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## Black-Box Immigration Federalism

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# BLACK-BOX IMMIGRATION FEDERALISM

IMMIGRATION OUTSIDE THE LAW. BY *Hiroshi Motomura*. New York: Oxford University Press (2014). Pp. xiii, 235. \$29.95.

*David S. Rubenstein\**

## INTRODUCTION

In *Immigration Outside the Law*, Hiroshi Motomura<sup>1</sup> confronts the three hardest questions in immigration today: *what* to do about our undocumented population, *who* should decide, and by what legal *process*. Motomura's treatment is characteristically visionary, analytically rich, and eminently fair to competing views. The book's intellectual arc begins with its title: "Immigration Outside the Law." As the narrative unfolds, however, Motomura explains that undocumented immigrants are "Americans in waiting," with moral and legal claims to societal integration (pp. 86, 89, 204–05).

Ushering immigration outside the law, inside of it, is no easy feat. The route is partly obstructed by politics,<sup>2</sup> and partly by the Constitution itself. After all, the Constitution's separation of federal power and finely wrought lawmaking process makes national solutions elusive.<sup>3</sup> Meanwhile, the Constitution's federalist structure provides a platform for state and local resistance to the wide-scale integration of undocumented immigrants that

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\* Professor of Law, Director of the Center for Law and Government, Washburn University School of Law. Like so many in the immigration community, I am indebted to Hiroshi Motomura for his leadership and mentorship. He also provided generous feedback on an early draft, which helped to clarify my views in relation to his. I am also grateful for the helpful comments and suggestions provided by Patrick Charles, Erin Delaney, Pratheepan Gulasekaram, Kevin Johnson, Stephen Lee, Peter Margulies, Juliet Stumpf, and Washburn colleagues Alex Glashausser and William Rich. I also thank my assistant Penny Fell, and the *Michigan Law Review* for outstanding editorial work.

1. Susan Westerberg Prager Professor of Law, UCLA School of Law.

2. See, e.g., Ryan Lizza, *Getting to Maybe: Inside the Gang of Eight's Immigration Deal*, *NEW YORKER* (June 24, 2013), <http://www.newyorker.com/magazine/2013/06/24/getting-to-maybe> [<http://perma.cc/LBR3-M4AS>] (discussing some of the reasons why comprehensive immigration efforts have stalled in Congress); Alan K. Simpson & Bruce A. Morrison, Opinion, *A Way Out on Immigration Reform*, *N.Y. TIMES* (Mar. 18, 2015), <http://www.nytimes.com/2015/03/18/opinion/a-way-out-on-immigration-reform.html> [<http://perma.cc/P323-GDZJ>] ("The goal of fixing our broken immigration system is further away than ever.").

3. See U.S. CONST. art. I, § 7; see also *INS v. Chadha*, 462 U.S. 919, 951 (1983) (holding that a unicameral legislative veto violated the separation of powers); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (preliminarily enjoining an executive branch program, called Deferred Action for Parents of Americans, that, inter alia, would confer temporary "lawful presence" to millions of undocumented immigrants), *cert. granted*, 2016 WL 207257, (U.S. Jan. 19, 2016) (No. 15-674); President Barack Obama, Remarks by the President on Immigration (Nov. 21, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/21/remarks-president>

Motomura envisions.<sup>4</sup> And despite the Constitution's guarantee of equal protection, it hardly protects this population from restrictionist policies at both the federal and subfederal levels.<sup>5</sup>

*Immigration Outside the Law* offers a path through these constitutional thickets.<sup>6</sup> But the path requires some departures from mainstream constitutional norms. As I will explain, Motomura blends elements of constitutional structure and rights into a mold that I call "Black-Box Immigration Federalism." I employ the black box metaphor here to reflect a system with known external effects but with opaque internal functions.<sup>7</sup> Outwardly, Black-Box Immigration Federalism reduces to the seemingly simple formula that "federal law overrides any inconsistent state or local law" (p. 7). The formula looks about right, and many commentators seem to accept it on faith. Yet beneath the formula's tidy veneer is a cache of legal uncertainties, complexities, and potential contractions. Foremost among them are what qualifies as federal law, how that law should be calibrated when it looks different in action than it does on the books, and conversions of nonbinding executive enforcement policies into federal law with preemptive effect.<sup>8</sup> Emphatically, Motomura's treatment of the "federal law" preemption formula is refreshingly self-aware and entirely transparent. It is the *formula itself*, however, that entails far more than it outwardly suggests. The black box metaphor is simply meant to draw attention to those inward complexities.

More specifically, Black-Box Immigration Federalism treats the federal government as an undifferentiated whole, and from that starting position

immigration [<http://perma.cc/VTZ7-77FG>] ("We're going to keep on working with members of Congress to make permanent reform a reality. But until that day comes, there are actions that I have the legal authority to take that will help make our immigration system more fair and more just.").

4. See *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012) ("Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect."); see also *State Laws Related to Immigration and Immigrants*, NAT'L CONF. ST. LEGISLATURES (Jan. 7, 2015), <http://www.ncsl.org/research/immigration/state-laws-related-to-immigration-and-immigrants.aspx> [<http://perma.cc/44XM-4KJZ>] (tracking steady rise in immigration-related state laws and resolutions over the past decade).

5. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 82–83 (1976) (applying rational basis test to federal alienage classification); see also *infra* Part II (discussing jurisprudential obstacles to equal protection relief for undocumented immigrants); cf. *Plyler v. Doe*, 457 U.S. 202, 219 n.19, 223 (1982) (generally eschewing heightened scrutiny of state laws directed at undocumented immigrants).

6. See *infra* Part I (summarizing Motomura's approach).

7. Cf. Cambridge Dictionaries Online, <http://dictionary.cambridge.org/us/dictionary/business-english/black-box> [<http://perma.cc/9CS2-BLET>] (defining "black box" as "a system or process that uses information to produce a particular set of results, but that works in a way that is secret or difficult to understand"); Merriam-Webster, <http://www.merriam-webster.com/dictionary/black%20box> [<http://perma.cc/XP6B-SEB3>] (defining "black box" broadly as "anything that has mysterious or unknown internal functions or mechanisms"). Although I do think the black box metaphor fits, nothing in my analysis below depends on it.

8. See *infra* Part II.

embeds some or all of the following propositions. First, the federal government can freely choose to make law by statute, regulation, or otherwise (pp. 122–23). Second, nonbinding federal policies qualify as law (pp. 121, 123). Third, immigration “law in action” (p. 4) takes presumptive precedence over Congress’s laws on the books (pp. 121, 123–24). Fourth, executive enforcement policies, which are not binding as against the federal government, are nevertheless binding on state and local jurisdictions. So, in the event of a conflict between executive enforcement policies and subfederal law, the former trumps.<sup>9</sup> Fifth, restrictionist state and local immigration policies are presumptively preempted by incorporation of an “equality norm” into Supremacy Clause challenges.<sup>10</sup> Collectively, the foregoing propositions feed Black-Box Immigration Federalism and are captured within Motomura’s framing statement that “federal law overrides any inconsistent state or local law” (p. 7).

Black-Box Immigration Federalism is a serious idea with serious intellectual backing.<sup>11</sup> Indeed, the Supreme Court’s decision in *Arizona v. United States* hints at something like it, albeit with mixed signals.<sup>12</sup> This Review

9. Pp. 123, 126; *see infra* Part II.

10. Pp. 133–35, 152; *see infra* Part III.

11. Motomura is a leading champion of this cause, but he is joined by a veritable chorus of commentators and practitioners. On the preemptive force of executive enforcement policies, *see*, for example, Brief for the United States at 15, 22, 50, 53, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182); Brief *Amicus Curiae* of Constitutional Accountability Center in Support of Respondent at 13–14, *Arizona*, 132 S. Ct. 2492 (No. 11-182); Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 639 (2013); Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577 (2012); Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251 (2011); Catherine Y. Kim, *Immigration Separation of Powers and the President’s Power to Preempt*, 90 NOTRE DAME L. REV. 691 (2014). On the importation of an equality norm into preemption analysis, *see*, for example, Chacón, *supra*; Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-“Alien” Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905 (2011); 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 (2013); Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609 (2012); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 28; Carrie L. Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-federal Immigration Laws: The California TRUST Act*, 18 CHAP. L. REV. 481, 483, 523 (2015); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).

12. *See* 132 S. Ct. at 2506 (finding one of the state laws preempted on the partial ground that state law “could be exercised without any input from the Federal Government [meaning the executive] about whether an arrest is warranted in a particular case,” thus “allow[ing] the State to achieve its own immigration policy”). In a partially concurring and partially dissenting opinion, Justice Alito described as “remarkable” the federal administration’s position that “a state law may be pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency’s current enforcement priorities. . . . [which] are not law.” *Id.* at 2527 (Alito, J., concurring in part and dissenting in part). The majority opinion, however, did not directly engage this objection. *See* David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J. L. & PUB. POL’Y 267, 280–81, 281 n.62 (2015) (explaining the ways in which the Court’s signals were mixed on the issue of whether

does not deny the constitutional or normative possibilities of Black-Box Immigration Federalism. Rather, my threefold aim is to bridge some gaps between immigration and constitutional theory, provide alternative views to Motomura's in these regards, and explain why Black-Box Immigration Federalism should not be taken for granted—perhaps especially by immigrant advocates. As I will explain, this intriguing constitutional construct may do as much to undermine as advance immigrant interests in the long run, if not also in the short.

Constitutionally, each of the animating features of Black-Box Immigration Federalism sketched above has potentially far-reaching implications.<sup>13</sup> Immigration law is famously exceptional in the sense that it sometimes departs from mainstream constitutional and administrative norms.<sup>14</sup> Yet whether immigration is exceptional in the ways that Motomura suggests, and whether it should be, remain vital questions for the future of immigration law.<sup>15</sup> Moreover, we must be scrupulous about whether *structural* doctrines can, or should, be a vehicle for the wide-scale integration that Motomura envisions. Certainly, Black-Box Immigration Federalism may bode well for undocumented immigrants in the short run, which may explain some of its appeal. With Congress gridlocked, undocumented immigrants generally will benefit from the combined effects of an executive branch that is unable or unwilling to enforce existing removal statutes,<sup>16</sup> and a robust preemption doctrine that prevents state and local governments from filling the enforcement gap. But, instrumentally, Black-Box Immigration Federalism comes with a major limitation: any promise it holds for promoting wide-scale integration is politically contingent. As a structural prophylactic, Black-Box Immigration Federalism allocates power, not social outcomes.

