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IMMIGRATION SEPARATION OF POWERS AND THE PRESIDENT'S POWER TO PREEMPT

*Catherine Y. Kim**

ABSTRACT

*This Article explores the unique separation of powers issues raised in the immigration context, focusing on the respective powers of Congress and the President to preempt state law. Pursuant to traditional understanding, Congress and only Congress is constitutionally vested with the authority to displace conflicting state laws. Outside of the immigration context, the Supreme Court nonetheless has invoked competing theories of executive power to justify extending preemptive effect to administrative decisions. At the same time, however, it has imposed significant doctrinal restrictions on its exercise. In its recent decision in *Arizona v. United States*, the Court departed from these existing doctrines to hold that a conflict with the potential exercise of executive prosecutorial discretion suffices to displace state law. In doing so, it signaled an unprecedented expansion of the executive's power to preempt, one without apparent limit.*

This Article argues that considerations unique to immigration law undermine the utility of existing doctrinal frameworks for limiting executive preemption. Nonetheless, some restriction remains warranted. It proposes a functionalist approach to cabinining executive authority in this context, awarding preemptive effect to executive decisions that mitigate the institutional concerns associated with administrative preemption, while denying it to those that do not.

INTRODUCTION

Scholars have long observed the inapplicability of ordinary constitutional rules to immigration law.¹ Most have focused on the federalism

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1 See, e.g., Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1392 (1999) (describing various species of "immigration exceptionalism").

aspects of such “immigration exceptionalism,” involving the unique allocation of authority between the federal government and the states.² Until recently, however, few have explored the separation of powers issues involving the allocation of immigration authority between Congress and the President.³ This Article focuses specifically on the power of the executive branch, rather than Congress, to displace state laws involving aliens.

Determining the scope of the executive branch’s preemptive power presents one of the most pressing questions in immigration law today. That is because the great bulk of contemporary immigration policymaking stems not from Congress, but rather from executive branch agencies and states. The failure by Congress to enact comprehensive immigration reform presents just the most recent example of the difficulties facing congressional enactments in immigration. Partisan gridlock, coupled with shifting political alliances over national immigration policy, exacerbate the legislative inertia that exists in other areas of federal regulation.⁴ Presidents and state governments have stepped into the breach. The Obama Administration’s Deferred Action for Childhood Arrivals (DACA) program granting relief from deportation to certain undocumented aliens presents a particularly salient example of executive policymaking in response to congressional inaction,⁵ although

2 See, e.g., 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); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 798 (2008); Motomura, *supra* note 1; Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 575 (2008); Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339 (2013); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

3 A handful of scholars have begun to address the complex relationship between the legislative and executive branches of the federal government over immigration matters. See Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 65 (positing that “immigration separation of powers—the allocation of lawmaking authority *within* the federal government—is among the most pressing questions of institutional design facing immigration law today”); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013); Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105 (2014); Cristina M. Rodríguez, *Constraint through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787 (2010); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL’Y 81 (2013); cf. Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 635–37 (2013) (arguing that the *Arizona* decision elides difficult questions regarding allocation of federal immigration authority between executive and legislative branches); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1840 (1993) (calling for more research to clarify allocation of immigration authority between the President and Congress).

4 See Su, *supra* note 2.

5 Memorandum from Janet Napolitano, Sec’y of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as

countless others exist.⁶ At the same time, frustration with the perceived failure of Congress has spurred an explosion of state and local regulation, ranging from efforts to provide “sanctuaries” to undocumented aliens to legislation designed to facilitate their deportation.⁷ As these respective bodies of regulation continue to expand, conflicts between executive authority and state laws become inevitable.⁸

Children (June 15, 2012), *available at* <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. In a Rose Garden speech announcing the program, President Obama expressly justified this executive action in light of congressional failure to enact the DREAM Act, which would have granted lawful status to these individuals. President Barack Obama, Remarks by the President on Immigration (June 15, 2012), <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

6 Other examples under the Obama Administration include the policy of granting relief from removal to statutorily deportable widows and widowers of U.S. citizens and their children, Press Release, U.S. Dep’t of Homeland Sec., DHS Establishes Interim Relief for Widows of U.S. Citizens (June 9, 2009), *available at* <https://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens>, and granting such relief to victims and witnesses of crimes or civil rights violations, Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

Administrative policies granting categorical relief from removal pre-date the Obama Administration. Shortly after Congress enacted the Immigration Reform and Control Act of 1986 (IRCA), awarding lawful status to certain undocumented aliens, the Reagan Administration announced a “Family Unity” policy to permit children of IRCA beneficiaries to remain in the United States even if they themselves were statutorily ineligible for IRCA amnesty. *INS Announces Limited Policy on Family Unity*, 64 INTERPRETER RELEASES 1191 (Oct. 26, 1987). Three years later, the administration of George H.W. Bush extended this policy to spouses of IRCA amnesty recipients. *INS Implements New Family Fairness Policy*, 67 INTERPRETER RELEASES 204 (Feb. 26, 1990). More recently, the administration of President George W. Bush instructed agency officials to exercise prosecutorial discretion in cases involving aliens who are nursing mothers. *See* Memorandum from Julie L. Myers, Assistant Sec’y, U.S. Immigr. & Customs Enforcement, Prosecutorial and Custody Discretion (Nov. 7, 2007), *available at* <http://www.ice.gov/doclib/foia/prosecutorial-discretion/custody-pd.pdf>; *see also* Cox & Rodríguez, *supra* note 3, at 483–518 (setting forth examples of executive branch policymaking in the immigration area).

7 According to the National Conference of State Legislatures, the individual states and the District of Columbia enacted 437 laws and resolutions relating to immigration in 2013 alone, a sixty-four percent (64%) increase from the preceding year. NAT’L CONFERENCE OF STATE LEGISLATURES, 2013 IMMIGRATION REPORT 2 (2013), *available at* http://www.ncsl.org/Portals/1/Documents/immig/2013ImmigrationReport_Jan21.pdf; *see also* Su, *supra* note 2, at 1378–96; Rodríguez, *supra* note 2, at 581–608.

8 The DACA program provides a current flashpoint for such conflicts as courts struggle to determine whether the program preempts state efforts to deny benefits to DACA recipients. In *Arizona Dream Act Coalition v. Brewer*, the district court denied a preliminary injunction in a challenge to Arizona’s denial of drivers’ licenses to DACA recipients, concluding that plaintiffs failed to show a likelihood of success on the merits of their preemption claim. *Arizona Dream Act Coal. v. Brewer*, 945 F. Supp. 2d 1049, 1053 (D. Ariz. 2013). On appeal, the Ninth Circuit reversed on other grounds, although a concurring opinion

Pursuant to traditional understanding, the Constitution vests Congress and only Congress with the authority to displace conflicting state laws. The Supreme Court nonetheless has invoked competing theories of executive power to justify extending preemptive effect to executive branch decisions. At the same time, the two emerging doctrines of executive preemption impose significant restrictions on its exercise. In its recent decision in *Arizona v. United States*, however, the Court departed from these doctrines to hold that in the immigration context, a conflict with the *potential exercise of executive branch prosecutorial discretion* suffices to displace state law.⁹ In doing so, it signaled an unprecedented expansion of the executive's power to preempt, one without apparent limit.

This Article contextualizes the *Arizona* decision as a response to unique challenges posed by the immigration context that undermine the utility of existing doctrinal approaches to limiting executive preemption. Notwithstanding the difficulties in applying preemption doctrines to the immigration context, some limit must remain. Extending preemptive effect to all potential discretionary decisions rendered by immigration agencies would displace *any* state regulation of aliens, a result unintended by either the Court or Congress, to say nothing of our constitutional framers. The question remains, then, under what circumstances should courts after *Arizona* permit immigration agencies' exercises of prosecutorial discretion to displace state law.

Drawing from the growing body of administrative law scholarship employing a functionalist approach to resolving agency preemption disputes, this Article argues that the preemptive effect of immigration agency decisions should depend on the extent to which the decisionmaking process mitigates the institutional concerns associated with administrative preemption.¹⁰

concluded that plaintiffs were in fact likely to succeed on the merits of their claim that DACA is entitled to preemptive effect. *Arizona Dream Act Coal v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (Christen, J., concurring). The preemptive effect of DACA on state denials of other benefits, such as bar admissions or in-state tuition for higher education institutes, similarly remains open to debate. See, e.g., *State v. Maricopa Cnty. Cmty. Coll. Dist. Bd.*, No. CV2013-009093 (Super. Ct. of Ariz. filed June 25, 2013) (involving state law efforts to deny in-state higher education tuition benefits to DACA beneficiaries); Fla. Bd. of Bar Exam'rs re Question, No. SC11-2568, 2014 WL 866065 (Fla. Mar. 6, 2014) (involving a state attempt to deny admission to the Florida bar to a DACA recipient).

9 132 S. Ct. 2492 (2012); see Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723, 725–26 (2013) (critiquing the absence of a coherent theoretical account of executive preemption in *Arizona*); Abrams, *supra* note 3 (discussing the departure in *Arizona* from conventional preemption doctrine); Cox, *supra* note 3, 48–55 (noting the departure in *Arizona* from conventional federalism notions).

10 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, 1976 (2008); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 717 (2008); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 756 (2008); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2074–75 (2008); David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1140 (2012) (discussing views on presumptions related to preemption); Catherine M. Sharkey, *Federal-*

These concerns include the risk that agencies will not adequately consider states' interests, be held politically accountable for their decisions, or carefully deliberate their decisions. In light of these concerns, a number of scholars suggest limiting preemptive effect to agency decisions adhering to the procedural formalities necessary to carry the binding "force of law."¹¹ Pursuant to this approach, agency decisions rendered through notice-and-comment rulemaking and formal adjudication would be entitled to preemptive effect, while those embodied through informal policy statements and interpretive guidance would not.¹² An examination of the institutional design of immigration agency decisionmaking, however, suggests that contrary to conventional wisdom, the procedural formality of the agency's decision serves as a poor proxy for mitigating the institutional concerns associated with administrative preemption. Rather, some types of nonformalized decisions—particularly highly visible ones announced by high-level administrative officials—have as strong a claim to preemptive effect as formalized decisions rendered pursuant to immigration court adjudication.¹³

Part I sets forth two competing doctrines for limiting executive preemption, each rooted in a different theory of executive power. It then discusses the *Arizona* majority's departure from these doctrinal limits. Part II explains the *Arizona* decision as a response to unique challenges posed by the immigration context. In light of the difficulties in applying existing doctrines to the immigration context, Part III proposes a functionalist approach to limiting executive preemption in this context.

I. DOCTRINES OF EXECUTIVE PREEMPTION

Outside of the immigration context, the Supreme Court has developed two competing doctrines to extend preemptive effect to executive branch

ism Accountability: "Agency-Forcing" Measures, 58 DUKE L.J. 2125 (2009) [hereinafter Sharkey, *Federalism Accountability*]; Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 471 (2008) [hereinafter Sharkey, *Products Liability Preemption*]; Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 869 (2008).

11 See, e.g., Merrill, *supra* note 10, at 764; Rubenstein, *supra* note 3, at 106, 120, 146; Young, *supra* note 10, at 899.

12 This approach draws from *United States v. Mead Corp.*, 533 U.S. 218, 230–31 (2001), which affords *Chevron* deference to agency decisions that comport with procedural regularities and carry the "force of law" such as notice-and-comment rulemaking and formal agency adjudication, while denying it to informal decisions such as those manifested through policy statements or interpretive guidance.

13 Outside the preemption context, advocates of "presidential administration" or enhanced presidential involvement in agency policymaking have raised similar arguments. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (contending that personal and publicly visible involvement of the President in agency policymaking provides stronger safeguards for institutional norms of accountability, transparency, and efficacy than adherence to procedural forms); see also Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1116–20 (2013) (arguing that the degree of presidential involvement and transparency provides stronger safeguards for institutional values than formalism of procedures).

decisions while at the same time imposing significant restrictions to its exercise. Pursuant to the administrative law preemption doctrine, the executive branch may displace state laws only where it acts pursuant to a valid delegation of congressional authority and adheres to the procedural formalities necessary to carry the binding force of law. The foreign affairs preemption doctrine dispenses with these requirements but at the same time limits executive preemption to administrative decisions that actually implicate foreign affairs and do not contravene congressional will. *Arizona* appears to reject both doctrines to announce an entirely novel conception of executive preemption, one wholly untethered from the restrictions imposed by existing doctrines.

A. *Traditional Understandings*

Pursuant to traditional understanding, the Constitution vests Congress and only Congress with the authority to preempt state laws. In his seminal analysis of preemption principles, Professor Bradford Clark defends this view, building on Herbert Wechsler's characterization of Congress as the institutional guarantor of the "political safeguards of federalism"¹⁴ to argue that the only federal laws entitled to displace state regulations—other than the Constitution and duly enacted treaties—are properly enacted congressional statutes.¹⁵ He maintains that the Supremacy Clause of Article VI, which refers to "the Laws of the United States which shall be made in Pursuance thereof,"¹⁶ restricts the types of federal law entitled to preemptive effect to those enacted in conformity with the formal lawmaking procedures set forth in Article I, Section 7, specifically the requirements of bicameralism and presentment.¹⁷ He reasons that by subjecting all preemptive federal legislation to approval by the Senate specifically—the body designed to provide the most direct representation of individual states—the Framers sought to guarantee a meaningful state voice in any decision to displace state regulation.¹⁸ Pursuant to this analysis, executive pronouncements, departing from formal constitutional lawmaking requirements, fail to carry preemptive effect.¹⁹

14 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).

