not to bring cases.

⁵⁵ U.S. Const. art. II, § 3.

⁵⁶ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) ("The [Federal Election] Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' Art. II, § 3").

of enforcement gives the president—and executive agencies more generally—the effective power to “veto” enforcement of a statute on policy grounds while defending nonenforcement in terms of resource scarcity.⁵⁷ Federal bureaucrats might, of course, defeat effective oversight by *both* the president and the Congress through the bureaucrats’ superior information about enforcement costs. The president, however, enjoys an advantage over Congress in controlling the bureaucracy through the president’s day-to-day appointments and supervision of agency policymakers.⁵⁸

One solution to this problem of agency costs is for Congress to foster competition among multiple agents by entitling several different actors to carry out a federal law. If one agent stalls on the ground of scarce resources, then the other can enlarge its policymaking domain and budget by offering to provide a better level of enforcement in exchange for the slacker’s appropriation.⁵⁹ Subnational government—states, counties, municipalities—provide built-in jurisdictional redundancy that Congress can exploit to promote enforcement competition, thereby reducing the president’s capacity to stall on the enforcement of federal statutes by citing resource scarcity.⁶⁰

Congress can most obviously pit state and federal officials against each other by expressly providing in a federal statute for the former to submit an implementation plan that meets statutory criteria and

⁵⁷ The scholarship describing how asymmetry of information impedes congressional efforts to monitor agencies is voluminous. See, e.g., Jeffrey S. Banks & Barry R. Weingast, *The Political Control of Bureaucracies under Asymmetric Information*, 36 *Am. J. Pol. Sci.* 509, 512–15 (1992); Randall L. Calvert, Mathew D. McCubbins & Barry R. Weingast, *A Theory of Political Control and Agency Discretion*, 33 *Am. J. Pol. Sci.* 588, 590–95 (1989); Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal Agent Perspective (with Applications to the SEC)*, 44 *Pub. Choice* 147, 151–58 (1984).

⁵⁸ Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 *Admin. L. Rev.* 1, 5–16 (1994).

⁵⁹ Weingast, *The Congressional-Bureaucratic System* 44 *Pub. Choice* at 155 (“Competition for budget increases, therefore, substantially mitigates asymmetries in information about bureaucratic production”).

⁶⁰ Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 *Colum. L. Rev.* 459 (2012); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 *N.C. L. Rev.* 663, 707–19 (2001); Roderick M. Hills Jr., *Federalism in Constitutional Context*, 22 *Harv. J.L. & Pub. Pol’y* 181, 190 (1998) (“Congress can discipline either type of organization—federal agency or non-federal politicians—by threatening to replace one with the other if it misbehaves.”).

thereby supplant enforcement by the latter. The states' achieving equal or greater compliance at equal or less than the cost of federal implementation provides data to Congress by which to assess the federal agencies' claims of inadequate resources.⁶¹ The idea of states' competing with federal officials for implementing authority over federal statutes is not an academic abstraction: The performance of one level is frequently used as a benchmark by which to assess the other level's performance by courts and voters.⁶²

What if a federal statute is silent or ambiguous about the states' role in implementing the federal law? The advantages of state-federal competition described above suggest a default presumption against preemption: When in doubt, construe the federal statute to preserve the states' concurrent authority over the subject matter concerning which a federal agency has statutory jurisdiction. If the state agency chooses a standard more stringent than the federal agency, the federal agency should be permitted to preempt the more stringent state standard only by setting forth, in the administrative process, how the state standard's excessive stringency undermines the regulatory goals that federal law is intended to advance. For instance, if the Food and Drug Administration sought to preempt a more stringent state labeling standard for a drug, then it should bear the burden of providing evidence in the administrative record of how the state's extra labeling requirements confuse consumers or over-deter the use of the drug, thereby undermining the goal of the Food, Drug, and Cosmetic Act's goal of securing "safe and effective" pharmaceuticals for consumers.

By placing the onus on the federal agency to demonstrate that the state standard impedes the federal statutory goal, this default presumption gives regulated entities with the greatest capacity to provoke agency fact-finding—usually industry groups—an incentive

⁶¹ For a theoretical account of such state-federal "vertical competition," see Albert Breton, *Competitive Governments: An Economic Theory of Politics and Public Finance* 233–39 (1996).