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executive enforcement policies can, or did, have preemptive effect); Eric Posner, *The Imperial President of Arizona*, SLATE (June 26, 2012, 12:04 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/06/the\\_supreme\\_court\\_s\\_arizona\\_immigration\\_ruling\\_and\\_the\\_imperial\\_presidency\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/the_supreme_court_s_arizona_immigration_ruling_and_the_imperial_presidency_.html) [<http://perma.cc/6QH-AZC8>] (observing that the *Arizona* majority found certain provisions of S.B. 1070 preempted, not because it conflicts with federal law, but because it “conflicts with the president’s policy”).

13. See *infra* Part II.

14. See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) (“Immigration has long been a maverick, a wild card, in our public law. Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.”).

15. See *infra* Parts II & III. Because immigration is *sometimes* treated exceptionally under the law, and other times not, there are no clear guideposts for which constitutional norms to relax, and which to insist on, in this new era of institutional conflict. I am currently working on a project with Deep Gulasekaram—titled “Immigration Exceptionalism(s)” —that explores this complication, and tension, within immigration law. For a recent claim that the Roberts Court is moving toward immigration normalization, see Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57 (2015).

16. See 8 U.S.C. § 1182(a)(6)(A)(i), 1227(a)(1)(A)–(B) (2012).

Of course, it is too soon to know whether Black-Box Immigration Federalism can or will deliver an enduring platform for the integration of undocumented immigrants. It depends on how the allocated federal power is used (or abused).<sup>17</sup> That uncertainty, however, is reason for pause. Immigration constitutional doctrine tends to be sticky—in ways often unfavorable to immigrant interests, and difficult to undo.<sup>18</sup> Caution is thus warranted before placing faith in structural arrangements that simultaneously consolidate federal power and relax checks against it, which is precisely what Black-Box Immigration Federalism portends to do.

### I. USHERING IMMIGRATION OUTSIDE THE LAW INSIDE THE LAW

One of *Immigration Outside the Law*'s most ingenious contributions is the analytical framework it offers for understanding and shaping responses to unauthorized immigration (pp. 3–5). The framework derives from *Plyler v. Doe*, in which the Supreme Court held that a state's denial of K-12 public education to undocumented immigrants violated equal protection.<sup>19</sup> *Plyler*'s actual holding was quite limited, which Motomura is quick to acknowledge.<sup>20</sup> Instead, what matters are three themes Motomura culls from that case, which he claims have shaped debates over undocumented immigration ever since: first, the meaning and significance of unlawful immigration; second, the state and local role in regulating unauthorized migration; and third, the integration of this population into the fabric of American life (pp. 10–13). This framework provides new egress to the question of *what* to do about unlawful immigration, which is mostly for political consumption. My focus here, however, is on Motomura's application of this framework to

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17. Cf. Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 831 (2008) (“[T]here is no structural reason to believe that one level of government will be more or less welcoming to non-citizens and therefore, on this basis, to favor uniformity over experimentalism.”).

18. Cf. David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015); Victor C. Romero, *Devolution and Discrimination*, 58 N.Y.U. ANN. SURV. AM. L. 377, 378 (2003) (“Despite calls among many to dismantle it, Congress's plenary power over immigration, and the executive's concomitant authority to enforce it, are likely here to stay . . .”). See generally Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001) (“[C]ourts' early resolutions of legal issues can become locked-in and resistant to change.”). The literature on the plenary power doctrine is legion. For some of Motomura's views and his critique of the doctrine, see Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990). See also Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995) (critiquing the doctrine and collecting sources of others who also do).

19. 457 U.S. 202 (1982). For an in-depth treatment of *Plyler*, its aftermath, and future implications, see MICHAEL A. OLIVAS, *NO UNDOCUMENTED CHILD LEFT BEHIND* (2012).

20. P. 9; cf. Stephen Lee, *Growing Up Outside the Law*, 128 HARV. L. REV. 1405 (2015) (book review) (raising questions about Motomura's reliance on *Plyler* as an analytical frame, and offering, in its place, a “membership as brokering” approach for understanding some unauthorized migrants' claims to be treated as Americans in waiting).

constitutional questions concerning *who* should decide what to do about unlawful immigration, and, procedurally, *how* those decisions must or may be made.

The book's first three chapters explore each of the *Plyler* themes separately, in seriatim. Chapter One argues that being present in the United States without authorization is legally inconclusive, in part because "the consequences of unlawful presence are highly variable, depending on the exercise of enforcement discretion." (p. 13). Here, Motomura deflects (or deflates) the significance of Congress's immigration law on the books, and, instead, emphasizes immigration law in action (p. 13). Of equal import, Motomura contends that unlawful status is inconclusive and indeterminate by *national design* (pp. 21–22, 31). "[T]he uncertainty that selective discretion creates for unauthorized migrants," he argues, "is an essential part of the system itself" (p. 53). This descriptive point is foundational to his prescriptive claims, in later chapters, about what the nation owes this population on moral and legal grounds.

Chapter Two provides a descriptive account of the state and local role in immigration matters. That role has varied over time and across jurisdictions.<sup>21</sup> Here, Motomura mostly tracks convention to sort subfederal laws into "restrictionist" and "integrationist" classifications: the former are characterized by their hostility to undocumented immigrants, whereas the latter create a neutral or welcoming environment for this population. Because it is relevant to the discussion that follows, examples of restrictionist laws include those giving state and local officials a role in detection, arrest, and detention of noncitizens on the basis of federal immigration violations. Restrictionist laws also make it difficult or impossible for undocumented immigrants to rent housing, find work, or attend public schools. Examples of integrationist measures, by contrast, include so-called sanctuary or non-cooperation laws, which limit state and local officers from identifying and apprehending individuals for immigration violations, and laws that provide public benefits to unauthorized immigrants, such as in-state college tuition or municipal identification cards (pp. 58–59, 80–81).

Chapter Three examines the integration of unauthorized immigrants into American society. It begins by probing the tension between national borders, on the one hand, and the American commitment to equality, on the other. Here, Motomura argues that integrating and affording immigrants a pathway to full membership is necessary to justify national borders (pp. 90–91). And, partly for that reason, he argues that the nation has a moral (if not also a legal) obligation to recognize and integrate unauthorized immigrants.<sup>22</sup>

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21. See pp. 56–85 (explaining some of the variations, across the dimensions of time and jurisdiction); see also Gerald L. Neuman, *The Lost Century of American Immigration (1776–1875)*, 93 *COLUM. L. REV.* 1833, 1835, 1841–80 (1993) (explaining that in the first 100 years of the republic, immigration regulation was dominated by the states, not the federal government).

22. P. 110. Motomura tables the "legal" question for later chapters.

After laying this foundation, the book's next three chapters consider how *Plyler's* thematic strands intersect and relate in ways that each alone cannot fully capture. Here is where the contours of Black-Box Immigration Federalism come into sharper view.

Specifically, Chapter Four considers immigration enforcement authority by linking the themes of what it means to be unlawfully present and the role of subfederal governments. Motomura suggests that the "power to make law includes the power to select the mode of law," and that "the federal government's decisions—no matter what form they take—override state or local law" (pp. 122–23). Moreover, he argues that "[t]he operation of immigration law in practice strongly suggests that the exercise of federal executive discretion in enforcement supplies the real content of federal immigration law for the purpose of deciding what is inconsistent with state and local decisions" (p. 124). On this view, "federal immigration law consists of both action and inaction, so no gap exists for state and local law to fill" (p. 121). Critically, however, Motomura eschews this no-gap-filling principle for state and local integrationist policies. The reason for this dichotomy, Motomura explains, is that restrictionist measures are far more likely than their integrationist foils to upset equality principles, either on the face of the laws themselves or in their application. Limiting state and local immigration enforcement, he claims, is a "way of preventing discrimination . . . before it might happen" (p. 115).

After explaining why state and local restrictionist measures should be preempted, Motomura explains in Chapter Five why subfederal integrationist policies should flourish. For this, Motomura joins another pair of themes—the subfederal role and the integration of undocumented immigrants. He observes that states and localities are the *de facto* sites of integration, and that these political communities can be well-suited to that function (pp. 165, 167).

Chapter Six makes the last thematic link, between the meaning of unlawful presence and the integration of unauthorized migrants. Whereas Motomura suggests in earlier chapters that many undocumented immigrants have strong claims to being treated as Americans in waiting based on individualized equities (pp. 111, 163), this chapter promotes categorical approaches that would offer most unauthorized immigrants legal status, or at least a path to it (pp. 204–06). Generally, Motomura disfavors hardline approaches that would deny legal recognition to the unauthorized population that we, as a nation, have both created and tolerated for so long.<sup>23</sup> Moreover, he argues, categorical legalization programs will be more faithful to the rule of law than haphazard, *ad hoc*, case-by-case executive decisionmaking.<sup>24</sup>

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23. See pp. 196–200, 207.

24. Pp. 186, 204–06. Chapter 7 concludes the book. Here, Motomura begins a conversation about how to rework the immigration system to avoid repeating the same debates over legalization in future generations (p. 208). These proposals range from designing guest-worker programs, limited amnesty programs, and international development, see pp. 209–15, 218–23, but are not my focus here.



## II. CRACKING OPEN THE BLACK BOX

This Part probes deeper into the mechanics of Black-Box Immigration Federalism. As already noted, many commentators and practitioners—including lawyers in the Obama administration—seem to ascribe to some version of this constitutional construct.<sup>25</sup> Here, I am foremost interested in Motomura’s views, which are emblematic and at the forefront of this conceptual movement.

According to Motomura:

1. The federal government can freely choose its lawmaking modes;<sup>26</sup>
2. Nonbinding enforcement policies may qualify as federal law;<sup>27</sup>
3. In the event of possible conflict between Congress’s law on the books and the “law in action,” the latter takes presumptive precedence, at least for purposes of preemption;<sup>28</sup>
4. Executive enforcement policies, which are not binding on the federal government, can nevertheless bind state and local actors;<sup>29</sup> and
5. State and local restrictionist laws, but not subfederal integrationist laws, should be presumptively preempted by incorporation of an “equality norm” into preemption analysis.<sup>30</sup>

This is a significant collection of ideas. Before turning to each, I offer some preliminary thoughts to frame the discussion that follows.