15 Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1334–36 (2001); see also MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 285 (2007) ("[L]aws not made in pursuance of the Constitution are not supreme law."). But see Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 756–57 (2010) (criticizing Clark's thesis for failing to account for non-constitutional lawmaking in the modern administrative state); Young, *supra* note 10, at 896 (acknowledging that "[i]t is probably too late in the day to insist that federal agency action cannot create supreme federal law").

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

17 Clark, *supra* note 15, at 1323–24.

18 *Id.* at 1343–44.

19 *Cf. id.* at 1393.

Although the Supreme Court continues to maintain that congressional intent remains the “touchstone” of any preemption analysis,²⁰ it has issued a number of decisions in recent years extending preemptive effect to executive branch decisions.²¹ In doing so, it has developed two competing doctrines—each rooted in a different theory of executive power²²—to extend preemp-

20 *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 96 (1992).

21 The Supreme Court frequently identifies four mechanisms by which the federal government preempts state laws: express preemption, field preemption, impossibility preemption, and obstacle preemption. *Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691, 699 (1984). First, Congress may enact a statute with an express preemption provision, thereby displacing state law. *Id.* Second, preemption may be inferred where the legislative scheme is so comprehensive as to indicate congressional intent to retain exclusive authority to regulate that field. *Id.* Third, federal law preempts state regulation where it would be physically impossible to comply with both the state and federal requirements. *Id.* Fourth, state law may be preempted to the extent it poses an obstacle to the achievement of federal purposes and objectives. *Id.*

Where a court finds state law preempted by executive action, it typically relies on obstacle preemption, concluding that the state regulation poses an obstacle to the achievement of federal objectives as determined by the executive. See Mendelson, *supra* note 10, at 700 (discussing prevalence of agency reliance on obstacle preemption). Such cases are distinguishable from field preemption, in which the court determines that Congress has regulated a particular area so exhaustively as to signify a legislative intent to occupy the entire field and preclude any state regulation in the area. In field preemption, the existence of any conflict between the state regulation and executive branch action is irrelevant; the state law is preempted regardless of whether the executive branch has taken any action at all.

This Article does not explore a fifth mechanism of *judicial* preemption—sometimes alternatively referred to as structural preemption, dormant preemption, or federal common law preemption—in which the federal judiciary deems a state or local law preempted absent any action by the political branches of the federal government. See, e.g., Zschernig v. Miller, 389 U.S. 429, 434 (1968) (holding Oregon probate rules that result in “more than some incidental or indirect effect in foreign countries” are preempted even absent conflict with a treaty (internal marks quotations omitted)); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 202–05 [hereinafter Goldsmith, *Statutory Foreign Affairs Preemption*] (discussing dormant or structural preemption); Huntington, *supra* note 2, at 808–10 (discussing structural and dormant preemption); Monaghan, *supra* note 15, at 758–61 (discussing federal common law preemption). For a scholarly critique of judicial preemption, see Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1618, 1622–24 (1997).

22 In his *Second Treatise on Government*, John Locke identified three theories of executive power exercised by the English crown. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 80–82, 89–93 (Prometheus Books 1986) (1690). First, the executive possessed a law enforcement authority to implement and administer positive laws enacted by a separate legislative body. *Id.* at 80–82. Second, it enjoyed a “federative” authority to develop and maintain relations with foreign sovereigns. *Id.* Third, the executive enjoyed “prerogative power” to exercise a more general discretionary authority to act absent positive law. *Id.* at 89–93. As Professor Henry Monaghan notes, the Framers of the Constitution consciously dispensed with the royal prerogative in response to the perceived excesses of the English crown, but allocated the remaining two powers to the federal government. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 12–14 (1993).

tive effect to executive branch decisions while at the same time imposing significant restrictions to its exercise.

B. *Administrative Law Preemption*

The first doctrine of executive preemption—the administrative law preemption doctrine—relies on a theory of executive authority as delegated by Congress.²³ Since the demise of the nondelegation doctrine, courts impose virtually no restraint on Congress’s ability to delegate lawmaking authority to administrative agencies.²⁴ The Court has relied on this theory of delegated authority to afford preemptive effect to executive branch decisions, concluding that Congress has delegated its constitutional authority to displace state laws to the executive.²⁵ At the same time, the theory of delegated authority implies two significant restrictions on executive ability to displace state law. First, it requires the executive branch to act pursuant to a valid delegation of congressional authority. Second, it counsels in favor of procedural safeguards to mitigate the harm resulting from circumventing congressional lawmaking procedures.²⁶ Consequently, the administrative law doctrine limits the preemptive effect of executive decisions to those that (1) are pursuant to a valid delegation of congressional authority, and (2) adhere to the procedural requirements necessary to carry the binding force of law.

First, consistent with the theory of delegated power, the administrative law preemption doctrine affords preemptive effect to agency decisions only where they are pursuant to a valid delegation of congressional authority. To that end, the Supreme Court repeatedly states, “an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign

23 This power corresponds with the “law enforcement” power pursuant to the Lockean taxonomy. See Locke, *supra* note 22.

24 See, e.g., Metzger, *supra* note 10, at 2098–99 (defending the constitutionality of agency preemption in light of current nondelegation doctrine); Rubenstein, *supra* note 3, at 122 (noting the failure of nondelegation doctrine to cabin the preemptive authority of the executive).

25 See, e.g., *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 160 (1982) (concluding that congressional delegation to the Federal Home and Loan Board of “plenary authority to issue regulations governing federal savings and loans” associations encompassed delegation of authority to preempt state consumer-protection laws); *United States v. Shimer*, 367 U.S. 374, 383 (1961) (concluding that a statute broadly delegating authority to “enable veterans to obtain loans and to obtain them with the least risk of loss upon foreclosure” authorized the agency to preempt state law regarding the calculation of mortgage guaranty credits); cf. Mendelson, *supra* note 10, at 707–08 (arguing that as a matter of statutory interpretation, general congressional delegations of agency authority do not evince a congressional intent to delegate the authority to displace state law).

26 In her insightful analysis of competing conceptions of the “force of law,” Professor Kristin Hickman contends that adherence to procedural formalities signals an agency’s intent to exercise congressionally delegated authority, which is necessary to extend the binding force of law to its decision. Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 481–82, 515 (2013).

State, unless and until Congress confers power on it.”²⁷ In practice, however, this limitation imposes few barriers to agency preemption, as the Court finds broad and general delegations of agency authority sufficient to infer a congressional intent to delegate the authority to preempt.²⁸

Second, the administrative law preemption doctrine requires agency decisions to comply with procedural formalities thought to mitigate the circumvention of congressional safeguards of federalism. Specifically, the Court limits preemptive effect to agency decisions that carry the “binding force of law.” This distinction draws from *United States v. Mead Corp.*, which held that agency decisions are entitled to *Chevron* deference only if they adhere to procedural formalities such as those associated with notice-and-comment rulemaking or formal agency adjudication.²⁹ The *Mead* Court reasoned that adherence to such procedural formalities “tend[s] to foster the fairness and deliberation” that Congress presumably intends for agency decisions carrying the effect of law.³⁰ Less formalized decisions such as those embodied in informal policy statements or interpretive guidance documents are entitled to the less deferential standard announced in *Skidmore*.³¹

In *Wyeth v. Levine*, the Court cited *Mead* for the proposition that “the agency’s explanation of state law’s impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness” and concluded that agency attempts to preempt state law absent procedural formalities “are inherently suspect.”³² In *Wyeth*, the Court held that the Food and Drug Administration’s approval of a warning label for a drug was insufficient to preempt a state tort action alleging that the drug manufacturer failed to provide adequate warnings.³³ Acknowledging “an agency regulation with the force of law can preempt conflicting state requirements,” the Court concluded that there was no such rule in the present case in light of the agency’s departure from the procedural regularities associated with notice-and-comment rulemaking.³⁴

27 *Wyeth v. Levine*, 555 U.S. 555, 588 (2009) (Thomas, J., concurring in the judgment); *New York v. FERC*, 535 U.S. 1, 18 (2002); *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

28 *See supra* note 25.

29 *United States v. Mead Corp.*, 533 U.S. 218 (2001).

30 *Id.* at 230.

31 *Id.* at 234–35 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)).

32 *Wyeth*, 555 U.S. at 577 (majority opinion).

33 *Id.*

34 *Id.* at 576. Although the Court requires that the substantive federal rule with which a state law purportedly conflicts adhere to procedural requirements necessary to carry the “force of law,” it does not require that an agency statement that such a conflict exists, i.e., an agency’s statement of its intent to preempt, be subject to such procedural requirements. *See Hillsborough Cnty. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 718 (1985) (noting that an agency may state its intent to preempt not only through notice-and-comment rulemaking, but also less formalized mechanisms such as preambles, interpretive statements, and responses to comments); *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 147, 159 (1982) (deferring to agency statement of preemptive intent appearing in regulatory preamble); *see also* Rubenstein, *supra* note 3, at 1147–51 (distinguishing between “interpretive

The Court's administrative law preemption doctrine thus affords preemptive effect to executive decisions on the theory that Congress has delegated to the agency its authority to displace state laws. Two doctrinal restrictions follow from this theory, however. First, executive attempts to preempt state law must be pursuant to a valid delegation of congressional authority. Second, they must comply with the procedural formalities necessary to carry the binding force of law.

C. Foreign Affairs Preemption

The second doctrine of executive preemption rests on a theory of inherent executive authority to regulate foreign affairs.³⁵ Although scholars express doubt as to whether this authority permits executive intrusions into domestic lawmaking functions,³⁶ the Court has concluded that executive exercise of foreign affairs authority suffices to displace state laws.³⁷

preemption," where an agency decides whether a statute preempts state law; "jurisdictional preemption," where the agency asserts intent to preempt; and "substantive preemption," where the agency promulgates a rule that conflicts with state law but expresses no statement on the agency's preemptive intent).

35 This power corresponds with the "federative power" in the Lockean taxonomy. See LOCKE, *supra* note 22. The precise scope of the executive's inherent foreign affairs authority remains subject to dispute. The Constitution explicitly vests some powers associated with foreign affairs with Congress, such as the power to regulate foreign commerce. U.S. CONST. art. I, § 8. It vests other foreign affairs powers with the President, such as the power to receive ambassadors. U.S. CONST. art. II, § 3. As to the "residuum" of foreign affairs authority not expressly allocated, scholars disagree as to whether it resides with Congress or the President. See Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280 (2006); Monaghan, *supra* note 22, at 10–11; Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001) (summarizing scholarly debate).

Notwithstanding this debate, the Supreme Court repeatedly has confirmed the executive's inherent power to regulate foreign affairs. The high watermark of this theory finds expression in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). *Curtiss-Wright* involved a nondelegability challenge to a presidential proclamation prohibiting the sale of arms to Bolivia. Sustaining the President's decision, the Court stated:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.

Id. at 319–20.

36 See, e.g., Monaghan, *supra* note 22, at 11, 24, 49 (acknowledging inherent executive authority to "protect and defend the personnel, property, and instrumentalities of the United States from harm" but emphatically denying any "independent, free-standing lawmaking authority" to "invade the 'private rights' of American citizens").

37 See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 399 (2003); *Crosby v. Nat'l Foreign Affairs Trade Council*, 530 U.S. 363, 381–82 (2000); cf. Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 830 (2004) (arguing that exercises of execu-

The resulting foreign affairs preemption doctrine, premised on this theory of inherent authority, dispenses with the restrictions of the administrative law preemption doctrine, premised on a theory of delegated authority. First, where the executive acts pursuant to its foreign affairs power, the Court does not require an affirmative delegation of congressional authority. In *American Insurance Association v. Garamendi*,³⁸ involving the executive branch's attempt to preempt a California law requiring insurers to disclose information about policies sold in Europe during the Nazi era, the Court acknowledged, "Congress has not acted on the matter." Nonetheless, it concluded that the executive branch's policy of encouraging the voluntary settlement of Holocaust-era claims constituted a valid exercise of the "President's independent authority in the areas of foreign policy and national security" sufficient to displace the State law.³⁹

Second, the foreign affairs preemption doctrine dispenses with the requirement that the executive decision comply with procedural formalities. In the foreign affairs context, even informal executive statements of policy suffice to preempt conflicting state law. In *Crosby v. National Foreign Trade Council*,⁴⁰ a Massachusetts law prohibited state agencies from purchasing goods and services with companies that did business with Burma (Myanmar). Although no agency regulation or adjudicatory decision prohibited states from imposing such sanctions, executive branch officials including the Assistant Secretary of State had testified before various bodies that the Massachusetts law interfered with federal diplomatic efforts; the Solicitor General further submitted a brief to the Court repeating this position.⁴¹ Although these statements of executive policy lacked the procedural regularities necessary to carry the force of law, the Court nonetheless held that in light of the foreign affairs concerns implicated, "opinions of senior National Government officials are competent and direct evidence of the frustration of congressional objectives" and are thus entitled to preemptive effect.⁴² In these ways, the foreign affairs preemption doctrine recognizes a broader executive authority to preempt state laws than permitted under the administrative law preemption doctrine.