⁶² *A.F.L.-C.I.O. v. Marshall*, 570 F.2d 1030, 1038 (D.C. Cir. 1980) (suggesting that the U.S. Department of Labor's staffing levels for safety inspectors under Occupational Safety and Health Act can constitute a benchmark for state staffing levels if the former follow a "coherent plan"); Henry Weinstein, Prop. 97 Gives State Task of Restoring Funds for Cal/OSHA, *L.A. Times*, Nov. 10, 1988 (describing California voters' choosing state or federal implementation of OSHA after trade union campaign to restore state implementation).

to petition federal agencies for an explanation of how placing a ceiling on further state regulation advances the federal agency's mission.⁶³ As Professor Catherine Sharkey has noted, by presuming that states can enforce more stringent regulatory standards, courts transform state law into "agency-forcing" measures: The states' regulation prods regulated interests to petition the agency to use its expertise to address the topic of the state regulation.⁶⁴ Professor Sharkey's "agency reference" model of administrative preemption thereby creates state-generated incentives to provide Congress with information about the performance of federal agencies' existing rules that might otherwise not exist.⁶⁵

Put simply, federalism protects Congress by giving it more information about the justifications for federal executives' inaction. Even if one regards state regulation of nationally scaled industries as likely to be inefficient over the long run, such regulation can provoke federal agencies to explain why existing levels of regulation are sufficient.

⁶³ For an account of why industry groups might be most capable of placing preemption on the agenda of Congress, see Roderick M. Hills, Jr., *Against Preemption*, 82 N.Y.U. L. Rev. 1, 29–32 (2007). Similar considerations suggest that the same interests would enjoy an advantage in the administrative process in petitioning for a rulemaking. For a defense of the idea that federal courts should take a genuinely "hard look" at federal agencies' claims that stringent state laws undermine federal statutory goals, see Catherine Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 Geo. Wash. L. Rev. 449 (2008).

⁶⁴ Catherine Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 Duke L. J. 2125 (2009). David Vladeck and David Kessler have offered a similar argument that tort liability provides an essential incentive for drug manufacturers to inform the FDA of post-marketing harms resulting from the use of drugs approved on the basis of much more limited data from pre-marketing clinical trials. David C. Vladeck & David A. Kessler, *A Critical Examination of the FDA's Effort to Preempt Failure-to-Warn Claims*, 96 Geo. L.J. 461–95 (2008).

⁶⁵ The Office of the Comptroller of the Currency and the now-defunct Office of Thrift Supervision obtained the lion's share of their budget from fees paid by nationally chartered banks and thrifts respectively, provoking the suspicion that both federal agencies preempted state consumer protection laws without sufficient justification, merely to increase the appeal of a federal charter to banks and thrifts. See Arthur E. Wilmarth Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. Banking & Fin. L. 225, 315 (2004); Nicholas Bagley, *Note, The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274, 2274 (2004).

How do these considerations apply to *Arizona's* preemption of S.B. 1070? One can regard Arizona's enforcement of federal immigration law as an "agency-forcing" measure that provokes the U.S. attorney general and Immigration and Customs Enforcement to reveal whether the under-enforcement of the INA and IRCA is the result of insufficient resources or instead ideological disagreement with the legislation's call for the removal of all undocumented aliens. As Justice Scalia noted in dissent, Arizona's arrest or detention of aliens does not consume any federal resources.⁶⁶ Conserving such resources, therefore, disappears as a justification for preempting Arizona's extra enforcement of federal standards.

The absence of any resource-conserving justification for preemption does not eliminate all bases for preempting S.B. 1070. ICE and the attorney general might seek such preemption on the ground that state and local officials operating outside of Section 287(g) agreements violate federal standards by detaining or arresting suspected aliens gratuitously, in an abusive or harassing way that violated federal standards or endangered U.S. foreign policy. The goal of providing information to Congress about the costs of implementing federal law, however, suggests that the president should bear the burden of showing that extra state implementation would endanger federal statutory or foreign policy goals. As Justice Scalia's dissent suggests, there is a widespread belief that the president might under-enforce federal immigration laws because of ideological disagreement with those laws' purpose.⁶⁷ Forcing the attorney general to provide specific data on how Arizona's enforcement would undermine the purpose of the immigration laws or otherwise interfere with federal foreign policy serves a function similar to forcing the FDA to explain why extra labeling will actually confuse consumers: It provides information to Congress and the public that the federal executive's inaction is the result of a considered and good-faith

⁶⁶ *Arizona*, 132 S. Ct. at 2521 (Scalia, J., dissenting) ("Of course there is no reason why the Federal Executive's need to allocate its scarce enforcement resources should disable Arizona from de-voting its resources to illegal immigration in Arizona that in its view the Federal Executive has given short shrift.").