First, considerable headway will be made here if the exceptional quality of Black-Box Immigration Federalism is brought to the fore. Motomura offers incisive views on how the Constitution may apply to immigration. But the significance of his account might be lost if not contextualized within the larger constitutional system, and in juxtaposition to mainstream constitutional norms.

Second, Black-Box Immigration Federalism is a new frontier. It subsumes but extends well beyond the “exclusivity principle” in immigration law.<sup>31</sup> In theory, that principle awards the federal government a monopoly

25. See sources cited *supra* note 11.

26. P. 122 (“[T]he power to make law includes the power to select the mode of law . . . .”); p. 123 (“Federal lawmaking power includes the power to choose whether Congress or the executive branch makes that law.”).

27. P. 121 (“The decision not to enforce in some situations is part of federal immigration law.”); p. 123 (“[T]he federal government is free to set out federal immigration law not only in the letter of federal statutes or regulations, but also in federal patterns of discretionary enforcement.”).

28. P. 124 (“The operation of immigration law in practice strongly suggests that the exercise of federal executive discretion in enforcement supplies the real content of federal immigration law for the purpose of deciding what is inconsistent with state and local decisions.”).

29. See pp. 123, 126.

30. See pp. 133–35, 152; see also *infra* Part III.

31. See, e.g., *Galvan v. Press*, 347 U.S. 522, 531 (1954) (“Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress . . . .”); *Truax*

over “immigration regulation.”<sup>32</sup> Yet that is bounded domain. The Supreme Court narrowly describes immigration regulation as laws governing the admission and expulsion of noncitizens.<sup>33</sup> So construed, the exclusivity principle has little or no bearing on state and local “alienage regulation,” which is the balance of laws that pertain to noncitizens,<sup>34</sup> and where most of the federalism action is today. Indeed, the Supreme Court treated Arizona’s flagship restrictionist laws as alienage regulation rather than immigration regulation,<sup>35</sup> despite Arizona’s statutorily declared purpose to make “attrition through enforcement” the state’s public policy.<sup>36</sup>

Third, Black-Box Immigration Federalism’s operative features are not static. For instance, if Congress passes a law in direct response to an executive policy, propositions 2 through 4 might be relaxed to the point of being overcome. Or, for example, courts may invoke the exclusivity principle to structurally preempt a state regulation directed at the admission or expulsion of noncitizens, without reliance on any of the foregoing propositions. But these sorts of examples are the exceptions and, more importantly, do not capture what we have today: a dormant Congress, an executive branch unable or unwilling to enforce existing removal statutes, unprecedented levels of state and local alienage regulation, and a mostly inert exclusivity principle.<sup>37</sup>

Fourth, the propositions straddle federalism and separation of powers, at times toggling between them seamlessly. That crossover can lead to some confusion. But, as developed further below, the crossover also exposes Black-Box Immigration Federalism to critique, inasmuch as this construct may disregard structural seams woven into the Constitution.<sup>38</sup>

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v. Raich, 239 U.S. 33, 42 (1915) (“The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government.”).

32. See David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL’Y 81, 118–27 (2013) (discussing the exclusivity principle and distinguishing it from the Court’s general preemption taxonomy). For critiques of the exclusivity principle, see Huntington, *supra* note 17, who argues that the exclusivity principle has no firm basis in law or judicial precedent. See also Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (arguing for a limited conception of the exclusivity principle on functional grounds).

33. See, e.g., *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

34. See, e.g., *Chin & Miller*, *supra* note 11, at 259–61, 263–64, 269 (defining “alienage regulation” in opposition to “immigration regulation”).

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

36. S.B. 1070, 49th Leg., 2d Reg. Sess. § 1 (Ariz. 2010).

37. See *supra* notes 33–36 and accompanying text.

38. Cf. THE FEDERALIST NO. 51, at 291 (James Madison) (Clinton Rossiter ed., 1961) (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence, a double security arises to the rights of the people.”).

Fifth, and relatedly, the challenges facing Black-Box Immigration Federalism do not reduce to generalized debates over formalism versus functionalism.<sup>39</sup> It almost goes without saying that constitutional formalists will reject Black-Box Immigration Federalism because it blurs institutional powers and functions. But, as I suggest below, more forgiving functionalists might also blink. Most functionalists, for example, accept sweeping delegations of power along the separation-of-powers dimension, and yet may be skeptical of power aggrandizement or the absence of sufficient checks on federal power.<sup>40</sup> Meanwhile, for issues of federalism, most functionalists have little concern for state sovereignty *per se*.<sup>41</sup> Still, however, functionalists may worry about doctrines and arrangements that pay insufficient heed to the instrumental values of federalism.<sup>42</sup> Those well-known values include, but are not limited to, checks on and competition with the federal government, regulatory innovation, and staging grounds for participatory government and national dialogue.<sup>43</sup> If functionalism has limits, then Black-Box Immigration Federalism tests them. As I will explain, this construct promotes concentrations of largely unchecked federal power, which may upset separation of powers, federalism, or both simultaneously. Thus, to shrug off

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39. The literature on this debate is legion. For a good start, see, for example, Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 8–9 (1994) (“[F]ormalism in the separation of powers context involves the application of more or less rigid rules, rather than flexible standards, to legal problems.”); Thomas W. Merrill, *The Constitutional Principle of Separation Powers*, 1991 SUP. CT. REV. 225, 231 (“Where [formalists and functionalists] disagree is over what sorts of deviations are permitted from the one function-one branch equation.”); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488–89, 517 (1987).

40. See Strauss, *supra* note 39, at 489, 517 (describing the functional approach as stressing the “core function and relationship” of the three branches of government, and suggesting that questions of aggrandizement might be treated differently than questions of delegation). That the nondelegation doctrine is notoriously underenforced is a familiar point made by many. See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 517 (2003).

41. See, e.g., Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1499 (1994) (“[J]ust because it’s no longer possible to maintain a *fixed* domain of exclusive state jurisdiction it’s not necessarily impossible to maintain a *fluid* one.”).

42. Federalism-functionalists frame questions around how power *should* be allocated between the federal and state governments and ask whether centralization or decentralization is best for public outcomes. See, e.g., Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 539 (1995) (“[F]ederalism can be reconceived not as about limiting federal power or even as about limiting state or local power. Rather, it should be seen as based on the desirability of empowering multiple levels of government to deal with social problems.”).

43. See *Gregory v. Ashcroft*, 501 U.S. 452, 457–59 (1991); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 53–63 (2004). But see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 907–08 (1994) (“[F]ederalism in America achieves none of the beneficial goals that the Court claims for it.”). For functional accounts of immigration federalism that recognize these and other values, see Huntington, *supra* note 17. See also Rodríguez, *supra* note 32; Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57; Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997).

the discussion below as a formalist critique would miss the point—or, at least it would miss mine.

Finally, before plunging into the merits, it bears emphasizing what has already been accomplished: the black box has been opened. This Part considers the first four propositions of Black-Box Immigration Federalism, which are mostly structural. Part III considers the fifth proposition, which more explicitly folds in constitutional rights.

#### A. *Black Box—Proposition 1*

Black-Box Immigration Federalism's first proposition is that the federal government is free to "choose" its lawmaking modes.<sup>44</sup> That is partly true, but only at a level of generality that elides important details about our structural Constitution. Under modern conceptions, each branch of the federal government may have the capacity to make law. Critically, however, *how* each branch does so remains circumscribed by a body of procedural law spelled out in the Constitution and, as relevant here, under the Administrative Procedure Act (APA).<sup>45</sup>

These procedural limitations are foundational to both separation of powers and federalism. For instance, Article I, Section 7 of the Constitution prescribes how Congress makes law.<sup>46</sup> Meanwhile, the executive branch generally can make law only pursuant to a valid congressional delegation, and must otherwise comply with legislatively imposed procedural requirements.<sup>47</sup> In turn, federal law made in violation of these substantive and procedural limitations cannot, a priori, preempt state law. The Supremacy Clause says so: only "Laws . . . made *in Pursuance* [of the Constitution] . . . shall be the supreme Law of the Land."<sup>48</sup> If Congress or the executive branch

44. See *supra* note 26 and accompanying text.

45. See 5 U.S.C. §§ 551–559 (2012).

46. U.S. CONST. art. I, § 7; see also *INS v. Chadha*, 462 U.S. 919, 951 (1983) ("[T]he prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.").

47. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–89 (1952) (holding that the president has no inherent domestic lawmaking authority); see also 5 U.S.C. §§ 551–59 (providing, among other things, elaborate procedural scheme for administrative rulemaking and adjudication).

48. U.S. CONST. art. VI, cl. 2 (emphasis added). The "in Pursuance" term is generally understood to mean that preemptive laws must be made in the manner prescribed by the Constitution. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 9–11 (2d ed., Yale Univ. Press 1986) (1962). Cases from the early republic also suggest that "in Pursuance" entails a substantive component that requires federal statutes be consistent with Congress's powers. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (asserting that the "made in [p]ursuance" language excludes from supremacy acts of Congress that the Supreme Court deems unconstitutional). But I am aware of no judicially backed conception—then or now—that interprets "in Pursuance" to entail a substantive requirement to the exclusion of a procedural one.

makes law in a way that violates procedural or substantive limits, that law cannot preempt state law.<sup>49</sup>

Further, how federal law is made has constitutional significance for states and localities affected by that law. Administrative officials—unlike members of Congress—are not politically beholden to states.<sup>50</sup> And, even when executive agencies make law, how they do so greatly affects the level of access and potential influence that states and localities may have on the outcome.<sup>51</sup> All else equal, the APA’s notice-and-comment procedures provide more of those participatory goods, as compared to when agencies forgo those procedures.

Of course, Motomura knows these distinctions. But they are mostly irrelevant or outweighed by other considerations. Motomura’s reasons may trace to his descriptive claims, in Chapters One and Three, that our dysfunctional immigration system is a product of national design and acquiescence. From that starting position, perhaps the federal government should be able to choose its lawmaking mode—either to correct or continue past practices. If that is the theory, however, then proposition 1 reflects or projects immigration-specific norms. But it stands apart from mainstream tenets of federalism *and* separation of powers. And, as I show below, these departures magnify when refracted through propositions 2 through 4.