Nonetheless, significant restrictions to the executive's authority remain even in the foreign affairs context. Current doctrine permits foreign affairs preemption only where the issue presented truly implicates foreign affairs, and only where the executive policy is not in conflict with congressional will.

tive foreign affairs powers to preempt state law violate separation of powers and federalism principles); see also Rubenstein, *supra* note 3, at 125 (contending that although the executive enjoys inherent foreign affairs authority to develop policy, it may not exercise this authority to preempt state law).

38 *Garamendi*, 539 U.S. 396.

39 *Id.* at 429 (internal quotation marks omitted).

40 *Crosby*, 530 U.S. 363.

41 *Id.* at 384 n.22.

42 *Id.* at 385; see also *Garamendi*, 539 U.S. at 424 (holding that non-formalized statements of executive policy, as described in correspondence by the Deputy Secretary of State and the Solicitor General's brief, sufficed to preempt conflicting state law).

First, the foreign affairs preemption doctrine restricts executive preemption to decisions that exhibit a sufficiently tight nexus with foreign affairs. In *Garamendi*, the Court held that “resolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive’s responsibility for foreign affairs.”⁴³ Citing longstanding executive practice in the area, the Court concluded: “Vindicating victims injured by acts and omissions of enemy corporations in wartime is . . . within the traditional subject matter of foreign policy in which national, not state, interests are overriding, and which the National Government has addressed.”⁴⁴ By contrast, in *Medellín v. Texas*,⁴⁵ the Supreme Court rejected the President’s attempt to preempt a state’s refusal to reconsider a death sentence after the International Court of Justice concluded that the defendant’s Vienna Convention rights had been violated.⁴⁶ In doing so, the Court emphasized the intrusion on the domestic lawmaking interests of the state, noting the absence of any precedent authorizing the executive to “reach[] deep into the heart of the State’s police powers and compel[] state courts to reopen final criminal judgments and set aside neutrally applicable state laws.”⁴⁷

Second, although the foreign affairs preemption doctrine eliminates the requirement that the executive decision be “pursuant to” congressional intent, it does require that the decision not be in conflict with Congress.⁴⁸ This limitation derives from Justice Jackson’s influential concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,⁴⁹ which a majority of the Supreme Court subsequently endorsed.⁵⁰ *Youngstown* involved President Truman’s attempt to seize the nation’s steel production to protect supply for the war effort in the face of an imminent labor strike. Agreeing that the President exceeded his constitutional authority, Justice Jackson articulated the following three categories of presidential authority:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. . . .

43 *Garamendi*, 539 U.S. at 420.

44 *Id.* at 421.

45 552 U.S. 491 (2008).

46 *Id.* at 498–99, 502.

47 *Id.* at 532.

48 *Id.* at 524 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

49 *Youngstown Sheet & Tube Co.*, 343 U.S. 579.

50 *Medellín*, 552 U.S. at 524 (“Justice Jackson’s familiar tripartite scheme provides the accepted framework for evaluating executive action in this area.”).

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.⁵¹

Relying on this framework, the Court in *Crosby* concluded that the President's authority to preempt Massachusetts's law prohibiting trade with Burma fell within the first category of cases, as it was pursuant to congressional authority.⁵² The *Garamendi* Court characterized the President's authority to preempt California's law requiring disclosure of Holocaust-era insurance policies as falling within the second category, because Congress had not acted in the matter.⁵³

In other cases, by contrast, the Court has characterized an executive decision as falling into the third *Youngstown* category and consequently denied it preemptive effect. In *Barclays Bank PLC v. Franchise Tax Board of California*,⁵⁴ corporate taxpayers challenged California's use of a worldwide combined reporting requirement for purposes of calculating corporate franchise taxes, arguing that it conflicted with federal policy.⁵⁵ Executive officials, through "a series of Executive Branch actions, statements, and *amicus* filings," sought to "proscrib[e] States' use of worldwide combined reporting."⁵⁶ The *Barclays* Court concluded that these statements, "express[ing] federal policy but lack[ing] the force of law," were insufficient to preempt the state law.⁵⁷ Subsequently, in *Crosby*, the Court explained that *Barclays* denied preemptive effect to the executive decision because Congress's consideration and rejection of a proposed prohibition against states' use of the worldwide combined reporting requirement placed the decision in *Youngstown's* third category; under these circumstances, informal statements of executive policies would not suffice to displace state law.⁵⁸ Consequently, where executive authority is at odds with congressional intent, as in *Barclays*, nonformalized statements of executive policy are insufficient to preempt conflicting state law.⁵⁹

Similarly, in *Medellín v. Texas*,⁶⁰ the Supreme Court concluded that a nonformalized executive policy conflicted with congressional intent and was

51 *Youngstown Sheet & Tube Co.*, 343 U.S. at 635–38 (Jackson, J., concurring).

52 *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375–76 (2000).

53 *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427–29 (2003).

54 512 U.S. 298 (1994).

55 *Id.* at 302–03.

56 *Id.* at 328.

57 *Id.* at 330.

58 *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 385–86 (2000).

59 *Id.* at 388; *see also* *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003) (finding "no need to consider the possible significance for preemption doctrine of tension between an Act of Congress and Presidential foreign policy").

60 552 U.S. 491 (2008).

therefore not entitled to preemptive effect.⁶¹ *Medellín* involved a challenge to the capital sentence imposed by Texas state courts on a Mexican national.⁶² The International Court of Justice (ICJ) had ruled that in light of violations of the petitioner's procedural Vienna Convention rights, he was entitled to reconsideration of his sentencing.⁶³ President Bush then issued a memorandum to the Attorney General stating that the United States would discharge its international obligations by requiring state courts to give effect to the ICJ decision.⁶⁴ *Medellín* argued that this executive branch memorandum preempted Texas's denial of reconsideration of his capital sentence.⁶⁵ Rejecting that argument, the Court concluded that because the executive decision conflicted with congressional intent and fell within Justice Jackson's third *Youngstown* category, it was not entitled to preemptive effect.⁶⁶

* * *

On the eve of the *Arizona* decision, the nature and source of executive authority carried important doctrinal implications for the scope of its authority to preempt state law. Where the executive branch exercised congressionally delegated power, the Court permitted it to preempt conflicting state law only where the agency action was pursuant to a valid delegation of congressional authority and adhered to the procedural requirements necessary to carry the force of law. Where the executive acted pursuant to its inherent foreign affairs authority, by contrast, the Court permitted it to preempt state law absent a congressional delegation of authority and through informal means. Even in the foreign affairs context, however, the Court preserved significant restrictions on the executive's power to preempt, prohibiting

61 *Id.* at 527.

62 *Id.* at 497.

63 *Id.*

64 *Id.* at 498.

65 *See id.* at 523.

66 *Id.* at 527, 532. *Medellín* suggests that executive preemption in the foreign affairs context may be even further limited. Characterizing preceding cases as involving "a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals," the Court suggested that the executive's expansive authority to preempt state laws in the foreign affairs context may be limited to executive agreements made pursuant to a "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned." *Id.* at 531 (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)) (internal quotation marks omitted); see Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987 (2013) (discussing the importance of longstanding practice to sanction executive decisionmaking); Rubenstein, *supra* note 3, at 134 (arguing that permitting executive enforcement decisions to preempt subfederal immigration laws departs from existing foreign affairs preemption doctrine which affords preemptive effect only to executive agreements with foreign nations); A. Mark Weisburd, *Medellín, the President's Foreign Affairs Power and Domestic Law*, 28 PENN. ST. INT'L L. REV. 595 (2010) (exploring restrictions on executive preemption imposed by *Medellín*).

executive preemption where foreign affairs were not sufficiently implicated and where the executive decision was contrary to congressional will.

D. *Arizona and a New Doctrine of Executive Preemption*

Far from clarifying which of the two existing doctrines for limiting executive preemption would apply to the immigration context, the Supreme Court in *Arizona* appeared to reject *both* frameworks. Without mentioning either doctrine or the carefully circumscribed limits imposed therein, a majority of the Supreme Court in *Arizona v. United States* reached the extraordinary conclusion that *potential exercises of prosecutorial discretion* by the executive branch suffice to preempt conflicting state laws.⁶⁷

Concerned with the rise in undocumented immigration, the Arizona legislature in 2010 enacted S.B. 1070 to impose a policy of “attrition through enforcement,” explicitly seeking to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”⁶⁸ Section 3 imposed criminal penalties on aliens who failed to comply with federal alien-registration requirements.⁶⁹ Section 5(C) criminalized unauthorized aliens who sought or engaged in work in the state.⁷⁰ Section 6 authorized local police to arrest individuals where there was probable cause to believe that the individual was deportable on criminal grounds.⁷¹ Finally, section 2(B) required law enforcement to check the immigration status of any individual subject to a stop, detention, or arrest.⁷²

Ultimately, the Court invalidated sections 3, 5(C), and 6 on preemption grounds, leaving intact only section 2(B).⁷³ In doing so, while purporting to apply ordinary preemption principles,⁷⁴ it reached the extraordinary conclusion that state provisions may be preempted where they interfere with the potential exercise of prosecutorial discretion by immigration agencies.

The Court began its opinion by emphasizing the unique role of the executive in immigration matters:

A principal feature of the removal system is the broad discretion exercised by immigration officials. . . .

67 132 S. Ct. 2492, 2501–07 (2012); *see also* Cox, *supra* note 3, at 54 (“Thus, the practical consequence of the Court’s approach in *Arizona* is to elevate prosecutorial decisions by executive branch officials to the status of law for purposes of preemption analysis.”).

68 *Arizona*, 132 S. Ct. at 2497 (internal quotation marks omitted).

69 *Id.*

70 *Id.* at 2497–98.

71 *Id.* at 2498.

72 *Id.*

73 *Id.* at 2510. The Court sustained section 2(B) only to the extent it would not result in the prolonged detention of any individual. *Id.* at 2509–10.

74 *Id.* at 2500–01. Professor Kerry Abrams provides an insightful account of the ways in which *Arizona* departs from ordinary preemption principles and instead develops a special “plenary power preemption” doctrine. Abrams, *supra* note 3, at 601. Indeed, the Court cited to ordinary principles of *congressional* preemption, without acknowledging the special rules applicable to *executive* displacement of state laws. *Arizona*, 132 S. Ct. at 2500–01.

... Some discretionary decisions involve policy choices that bear on this Nation's international relations. . . . The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.⁷⁵

Its subsequent discussion of sections 3 and 6 expressly relied on the need to preserve this executive discretion in finding those provisions preempted.

The Court's analysis of section 3, criminalizing the failure to comply with federal alien-registration requirements, began with a straightforward analysis of ordinary congressional field preemption principles,⁷⁶ but then went further to suggest that even if field preemption did not apply, section 3 would be *obstacle* preempted because it conflicted with the potential exercise of executive policymaking discretion. It reasoned: "Were § 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies."⁷⁷

The Court's discussion of section 6, authorizing the arrest of individuals believed to be deportable for criminal offenses, was even more direct in its reliance on the need to preserve prosecutorial discretion. The majority concluded that authorizing state law enforcement to arrest deportable aliens was preempted because "[t]he result could be unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed."⁷⁸ In these ways, the majority held that state laws are preempted to the extent they conflict with the potential exercise of executive branch prosecutorial discretion.

In doing so, the Court eschewed the carefully circumscribed limits to executive preemption imposed by the existing executive preemption doctrines. Pursuant to the administrative law preemption doctrine, executive decisions may displace state law only where they are pursuant to a valid delegation of congressional authority and comport with the procedural formalities necessary to carry the force of law. As discussed more fully in Section II.C, it is not at all clear whether exercises of prosecutorial discretion are pursuant to congressionally delegated authority. Moreover, they generally depart from the procedural formalities associated with the binding force of

75 *Id.* at 2499.

76 *Id.* at 2501–02. This section of the opinion applied earlier precedent holding that the comprehensive statutory scheme enacted by Congress to regulate alien registration demonstrates a congressional intent to occupy the field and leaves no room for state regulation in the area. *Id.* at 2501–02 (discussing *Hines v. Davidowitz*, 312 U.S. 52 (1941)). Under this reasoning, any potential conflict with executive decisionmaking becomes irrelevant to finding preemption. *See supra* note 21.

77 *Arizona*, 132 S. Ct. at 2503.

78 *Id.* at 2506.

law. Indeed, the prototypical exercise of prosecutorial discretion consists of a decision to *not* act, by declining to enforce the law against a particular individual.⁷⁹ While it is one thing to conclude that such executive discretion is constitutionally permissible,⁸⁰ it is quite another to suggest it is entitled to preemptive effect.⁸¹

Justice Alito's dissent, focusing on the absence of properly promulgated regulations carrying the binding force of law, underscores this departure from the administrative law doctrine of executive preemption:

The United States suggests 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. Those priorities, however, are not law. They are nothing more than agency policy. I am aware of no decision of this Court recognizing that mere policy can have pre-emptive force.⁸²

By concluding that a potential conflict with the exercise of prosecutorial discretion—which generally lacks procedural formalities—preempts state law, the *Arizona* majority appeared to reject the administrative law preemption framework for the immigration context.

At the same time, the majority does not appear to apply the foreign affairs preemption doctrine either. It makes only passing reference to *Garamendi* and *Crosby*, citing these cases to support entirely ordinary preemption principles rather than for their exceptional conceptions of executive authority in the foreign affairs context.⁸³ To be sure, much of the language in Kennedy's opinion echoes *Garamendi*, invoking the dominance of federal

79 For discussion of the difficulties in constraining agency decisions to *not* act, see Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461 (2008); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004); Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107 (2000); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653 (1985).