⁶⁷ *Id.* (characterizing the Obama administration's position on immigration as that of "[a] Federal Government that does not want to enforce the immigration laws as written, and leaves the States' borders unprotected against immigrants whom those laws would exclude").

judgment about how best to implement a statute rather than the product of disagreement with the statute itself.

Because the Obama administration had sought an injunction of S.B. 1070 before it had ever been implemented, the attorney general lacked such data.⁶⁸ One might argue, therefore, that, were the only relevant consideration ensuring that the president faithfully executed the immigration laws, then *Arizona* was wrongly decided.

IV. Prosecutorial Discretion as a Rights-Protecting Structure in Immigration Law

Nevertheless, the Court expressly set aside the presumption against preemption in favor of a presumption that the president has exclusive oversight over “foreign relations,” on the theory that at least some sorts of state laws affecting aliens belong in the category of “foreign relations.” Is there any way to justify this category of immigration-related “foreign relations” preemption that can make sense of the language and holding of *Arizona* yet simultaneously limit the inroads that *Arizona* makes on an otherwise valuable presumption against preemption?

I suggest that *Arizona* might best be understood as using the president’s prosecutorial discretion to advance libertarian and egalitarian goals that the Court is reluctant to advance more directly through some sort of heightened scrutiny under the Fourteenth Amendment. Put another way, by conferring a monopoly on the president to enforce federal immigration laws, *Arizona* enlists principles of separation of powers to safeguard a discrete and insular minority.

Consider four reasons for accepting such an account of *Arizona*. First, such a conclusion is consistent with *Arizona*’s language. At the outset of the opinion, *Arizona* justifies executive discretion with respect to aliens as a way to protect “immediate human concerns”—for instance, the lack of danger posed by “[u]nauthorized workers” who are “trying to support their families,” the aliens’ “children born

⁶⁸ *Id.* at 2515 (Scalia, J., dissenting) (“It is impossible to make such a finding without a factual record concerning the manner in which *Arizona* is implementing these provisions—something the Government’s pre-enforcement challenge has pretermitted.”).

in the United States, long ties to the community, or a record of distinguished military service,” and the danger that indiscriminate removal could be “inappropriate” when a removable alien is eligible only for return to a state “mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return.”⁶⁹ Although the Court characterizes these concerns as endemic to “[t]he dynamic nature of relations with other countries,” they are also focused on the vulnerability of aliens to persecution at home and abroad. This concern that state laws could subject aliens to persecution is suggested as well by the Court’s worry that state enforcement of federal immigration laws could subject harmless categories of aliens to “unnecessary harassment.”⁷⁰ Such a view of *Arizona* is also consistent with the Court’s interpretation of IRCA’s authorization for employer sanctions as an implicit bar on any sanctions imposed on employees: *Arizona* relied on legislative history suggesting that Congress did not want to “mak[e] criminals out of aliens engaged in unauthorized work” because such aliens were already vulnerable to employer exploitation.⁷¹ Viewed abstractly as an *expressio unius* argument, this theory is unconvincing, because IRCA also contained a limited preemption of state laws’ sanctions on employers implying, by the same *expressio unius* logic, authorization for state sanctions on employees.⁷² Viewed through a lens of equal protection norms, however, it makes eminent sense to distinguish between state laws that burden employers with paperwork and state laws that subject aliens to detention and arrest.

Second, an account of *Arizona* that makes direct burdens on aliens essential to trigger *Arizona*’s presumption of preemption has the virtue of explaining why *Whiting* regarded *Arizona*’s regulation of employers as outside the scope of “foreign relations” or any other “uniquely federal concern.” State laws burdening employers with a duty to check paperwork or use E-Verify undoubtedly affect aliens

⁶⁹ *Id.* at 2499.

⁷⁰ *Id.* at 2506.

⁷¹ *Id.* at 2504.

⁷² See *id.* at 2520 (Scalia, J., dissenting) (“Common sense, reflected in the canon *expressio unius est exclusio alterius*, suggests that the specification of pre-emption for laws punishing ‘those who employ’ implies the lack of pre-emption for other laws, including laws punishing ‘those who seek or accept employment.’”).

by discouraging employers from hiring them. But such state laws do not subject aliens to detention, arrest, fines, or imprisonment. If the essence of the federal interest is protecting a vulnerable minority from exploitation or persecution by state officials, then it is easy to see why a regulatory burden on employers would not implicate that interest even though such a burden might affect aliens and draw lines based on immigrant status.