### B. *Black Box—Proposition 2*

Under Black-Box Immigration Federalism’s second proposition, non-binding executive policies qualify as federal law, at least for purposes of preemption.<sup>52</sup> This proposition may collapse on itself, inasmuch as it turns

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49. See *Free v. Bland*, 369 U.S. 663, 666 (1962) (“The relative importance to the State of its own law is not material when there is a conflict with a *valid* federal law, for the Framers of our Constitution provided that the federal law must prevail.” (emphasis added)). And so the question of validity must be answered in a preemption contest. See *generally* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (explaining that a valid federal law can preempt a state law).

50. Agencies are politically accountable—at most, and generally only in theory—through the President. See, e.g., *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is . . .”). *But cf.* Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 *CONN. L. REV.* 779, 803 (2010) (questioning the extent to which agencies are actually held accountable). In any event, the President’s constituency is national (not regional) in scope.

51. See David S. Rubenstein, *Administrative Federalism as Separation of Powers*, 72 *WASH. & LEE L. REV.* 171, 229–30 (2015); Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 *VA. L. REV.* 953, 970–79 (2014); see also Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 *AM. U. L. REV.* 1183, 1227–37 (2015) (arguing that the deliberation behind DAPA would have benefited from notice-and-comment procedures); Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 *DUKE L.J.* 2125, 2129 (2009) (arguing that increased state involvement in agency regulation *supra* could affect preemption rulemakings).

52. See sources cited *supra* note 27.

*nonbinding* federal action into *law*. Granted, law is a capacious jurisprudential term.<sup>53</sup> But any theory that operationalizes nonlaw into law must explain away the lawmaking procedures, divisions of power, and checks-and-balances prescribed in the Constitution.

Moreover, proposition 2's conversion of nonbinding federal action into binding law invites the type of agency gamesmanship that administrative law generally disfavors.<sup>54</sup> Specifically, if agencies could have their policies treated as binding law without the hassle and delay of notice-and-comment procedures, the incentive structure for agencies to select that form of policymaking may be seriously compromised.<sup>55</sup>

Proposition 2 also raises fundamental questions about scope. Motomura lays no outer bounds on what qualifies as "federal law" within the exceedingly vast domain of nonbinding agency action. We are only told that federal enforcement policies should be included. Still, even that is an unwieldy domain. On Motomura's account, a memorandum from the Department of Homeland Security (DHS) secretary clearly qualifies as federal law. So would a memorandum from non-cabinet-level agency heads such as the director of Immigration and Customs Enforcement. For example, the enforcement memoranda in effect during the *Arizona v. United States* litigation were signed by non-cabinet-level agency heads and were *self-referentially non-binding* against the agency.<sup>56</sup> And yet, it was these same memoranda that

53. See John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 223–24 (2001) (canvassing some of the literature on the age-old question—"What is law?").

54. On agency gamesmanship, see Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 390, who notes that "an agency might manipulate its description [of whether a rule is legislative or not] in order to avoid pre-enforcement judicial review, keep a low profile, or circumvent cumbersome notice and comment requirements, while achieving the desired change in staff and private party behavior" (footnotes omitted); see also David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 280 (2010) ("[A]gencies cannot have their cake and eat it too by sidestepping expensive public input at the promulgation stage while also counting on lenient substantive review from courts at the enforcement stage.").

55. See Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565–66, 592–93 (2012) (explaining that the USCIS prefers to avoid notice-and-comment procedures and instead uses guidance documents for immigration policies); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547, 553–55 (2000) ("[T]he agency has an incentive to mischaracterize a legislative rule as interpretative to circumvent the APA rulemaking procedure."); cf. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203–04 (2015) (noting that interpretive rules that forgo notice-and-comment are convenient for agencies but lack the force of law).

56. See, e.g., Memorandum from John Morton, Dir., U.S. Immigration & Customs Enft, to All Field Office Dirs. et al., *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 6* (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<http://perma.cc/WPZ8-EC94>] ("[T]his memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.").

ostensibly had preemptive bearing on at least one, and maybe two, of the state laws at issue in *Arizona*.<sup>57</sup>

Under Motomura's account, even a non-cabinet-level policy directive that is *routinely disregarded* by rank-and-file federal officers can have preemptive effect. This requires some piecing together. In 2012, Secretary of Homeland Security Janet Napolitano issued the Deferred Action for Childhood Arrivals (DACA) memorandum, which, among other things, reified pre-existing enforcement policies that deprioritized the removal of young undocumented immigrants.<sup>58</sup> The secretary's memorandum was publicly backed by President Obama, and some say necessary, because rank-and-file federal agents were neglecting (often purposefully, and chronically) the pre-existing directives of non-cabinet-level supervisors.<sup>59</sup> If that is so, however, then the enforcement memoranda in effect during the *Arizona* litigation were neither Congress's law on the books *nor the law in action*.<sup>60</sup> Still, Motomura's view is that macro-level executive policies honored in the breach have preemptive effect.

Motomura's elastic conception of federal law may make sense for immigration; indeed, many immigration scholars seem to share this view, at least as pertains to striking down restrictionist state and local laws. But, again, this conception arguably departs from mainstream constitutional and administrative law norms. To my mind, that raises important questions about whether this particular departure is warranted in general, and whether Motomura and others would still support this conception if operationalized to preempt state and local integrationist laws.

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57. See Rubenstein, *supra* note 32, at 112–14 (discussing the role that enforcement discretion played, and did not play, in the government's briefing and the Court's preemption analysis). For another perspective on how executive enforcement policies were treated in *Arizona*, and what the Court's decision may portend, see Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31. To be sure, the noncabinet memoranda at issue may have been made in consultation with or instigated by the secretary of Homeland Security and with the President's approval. But that does not seem to be a precondition for Motomura. In any event, as the Court held in *Medellin v. Texas*, even a memorandum signed by the President is not a sufficient basis alone to preempt state law. 552 U.S. 491, 530–32 (2008).

58. See Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot. et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 2 (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/P39C-V6EL>] [hereinafter DACA Memo].

59. Pp. 204–05 (“[The memos that pre-dated DACA] failed to have much consistent and uniform influence on enforcement activities in the field . . . [as] rank-and-file ICE officers resisted implementation of the . . . memos, and members of their union adopted a vote of non-confidence in ICE director John Morton and one of his chief deputies.”); see also Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 187–90 (2015) (elaborating that ICE director Morton's memos had no significant impact on agents' prosecutorial discretion to arrest immigrants).

60. The DACA Memo, *supra* note 58, was issued after oral argument and while the Court's decision in *Arizona* was pending.

### C. *Black Box—Proposition 3*

Under Black-Box Immigration Federalism’s third proposition, federal law in action would take presumptive (but defeasible) precedence over Congress’s laws, at least for purposes of preemption (pp. 121, 123–24). This is an extension of proposition 2, although not a necessary one. Whereas proposition 2 treats nonbinding executive policies as federal law, proposition 3 mediates potential conflicts between Congress and the executive branch when questions arise over what the federal law *is*. Motomura allows for a congressional override of executive policy, thus recognizing Congress’s formal power vis-à-vis the executive (p. 151). Critically, however, proposition 3 places the political burden on Congress to overcome executive policies. Thus, as a practical matter, unless Congress clearly precludes or overrides executive enforcement policies, the executive policies are good law. Any doubts about executive authorization—as is the case, for example, with programs like DACA and Deferred Action for Parents of Americans (DAPA)<sup>61</sup>—are resolved in favor of the executive for federalism purposes, if not also for separation of powers.<sup>62</sup>

This move arguably inverts the conventional lawmaking relationship between Congress and the executive. For constitutional purposes, and with few exceptions, Congress’s laws reign supreme over administrative policies in domestic affairs,<sup>63</sup> including in immigration.<sup>64</sup> Under proposition 3, however, Congress must effectively veto the President, rather than the other way around. Needless to say, in a political climate where passing any law is exceedingly difficult, shifting the political burden can be dispositive, especially when conjoined with the President’s formal veto power. DACA and DAPA

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61. See Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs. et al., *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* (Nov. 20, 2014) [hereinafter DAPA Memo], [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<http://perma.cc/9N36-2NBX>].

62. Cf. Hiroshi Motomura, *The President’s Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1 (2016) (defending DAPA and DACA on rule-of-law grounds, apart from the preemption context).

63. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952) (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”); see also *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) (“The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law’s administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice.”).

64. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 476–78 (2009) (noting the Court’s “evolution toward more mainstream conceptions” of the lawmaking relationship between Congress and the President in immigration beginning in the latter half of the twentieth century).



are cases in point. Some defenders of these programs claim that the President is not substituting for Congress, or aggrandizing the legislative function, because Congress can override these executive actions.<sup>65</sup> While this line of defense is formally true, it is functionally false: any attempted statutory override will face an executive veto. Indeed, President Obama has already said so.<sup>66</sup>

Again, perhaps proposition 3 may be defended on immigration-specific grounds and rooted in Motomura's descriptive claim that Congress (or the nation more generally) does not intend for the executive's zealous enforcement of the immigration law on the books.<sup>67</sup> Still, however, the question remains: How much *constitutional* significance should we lend this *descriptive* account? If the wink-and-nod lawmaking pathology that Motomura describes is desirable, then perhaps the Constitution should bend to accommodate those dynamics. But Motomura surely does not condone the lawmaking pathology he describes, inasmuch as it enables arbitrary government action and threatens the rule of law.<sup>68</sup>

Alternatively, if proposition 3 is doctrinally meant to compensate for federal wink-and-nod lawmaking, we should not lose sight of the ways the system might further recede. More specifically, if Congress already passes restrictionist laws with the expectation of executive underenforcement, then proposition 3 might exacerbate this moral hazard. That is, Congress may pass even more restrictive immigration laws, hoping or anticipating—but by no means guaranteeing—that the executive will modulate any excesses. Ironically, if not counterproductively, proposition 3 would simply give more discretionary power and scope to the executive branch, while making it harder for Congress and the courts to curb any abuses. Of course, we can envision a dutiful executive branch channeling its newfound power for “good.” But, critically, nothing in proposition 3 defines good, much less ensures it.