80 See *Heckler v. Chaney*, 470 U.S. 821, 846–47 (1985). But see Delahunty & Yoo, *supra* note 3, at 792–94 (arguing that at least some forms of prosecutorial discretion violate the “Take Care” Clause of the Constitution); Complaint, *Crane v. Napolitano*, No. 3:12-cv-03247-O (N.D. Tex. Aug. 23, 2012) (lawsuit alleging same), 2012 WL 3629252.

81 See Denning & Ramsey, *supra* note 37, at 859 (noting that “[i]t is a somewhat larger step to conclude that [executive action is] not only constitutional but preemptive”); see also Robert L. Glicksman, *Nothing Is Real: Protecting the Regulatory Void Through Federal Preemption by Inaction*, 26 VA. ENVTL. L.J. 5 (2008) (setting forth normative grounds against finding preemption through federal *inaction*, as opposed to affirmative decisionmaking by either Congress or agencies).

82 *Arizona*, 132 S. Ct. at 2527 (Alito, J., concurring in part and dissenting in part) (citing *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 330 (1994)).

83 *Id.* at 2502 (citing *Garamendi* for the proposition that *Hines v. Davidowitz* sets forth the standard for field preemption); *id.* at 2500 (citing *Crosby* for the proposition that Congress may preempt state law); *id.* at 2501 (citing *Crosby* for the proposition that state law is preempted when it conflicts with federal law); *id.* (citing *Crosby* for the proposition that state law is preempted when it poses an obstacle to federal law).

interests in areas involving foreign affairs⁸⁴ and the need to preserve executive discretionary decisionmaking.⁸⁵ *Arizona* does not, however, analyze whether the executive policy conflicts with congressional policy, a crucial limit to the executive branch's preemptive power in foreign affairs. Justice Scalia's dissent underscores this departure, suggesting that the executive branch's refusal to enforce congressional dictates should not be entitled to preemptive effect: "But to say, as the Court does, that *Arizona* *contradicts federal law* by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind."⁸⁶

In these ways, *Arizona* signifies an unprecedented enlargement of the executive branch's authority to preempt state law, eschewing the carefully circumscribed limits imposed by existing doctrines. Taken to its logical conclusion, *all* state law would appear displaced because the executive branch might always exercise its prosecutorial discretion as to any particular individual or entity.⁸⁷ The Kennedy majority certainly did not intend such a result, as it preserved at least one of the four challenged state provisions. Nonetheless, without any meaningful engagement with the prior caselaw on executive preemption, the *Arizona* majority fails to provide a limiting principle for when executive decisions may displace state law.⁸⁸

II. THE UNIQUE CHALLENGES POSED BY THE IMMIGRATION CONTEXT

One approach to understanding *Arizona's* rejection of existing doctrinal limits to executive preemption contextualizes the decision within the unique challenges posed by the immigration context. Three considerations specific to immigration law undermine the utility of existing doctrines for limiting executive preemption.⁸⁹ First, unresolved questions relating to the nature and source of the executive branch's power to regulate immigration render it impossible to determine which of the two doctrinal frameworks should apply. Second, the absence of any principled ground for distinguishing when the regulation of aliens implicates the nation's foreign affairs or when it impli-

84 Compare *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413–14 (2003), with *Arizona*, 132 S. Ct. at 2498.

85 Compare *Garamendi*, 539 U.S. at 423–24, with *Arizona*, 132 S. Ct. at 2499.

86 *Arizona*, 132 S. Ct. at 2521 (Scalia, J., concurring in part and dissenting in part).

87 See Cox, *supra* note 3, at 54 (suggesting that as a result of the Court's approach in *Arizona*, where "every enforcement decision by an executive branch official [is] 'law' for purposes of preemption analysis, no state regulation would be permissible in any regulatory arena into which the federal government had stepped," as "[a]nything the state did would conflict with either an action or an inaction of some federal official").

88 See Abrams, *supra* note 3, at 602 ("Less debated, but equally if not more important, is what the [*Arizona*] opinion means for preemption doctrine going forward. Numerous other states have anti-immigration statutes on their books, some of which have already been invalidated or upheld in the wake of *Arizona*. Lower courts, state legislatures, and activists representing diverse agendas will all be looking to *Arizona* for guidance on the proper scope of state immigration regulation." (footnote omitted)).

89 Cf. Rubenstein, *supra* note 3, at 135 (arguing for application of ordinary doctrines of preemption to the immigration context).

cates purely domestic matters similarly undermines any attempt to determine which of the two existing frameworks should apply in a given case. Third, the sheer breadth of congressional authority delegated to the immigration agencies—both express and de facto—defeats any meaningful attempt to determine whether an agency’s decision is “pursuant to” or “in conflict with” congressional intent, questions crucial to applying existing doctrinal limits. Although none of these factors were discussed in the *Arizona* opinion, they provide plausible rationales for its failure to apply existing doctrinal limits to executive preemption in the immigration context.

A. *Competing Theories of Executive Power over Immigration*

As set forth in the preceding Section, the two doctrines of executive preemption rely on different theories of executive power. If executive power over immigration derives from congressionally delegated authority, rules for administrative law preemption apply. If, by contrast, the executive branch enjoys inherent authority to regulate immigration independent of any power delegated by Congress, rules for foreign affairs preemption apply. Whether the executive exercises delegated or inherent authority thus determines which of the two executive preemption doctrines should apply. Unfortunately, the nature and source of the executive’s authority to regulate immigration remains unresolved.⁹⁰

The Constitution itself provides little guidance on the issue. While the text expressly vests Congress with the power to regulate areas closely related to immigration, namely naturalization and foreign commerce,⁹¹ it makes no mention of the immigration power itself. Characterizing immigration as a subset of a broader foreign affairs power hardly clarifies this question, as the Constitution fails to explicitly vest any broad foreign affairs power with either the executive or legislature.⁹² Notwithstanding these textual omissions, the

90 See Neuman, *supra* note 3, at 1840 (noting the unresolved debate over whether the executive branch possesses inherent authority to regulate immigration or whether it possesses only delegated authority); see also THOMAS ALEXANDER ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP 188–94 (7th ed. 2012) (same).

91 U.S. CONST. art. I, § 8. A third constitutional provision, the Migration and Importation Clause, also arguably allocates immigration authority with Congress. That Clause provides:

The [m]igration or [i]mportation of such [p]ersons as any of the [s]tates now existing shall think proper to admit, shall not be prohibited by the Congress prior to the [y]ear one thousand eight hundred and eight, but a [t]ax or duty may be imposed on such [i]mportation, not exceeding ten dollars for each [p]erson.

U.S. CONST. art. I, § 9, cl. 1. By prohibiting Congress from limiting the migration or importation of persons prior to 1808, the Clause might be read to implicitly grant Congress the authority to regulate after that date. However, both the Supreme Court and commentators interpret this Clause to refer exclusively to slavery. See ALENIKOFF ET AL., *supra* note 90, at 190.

92 See LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 13–14 (2d ed. 1996) (noting that with respect to foreign affairs, the Constitution is a “strange, laconic document”); see also *supra* notes 35–36 and accompanying text.

Supreme Court has made clear since at least the 1890s that the Constitution vests the federal government with the power to regulate immigration.⁹³ It has been inconsistent, however, in determining whether the federal immigration power rests exclusively with Congress, or whether the executive and legislative branches share concurrent authority in this area.⁹⁴

A number of cases support the view that any executive authority over immigration is limited to that delegated by Congress. In *Nishimura Ekiu v. United States*,⁹⁵ which rejected a due process challenge to the refusal to admit an alien, the Court identified the power to regulate immigration with Congress, citing constitutional provisions vesting it with authority over related areas of foreign commerce, naturalization, and war powers.⁹⁶ As to any executive power to regulate immigration, the Court suggested that outside of the treaty context, where both the President and Senate enjoy concurrent authority, the scope of executive branch authority is limited to that “entrusted by Congress.”⁹⁷ In this way, the early Court appeared to endorse a model of delegated executive power over immigration.

Even more forcefully, in *Galvan v. Press*,⁹⁸ involving the deportation of a legal permanent resident based on prior Communist party membership, the Court stated:

Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.⁹⁹

More recent cases applying the Administrative Procedure Act and related administrative law doctrines—centrally concerned with limiting executive decisions to those delegated by Congress—to the immigration context lend further support for the view that the executive branch enjoys no inher-

93 See *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (“[E]very sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested with the national government.” (citation omitted)); *Chae Chan Ping v. United States*, 130 U.S. 581, 605–07 (1889). Interestingly, as Professor Neuman documents, the states dominated immigration regulation prior to this era. Neuman, *supra* note 3, at 1834.

94 See Cox & Rodríguez, *supra* note 3, at 466 (criticizing judicial treatment of the relationship between Congress and the President over immigration law as “thin and confused”).

95 142 U.S. at 651.

96 *Id.* at 659.

97 *Id.*

98 347 U.S. 522 (1954).

99 *Id.* at 531 (citations omitted).

ent authority to regulate immigration.¹⁰⁰ Taken together, these cases suggest that the executive branch's authority to regulate immigration is limited to that delegated by Congress, counseling in favor of applying the administrative law preemption doctrine to analyze executive attempts to displace state laws in the immigration context.

Other cases, however, support the alternative view that the executive possesses inherent power to regulate immigration as part of a broader foreign affairs power vested in the executive, independent of any congressional delegation. In *United States ex rel. Knauff v. Shaughnessy*, which sustained the executive branch's exclusion of an alien without a hearing notwithstanding a congressional statute authorizing her admission and entitling her to a hearing,¹⁰¹ the Court asserted an inherent executive authority to regulate immigration:

The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General.¹⁰²

Subsequent cases similarly support this view by identifying the federal power to regulate immigration with both the executive and legislative branches.¹⁰³

100 See, e.g., *Judulang v. Holder*, 132 S. Ct. 476, 490 (2011) (applying “ordinary principles of administrative law” to conclude that agency’s interpretation of statute was in violation of the Administrative Procedure Act because it was “unmoored from the purposes and concerns of the immigration laws”).

101 338 U.S. 537, 546–47 (1950).

102 *Id.* at 542–43 (footnotes omitted) (citations omitted). To be sure, *Knauff* has been subject to scathing criticism. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1391–98 (1953) (criticizing *Knauff* for suggesting that political branches could deny judicial review over a constitutional question of due process).

103 See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976) (holding in dicta that a citizenship requirement for the Civil Service Commission would be permissible if either Congress or the President mandated it); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” (emphasis added)); see also KATE M. MANUEL & TODD GARVEY, CONG. RESEARCH SERV., R42924, PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT: LEGAL ISSUES 10–19 (2013) (discussing cases suggesting federal authority to regulate immigration shared by executive and legislative branches rather than merely delegated by legislative to

Given that the existing doctrinal approaches to limiting executive preemption hinge on a determination of whether the executive exercises delegated rather than inherent authority, the failure to resolve the nature and source of the executive's immigration authority undermines their utility. Absent resolution of this question, it is impossible to determine which of the two doctrines should apply to the immigration context.

B. *Immigration and Foreign Relations*

An alternative means of identifying which of the two executive preemption doctrines applies is to determine whether the issue implicates the nation's foreign relations. As noted earlier, although the precise allocation of foreign affairs authority between Congress and the President remains subject to dispute, the Court has been willing to evaluate executive attempts to displace state law pursuant to the foreign affairs preemption doctrine where it deems foreign interests sufficiently implicated. A conclusion that immigration implicates the nation's foreign relations thus lends support for applying the more forgiving rules of foreign affairs preemption. A contrary conclusion, that immigration implicates only domestic matters, lends support for applying the stricter rules of administrative law preemption.

In theory, *any* regulation of aliens—even rules generally applicable to aliens and citizens alike and that lie within the traditional police powers of the states—concerns our nation's foreign relations. As the *Arizona* majority acknowledged, a foreign sovereign's interests may be implicated any time the "status, safety, and security" of its nationals are at stake.¹⁰⁴ Yet, the Court has refused to characterize all regulations relating to immigrants as falling within the special domain of foreign relations.¹⁰⁵ In doing so, however, it has failed to provide a coherent theory for distinguishing immigration laws that sufficiently implicate foreign affairs from those that do not.¹⁰⁶

executive branch); Cox & Rodríguez, *supra* note 3, at 465–80 (analyzing inherent executive authority over immigration).

104 *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012); *see also* *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490–91 (1999) (discussing foreign policy impact of deportation decisions); *Toll v. Moreno*, 458 U.S. 1, 12 (1982) (discussing foreign affairs implications resulting from imposition of "auxiliary burde[n]" on the entrance and residence of aliens (quoting *Graham v. Richardson*, 403 U.S. 365, 379 (1971))); *Hines v. Davidson*, 312 U.S. 52, 64 (1941) ("One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country."); *cf.* Rubenstein, *supra* note 3, at 99 (suggesting that "in the great bulk of [immigration] cases" foreign policy concerns are "not actually implicated or seriously threatened").

105 *See, e.g., De Canas v. Bica*, 424 U.S. 351, 355 (1976) ("[Not] every state enactment which in any way deals with aliens is a regulation of immigration.").