Third, such an account of *Arizona* is consistent with analogous uses of preemption doctrine to do the work of equal protection. As Hiroshi Motomura argued 22 years ago, immigration law is filled with “phantom constitutional norms” of equal protection that are enforced as principles of statutory interpretation rather than constitutional law.⁷³ The idea that equal protection prohibits states’ discrimination against aliens unauthorized to be present in the United States reached its high-water mark with the Court’s 1982 decision of *Plyler v. Doe*⁷⁴ and has since lapsed into desuetude. *Arizona*, however, can be regarded as imposing a sort of heightened scrutiny on such laws for the purposes of inferring whether they are preempted by federal statutes, akin to a similar norm long governing preemption of state laws burdening legally authorized aliens.⁷⁵

⁷³ Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *Yale L.J.* 545 (1990).

⁷⁴ 457 U.S. 202 (1982). As Professor Motomura notes, “[t]he Court’s equal protection rationale [in *Plyler*]—especially its application of intermediate judicial scrutiny—relied so heavily on the involvement of children and education that no court has ever used it to overturn a statute disadvantaging unauthorized migrants outside the context of K-12 public education’’. Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 *Duke L.J.* 1723, 1731–32 (2010).

⁷⁵ See, e.g., *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (state university’s policy of denying in-state status to holders of certain nonimmigrant visas held invalid under the Supremacy Clause with Court’s refraining from reaching due process and equal protection issues). On the idea that field preemption analogous to the Dormant Commerce Clause applies to state laws regulating persons based on alienage, see Erin Delaney, Note, *In the Shadow of Article I: Applying a Dormant Commerce Clause Analysis to State Laws Regulating Aliens*, 82 *N.Y.U. L. Rev.* 1821 (2007). On the idea that 1970s precedents barring burdens on authorized aliens are justified more by preemption than equal protection, see Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 *Colum. L. Rev.* 1023, 1060–65 (1979) (arguing that the Court’s doctrine concerning alienage-based classifications is justifiable not as a matter of equal protection, but rather of federalism).

Fourth, it is a familiar notion that doctrines of separation of powers can indirectly protect constitutional values that the Court might be reluctant to enforce more directly for fear of unduly stifling political accommodation of emergencies. This sort of structural protection for liberty and equality most commonly takes the form of a non-delegation doctrine limiting executive power that invades important interests in equality or liberty without sufficiently specific legislative authorization.⁷⁶ The Court's use of a nondelegation doctrine rather than an absolute prohibition is a judicial compromise designed to give the political branches flexibility to respond to governmental exigencies while simultaneously encouraging the democratic deliberation promoted by separate legislative and executive branches' joint decisionmaking. For instance, Professors Sam Issacharoff and Rick Pildes note that *Ex Parte Endo* invalidated executive detention of Japanese-Americans beyond the terms authorized by federal statute as a way to ensure that presidential deprivations of civil liberties allegedly required by wartime emergencies were nevertheless limited by congressional oversight.⁷⁷

Arizona is analogous to *Endo* because *Arizona* protects the double veto of joint legislative and executive decisionmaking when important issues of liberty or equality are at stake. The president's prosecutorial discretion *de facto* to suspend federal immigration laws through nonenforcement constitutes an executive veto of the immigration laws as applied just as the requirement of specific legislative authorization constitutes a congressional veto on specific executive suspensions of liberty. Understood as a structural protection of aliens' liberty and equality, *Arizona* is, therefore, the mirror image of *Endo*—not limiting executive power with mandatory legislative oversight but instead limiting legislative power (in the form of federal immigration laws authorizing detention, arrest, imprisonment, and

⁷⁶ See, e.g., *Hampton v. Mow Sun Wong*, 426 US 88 (1976) (narrowly construing power of Civil Service Commission to bar noncitizens, including lawfully admitted resident aliens, from employment in the federal competitive civil service); *Kent v. Dulles*, 357 U.S. 116 (1958) (narrowly construing statutory authority of secretary of state to restrict issuance of passports to communists).

⁷⁷ Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism*, 5 *Theoretical Inquiries L.* 1, 22–24 (2004). Issacharoff and Pildes rely on Patrick O. Gudridge, *Remember Endo?*, 116 *Harv. L. Rev.* 1933 (2003), for their account of *Endo*.

removal) with mandatory executive oversight (in the form of prosecutorial discretion).