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65. See, e.g., President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/MCK9-LHJQ>] (“And to those members of Congress who question my authority to make our immigration system work better, or question the wisdom of me acting where Congress has failed, I have one answer: Pass a bill. I want to work with both parties to pass a more permanent legislative solution. And the day I sign that bill into law, the actions I take will no longer be necessary.”).

66. See President Barack Obama, Remarks by the President in State of the Union Address (Jan. 20, 2015), <http://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015> [<http://perma.cc/YS26-53QY>]; see also Elise Foley, *House GOP Votes to Block Protections for Undocumented Immigrants*, HUFFINGTON POST (Jan. 15, 2015, 12:59 AM), [http://www.huffingtonpost.com/2015/01/14/house-republicans-dhs-immigration\\_n\\_6470288.html](http://www.huffingtonpost.com/2015/01/14/house-republicans-dhs-immigration_n_6470288.html) [<http://perma.cc/837U-EBLR>] (reporting that the White House “issued a formal veto threat [against] . . . anything that goes against [its] executive actions on immigration”).

67. This descriptive claim has important parallels to what Adam Cox and Cristina Rodríguez describe as “de facto delegation.” See Cox & Rodríguez, *supra* note 64, at 510–11 (“[D]e facto delegation is driven by legal rules that make a huge fraction of resident noncitizens deportable at the option of the executive.”). For an updated account of their views, see Cox & Rodríguez, *supra* note 59.

68. See pp. 186, 204–06.

Finally, even assuming *arguendo* that the executive branch has wide berth to make immigration policy, that does not independently resolve the federalism question of whether the law in action (as opposed to the law on the books) may have preemptive effect. Congress may be deemed to constructively consent to executive branch enforcement policies. Still, whether and how those separation-of-powers dynamics should be imposed on non-consenting states is an entirely different question, to which I now turn.

#### D. *Black Box—Proposition 4*

Under Black-Box Immigration Federalism’s fourth proposition, executive enforcement policies that are not binding for purposes of separation-of-powers and individual-rights claims can nevertheless be binding on states and localities.<sup>69</sup> To help isolate this move from the others, assume propositions 1 through 3. Specifically, assume that the federal government is free to choose its mode of immigration regulation; assume that nonbinding federal policies can qualify as law; and assume that absent a clear conflict between the law on the books and executive enforcement policies, the latter controls. Still missing, however, is the conceptually distinct move that would impose these *federal* dynamics on nonconsenting *states*. It is in this transition that any missteps and close calls over separation of powers get effectively laundered across the structural divide into federalism.

To begin, proposition 4 may run headlong into a constitutional paradox.<sup>70</sup> More specifically, if executive enforcement policies qualify as “law,” then those policies arguably violate separation of powers (and, for that reason, are ineligible to preempt state law).<sup>71</sup> Meanwhile, if executive action does not qualify as “law” (thus avoiding a separation-of-powers problem), then the action arguably falls beyond the Supremacy Clause’s purview of “Laws made in Pursuance [of the Constitution].”<sup>72</sup> Proposition 4, however, requires that executive action qualify *as law* for purposes of federalism, yet simultaneously qualify as *not law* for separation of powers.

Moreover, proposition 4 elides distinctions between choice-of-law rules that apply to federalism and separation of powers. Justice Jackson’s famous concurrence in *Youngstown*, for example, provides a leading test for resolving potential conflicts between congressional and presidential power.<sup>73</sup> But,

69. See pp. 123, 126.

70. For more on this paradox, see Rubenstein, *supra* note 12 (framing the paradox and assessing it through textual, structural, historical, doctrinal and pragmatic lenses).

71. See U.S. CONST. art. I, § 1 (vesting “All legislative Powers” in Congress); *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 n.4 (2013) (“Agencies make rules . . . [that] take ‘legislative’ . . . forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the ‘executive Power.’” (quoting U.S. CONST. art. II, § 1, cl. 1)); *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (“[Article I] permits no delegation of [legislative] powers . . .”).

72. U.S. CONST. art. VI, cl. 2.

73. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (Jackson, J., concurring). For accounts of whether DAPA and DACA violate separation of powers under *Youngstown*’s three-tiered analysis, compare Lauren Gilbert, *Obama’s Ruby Slippers: Enforcement Discretion*

whatever indeterminacy inheres along the separation-of-powers dimension, federalism has its own choice-of-law rule. It is enshrined in the Supremacy Clause, and provides in relevant part: “This [1] Constitution, and [2] the Laws of the United States which shall be made in Pursuance thereof; and [3] all Treaties made . . . shall be the supreme Law of the Land . . . .”<sup>74</sup>

Notice what the Supremacy Clause does not provide: it does not say that “federal law” is the supreme law of the land. Rather, by design, the Supremacy Clause provides that certain federal laws—the Constitution, “Laws . . . made in Pursuance” of the Constitution, and treaties—are supreme over state law.<sup>75</sup> I have written at length elsewhere about the import of this qualifying language for both federalism and separation of powers.<sup>76</sup> For present purposes, however, my point is more confined: the Supremacy Clause makes the quality and type of federal law centrally relevant to federalism, even if these features of federal law are not relevant to separation of powers.

Put otherwise, even if the law in action functionally trumps the law on the books for purposes of separation of powers, something more is required to impose that arrangement on states and local governments. Proposition 4 siphons federal law (broadly conceived) into the states without taking cognizance of the move itself, much less its constitutional significance. The so-called “political safeguards of federalism,”<sup>77</sup> for example, rely heavily on states’ ability to protect their interests in *Congress*, both substantively and

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*in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 279 (2013), which notes that “DACA . . . falls within Justice Jackson’s twilight zone, which allows the President to act in cases of ‘congressional inertia, indifference, or quiescence,’ particularly where Congress and the executive enjoy concurrent authority,” (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring))), with Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 267 (2015), which observes that “DAPA is a perfect storm of executive lawmaking, descending to the lowest depths of *Youngstown*, beyond the ‘zone of twilight,’ and even below the ‘lowest ebb,’ ” and Margulies, *supra* note 51, at 1252–55 who argues that DAPA falls into *Youngstown*’s third-tier, and is unconstitutional.

74. U.S. CONST. art. VI, cl. 2; see also Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2088 (2000) (describing the Supremacy Clause as a “constitutional choice of law rule”).

75. See Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1422–23 (2008); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1328–72 (2001); Michael D. Ramsey, *The Supremacy Clause, Original Meaning, and Modern Law*, 74 OHIO ST. L.J. 559, 575–78 (2013). The import of this constitutional text, however, is subject to debate, including with respect to administrative preemption in particular. See Rubenstein, *supra* note 12, at 276–97 (canvassing the literature and doctrine).

76. See David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125 (2012); Rubenstein, *supra* note 12.

77. See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

procedurally.<sup>78</sup> Legislative gridlock is a feature of that political representation, especially as it relates to subjects as hotly contested as immigration, on which there is no national consensus.<sup>79</sup> These political and procedural safeguards, however, have little or no traction in the administrative forum.

To be sure, other safeguards may be administratively available. Some commentators believe, for example, that administrative notice-and-comment procedures provide a sufficient (even if not optimal) proxy for the political and procedural safeguards of federalism in Congress.<sup>80</sup> But, critically, these administrative safeguards are neutered when agencies bypass notice-and-comment procedures. Indeed, for that reason, most commentators who have addressed the issue suggest that agency policies must first undergo notice and comment, or otherwise have the “force of law,” before these policies may have preemptive effect.<sup>81</sup> Executive enforcement policies, in the form of nonenforcement or memoranda directives, are simply not of that class. Indisputably, enforcement policies are a necessary component of federal immigration regulation. But that is a reason for the executive to *have* enforcement policies, not a stand-alone reason why states and localities must be *bound* by those policies.<sup>82</sup>

Again, the concerns are not only, or even mostly, formalistic. On functional grounds, notice-and-comment rulemaking generally offers greater accountability, deliberation, and congressional and judicial oversight of

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78. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547–56 (1985) (citing Wechsler, *supra* note 77); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001); see also Rubenstein, *supra* note 12, at 315–18 (arguing that the Court’s political-safeguards theory is a type of “super-dicta” on which the legitimacy of the Court’s modern federalism jurisprudence depends).

79. If anything, the state consensus may run against the executive’s enforcement policy, given that more than half of states sued to enjoin the executive’s DAPA program. See *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *cert. granted*, 2016 WL 207257, (U.S. Jan. 19, 2016) (No. 15-674).

80. See, e.g., Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 2010–12 (2008); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008); Sharkey, *supra* note 51, at 2127–28 (claiming that “federal agencies . . . surprisingly emerge as the best possible protectors of state regulatory interests” and suggesting that agencies be “reform[ed] . . . to ensure they can become a rich forum for participation by state governmental entities”).

81. See Galle & Seidenfeld, *supra* note 80, at 2010–12; Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 73–94 (2008); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 761–65 (2008); Rubenstein, *supra* note 32, at 129–30; Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 897–900 (2008). *But cf.* *Altria Grp., Inc. v. Good*, 555 U.S. 70, 91 (2008) (expressly leaving open the question of whether an agency’s policy without the force of law can have preemptive effect); Kim, *supra* note 11, at 719–32 (arguing that under certain circumstances nonbinding immigration enforcement policies should have preemptive effect); *supra* note 12 and accompanying text (noting that the Court’s *Arizona* decision sent mixed signals on this issue).

82. *But cf.* *Arizona v. United States*, 132 S. Ct. 2492 (2012) (blurring past this distinction).

administrative action.<sup>83</sup> These instrumental values may not be sufficient for federalism formalists. But, for formalists and functionalists alike, these values may be necessary to impose the executive's will on nonconsenting states and localities. Of course, the executive branch may choose to be relatively transparent about its enforcement policies, as it has with the DACA and DAPA programs. But proposition 4 does not draw distinctions (though, perhaps it should) between executive policies that are announced in the Rose Garden and those that are not.