106 *See* Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 351 (2008); Huntington, *supra* note 2, at 844–45; Wishnie, *supra* note 2, at 524–25. Outside of the immigration context, Professor Goldsmith observes the increasing difficulty of distinguishing between laws that implicate foreign affairs and those that implicate only domestic

In *De Canas v. Bica*,¹⁰⁷ and more recently in *Chamber of Commerce v. Whiting*,¹⁰⁸ the Court concluded that state laws regulating the employment of aliens implicate only domestic concerns, not foreign ones. In *De Canas*, sustaining a California law prohibiting the employment of aliens without lawful resident status against preemption challenge, the Court rejected the suggestion that the law implicated foreign affairs, instead characterizing it as “fashioned to remedy local problems.”¹⁰⁹ In *Whiting*, decided just one year before *Arizona*, the Court adopted a similar rationale to sustain an Arizona law revoking the business licenses of employers that hired undocumented aliens. Expressly distinguishing foreign affairs preemption cases such as *Garamendi* and *Crosby*, the *Whiting* Court held that unlike the foreign affairs concerns raised in those cases, “[r]egulating in-state businesses through licensing laws has never been considered such an area of dominant federal concern.”¹¹⁰ Standing alone, these cases suggest that state laws regulating only in-state activities—whether of aliens or citizens—implicate only domestic concerns and should thus be subject to the ordinary rules of administrative law preemption.

Yet, other cases reach the opposite conclusion. In *Toll v. Moreno*,¹¹¹ the Court held that federal law preempted a Maryland law denying in-state tuition benefits to certain aliens, concluding that any state attempt to “impose [] an ‘auxiliary burden upon the entrance or residence of aliens’” implicates the nation’s foreign affairs.¹¹² This approach suggests that regulations relating to aliens should be subject to the special rules for foreign affairs preemption.

The Court has proffered no principled ground for explaining why the denial of in-state tuition benefits to aliens implicates foreign affairs but the denial of alien employment does not. The recent spate of sub-federal immigration regulation exacerbates this difficulty. While these laws typically are limited to areas within the traditional police powers of the states, such as housing, contracts, and employment, their express purpose is to encourage undocumented aliens to “self-deport.”¹¹³ The absence of a coherent theory

matters “as foreign affairs and international law expand to include issues at the core of the states’ reserved power.” Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 21, at 176.

107 *De Canas*, 424 U.S. 351.

108 131 S. Ct. 1968 (2011).

109 *De Canas*, 424 U.S. at 363.

110 *Whiting*, 131 S. Ct. at 1983.

111 458 U.S. 1 (1982).

112 *Id.* at 12 (quoting *Graham v. Richardson*, 403 U.S. 365, 379 (1971)).

113 See, e.g., H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011) (denying undocumented aliens access to public postsecondary education and requiring public schools at the primary and secondary levels to check the immigration status of all students); S. Enrolled Act 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011) (denying undocumented aliens access to all public benefits); Hazleton, Pa., City Illegal Immigration Relief Act Ordinance (2006) (prohibiting employment or rental of housing to undocumented aliens); Farmers Branch, Tex., Ordinance 2952 (2008) (prohibiting renting or leasing of residence to undocumented alien);

for distinguishing when such regulations implicate foreign affairs rather than solely domestic interests precludes an assessment of which of the two existing doctrines of executive preemption should apply in a given case.

C. *Measuring Executive Discretion Against Congressional Intent*

Finally, the structure of our nation's immigration laws, characterized by an extraordinary breadth of executive authority, defeats any meaningful attempt to measure a given executive branch decision against congressional intent. The scope of authority delegated by Congress—both express and “de facto”—undermines the ability to determine whether an immigration agency decision is “pursuant to” or not “in conflict with” congressional intent, questions crucial to applying the existing doctrines of executive preemption.¹¹⁴

Express congressional delegations of immigration authority are exceedingly broad, even by administrative law standards. Indeed, Congress's first foray into immigration lawmaking in the Alien and Sedition Acts of 1798—well before the rise of the modern administrative state and its accompanying broad delegations of power—granted the President unfettered discretion to arrest and deport any alien who, in his estimation, was “dangerous to the peace and safety of the United States” and to identify the conditions under which such aliens might remain.¹¹⁵ Today, as in many areas of the modern administrative state, the Immigration and Nationality Act (INA), which provides the statutory framework for our nation's immigration laws, includes broadly worded delegations of authority to agencies.¹¹⁶ Unlike other areas of administrative law, however, the INA also expressly awards immigration agencies discretionary authority to override many of its central mandates.¹¹⁷

For example, although the INA identifies aliens entitled to admission into the United States,¹¹⁸ it authorizes the executive to suspend the entry of aliens or restrict their entry any time it finds that such entry would be “detrimental to the national defense, the national security, or the public interest.”

see also Rubenstein, *supra* note 3, at 119 (discussing the challenge in determining whether the recent spate of subfederal “attrition-through-enforcement” laws infringes on exclusive federal authority to regulate immigration rather than lying within realm of ordinary domestic police powers).

114 *See generally* Cox, *supra* note 3, at 56–57 (observing that the structure of modern immigration law is “rooted principally in unilateral executive action”).

115 Act of June 25, 1798, ch. 58, § 1, 1 Stat. 570, 570–71 (expired 1801).

116 *See* 8 U.S.C. § 1103(a)(3) (2012) (directing the Secretary of Homeland Security to “establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter”); *id.* § 1103(g)(2) (directing Attorney General to “establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section”).

117 *See generally* Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611 (2006) (discussing extensive range of discretion expressly delegated to immigration agencies by Congress).

118 *See* 8 U.S.C. §§ 1151, 1153.

mental to the interests of the United States.”¹¹⁹ Likewise, although section 212(a) of the INA provides a comprehensive list of factors precluding an alien’s admission into the country,¹²⁰ section 212(d)(3)(A) grants the executive unfettered discretion to admit such statutorily inadmissible aliens on at least a temporary basis.¹²¹

Congress likewise expressly grants agencies broad discretion to determine which aliens already in the United States will be deported. Section 237 of the INA catalogs an extensive list of factors—such as presence in violation of law, commission of crimes, or failure to register—rendering an alien deportable.¹²² At the same time, however, it grants broad discretionary power to the executive to permit such aliens to remain in the United States notwithstanding their statutory deportability.¹²³ Some of these forms of discretionary relief are somewhat restricted. Section 240A(a) of the INA authorizes the executive branch to grant “cancellation of removal” to statutorily deportable aliens, but only if the alien meets minimal requirements for lengths of lawful presence and residence and the absence of aggravated felony convictions.¹²⁴

Other forms of statutory relief, by contrast, extend virtually limitless discretion to the agency. Section 212(d)(5)(A) of the INA authorizes executive officials to grant “parole” status to permit a deportable alien to remain in the United States whenever there are “urgent humanitarian reasons or significant public benefit.”¹²⁵ Likewise, section 241(c)(2) permits the executive to grant a “stay of removal” to permit a deportable alien to remain in the United States whenever “immediate removal is not practicable or proper.”¹²⁶ In these ways, Congress expressly grants to the executive exceedingly broad discretion in the administration of immigration laws.

In addition to these express grants of statutory authority, both Congress and the Court acknowledge and condone broad executive authority to exercise prosecutorial discretion separate and apart from the statutory forms of relief. As in any criminal or civil enforcement context, an immigration agency may exercise this discretion simply by declining to arrest, charge, or prosecute a particular individual. In the immigration context, however, agencies sometimes affirmatively act to grant favorable exercises of discretion

119 *Id.* § 1182(f).

120 *Id.* § 1182(a).

121 *Id.* § 1182(d)(3)(A) (granting executive authority to permit temporary entry of alien otherwise excludable).

122 *Id.* § 1227(a).

123 *See generally* Cox & Rodríguez, *supra* note 3, at 485 (discussing breadth of executive removal authority); Neuman, *supra* note 117 (same).

124 8 U.S.C. § 1229b(a). Section 240A(b) authorizes agencies to grant cancellation of removal for aliens *and provide legal permanent resident status* to an otherwise removable alien, if additional criteria are satisfied. The INA caps the total number of aliens who might benefit from discretionary grants of section 240A(b) relief, but does not limit the total number of aliens who might benefit from section 240A(a).

125 *Id.* § 1182(d)(5)(A).

126 *Id.* § 1231(c)(2).

in the form of “administrative closure” or “deferred action.” Administrative closure constitutes a decision to remove a case from the active docket of immigration court. Immigration judges within the Department of Justice’s Executive Office for Immigration Review (EOIR) grant this form of relief in the context of ongoing adjudication when both the prosecution and alien agree to move for such relief.¹²⁷ Deferred action constitutes a decision not to initiate removal proceedings against an alien, or to terminate removal proceedings already initiated.¹²⁸ Regulations define “deferred action” as “an act of administrative convenience to the government which gives some cases lower priority.”¹²⁹ Enforcement officials, typically housed within the Immigration and Customs Enforcement (ICE) agency of the Department of Homeland Security, rather than immigration judges within the EOIR, extend such grants of relief. Deferred action typically entitles the individual to remain in the United States for a renewable period of one to two years; it also authorizes the alien to work in the United States.¹³⁰

Few doubt the executive branch’s constitutional authority to engage in such exercises of prosecutorial discretion.¹³¹ Indeed, the Supreme Court not only acknowledges the permissibility of administrative prosecutorial discretion, but further insulates such decisions from judicial review. In *Heckler v. Chaney*, the Court rejected a challenge to the Federal Drug Administration’s failure to initiate enforcement proceedings to prohibit the use of certain drugs for lethal injection in death penalty cases.¹³² Concluding that “an agency’s decision not to take enforcement action should be presumed immune from judicial review,” it noted:

[A]n agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged to “take Care that the Laws be faithfully executed.”¹³³

127 See *Lopez-Reyes v. Gonzales*, 496 F.3d 20, 21 (1st Cir. 2007) (describing administrative closure).

128 *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (quoting 6 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 72.03[2][h] (1998)); see U.S. DEP’T OF JUSTICE, IMMIGRATION NATURALIZATION SERVICE FACT SHEET ON PROSECUTORIAL DISCRETION GUIDELINES (2000); see also JANUARY CONTRERAS, CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., DEFERRED ACTION: RECOMMENDATIONS TO IMPROVE TRANSPARENCY AND CONSISTENCY IN THE USCIS PROCESS (2011); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010) (discussing deferred action).

129 8 C.F.R. § 274a.12(c)(14) (2014).

130 *Id.*

131 *Cf.* Delahunty & Yoo, *supra* note 3, at 856 (maintaining that individual exercises of prosecutorial discretion are permissible, but that categorical exercises of such discretion violate the Take Care Clause).

132 470 U.S. 821, 837–38 (1985).

133 *Id.* at 832 (quoting U.S. CONST. art. II, § 3). For critiques of this nonreviewability doctrine, see, for example, Bressman, *supra* note 79, at 1657, and Sunstein, *supra* note 79, at 675–83.

More recently, in *Reno v. American-Arab Anti-Discrimination Committee*, the Court examined exercises of prosecutorial discretion within the context of immigration removals more specifically.¹³⁴ Confirming that “the Executive has discretion to abandon the endeavor” of deporting an alien at each stage of a removal proceeding, it described the “regular practice (which had come to be known as ‘deferred action’) of exercising that discretion for humanitarian reasons or simply for its own convenience.”¹³⁵ Far from casting doubt on the validity of such exercises, it concluded that Congress intended to insulate such executive branch decisions from judicial review.¹³⁶

The constitutional validity of these exercises of prosecutorial discretion does not resolve, however, whether they should be entitled to preemptive effect. Doctrines of executive preemption require an assessment of the exercise of prosecutorial discretion against congressional intent. In the ordinary administrative law context, agency decisions are entitled to preemptive effect only if they are “pursuant to” congressional intent.¹³⁷ The foreign affairs context imposes a lower hurdle, granting preemptive effect to agency decisions so long as they are not “in conflict” with congressional intent.¹³⁸ The vast discretionary authority granted to immigration agencies, however, precludes any clear resolution of these questions.

Take deferred action, for instance. Pursuant to the doctrine of administrative law preemption, one might plausibly argue that executive grants of deferred action are not “pursuant to” a congressional delegation of authority because, unlike the case for statutory categories of relief such as cancellation of removal, the INA does not expressly authorize this form of relief.¹³⁹ On the other hand, by delegating to agencies authority to extend certain forms of relief that are virtually limitless, such as parole or temporary admission for excludable aliens, Congress arguably signals an intent to allow the executive unfettered authority to determine which aliens to remove. This view suggests that exercises of prosecutorial discretion are pursuant to the broad delegation of congressional authority for agencies to “perform such other acts as [they] deem[] necessary for carrying out [their] authority under the provisions of this [Act].”¹⁴⁰ Moreover, although Congress has not statutorily

134 *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 471–72 (1999).

135 *Id.* at 483–84.

136 *Id.* at 485.

137 *See supra* Section I.B.

138 *See supra* Section I.C.

139 *See generally* 8 U.S.C. § 1103 (2012) (detailing the powers and duties of officers empowered by the INA).

140 *Id.* § 1103(a)(3). For a debate over whether the Obama Administration’s program to grant deferred action to childhood arrivals violates congressional intent, compare Delahunty & Yoo, *supra* note 3, at 835 (asserting that Congress’s repeated consideration and rejection of the DREAM Act demonstrates that the DACA program to grant relief to individuals who would have benefited from the DREAM Act contravenes congressional intent), with David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade*, 122 *YALE L.J. ONLINE* 167 (2012) (engaging in statutory analysis to argue that the DACA program is congressionally authorized).

authorized these grants of prosecutorial discretion, it has not acted to preclude them either, even though immigration agencies have been engaged in the practice of awarding deferred action since at least 1975.