Does this check come at too high a price, by depriving citizens of statutory protection from aliens unauthorized to live in the nation? Limiting *Arizona's* presumption of presidential preemption to the narrow category of state laws directly regulating aliens also limits the harms that citizens incur as a result of the preemption of federal regulatory standards. One can plausibly argue that, unlike states' restrictions on predatory lending, unsafe drugs, or dangerous automobiles, state restrictions on unauthorized aliens do little to safeguard state residents' interests in life, liberty, or property. Although *Arizona* pays obeisance to the idea that states' residents suffer from mere proximity to undocumented aliens,⁷⁸ it is not obvious why states have a critical "sovereign" interest in excluding unwanted persons from their territory. Justice Scalia oddly cited *Mayor of New York v. Miln* for the proposition that "the defining characteristic of sovereignty" is "the power to exclude from the sovereign's territory people who have no right to be there."⁷⁹ *Miln* is notorious today as the Taney Court decision announcing that "it is as competent and as necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported."⁸⁰ The Court not only overruled *Miln* more than 70 years ago in *Edwards v. California*—contemptuously rejecting *Miln's* equation of poverty with immorality⁸¹—but also branded as illegitimate "attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders."⁸² To cite *Miln* for the proposition that states have a sovereign interest in excluding persons who have no right to enter the state is akin to

⁷⁸ *Arizona*, 132 S. Ct. at 2500.

⁷⁹ *Id.* at 2511 (Scalia, J., dissenting) (citing *New York v. Miln*, 11 Pet. 102, 132–33 (1837)).

⁸⁰ *Miln*, 11 Pet. at 142–43.

⁸¹ *Edwards*, 314 U.S. 160, 177 (1941) ("it will now not be seriously contended that, because a person is without employment and without funds, he constitutes a 'moral pestilence.' Poverty and immorality are not synonymous.").

⁸² *Id.* at 173.

citing *Plessy v. Ferguson*⁸³ for the proposition that states have a sovereign interest in regulating public transportation.

The price of such executive oversight over immigration law, however, is erosion of congressional power to ensure full enforcement of their immigration statutes. There is an inevitable tradeoff between the benefits of a political check on Congress created by giving the president a monopoly on the enforcement of federal standards and the benefits of faithful execution of Congress's commands created by presuming that both federal and state officials have overlapping and competing power to enforce a congressional standard. One can read *Arizona* as accepting this tradeoff for the category of immigration restrictions requiring the detention, arrest, fining, imprisonment, or removal of aliens. The burdens on state residents' interests in protection of their life, liberty, or property are relatively slight, while the protections for equitable treatment of a vulnerable population are substantial.

Moreover, giving a unitary federal executive a veto over prosecutions fits within an American tradition of safeguarding liberty with structure in a way that Justice Scalia, of all jurists, should appreciate. In his dissent in *Morrison v. Olson*, Justice Scalia noted how presidential oversight of prosecutors provides democratic oversight of the enforcement of legislation necessary to curb vexatious or overzealous prosecutions. "Almost all investigative and prosecutorial decisions—including the ultimate decision whether, after a technical violation of the law has been found, prosecution is warranted," Justice Scalia noted, "involve the balancing of innumerable legal and practical considerations."⁸⁴ To prevent "prosecutorial abuse" of this "awesome discretion," Justice Scalia called for a unitary executive to control federal prosecutions: The persons who exercise the nation's prosecutorial discretion "are selected, and can be removed, by a president whom the people have trusted enough to elect." If presidents fail to supervise their subordinates' exercise of prosecutorial discretion with sufficient attention to their constituents' interests in fairness and legality, then "the unfairness will come home to roost in the Oval Office."⁸⁵ Justice Scalia's fears that an elected

⁸³ 163 U.S. 537 (1896).

⁸⁴ *Morrison v. Olson*, 487 U.S. 654, 707–08 (1988) (Scalia, J., dissenting).

⁸⁵ *Id.* at 728–29.

president would give “short shrift”⁸⁶ to Arizonans’ interest in full enforcement of the immigration laws, in blithe indifference to the interests of Arizonans or any other voting constituency, seem inconsistent with his confidence in democratically accountable presidential oversight of prosecution expressed in his *Morrison* dissent.

V. Conclusion

In the area of aliens’ rights, *Arizona* substitutes the safeguards of the unitary executive for the safeguards of federalism. The former provides a check on Congress. The latter provides competitive pressure to ensure the fullest enforcement of congressional commands. There is definitely a cost from such a substitution, not only in terms of a loss of federalism but also in terms of a loss of congressional capacity to monitor whether federal statutory standards are fully implemented. So long as the presidential monopoly on enforcement of federal law is confined to the narrow category of immigration law writ small—that is, not “foreign affairs” vaguely defined but rather state and federal laws directly enforced against aliens—the loss for both federalism and congressional oversight is likely going to be modest, and the gains for aliens’ fair treatment substantial.

⁸⁶ *Arizona*, 132 S. Ct. at 2520–21 (Scalia, J., dissenting).