Finally, proposition 4 misses a functional possibility: preemption doctrine might be leveraged to check—rather than channel—any separation-of-powers slippage and dysfunctional federal lawmaking. After all, overlapping safeguards of liberty is a key design feature of the Constitution.<sup>84</sup> If one safeguard fails (say, along the separation-of-powers dimension), another may yet survive (say, along the federalism dimension). Again, this claim does not insist on any particular theory of separation of powers or federalism, much less a formalistic one.<sup>85</sup> My point is only that relaxing separation of powers, as propositions 1 through 3 contemplate, is not a reason to relax federalism.

Indeed, a good case can be made for the opposite. More specifically, we might insist on the power-checking functions of federalism to compensate for dubious lawmaking pathologies or errant federal policies. As I have explained in more detail elsewhere, foreclosing the preemptive effect of non-binding executive policies can, cross-structurally, nudge the political process toward transparency, deliberation, stability, and other values along the separation-of-powers dimension.<sup>86</sup> Incidentally, these are the same values that

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83. See Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 406–07 (2006) (discussing transparency and deliberation as factors that increase agency accountability); Metzger, *supra* note 80, at 2087 (“[B]y forcing an agency to provide notice of actions it plans to take, procedural requirements empower congressional oversight and thus reinforce such political safeguards as Congress has to offer”); Mark Seidenfeld, *Who Decides Who Decides: Federal Regulatory Preemption of State Tort Law*, 65 N.Y.U. ANN. SURV. AM. L. 611, 647 (2010) (noting that notice and comment permits interested parties to inform Congress if the rulemaking proceedings conflict with their interests).

84. See, e.g., THE FEDERALIST NO. 51, at 291 (James Madison) (Clinton Rossiter ed., 1961) (explaining how separation of federal power, on the one hand, and separation of federal and state power, on the other, could offer a “double security” of liberty).

85. See Rubenstein, *supra* note 51, at 179–208 (surveying “structural pluralism,” which contains myriad theories of “separation(s) of powers” and “federalism(s),” and no clear winners among them).

86. Some of the discussion that follows draws from my earlier work. See Rubenstein, *supra* note 32; Rubenstein, *supra* note 51. For treatments of how federalism can safeguard separation of powers in other contexts, see Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 503 (2012) which explores this idea for cooperative federalism schemes, and Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL’Y 181, 185–86 (1998), which does the same. See also Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 829–30 (2004) (exploring this idea for foreign affairs federalism).

Motomura prizes, albeit under a rule-of-law heading, in support of categorical grants of legal reprieve to undocumented immigrants.<sup>87</sup> My functional suggestion is complementary, but would advance these separation-of-powers (or rule-of-law) values differently, and arguably better, at least when the executive branch prefers a uniform policy shielded from a patchwork of sub-federal resistance. Recall that under proposition 4, an executive official can write a memorandum to preempt subfederal resistance to federal enforcement policies.<sup>88</sup> Yet if proposition 4 is foreclosed, as I suggest, the executive branch would either have to achieve the same preemptive policy through Congress or via notice-and-comment procedures. Either of these lawmaking alternatives would provide more deliberation, more transparency, and more stability than if an executive official can sign a memorandum, shut down state resistance though preemption along federalism dimensions,<sup>89</sup> and then seek to dismiss any separation-of-powers challenges on the ground that no one has standing to bring them.<sup>90</sup>

Before proceeding, let me be clear about my claims. I am not claiming that categorical programs like DACA and DAPA are bad policy. And I agree with Motomura that *relative to* a system of case-by-case, ad hoc, executive decisionmaking, categorical exercises of prosecutorial discretion can offer greater doses of transparency, deliberation, and stability.<sup>91</sup> My point, however, is that we might do better: scrapping proposition 4 from the playbook could nudge the executive branch to notice-and-comment rulemaking or legislative solutions, in contexts—like DACA and DAPA—when the executive wants uniform federal policies free from subfederal interference.

In sum, even assuming that “the federal choice of one kind of decision-making process over another is part of *federal authority* over immigration” (p. 123; emphasis added), the policy emerging from that procedural choice need not have *preemptive effect*.<sup>92</sup> A valid congressional statute clearly has preemptive effect. So too would an administrative regulation promulgated

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87. See p. 207.

88. See pp. 123, 126; see also *supra* notes 56–57 and accompanying text.

89. Cf. United States’ Brief as Amicus Curiae in Opposition to Rehearing En Banc at 8, *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) (No. 13-16248) (arguing that Arizona’s denial of driver’s licenses to DACA recipients is preempted by federal enforcement authority).

90. Cf. Brief for the Federal Appellees at 21–22, *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (arguing that states lack standing to challenge DAPA program), *cert. granted*, 2016 WL 207257, (U.S. Jan. 19, 2016) (No. 15-674); Brief of Professor Ernest A. Young as Amicus Curiae in Support of Appellees at 23, *Texas v. United States*, 809 F.3d 134 (“The United States’ position in this case is not an attempt to identify the best possible plaintiff to challenge the DAPA, but rather to ensure that *no* litigant may challenge the President’s unilateral assertion of power.”).

91. See pp. 204–05.

92. Cf. Rubenstein, *supra* note 12, at 321 (“If there is a reason for the conceptual leap from delegation to preemption, it does not come from the *nondelegation* doctrine. Indeed, if anything, preemption would seem repelled by that doctrine’s core principle—namely, that Congress cannot lawfully delegate its lawmaking power.”).

pursuant to notice-and-comment procedures.<sup>93</sup> In both events, the federal policy has the force of law upon inception and is thus binding on states and localities regardless of their consent. Nonbinding executive enforcement policies are an entirely different breed.

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As the foregoing hopes to lay bare, Black-Box Immigration Federalism's simple preemption formula is not so simple. It may be true, or perhaps it should be true, that "federal law" preempts conflicting state and local law (p. 7). But the devil is in the details. Black-Box Immigration Federalism elides those details—such as what qualifies as federal law, who makes it, and how. Moreover, Black-Box Immigration Federalism embeds a number of normative choices that may, on balance, prove dangerous. Among other concerns, this exceptional constitutional construct permits the executive branch to functionally relax Congress's laws and to formally trump subfederal jurisdictions. That consolidation of executive power may be efficient and convenient. Yet it arguably does so in ways that the Constitution does not, and should not, countenance.

#### E. *The Problem of Preemption Symmetry*

I now turn to an additional problem that Black-Box Immigration Federalism poses for immigrant advocates: preemption symmetry. The more capaciously "federal law" is defined, the more possible it becomes that subfederal restrictionist *and* integrationist measures can be preempted. Most notably, the executive branch can adopt or promote *federal restrictionist* policies that preempt *subfederal integrationist* policies.<sup>94</sup> This is no chimerical prospect. Even the current administration, which has been quite generous to certain immigrants,<sup>95</sup> has demonstrated its propensity not to be. Apart from

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93. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (holding that an agency regulation preempted a state tort law claim); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 675 (1993) (same).

94. Of course, downward preemption symmetry is not a problem if the intention is to shut down restrictionist *and* integrationist measures. But Motomura is refreshingly candid about his integrationist-only preference. See, e.g., pp. 152–53, 163–64. Indeed, the arc of his book arguably depends on it.

95. DACA and DAPA, combined, potentially reach about 50 percent of our estimated 11.4 million undocumented population. Press Release, Migration Policy Inst., As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation Under Anticipated New Deferred Action Program (Nov. 19, 2014), <http://www.migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new> [<http://perma.cc/7UUK-FHYN>] (“[T]he anticipated new deferred action program and expanded DACA initiative could benefit as many as 5.2 million people—nearly half of the 11.4 million unauthorized immigrants living in the United States.”); see also Simpson & Morrison, *supra* note 2 (noting that almost 5 million unauthorized immigrants might be eligible for relief under President Obama's executive orders).

removing exponentially more immigrants than any preceding one,<sup>96</sup> the Obama administration's unilateral expansion of Secure Communities effectively mooted state and local non-cooperation laws.<sup>97</sup> Moreover, when Illinois tried to limit the use of the federal E-Verify system to check employment authorization, the Obama administration took the extraordinary step of suing, successfully it turns out, to preempt that state law.<sup>98</sup> And, when the California Supreme Court was considering whether to admit an undocumented immigrant to the state bar, the Obama administration filed an amicus brief arguing that the state court had no power to do so.<sup>99</sup>

Consider what a less immigrant-friendly administration might accomplish, enabled and encouraged by Black-Box Immigration Federalism. Trending integrationist measures like California's TRUST Act, subfederal sanctuary laws throughout the country, and New York's contemplated state-citizenship bill, may become targets of federal preemption.<sup>100</sup> I take no position here on whether these and other integrationist initiatives can survive preemption challenges under existing federal statutes and mainstream federalism doctrines. For present purposes, the point for consideration is that Black-Box Immigration Federalism opens a new legal front: preemption by executive fiat. Certainly, there is no shortage of legal or political reasons that a sufficiently motivated executive might offer to preempt integrationist laws. Just to name a few, administrators might claim that subfederal integration programs interfere with a federal statute, interfere with (new) enforcement

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96. *Barack Obama, Deporter-in-Chief*, THE ECONOMIST (Feb. 8, 2014), <http://www.economist.com/news/leaders/21595902-expelling-record-numbers-immigrants-costly-way-make-america-less-dynamic-barack-obama> [<http://perma.cc/R3AF-BC9Y>] (“America is expelling illegal immigrants at nine times the rate of 20 years ago[,] nearly 2 [million] so far under Barack Obama, easily outpacing any previous president.” (citation omitted)). *Contra Texas v. United States*, 809 F.3d 109 n.118 (5th Cir. 2015) (suggesting that the comparative statistics can be misleading and that when “returns” are accounted for in addition to “removals,” the “total number of deportations is at its lowest level since the mid-1970’s [sic] (citing U.S. DEP’T OF HOMELAND SEC., 2013 YEARBOOK OF IMMIGRATION STATISTICS 103 tbl.39 (2014), [http://www.dhs.gov/sites/default/files/publications/ois\\_yb\\_2013\\_0.pdf](http://www.dhs.gov/sites/default/files/publications/ois_yb_2013_0.pdf))), *cert. granted*, 2016 WL 207257, (U.S. Jan. 19, 2016) (No. 15-674).

97. See *Cox & Rodríguez*, *supra* note 59, at 137 (“Secure Communities promised to displace the unpredictable human element of formal and informal cooperation with local police.”). *But cf. Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014) (holding that federal detainer requests directed at state and local officials to maintain custody over potentially deportable immigrants must be construed, and treated by subfederal officials, as a non-mandatory request).