Indeed, in *Reno v. American-Arab Anti-Discrimination Committee*, the Supreme Court concluded that the congressional restrictions to judicial review enacted through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) were “clearly designed to give some measure of protection to ‘no deferred action’ decisions and similarly discretionary determinations.”¹⁴¹ Congressional acquiescence to executive exercises of prosecutorial discretion finds further support in a 1999 letter drafted by twenty-eight bipartisan members of Congress castigating federal immigration agencies for failing to exercise prosecutorial discretion, and instead, deporting aliens in cases of extreme hardship.¹⁴² Criticizing the agencies’ removal of certain cases “when so many other more serious cases exist[],” they demanded that agencies promulgate guidelines for the exercise of prosecutorial discretion, “both to legitimate in their eyes the exercise of discretion and to ensure that their decisions to initiate or terminate removal proceedings are not made in an inconsistent manner.”¹⁴³ Finally, while it is true that the INA does not expressly authorize grants of deferred action, Congress cited the practice with apparent approval in the REAL ID Act of 2005, which identifies deferred action status as one of the forms of proof acceptable for federal approval of states’ issuance of drivers’ licenses.¹⁴⁴

In these ways, immigration agencies’ exceedingly broad authority to determine whether to remove a statutorily deportable alien compromises any meaningful assessment of whether a given exercise of prosecutorial discretion is “pursuant to” or “in conflict” with congressional intent. Indeed, Professors Cox and Rodríguez characterize our modern immigration structure as one of “de facto delegation” to the executive branch.¹⁴⁵ They report that current immigration laws render an impossibly large swath of the foreign-born population deportable while providing resources to remove only a small fraction of this population.¹⁴⁶ Consequently, one out of every three resident noncitizens in the United States today is deportable at the option of the President.¹⁴⁷ The magnitude of this mismatch between congressional removal mandates and enforcement resources, they argue, requires the executive branch to implement policy choices outside of any traditional conceptions of delegation.¹⁴⁸ Indeed, they suggest that Congress reaps significant

141 *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 485.

142 Letter from 28 Members of Congr. to Att’y Gen. Janet Reno & Doris Meissner, Comm’r, Immigration & Naturalization Serv. (Nov. 4, 1999), *reprinted in* 76 INTERPRETER RELEASES 1720 app. 1 (Dec. 3, 1999).

143 *Id.*

144 REAL ID Act of 2005, Pub. L. No. 109-13, § 202(c)(2)(B), 119 Stat. 302, 313.

145 Cox & Rodríguez, *supra* note 3, at 462.

146 *Id.* at 463.

147 *Id.*

148 *See id.* at 546–47; *see also* Memorandum from Doris Meissner, Comm’r, Immigration & Naturalization Serv., to Regional Directors, District Directors, Chief Patrol Agents, and

political rewards by encouraging broad exercises of prosecutorial discretion on the part of the executive, while refusing to authorize them explicitly through statute.¹⁴⁹ By doing so, Congress may enjoy the benefits of a humanitarian immigration policy while deflecting political costs to the agencies.¹⁵⁰

In these ways, the very structure of our nation's immigration laws, characterized by exceedingly broad delegations of discretionary authority to the executive, precludes any clear resolution as to whether a given exercise of prosecutorial discretion is "pursuant to" or "in conflict with" congressional intent, a question crucial to the application of existing doctrines of executive preemption.

* * *

These three aspects of immigration law—unresolved questions regarding the source of the executive's immigration authority; the absence of any principled ground for distinguishing when a regulation of aliens implicates the nation's foreign affairs; and the difficulty in measuring an immigration agency's decision against congressional intent—undermine the utility of the existing frameworks for executive preemption. While not discussed in the *Arizona* opinion, these considerations provide a plausible explanation for the Court's rejection of existing doctrines, an explanation that is limited to the immigration context alone.

III. TOWARD A FUNCTIONALIST APPROACH TO EXECUTIVE IMMIGRATION PREEMPTION

Notwithstanding the difficulties in applying existing preemption doctrines to the immigration context, some limit must remain. Extending preemptive effect to all potential decisions rendered by immigration agencies, including *non*-decisions such as those declining to initiate enforcement actions in the first instance, would threaten to displace all state regulations of aliens—a result unintended by the *Arizona* majority and Congress, to say nothing of our constitutional framers. The question remains, then, under what circumstances should courts after *Arizona* permit the exercise of prosecutorial discretion by immigration officials to preempt state law? This Article joins the growing body of administrative law scholarship endorsing a functionalist approach to resolve this question, in which the preemptive force of an executive branch decision depends on the extent to which the decisionmaking process mitigates the institutional concerns associated with

Regional and District Counsel, Exercising Prosecutorial Discretion (Nov. 17, 2000) (justifying exercises of prosecutorial discretion in part on need to conserve limited agency resources).

149 Cf. Cox & Rodríguez, *supra* note 3, at 533–36.

150 See *id.*

agency preemption.¹⁵¹ These institutional concerns include: (1) the risk that agencies will not adequately consider the interests of the states in developing preemptive rules; (2) the absence of mechanisms to hold agencies publicly accountable for their decisions; and (3) the relatively limited deliberation of agency decisionmaking. It departs from preceding scholarship, however, by concluding that in the immigration context, adherence to procedural formalities provides a poor proxy for promoting these norms. Contrary to conventional wisdom, a careful examination of the institutional design of immigration agency decisionmaking demonstrates that some types of nonformalized decisions—particularly highly visible ones announced by high-level agency officials—mitigate the institutional concerns associated with agency preemption at least as effectively as formalized decisions rendered through immigration court adjudication.

A. *Institutional Concerns Associated with Executive Preemption*

Concerns regarding executive branch preemption emphasize three institutional weaknesses of administrative agencies. Agency decisionmaking processes, unlike congressional ones, need not consider states' interests, are not necessarily publicly accountable, and are not always carefully deliberated.¹⁵²

1. Consideration of States' Interests

First, a number of contemporary scholars challenge executive preemption on the ground that it evades the “political safeguards of federalism” built into congressional enactments, thereby displacing state laws without adequate consideration of the interests of the individual states.¹⁵³ Congressional enactments require approval by the Senate, the body designed to provide the most direct representation of individual states, thereby ensuring a voice for state interests in any decision to displace state regulation.¹⁵⁴ In addition, the various veto-gates to which congressional enactments are subject create procedural safeguards of federalism by constraining federal lawmaking, thereby preserving the federal-state balance.¹⁵⁵ Executive agencies, by contrast, do not directly represent state interests and enact rules with far greater ease

151 See, e.g., Galle & Seidenfeld, *supra* note 10, at 2020–22 (endorsing institutional choice approach to resolving administrative preemption disputes); Metzger, *supra* note 10, at 2069–72.

152 These arguments mirror earlier defenses of the now largely defunct nondelegation doctrine, which pointed to similar institutional weaknesses of agencies to argue that they should not be entitled to engage in lawmaking. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 82–85 (1985) (discussing institutional claims to support the nondelegation doctrine); Sunstein, *supra* note 79, at 655 (noting that concerns regarding agency accountability and transparency “were a prime reason behind the nondelegation doctrine”).

153 See *supra* notes 15–19 and accompanying text.

154 See Clark, *supra* note 15, at 1342–46.

155 See *id.* at 1345–46.

than Congress, rendering them more likely to intrude on state autonomy.¹⁵⁶ As Justice Stevens observed, “[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law.”¹⁵⁷

Of course, agencies sometimes do consult with states in developing pre-emptive rules. Indeed, some scholars suggest that agencies, in fact, are better institutionally suited than Congress to consider and incorporate state interests. For example, Professor Catherine Sharkey maintains “[a]gency experts at the policy and enforcement levels may better be able to engage with state actors in a more meaningful and substantive way than congressional staffers.”¹⁵⁸ Recent presidential directives require such consultation.¹⁵⁹ Executive Order 13132, issued by President Clinton in 1999, expressly requires agencies to confer with state and local officials in developing any policy relating to the allocation of authority between the federal government and the states, setting forth a series of procedural steps that agencies must follow.¹⁶⁰ More recently, President Obama issued a memorandum affirming his commitment to Executive Order 13132, and stating “preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States.”¹⁶¹ Although agency compliance with these directives remains inconsistent,¹⁶² agencies at least sometimes pay serious attention to state interests.¹⁶³

2. Public Accountability

Second, a number of contemporary scholars maintain that agencies lack the political accountability necessary to legitimate decisions to preempt state laws.¹⁶⁴ Agency officials, unlike members of Congress, are not popularly

156 See Mendelson, *supra* note 10, at 725 (noting that administrative decisionmaking fails to ensure that any “state-federal dialogue on regulatory policy” takes place); Young, *supra* note 10, at 896 (arguing that agency decisionmaking circumvents political and procedural safeguards of federalism).

157 *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting).

158 Sharkey, *Federalism Accountability*, *supra* note 10, at 2149–50.

159 See generally Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 528–31 (2012) (discussing executive directives on preemption).

160 Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 10, 1999).

161 Memorandum for the Heads of Executive Departments and Agencies, Preemption (May 20, 2009), *reprinted in* 74 Fed. Reg. 24,693 (May 22, 2009).

162 See *id.* (noting violations of Executive Order 13,132); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 783 n.191 (2004) (documenting a lack of agency compliance with Executive Order 13,132); Sharkey, *supra* note 159, at 527 (noting “failures to comply with [the order]”).

163 See Sharkey, *Federalism Accountability*, *supra* note 10, at 2146–50 (documenting examples of agency consultation with state interests).

164 See, e.g., Merrill, *supra* note 10, at 756–57; Young, *supra* note 10, at 878, 893. Concern regarding the political accountability of agencies is by no means unique to the pre-emption context. On the contrary, these concerns animate debates in virtually every

elected and remain notoriously vulnerable to capture by regulated interests and self-aggrandizing bias.¹⁶⁵ Such capture and bias renders agencies liable to depart from the political will in preempting state laws, thereby compromising norms of democratic accountability and participation.¹⁶⁶ Additionally, agency decisions tend to be less transparent than congressional enactments, further insulating agencies from political accountability.¹⁶⁷ These institutional aspects of agency design thus compromise the political accountability of administrative decisionmaking.

Others, however, maintain that in at least some circumstances, agencies are at least as accountable for their decisions as Congress. Professors Galle and Seidenfeld contend that administrative decisions rendered pursuant to notice-and-comment rulemaking are far more transparent and subject to public scrutiny than congressional pork barreling.¹⁶⁸ It is also worth noting that agencies' insulation from political pressures sometimes counsels in favor of empowering them with the authority to preempt state laws, where such insulation is necessary to protect individual or minority rights or to advance the public good in a manner that majoritarian legislative processes would not allow.¹⁶⁹

3. Deliberation

Finally, a number of scholars contend that agency decisions lack the extensive deliberation necessary to justify displacing state law.¹⁷⁰ Pursuant to this view, the very reasons for the rise in the administrative state—the ease and flexibility of decisionmaking—circumvent the careful deliberation required to determine the optimal combination of federal and state regulation. Coupled with incentives for self-aggrandizement, this lack of deliberation may result in preempting more state regulations than optimally necessary. To the extent that permitting state experimentation might in

aspect of administrative law. Cf. Bressman, *supra* note 79, at 1658–61 (criticizing administrative law scholarship for being excessively concerned with political accountability while paying little attention to the risk of arbitrariness).

165 See generally Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHL-KENT L. REV. 1039, 1069 (1997); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 448–52 (1987).

166 Mendelson, *supra* note 10, at 722 (discussing impact of agency bias on preemption decisions); Merrill, *supra* note 10, at 756 (discussing implications of agency bias in resolving federalism disputes); Young, *supra* note 10, at 878 (“Federal agencies, after all, have no mandate to represent state interests and possess strong countervailing incentives to maximize their own power and jurisdiction.”). But see Sharkey, *Products Liability Preemption*, *supra* note 10, at 475 (“Counterintuitively, federal agencies have been just as likely, if not more likely, to argue *against* preemption in the products liability realm.”).

167 See Mendelson, *supra* note 10, at 717.

168 See Galle & Seidenfeld, *supra* note 10, at 1954–61.

169 See Bressman, *supra* note 79, at 1658–59; Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 443–49 (2010).

170 See, e.g., Mendelson, *supra* note 10, at 715–17; Young, *supra* note 10, at 878, 893.

some cases yield superior regulatory outcomes, administrative preemption may foreclose this possibility.¹⁷¹

Again, however, agencies arguably reach better-quality decisions, including decisions to preempt state law, than the legislative process does. For example, Professor Catherine Sharkey argues that the policy expertise of agencies may render them better institutionally suited than Congress to consider “concrete” federalism values, i.e., consideration of state interests and their interaction with federal regulatory goals.¹⁷² Agencies enjoy the advantage of subject matter expertise, which may enable them to strike a better balance between competing interests in a given preemption dispute than the political process.

* * *

In these ways, critics of administrative preemption emphasize three institutional weaknesses of agencies as compared to Congress: (1) the risk that the agency will not adequately consider state interests; (2) the lack of direct political accountability for agency decisions; and (3) the relatively limited deliberation associated with agency decisionmaking. As the above analysis suggests, however, agency decisions differ in the extent to which they implicate these weaknesses. While agencies sometimes fail to consider state interests, sometimes insulate themselves from public accountability, and sometimes reach decisions without careful deliberation, other times they do not.

B. Institutional Design to Mitigate Agency Weaknesses

Agency decisionmaking takes many forms—including notice-and-comment rulemaking, administrative adjudication, and informal policy guidance to name a few¹⁷³—and these forms vary considerably in the extent to which they implicate the institutional concerns associated with executive preemption. Acknowledging these distinctions, a growing body of administrative scholarship endorses a functionalist approach to extend preemptive effect only to those decisions that adequately mitigate those concerns.¹⁷⁴ Outside

171 See Huntington, *supra* note 2, at 847 (discussing the merits of state experimentation); Mendelson, *supra* note 10, at 709 (arguing that “state policymaking experiments can be a useful source of information to . . . the federal government”); Rubenstein, *supra* note 3, at 141 (arguing the merits of “regulatory experimentation”); Rubenstein, *supra* note 10, at 1162–63 (discussing the merits of state “laboratories”).

172 Sharkey, *Federalism Accountability*, *supra* note 10, at 2147–53. Other scholars have argued the same. See, e.g., Metzger, *supra* note 10, at 2082–83 (suggesting that agencies’ substantive policy expertise “likely” grants agencies the “greatest expertise on the specific question of how best to balance federal-state regulatory roles,” and concluding that “claims of agency insensitivity to state interests may well be exaggerated”).

173 See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1383 (2004) (identifying a “menu of policymaking tools” available to agencies).

174 In a recent article, Professors Daniel Abebe and Aziz Huq propose an alternative framework to govern the executive branch’s authority to preempt state law across all cases

the immigration context, the approach most frequently endorsed by commentators and indeed partially reflected in the existing administrative law preemption doctrine extends preemptive effect to agency decisions adhering to the procedural formalities necessary to carry the “binding force of law,” while denying it to decisions that depart from such formalities.¹⁷⁵ Adapting this approach to the immigration context would extend preemptive effect to decisions rendered pursuant to notice-and-comment rulemaking and agency adjudication, but not to decisions rendered through policy statements, interpretive guidance, or case-by-case exercises of prosecutorial discretion by enforcement officials.¹⁷⁶ This approach presumes that procedural formalities such as those required by notice-and-comment rulemaking and agency adjudication mitigate the institutional concerns associated with administrative preemption.

Procedural requirements for notice-and-comment rulemaking warrant this presumption. Pursuant to the Administrative Procedure Act, agencies seeking to preempt state law through rulemaking must publish advance notice of the proposed rule, permit the public to comment on the proposed rule, and respond to those comments prior to promulgation.¹⁷⁷ These safeguards mitigate, if not entirely eliminate, the institutional concerns associated with agency preemption. First, the statutorily mandated procedures guarantee individual states the opportunity to comment on proposals to preempt their laws.¹⁷⁸ Second, the rulemaking process ensures transparency

involving foreign affairs. Abebe & Huq, *supra* note 9. They offer a parsimonious rule, based on the international law concept of polarity. *Id.* at 782–94. Where the United States operates in a multipolar world, which significantly constrains the United States’ international authority, they reason federal interests are at their “zenith,” justifying a judicial presumption in favor of federal interests. *Id.* at 728. By contrast, in a unipolar world characterized by U.S. hegemony, the United States’ status as a superpower reduces the benefits of centralized national policy, justifying a judicial presumption in favor of states. *Id.* at 793. This approach, however, fails to account for the central normative principles that animate objections to agency preemption—namely, consideration of state interests, political accountability, and deliberation.

175 See Merrill, *supra* note 10, at 764 (endorsing an approach affording preemptive effect to agency decisions rendered pursuant to notice-and-comment rulemaking and formal adjudication); Rubenstein, *supra* note 3, at 120, 145–46 (contending that within the immigration context, nonbinding executive enforcement decisions should not be entitled to preemptive effect); Young, *supra* note 10, at 899 (suggesting a “fallback position” of affording preemptive effect to agency decisions that carry the force of law).

176 This approach modifies the existing administrative law framework by dispensing with the requirement that the agency action be “pursuant to” congressional intent, see *supra* note 28 and accompanying text, in light of the difficulties inherent in making that determination in the immigration context, see *supra* Section II.C.

177 5 U.S.C. § 553 (2012).

178 Merrill, *supra* note 10, at 756–57 (noting that notice-and-comment rulemaking provides an opportunity to be heard to affected parties in federalism disputes); Metzger, *supra* note 10, at 2084 (“From a political perspective, notice-and-comment rulemaking offers a means by which states can learn of pending agency action that might harm their interests and inform their political allies in Congress. . . . [It] offers a means of ensuring agencies are informed of and respond to state concerns.”); Young, *supra* note 10, at 899 (acknowledging

and provides the public at large with the opportunity to influence and shape the agency's decision to preempt.¹⁷⁹ Finally, the rulemaking requirements promote deliberation by requiring the agency to consider and respond to all of the various considerations identified in the public comment period.¹⁸⁰ Even more importantly, the threat of reversal presented by the availability of judicial review over rulemaking decisions¹⁸¹ ensures that agencies engage in reasoned decisionmaking prior to promulgating a rule.¹⁸² These procedural safeguards thus mitigate the perceived institutional weaknesses of agencies, thereby providing rulemaking decisions with a relatively strong claim for preemptive effect.

By comparison, the institutional rationales for extending preemptive effect to decisions rendered pursuant to agency adjudication have received far less scholarly attention. Almost in passing, Professor Merrill suggests that hearing requirements for agency adjudication safeguard what he terms representational norms,¹⁸³ which he defines to include consideration of state interests and those of other parties affected by regulation.¹⁸⁴ Similarly, Professor Young suggests that such procedural formalities promote deliberation.¹⁸⁵ A careful examination of the institutional design of immigration agency decisionmaking, however, suggests that the procedural formalities of agency adjudication serve as a poor proxy for alleviating the institutional concerns associated with administrative preemption. Rather, certain types of nonformalized agency decisions—particularly highly visible ones announced by high-level administrative officials—safeguard state interests, public accountability, and deliberation values at least as effectively as formalized immigration court adjudication.

C. *Institutional Design of Immigration Agency Decisionmaking*

Within the immigration context, a broad range of executive officials across a number of agencies exercise prosecutorial discretion through a panoply of devices. Immigration Judges (IJs) within the Executive Office for Immigration Review (EOIR), a component of the Department of Justice,

edging that notice-and-comment rulemaking provides opportunity for consideration of state interests).

179 See Galle & Seidenfeld, *supra* note 10, at 1939 (noting that the rulemaking process ensures that “interest groups concerned about regulatory issues will know of any prospective agency action before it happens, and interest group entrepreneurs can inform their public constituencies of the proposed action”).

180 See Metzger, *supra* note 10, at 2086.

181 5 U.S.C. § 702.

182 See Metzger, *supra* note 10, at 2058–60 (positing that judicial review ensures agencies engage in “reasoned decisionmaking” and thus protects federalism interests); Sunstein, *supra* note 79, at 655–56 (characterizing the availability of judicial review as a surrogate for the absence of the procedural and federalism safeguards of the nondelegation doctrine).

183 Merrill, *supra* note 10, at 765.

184 *Id.* at 749.

185 Young, *supra* note 10, at 899.

exercise discretion to permit deportable aliens to remain in the United States in the course of formal immigration court adjudications.¹⁸⁶ Other officials, such as the street-level bureaucrats of Immigration and Customs Enforcement (ICE) within the Department of Homeland Security (DHS)¹⁸⁷ exercise prosecutorial discretion through less formal means such as by awarding “deferred action” or simply declining to initiate enforcement proceedings against a particular individual.¹⁸⁸ Supervisory officials within DHS may engage in formal notice-and-comment rulemaking to define categories of aliens entitled to favorable exercises of prosecutorial discretion, although they typically rely on less formal policy statements or interpretive guidance documents to guide the exercise of discretion by street-level enforcement agents. A comparison of these different forms of immigration decisionmaking suggests that procedural formality serves as a poor proxy for determining the extent to which a given decision considered state interests, is subject to political accountability, or was carefully deliberated. Rather, some types of informal immigration agency decisions have at least as strong a claim to preemptive effect as decisions formally rendered through immigration court adjudication.

1. Exercises of Prosecutorial Discretion Pursuant to Immigration Court Adjudication

Exercises of prosecutorial discretion awarded by IJs pursuant to adjudication in immigration court adhere to the procedural formalities necessary to warrant the binding “force of law” and thus would be entitled to preemptive effect under a modified administrative law approach to executive preemption.¹⁸⁹ These procedural formalities include the requirement for advance notice, the right to private counsel, the right to present evidence and cross-examine adverse evidence, the development of an administrative record, and, in some cases, a right to appeal an adverse decision.¹⁹⁰ Notwithstanding these procedural formalities, however, these decisions fail to mitigate the institutional concerns associated with administrative preemption.

First, immigration court adjudications provide no mechanism to consider the interests of individual states. Although immigration court provides procedural protections to ensure consideration of the *individual’s* interest, unlike notice-and-comment rulemaking, it provides no mechanism for individual states to intercede.¹⁹¹ Second, these decisions generally are insulated from political accountability. Decisions by IJs are not reported or publicly

186 See 8 U.S.C. § 1229a (setting forth requirements for removal hearings).

187 Wadhia, *supra* note 128, at 256–61 (describing the reorganization of immigration agencies after September 11 and their respective authorities).

188 See Memorandum from John Morton, *supra* note 6.

189 Procedural requirements for immigration court hearings are set forth in sections 239 and 240 of the Immigration and Nationality Act. 8 U.S.C. §§ 1229, 1229a.

190 *Id.*; 8 C.F.R. §§ 1240.20(a), 1003.1 (2014).

191 See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1440 (1992) (noting that agency decision to produce rules through adjudi-

accessible. Although the EOIR publishes annual statistics on certain types of grants of relief, it provides no mechanism by which the public can ascertain the grounds for a particular grant or denial of relief.¹⁹²

Finally, it is not at all clear that exercises of prosecutorial discretion made by IJs are carefully deliberated. Legal scholars as well as federal courts have long decried the “crisis” in immigration courts, casting significant doubt on the quality of immigration court deliberation.¹⁹³ For example, Professors Ramji-Nogales, Schoenholtz, and Schrag have documented vast inconsistencies in asylum adjudications, finding that a Colombian applicant for asylum had a five percent chance of obtaining relief before one IJ, as compared to an eighty-eight percent chance of obtaining relief before another IJ in the same building.¹⁹⁴ Similarly, according to Judge Posner, the Seventh Circuit reversed decisions by the Board of Immigration Appeals in a “staggering” forty percent of cases on the merits,¹⁹⁵ leading him to conclude that “the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”¹⁹⁶ Even more alarming, the careful deliberation presumed to inhere in agency adjudication relies in large part on the availability of judicial review.¹⁹⁷ In the 1996 amendments to the INA, however, Congress added section 242(g), which provides, “no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.”¹⁹⁸ The elimination of judicial review in the immigration context undermines the careful checks and balances and consequent safeguards assumed to inhere in formal agency adjudication.¹⁹⁹

Thus, although grants of relief rendered through immigration court adjudication adhere to the procedural formalities necessary to the binding force of law, they do not provide meaningful safeguards to mitigate the institutional concerns associated with administrative preemption.

cation rather than notice-and-comment rulemaking eliminates opportunity for public participation and reduces agency accountability to Congress and the public).

192 See, e.g., EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2012 STATISTICAL YEAR BOOK (2013), <http://www.justice.gov/eoir/statspub/fy12syb.pdf>.

193 See, e.g., Michele Benedetto, *Crisis on the Immigration Bench*, 73 BROOK. L. REV. 467, 487–89 (2008) (discussing problems of immigration adjudication); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1644–45 (2010) (describing judicial and scholarly critiques of immigration courts); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 328 (2007) (documenting a lack of consistency in immigration court adjudication).

194 Ramji-Nogales et al., *supra* note 193, at 339.

195 *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005).

196 *Id.* at 830.

197 See *supra* note 182.

198 8 U.S.C. § 1252(g) (2012).

199 See Neuman, *supra* note 117, at 625–31 (discussing the impact of eliminating judicial review on individual rights in removal cases).

2. Informal Policy Memoranda Guiding Exercises of Prosecutorial Discretion

By contrast, certain types of informal agency decisions, while departing from the procedural formalities necessary to carry the binding force of law, mitigate the institutional concerns associated with administrative preemption more effectively than decisions rendered through formalized immigration court adjudication. From a functionalist perspective, highly publicized grants of relief announced by high-level administrative officials have as strong a claim for preemptive effect as those awarded through adjudication.