98. See *United States v. Illinois*, No. 07-3261, 2009 WL 662703 (C.D. Ill. Mar. 12, 2009).

99. See Application and Proposed Brief for Amicus Curiae the United States of America, *In re Garcia*, 315 P.3d 117 (2014) (No. S202512), 2012 WL 3822246.

100. Cf. Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247 (2012) (discussing subfederal sanctuary laws and defending them on normative and constitutional grounds); Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869 (2015) (same for New York’s contemplated state citizenship law); Rosenbaum, *supra* note 11 (same for California TRUST Act).



priorities, unduly incentivize unlawful migration to the country, and/or reduce incentives for undocumented immigrants to voluntarily depart.

Thus far, what has saved some integrationist measures from challenge is the absence of a plaintiff with standing to sue.<sup>101</sup> That jurisprudential bar, however, would not prevent the federal government from suing (as it did in Illinois to preempt an integrationist law), or enticing states and localities to forgo integrationist measures in exchange for federal funding or other forms of federal assistance. Of course, political forces might temper these possibilities. For example, politics might be a reason for the executive branch not to seek preemption of subfederal integrationist laws. But politics is not a limiting principle that immigrant advocates should rush to, especially if it is the only limiting principle. After all, politics has not prevented past administrations from taking hard-nosed (not to mention, rights-depriving) actions against undocumented immigrants.<sup>102</sup> Indeed, politics is often to blame for these incursions, and it will be the cause of future ones.

### III. BLACK BOX—PROPOSITION 5: DEALING WITH PREEMPTION SYMMETRY

As explained above, the more capaciously that “federal law” is defined, the more possible it becomes that state and local laws will preemptively conflict with the law on the books *or* the law in action. But a symmetrically robust preemption doctrine that treats restrictionist and integrationist laws with equal hostility presents a structural dilemma for Motomura: without Congress, and without state and local integration efforts, Motomura’s vision of undocumented immigrants as Americans in waiting cannot be realized. It is with this challenge in mind that Motomura suggests importing an equality norm into immigration preemption analysis.<sup>103</sup> I call this proposed doctrine “Equal Pro-Emption,” to capture its hybrid composition.

Under Equal Pro-Emption, courts would take an especially skeptical approach to restrictionist laws; and, because this doctrine would not apply to integrationist laws, it might help to ratchet Black-Box Immigration Federalism toward subfederal integration of undocumented immigrants. More specifically, under Motomura’s proposed Equal Pro-Emption doctrine, federal law would trump restrictionist laws unless the state or locality can demonstrate that its law does not purposefully discriminate and will not have a

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101. See, e.g., *Day v. Sebelius*, 376 F. Supp. 2d 1022, 1033–34 (D. Kan. 2005) (holding that plaintiffs lacked standing to challenge Kansas’s in-state tuition law for undocumented immigrants), *aff’d sub nom.* *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007).

102. See Johnson, *supra* note 11, at 635–36 (providing examples, “including ‘repatriation’ of persons of Mexican ancestry . . . during the Great Depression, deportations of communist party members during the McCarthy era, exploitation of Mexican workers through the Bracero Program, the mass arrests, detentions, and removals of Muslim and Arab noncitizens after the attacks on September 11, 2001, and the raids, detention, and removal of noncitizens in contemporary times”).

103. See pp. 134–35.

discriminatory effect (p.135). By design, this restructuring inverts the constitutional burden of proof: “plaintiffs would no longer need to prove that state and local governments intend to discriminate, as an equal protection challenge would require to succeed. Instead, preemption analysis would require state and local governments to allay concerns about allowing them to enforce immigration law” (p. 135).

With Motomura leading the charge, other prominent commentators have also ascribed to something like Equal Pro-Emption.<sup>104</sup> So, this is a vogue idea. As I will explain, however, Equal Pro-Emption is at best an underinclusive solution to the problem of preemption symmetry. And, absent judicial buy-in, it is no solution at all. Certainly, Motomura offers no shortage of reasons why the Supreme Court should adopt an Equal Pro-Emption doctrine. Foremost, he worries that state and local officials may enforce immigration laws in discriminatory ways that go undetected and difficult to prove under the Court’s equal protection jurisprudence.<sup>105</sup> Absent from Motomura’s account, however, is an assessment of whether the Court is likely to adopt an Equal Pro-Emption doctrine. I offer that skepticism here. Without Equal Pro-Emption, there is yet no alternative theory to save integrationist measures from the vortex of Black-Box Immigration Federalism. And, under that skeptical scenario, Black-Box Immigration Federalism might undermine the ends of wide-scale integration.

#### A. *Constitutional Hurdles*

As a constitutional matter, Equal Pro-Emption must overcome or side-step a trifecta of rights, federalism, and separation-of-powers jurisprudence of the Court’s own creation. First, Equal Pro-Emption circumvents the Court’s general requirement that plaintiffs demonstrate a discriminatory purpose, not merely a discriminatory impact, when challenging facially neutral laws under the Equal Protection Clause.<sup>106</sup> The Court deliberately designed the discriminatory-purpose standard to be difficult to meet.<sup>107</sup> Motomura acknowledges this, and explains that importing an equality norm into preemption analysis can turn “a losing equal protection . . . challenge” into “a winning preemption challenge” (p. 135). Indeed, avoiding the Court’s equal protection jurisprudence seems to be the sine qua non of Equal Pro-Emption.<sup>108</sup>

To take root, therefore, Equal Pro-Emption will require the Court either to jettison the discriminatory-purpose standard across the board or carve an

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104. See sources cited *supra* note 11.

105. See pp. 134–35.

106. See *Washington v. Davis*, 426 U.S. 229 (1976); see also Reva B. Siegel, *Equality Divided*, 127 HARV. L. REV. 1, 16–17 (2013).

107. See Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1847 (2012); Siegel, *supra* note 106, at 15–20.

108. See pp. 133–35.

exception for immigration federalism.<sup>109</sup> Neither scenario is likely under current conditions. To be sure, the Court's discriminatory-purpose requirement may be ill conceived, as any number of prominent theorists have long attested.<sup>110</sup> Moreover, there is no denying here that undocumented immigrants experience discriminatory impact.<sup>111</sup> The unfortunate reality, however, is that countless others in our society do too—in drug enforcement, death-penalty cases, and many other contexts. Yet the Court has shown no signs of retreating from its discriminatory-purpose standard, which makes it doubtful that the Court will give immigration enforcement special constitutional treatment in this regard.

The Court's discriminatory-purpose standard also has links to federalism, and for reasons that Equal Pro-Emption must also overcome. In the progenitor case of *Washington v. Davis*, the Court waxed profusely about institutional considerations, objecting to the far reaching consequences that a disparate-impact standard would have on a swath of state and local laws.<sup>112</sup> Equal Pro-Emption, if adopted, would effectively invert this judicial solicitude for representative government. Rather than give subfederal officials the benefit of the doubt, the Court would doctrinally presume that subfederal officials might violate constitutional rights, and thus deny these officials the opportunity to enforce the law. That judicial hubris is conceivable, but, again, unlikely from the sitting Court. If anything, the Court's recent jurisprudence—including on voting rights, the war on drugs, and immigration in particular—suggests that the Court is not willing to presume rights violations by state and local officials.<sup>113</sup> Closest to home on this point is the *Arizona* Court's denial of the federal government's facial preemption challenge

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109. In theory, Equal Pro-Emption might provide a third option, between the binary discriminatory purpose and discriminatory-impact standards. But, in practice, it is not clear what work the discriminatory purpose test would do if plaintiffs could simply have the government acts enjoined under Motomura's proposed Equal Pro-Emption standard.

110. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, in CRITICAL RACE THEORY 235, 237 (Kimberlé Crenshaw et al. eds., 1995); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1144–45 (1997); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 939 (1989). And, for critiques of the Court's equal protection jurisprudence as applied to aliens in particular, see Jason H. Lee, *Unlawful Status as a "Constitutional Irrelevancy": The Equal Protection Rights of Illegal Immigrants*, 39 GOLDEN GATE U. L. REV. 1 (2008), and Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425 (1995).

111. See generally Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 688–716 (2000) (documenting prevalent claims of racial profiling in immigration enforcement).

112. 426 U.S. 229, 245–48 (1976).

113. Cf. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (striking down the coverage formula of the Voting Rights Act of 1965); *Dorsey v. United States*, 132 S. Ct. 2321, 2344 (2012) (Scalia, J., dissenting) (“Although many observers viewed the 100-to-1 crack-to-powder ratio under the prior law as having a racially disparate impact, only *intentional* discrimination may violate the equal protection component of the Fifth Amendment’s Due Process Clause.” (citation omitted)); *Arizona v. United States*, 132 S. Ct. 2492, 2509–10 (2012) (declining to

to the state's "show-me-your-papers" law<sup>114</sup>—a law that requires state and local officers conducting stop, detention, or arrests to verify a person's immigration status with federal agents if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States."<sup>115</sup> In upholding that provision, the Court did not assume rights violations. In fact, it did just the opposite: it took a wait-and-see approach.<sup>116</sup>

Through a federalism lens, then, Equal Pro-Emption may be both over-inclusive and underinclusive. More specifically, it might be overinclusive insofar as it prophylactically preempts state and local officials who may not be discriminating in immigration enforcement. At the same time, Equal Pro-Emption would be underinclusive if other areas of law enforcement would still be subject to the disparate purpose test. Again, these observations do not render Equal Pro-Emption impossible, just doubtful under current conditions.

Lastly, if the theory behind Equal Pro-Emption is that Congress implicitly intends a disparate-impact standard in immigration, then the proposal must also contend with separation of powers.<sup>117</sup> As already noted, the Court has interpreted the Equal Protection Clause as requiring discriminatory purpose and pins the evidentiary burden on the claimant.<sup>118</sup> Congress has some leeway to prophylactically enforce the Fourteenth Amendment's substantive provisions, and in limited contexts has created liability schemes based on discriminatory impact alone.<sup>119</sup> But Congress does not have a roving license to do so.<sup>120</sup> As required by the Court, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted [by Congress] to that end."<sup>121</sup> Again, this is a demanding

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presume that Arizona law requiring state officers to attempt to verify an individual's immigration status would be interpreted by the state court in a way that would lead to constitutional violations against immigrants or people of color, more generally).

114. See *Arizona*, 132 S. Ct. at 2510.

115. *Id.* at 2507 (quoting ARIZ. REV. STAT. ANN. § 11-1051(B) (2012)).

116. *Id.* at 2510 ("At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume § 2(B) will be construed in a way that creates a conflict with federal law."); see also *id.* ("So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; and it is to be presumed that state laws will be construed in that way by the state courts." (citation omitted in original) (quoting *Fox v. Washington*, 236 U.S. 273, 277 (1915))).

117. *Motomura* does not make this particular claim, but I consider it briefly here because others may wish to pursue it. Moreover, this potential claim also has links to the Court's preemption doctrine, insofar as Equal Pro-Emption may be justified on the ground that Congress intends for a disparate-impact standard in its immigration laws. See *infra* notes 124–127 and accompanying text (expressing skepticism that Congress intends this).

118. See *supra* notes 106–107 and accompanying text.

119. See, e.g., 42 U.S.C. §§ 2000a to 2000a-6 (2012) (public accommodations); *id.* §§ 2000c to 2000c-9 (education); *id.* §§ 3601–3619 (housing); *id.* §§ 12101–12117 (employment).

120. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997).

121. *Id.* at 520.

standard. The federal statute cannot be overbroad,<sup>122</sup> and its congruence and proportionality to the state or local action sought to be prevented must be well supported by evidence.<sup>123</sup> As far as I am aware, Congress has not amassed the evidence required to meet this test, much less relied on it when passing any of the arguably relevant statutory provisions. From the Court's perspective, Congress will have much work to do if it intends to prophylactically adjust the Court's disparate-purpose standard under the Equal Protection Clause for purposes of immigration enforcement.

### B. Preemption Hurdles

Related to the foregoing point, Equal Pro-Emption also fits awkwardly with the Court's mainstream preemption doctrine. It is hornbook law that Congress's intent is the touchstone of a preemption analysis.<sup>124</sup> Surely Congress intends that states and localities will not enforce immigration law in violation of individual rights. But that is question begging at best.

If states and localities are violating individual rights, then their actions would conflict with Congress's purposes (as well as the Constitution). Yet without evidence demonstrating *which* states and localities are doing so, reviewing courts would have to *presume* intolerable levels of rights violations across all jurisdictions. Although certainly possible, Congress likely does not intend that presumption. Among other indicators, congressional devolution of enforcement authority to state and local actors is a key feature of modern immigration law. Many of the most important deportation grounds are tied to criminal convictions under state law, and thus depend on state justice

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122. Compare *id.* at 532–33 (holding that the Religious Freedom Restoration Act was overbroad), with *City of Rome v. United States*, 446 U.S. 156, 177 (1980) (finding that Congress could “prohibit changes that have a discriminatory impact” in “jurisdictions with a demonstrable history of intentional racial discrimination,” where the “risk of purposeful discrimination” runs high), *abrogated by* *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (striking down formula section of Voting Rights Act of 1965, explaining that “while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions,” based on current factual findings).

123. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 369–71 (2001) (holding that Title I of the Americans with Disabilities Act was not congruent and proportional to any documented pattern of constitutional violations by states); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88–91 (2000) (noting same problem with respect to the Age Discrimination in Employment Act); *City of Boerne*, 521 U.S. at 530–31 (striking down law as applied for, among other things, lack of evidence); see also *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966) (holding that Congress had a factual basis to conclude that New York's literacy requirement “constituted an invidious discrimination in violation of the Equal Protection Clause”); *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 333–34 (1966) (noting the need for evidence, and finding sufficient evidence to uphold various provisions of the Voting Rights Act of 1965).

124. *Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn*, 375 U.S. 96, 103 (1963); see also *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (“In preemption analysis, courts should assume that ‘the historic police powers of the States’ are not superseded ‘unless that was the clear and manifest purpose of Congress.’” (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

systems all the way down to arresting officers.<sup>125</sup> Moreover, Congress expressly contemplates federal and state cooperation in immigration enforcement.<sup>126</sup> Thus, the law on the books expressly carves out a role for states and localities to shape immigration law in action. Perhaps Congress should include a specific antidiscrimination provision directed at state and local immigration enforcement for all the reasons that Motomura and others suggest.<sup>127</sup> As yet, however, that has not been a political reality.

In past eras, the Court sporadically invoked The Civil Rights Act of 1870 as a makeweight in preemption analysis.<sup>128</sup> But the Court also found equal protection violations in almost all of those cases; thus, the factual predicate for rights violations was established in ways that Equal Pro-Emption would not require.<sup>129</sup> Even more to the point, however, all of those cases predated the Court's modern approaches to immigration preemption<sup>130</sup> and equal protection.<sup>131</sup> Tellingly, there was no mention of the Civil Rights Act of 1870, or a more sublime equality norm, in either *Chamber of Commerce of the United States v. Whiting* or *Arizona v. United States*.<sup>132</sup>

Again, I hope to be clear about my claims. I am not claiming that importing an equality norm into immigration preemption doctrine is impossible. And, I agree with Motomura that it could venerably close some of the

125. See 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1101(a)(43) (2012) (including both state and federal crimes within the definition of an “aggravated felony” that is grounds for deportation). On the expansion of crime-based removal from the United States, see DANIEL KANSTROOM, *DEPORTATION NATION* (2007). See also Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

126. See, e.g., 8 U.S.C. § 1357(g) (describing performance of immigration officer functions by state officers and employees); *id.* § 1373(c) (requiring federal government to respond to state and local inquiries about any individual's immigration status); see also Michael J. Wishnie, *Introduction: Immigration and Federalism*, 58 N.Y.U. ANN. SURV. AM. L. 283, 287 (2002) (“[T]he 1996 immigration laws sought to encourage state and local law enforcement officials to collaborate in the enforcement of federal immigration laws.”).

127. See, e.g., pp. 134–35; see also sources cited *supra* note 11.

128. See *Graham v. Richardson*, 403 U.S. 365, 376–77 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419–20 (1948); *Hines v. Davidowitz*, 312 U.S. 52, 69–70 (1941). The key provision of the Civil Rights Act of 1870 provides in relevant part that “[a]ll persons . . . shall have the same right” as “white citizens” in “every State and Territory” to certain enumerated rights. 42 U.S.C. § 1981(a) (2012); see also Guttentag, *supra* note 11, at 3 (“[T]he preemptive force of the 1870 Act—and of the immigrant equality component of immigration preemption—has been largely overlooked or forgotten.”).

129. See Guttentag, *supra* note 11, at 29–38. In *Hines*, the court ruled solely on preemption grounds. 312 U.S. at 62. In *Graham* and *Takahashi*, the Court separately ruled in favor of the lawfully present claimants on equal protection and preemption grounds. See *Graham*, 403 U.S. at 376–77; *Takahashi*, 334 U.S. at 419–20.

130. See *Arizona v. United States*, 132 S. Ct. 2492 (2012) (making no mention of the Civil Rights Act of 1870, or an equality norm, in upholding one state law and preempting three others); *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011) (upholding state law against preemption challenge and making no mention of the Civil Rights Act of 1870); *De Canas v. Bica*, 424 U.S. 351, 354–56 (1975) (same).

131. See *supra* Section III.A (tracing the Court's disparate purpose requirement to *Washington v. Davis*, 426 U.S. 229 (1976)).

132. See *Arizona*, 132 S. Ct. 2492; *Whiting*, 131 S. Ct. 1968.

gap between the Court's discriminatory-purpose test in equal protection jurisprudence and the discriminatory effects chronicled in immigration enforcement. That said, however, Equal Pro-Emption (black-box proposition 5) is an unlikely doctrinal scenario. Immigration theorists should account for that now, before putting their weight behind the rest of Black-Box Immigration Federalism (propositions 1 through 4). Otherwise, the full range of normative tradeoffs inhering in Black-Box Immigration Federalism's doctrinal and institutional arrangements may be missed, and too late to undo.

#### CONCLUSION

Central to Motomura's project, and my focus here, are the hydraulics of immigration authority when the congressional spigot is closed. With Congress gridlocked, the executive branch and subfederal jurisdictions have rushed to the void. These political developments, in turn, have spawned a mix of constitutional questions about how separation of powers, federalism, and individual rights apply, or should apply, to the field of immigration.

There are no easy answers, for at least two reasons. First, immigration is sometimes treated exceptionally under the law.<sup>133</sup> But because immigration is sometimes treated exceptionally, and other times not, there are no clear guideposts for which constitutional norms to relax, and which to insist on, in this new era of institutional conflict.<sup>134</sup> Second, and relatedly, the types of constitutional controversies emerging today are often multidimensional and dynamic. Properly understood, cases like *Arizona v. United States*<sup>135</sup> and *United States v. Texas*<sup>136</sup> are arguably about separation of powers, federalism, and rights *simultaneously*. As yet, however, we do not have ready-made analytic frames to grapple with the constitutional and normative tradeoffs in the undertheorized space where separation of powers, federalism, and rights intersect.

*Immigration Outside the Law* contributes mightily to this nascent project. Pushing past convention, Motomura's work offers much to celebrate, both in his innovative framework for understanding today's immigration debates, and his vision for how that framework may translate into equality, morality, the rule of law, and constitutionalism more generally. His outlook, however, depends in large measure on fresh conceptions of law and new structural arrangements that will require judicial buy-in. Even with judicial buy-in, or partial buy-in, it is uncertain that the structural arrangements championed by Motomura will deliver the stable and widespread integration of undocumented immigrants that he envisions. Black-Box Immigration Federalism may be right. But it should not be taken for granted.

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133. See sources cited *supra* notes 14–15.

134. See David S. Rubenstein, *Self-Help Structuralism*, 95 B.U. L. REV. 1619, 1657–59 (2015) (teasing out this idea through a theoretical frame of constitutional self-help).

135. *Arizona*, 132 S. Ct. at 2506.

136. No. 15-40238 (5th Cir. Nov. 25, 2015) *cert. granted*, 2016 WL 207257, (U.S. Jan. 19, 2016) (No. 15-674).