Within the immigration agencies of the Department of Homeland Security, although street-level officials exercise prosecutorial discretion in individual cases, higher-level supervisory officials periodically issue guidance on when to grant a favorable exercise of discretion—whether it be in the form of administrative closure, deferred action, or even a decision to decline to initiate charges in the first instance.²⁰⁰ Most of these policy memoranda direct lower-level officials to consider a nonexhaustive list of factors on a case-by-case basis, including the agency's priorities for enforcement, the duration of the alien's residence in the United States, family and community ties, and moral character, for example.²⁰¹ Some policy memoranda, however, identify categories of individuals who presumptively warrant a favorable exercise of discretion. For example, Secretary of Homeland Security Janet Napolitano announced in 2009 a policy to grant relief from removal to all statutorily deportable widows and widowers of U.S. citizens and their unmarried children under the age of 21.²⁰² Similarly, the Director of Immigration and Customs Enforcement in 2011 announced a policy of granting favorable exercises of prosecutorial discretion to "victims of crime, or witnesses to crime, and individuals pursuing legitimate or civil rights complaints."²⁰³ Most controversially, Secretary Napolitano in 2012 announced the Deferred Action for Childhood Arrivals (DACA) program, directing street-level officials to grant relief from removal to categories of individuals who would have benefited from the failed DREAM Act, including undocumented aliens who

200 See Memorandum from John Morton, *supra* note 6; Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enforcement, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), *available at* <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>; Memorandum from Doris Meissner, *supra* note 148; Memorandum from Bo Cooper, Gen. Counsel, Immigration & Naturalization Serv., INS Exercise of Prosecutorial Discretion (July 11, 2000), *available at* <http://www.legalactioncenter.org/sites/default/files/docs/lac/Bo-Cooper-memo.pdf>; Sam Bernsen, Gen. Counsel, Immigration & Naturalization Serv., Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976), *available at* <http://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf>.

201 Memorandum from John Morton, *supra* note 6; see Memorandum from Doris Meissner, *supra* note 148.

202 Press Release, *supra* note 6.

203 Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enforcement, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

have lived in the United States since childhood and satisfy certain additional requirements.²⁰⁴

These policy memoranda depart from the procedural formalities necessary to carry the binding force of law. Indeed, the Court frequently cites policy memoranda and similar internal guidance as the paradigmatic example of agency decisions lacking the binding force of law.²⁰⁵ Yet it is not at all clear that denying preemptive effect to these types of decisions while affording it to individual agency adjudications promotes the underlying institutional concerns surrounding agency preemption. Highly visible policy decisions announced by high-level administrative officials directing categorical grants of relief, even when issued through informal policy statements, may well be more attentive to states' interests, subject to greater political accountability, and more carefully and extensively deliberated than granular case-by-case decisions rendered by street-level officials, including IJs.²⁰⁶

Advocates of "presidential administration" point out that the procedural formality of an agency decision often bears little relation to the extent to which the decision mitigates institutional concerns associated with agency decisionmaking. In a direct challenge to the *Mead* framework, then-Professor Elena Kagan argued that courts should directly examine the extent to which an administrative decision is subject to political accountability mechanisms rather than rely on procedural formalities as a proxy for such accountability.²⁰⁷ Specifically, she argued that highly salient decisions attributable to the President himself are subject to a degree of political accountability unmatched by most agency decisions, even those reached through more formal procedures.²⁰⁸ Focusing more specifically on agency enforcement discretion, Professor Kate Andrias similarly maintains that presidential control over agency decisionmaking advances core democratic values far better than agency control by unelected judges or career bureaucrats.²⁰⁹ Like Kagan, she emphasizes that from an accountability perspective, the form of a policy decision matters less than the public ownership of a decision by high-level administrative officials.²¹⁰ This body of scholarship thus suggests that at least some types of informal decisions—notably those made through politically salient announcements by high-level officials—provide institutional safeguards that evade even formally rendered agency decisions.

The Obama administration's controversial announcement of the DACA program demonstrates the manner in which informal policies may be subject

204 Memorandum from Janet Napolitano, *supra* note 5.

205 See, e.g., *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (analogizing agency opinion letters to "interpretations contained in policy statements, agency manuals, and enforcement guidelines" to conclude that they "lack the force of law").

206 See Cox & Rodríguez, *supra* note 3, at 530 (noting costs of delegating discretionary authority to "lower level officers" whose work is difficult to publicly monitor).

207 Kagan, *supra* note 13, at 2382.

208 *Id.* at 2384.

209 Andrias, *supra* note 13, at 1083–94.

210 *Id.* at 1077.

to stronger safeguards than individual agency adjudication. On June 15, 2012, following the issuance of the Secretary of Homeland Security's memorandum and news release describing the program, President Obama held a news conference in the Rose Garden defending the program, stating "[i]n the absence of any immigration action from Congress to fix our broken immigration system, what we've tried to do is focus our immigration enforcement resources in the right places."²¹¹ The political salience of this announcement generated a great deal of debate among states.²¹² Even if the administration did not consider state concerns prior to adopting the program, an unlikely proposition, it almost certainly did in its aftermath. The DACA program has been subject to heated debate in the public as well.²¹³ Moreover, there is no indication that the development of DACA was anything but carefully deliberated. The extremely public announcement, made by the President himself, suggests that the decision was carefully considered. The underlying normative values of reflecting states' interests, political accountability, and agency deliberation thus suggest that the informal DACA program has at least as strong a claim to preemptive effect as immigration court adjudications.

To be sure, the proposed approach affording preemptive effect to executive branch decisions subject to meaningful accountability and deliberation regardless of procedural formality would not only privilege executive decisions protective of aliens such as the DACA program, but also those that might be less favorable to immigrants.²¹⁴ One might imagine a future

211 President Barack Obama, Remarks by the President on Immigration, *supra* note 5.

212 See, e.g., Editorial, *Driver's License Veto a Big Step Backward*, SUN SENTINEL (June 10, 2013), http://articles.sun-sentinel.com/2013-06-10/news/fl-editorial-immigration-dl-2013-0610_1-legal-status-young-immigrants-temporary-driver (describing Florida Governor Rick Scott's "attack" on DACA program); Editorial, *Gov. Jan Brewer, Arizona's Loose Cannon*, L.A. TIMES, May 29, 2013, <http://articles.latimes.com/2013/may/29/opinion/la-ed-arizona-immigrant-drivers-license-20130529> (describing Arizona Governor Jan Brewer's efforts to "undermine" the DACA program); Editorial, *Patrick's Power Grab*, BOS. HERALD, Nov. 20, 2012, http://bostonherald.com/news_opinion/opinion/editorials/2011/01/patrick%E2%80%99s_power_grab (criticizing Massachusetts Governor Deval Patrick's attempt to extend in-state tuition benefits to undocumented students in response to the DACA program); Peggy Fikac, *Governor Slams Deferred Action Policy*, SAN ANTONIO EXPRESS-NEWS (Aug. 21, 2012), http://www.mysanantonio.com/news/local_news/article/Governor-slams-deferred-action-policy-3802030.php (stating that Texas Governor Rick Perry "blistered the Obama administration's" DACA program in a letter to state agencies); see also Andrias, *supra* note 13, at 1090-93 (discussing accountability and transparency of presidential involvement in the DACA announcement).

213 See, e.g., Jennifer Preston, *Obama's Decision on Immigration Is Met with Joy, Anger and Skepticism*, N.Y. TIMES: LEDE (June 15, 2012, 1:10 PM), <http://thelede.blogs.nytimes.com/2012/06/15/online-reaction-to-obamas-immigration-decision-is-swift-and-polarized/?ref=us>.

214 See Rubenstein, *supra* note 3, at 89-90 (expressing a concern that defense of "federal monopolization in the name of immigrant rights may prove self-defeating" because, among other things, it "would hamstring subfederal initiatives that afford *more* rights and protection than federal law requires"). But see Cox, *supra* note 3, at 64 ("[P]residents are

administration, for example, that sought to displace state and local efforts to provide “sanctuaries” to undocumented aliens or licenses to practice law. Pursuant to the proposed approach, the executive branch could accomplish such ends without adhering to the procedural hurdles of notice-and-comment rulemaking, if the President himself announced the decision in a transparent and public manner.

Even under such circumstances, however, the proposed approach promotes rule-of-law values and democratic norms better than the alternative of affording preemptive effect only to decisions made pursuant to immigration court adjudication. Granular decisions rendered by immigration judges in individual cases are invisible to the public, escaping any meaningful political accountability. Yet, in the aggregate, these decisions may well exhibit a policy trend—one that is not particularly well-deliberated and one that may well be odds with states’ interests and the public will.²¹⁵ The proposed framework would provide incentives, then, for higher-level executive officials to take responsibility for such policy decisions in a manner to promote transparency and accountability. In other words, the procedural formality of the decision should matter less, from the perspective of institutional safeguards, than a direct assessment of an agency’s consideration of states’ interests, political accountability, and deliberation. Such a system better conforms to our democratic norms, which do not mandate particular outcomes, but instead require mechanisms for transparency and accountability so that the public, ultimately, can select its chosen course.

* * *

An examination of the institutional design of immigration agency decisionmaking suggests that the formality of an agency decision provides little protection against the institutional concerns associated with agency preempt-

plausibly more predisposed than Congress to pursue open immigration policies. The president’s more nationalistic electoral mandate, as well as his more direct engagement in foreign affairs, both suggest as much.”).

215 This claim thus departs from the reasoning of Professors Delahunty and Yoo, who assert the legitimacy of executive grants of *individual* relief from removal, but condemn executive grants of categorical relief. Delahunty & Yoo, *supra* note 3, at 841–45. Although they do not address the question of executive preemption specifically, they contend that the executive branch’s exercise of prosecutorial discretion as to entire categories of aliens exceeds its constitutional authority, although its authority to exercise prosecutorial discretion to achieve equity in individual cases is permissible. *Id.*; see also Rubenstein, *supra* note 3, at 123 (arguing that the more categorically an executive policy of enforcement applies, the less legitimate it is). On pragmatic grounds, Professors Delahunty and Yoo reason that individual grants of equitable relief, unlike categorical ones, have a minimal impact on macro-level policies. In my view, however, large numbers of equitable decisions in the aggregate have a considerable impact on macro-level policies, and would better serve democratic and rule-of-law values if they were directed by a high-level, politically accountable executive official rather than ad hoc by frontline bureaucrats. See also Neuman, *supra* note 117, at 624 (noting that case-by-case immigration adjudication reduces availability of oversight mechanisms).

tion. Specifically, several aspects of immigration adjudication suggest that those decisions—while adhering to the procedural formalities necessary to carry the force of law—are no more attentive to states’ interests, politically accountable, or carefully deliberated than nonbinding grants of relief announced by high-level executive officials. Lower courts charged with interpreting and applying *Arizona*’s potentially limitless statement of executive preemption would do well to examine the institutional concerns at stake in determining when, and what types of, executive immigration decisions should be entitled to preempt state law.

CONCLUSION

In an unprecedented expansion of executive preemption, the Supreme Court in *Arizona v. United States* concluded that state laws seeking to regulate undocumented aliens are preempted to the extent they conflict with the potential exercise of executive prosecutorial discretion. In doing so, the Court failed to articulate a coherent theory for when, or what types of, immigration agency decisions should be entitled to such preemptive effect. Outside of the immigration context, the Court has developed two doctrinal frameworks to limit the scope of executive preemption. This Article has argued, however, that considerations unique to the immigration context undermine the utility of those frameworks, necessitating a new approach to cabining executive power in this context.

The need for such an approach becomes increasingly urgent as the regulation of aliens by federal agencies and individual states expands. Congress of course could obviate these conflicts by clearly delineating the respective bounds of agency authority and state authority. The partisan gridlock surrounding attempts to enact comprehensive immigration reform, however, suggests that such a legislative solution is unlikely. Indeed, Congress may well hope to capitalize on conflicts between federal agencies and individual states to achieve regulatory uniformity while deflecting political blame to agencies. In such a scenario, it falls on courts to develop a mechanism for resolving such conflicts in a manner that promotes both federalist and democratic norms.

* * *

POSTSCRIPT

As this article went to press, President Obama announced a significant expansion of his administration’s deferred action program on November 20, 2014, granting relief from deportation to additional categories of noncriminal longtime residents who were brought to the United States as children or who are parents of U.S. citizens or lawful permanent residents.²¹⁶ Pursuant

²¹⁶ *FACT SHEET: Immigration Accountability Executive Action*, WHITE HOUSE (Nov. 20, 2014, 7:03 PM), <http://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>.

to the new policy, up to five million undocumented aliens will be eligible for a three-year reprieve from removal as well as work authorization.²¹⁷

The executive branch's decision to normalize the immigration status of nearly half the undocumented population exacerbates tensions with local and state governments seeking to deny benefits to these aliens, placing all the more pressure on courts to develop a workable framework to mediate these differences. As they do so, it is worth keeping in mind that executive branch officials might have pursued the same policy outcome through alternative means, ones that offer less voice to state interests, fewer mechanisms for public accountability, and a more limited deliberative process.

For example, rather than announcing the new program himself through a live televised address, President Obama or one of his subordinates might have issued an internal memorandum directing the exercise of prosecutorial discretion to immigration agency staff only, thereby evading any public criticism—from the states or voters at large—for the policy decision. Alternatively, street-level officers or their regional superiors might have adopted similar practices on their own, granting relief from removal to noncriminal residents with strong ties to the United States while focusing enforcement resources on recent arrivals or aliens posing a danger to the community. Such decentralized decisionmaking would not only fail to account for state interests and evade public accountability, but it would also compromise uniformity so that an alien's ability to remain in the country would be determined on the whim of an individual official rather than a deliberated and centralized process.

These observations are not intended to defend the President's decision either as a policy matter or as a political one. As a matter of preemption doctrine, however, the development of rules to mediate conflicts between executive branch immigration policies and those of the states should not be determined by one's views regarding the desirability of any particular policy. Rather, it should focus on the incentives created by such rules in driving administrative decisionmaking underground and away from public scrutiny.

