

# IMMIGRATION AND COOPERATIVE FEDERALISM: TOWARD A DOCTRINAL FRAMEWORK

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## INTRODUCTION

What can the new federalism teach us about what is happening in immigration law? The changing relationship of federal-state government in the regulation of immigrants has led to the creation of “immigration federalism” as a field of scholarship. Most of this scholarly attention has been directed at resisting restrictionist legislation that encourages vigorous law enforcement against undocumented immigrants. The scholarly tilt is especially pronounced since the United States Supreme Court recently struck down several provisions of S.B. 1070, Arizona’s restrictive law enforcement legislation.<sup>1</sup> However, law enforcement is only one type of regulation, and the overwhelming focus on it skews the broader debate about the proper place of states in regulating immigrants. According to recent statistics, restrictionist state law is on the decline and, as of mid-2013, there has been an increase in inclusionary state laws.<sup>2</sup>

In light of this shifting landscape, this Essay attempts to

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1. *Arizona v. United States*, 132 S. Ct. 2492 (2012). See Juliet Stumpf, *States of Confusion: The Rise of State and Local Power of Immigration*, 86 N.C. L. REV. 1557, 1566–71 (2008) (suggesting that regulation by states preexisted recent events); see also Monica Varsanyi et al., *A Multilayered Jurisdictional Patchwork: Immigration Federalism in the United States*, 34 LAW & POL’Y 138, 140–43 (2012) (pointing to the noteworthy scale of recent developments).

2. See NAT’L CONFERENCE OF STATE LEGISLATURES, IMMIGRATION POLICY REPORT 2–4 (2013), available at [http://www.ncsl.org/documents/statefed/ImmigrationReport\\_August2013.pdf](http://www.ncsl.org/documents/statefed/ImmigrationReport_August2013.pdf); see also *Inclusive Policies Advance Dramatically in the States: Immigrants’ Access to Driver’s Licenses, Higher Education, Workers’ Rights, and Community Policing*, THE NAT’L IMMIGRATION LAW CTR., Oct. 2013, available at <http://www.nilc.org/document.html?id=963>.

advance the discussion beyond the normative dimension of immigration federalism—*whether* states should be involved in the enterprise—to consider *how* states can be involved. Part I makes the case that cooperative federalism in immigration is legally permissible and normatively desirable in some instances. Part II describes the attributes of cooperative federalism in immigration law. Part III uses the rise of state DREAM Acts as an illustration of cooperative federalism at work.

## I. OVERCOMING IMMIGRATION LAW'S EXCEPTIONALISM

Other esteemed scholars—including many of the participants in this conference and Heather Gerken, in her keynote address for this Symposium<sup>3</sup>—have carefully charted a shift in federalism debates from dueling sovereigns toward cooperative federalism. In brief, the dueling sovereigns view envisions state and federal governments as having separate spheres of influence.<sup>4</sup> Cooperative federalism, in contrast, presumes that federal and state governments share power over certain affairs and permits cooperation among them.<sup>5</sup>

### A. *Plenary Power Preemption*

By and large, immigration federalism lags behind other policy arenas in the move toward cooperative federalism. It remains preoccupied with dueling sovereigns. Indeed, the sovereign account of federalism is even more heavily emphasized in immigration law because immigration law emphasizes the federal government's primacy—some would say exclusivity—as an inherent power of a national sovereign.<sup>6</sup>

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3. Heather Gerken, J. Skelly Wright Professor of Law, Yale University, Keynote Address at the University of Colorado Law School Ira C. Rothgerber, Jr. Conference: The Political Safeguards of Horizontal Federalism (Nov. 7, 2013).

4. *Id.* (“The core divide between scholars and the Supreme Court centers on sovereignty.”).

5. See, e.g., Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001).

6. T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP 191 (7th ed. 2012) (citing *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889), for the proposition that “[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution”). See Michael Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection*,

Beyond the inherent powers account, the plenary power doctrine has long served to protect congressional purposes in immigration law by emphasizing broad national interests such as uniformity in foreign relations. The Doctrine results in extraordinary judicial deference to the political branches on immigration matters.<sup>7</sup>

Since the first federal immigration legislation was enacted in 1875 and consolidated in the Immigration and Nationality Act in 1952,<sup>8</sup> much analysis of immigration power turns on preemption: whether Congress, through enactment of comprehensive federal legislation, intended to lay claim to all matters related to immigration.<sup>9</sup> Express preemption is the easy part of the analysis, where the federal government makes clear that states cannot regulate. Implied preemption is the more difficult part of the analysis. Most immigration law cases are decided on implied conflict preemption. The question of whether there is a conflict between federal and state laws meriting preemption of the state law turns on Congress's purposes and objectives. As elsewhere, congressional intent is *often* an elusive matter.

In immigration law, the search for congressional intent suffers from two additional problems. First, it can be overly mechanistic as a result of the plenary power doctrine. As a result, “[preemption] provides only a blunt tool for difficult situations in which policy concerns may call for more nuanced approach.”<sup>10</sup>

In an aptly titled article, *Plenary Power Preemption,*

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*and Federalism*, 22 IMMIGR. & NAT'LITY L. REV. 51 (2001) (setting forth a powerful case that immigration power is nondelegable and nondelegable).

7. ALEINIKOFF ET AL., *supra* note 6, at 195. For an account of the role of the plenary power doctrine in immigration law, see Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550–54 (1990) (citing several foundational immigration cases claiming Congress's dominance over immigration law. In *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909), for example, the Court declared, “[o]ver no conceivable subject is the legislative power of Congress more complete than it is over [the admission of aliens].”).

8. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1537).

9. See ALEINIKOFF ET AL., *supra* note 6, at 196–98.

10. Erin F. Delaney, *In the Shadow of Article I: Applying a Dormant Commerce Clause Analysis to State Laws Regulating Aliens*, 82 N.Y.U. L. REV. 1821, 1826 (2007); see also Clare Huntington, *Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 795 (2008) (describing federalism lens as “vastly superior to the blunt tool of structural preemption”).

Professor Kerry Abrams argues that the Supreme Court in *Arizona v. United States*<sup>11</sup> used its conception of federal sovereignty to improperly import notions of plenary power deference into its decision defending the federal role in law enforcement.<sup>12</sup> The Court announced: “[the federal government] has broad, undoubted power over the subject of immigration and the status of aliens.”<sup>13</sup> Describing the doctrinal approach that links this rhetorical statement about federal sovereignty with the preemption of state law is tricky. Abrams claims that the Court’s paean to federal power bleeds into its preemption analysis, even though it is arguably not relevant.<sup>14</sup> The Court’s faulty framework results in misplaced deference to federal law, as if it were a border-related matter within Congress’s sole purview.<sup>15</sup>

### *B. Immigration Law Between Borders*

Second, preemption also suffers from the tough task of characterizing immigration laws that indirectly enforce borders as opposed to laws that regulate immigrants between borders. For example, the Supreme Court in *DeCanas v. Bica*<sup>16</sup> upheld on preemption grounds a state labor law that forbade employers from hiring undocumented workers if the hiring hurt lawful workers. In an earlier Supreme Court case reviewing a similar employment provision, *Traux v. Raich*,<sup>17</sup> the Court held that encroachments on a person’s “livelihood” effectively discourages them from living in the United States and therefore constitutes an attempt to enforce federal

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11. 132 S. Ct. 2492 (2012).

12. Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601 (2013).

13. 132 S. Ct. at 2498 (citations omitted).

14. Abrams, *supra* note 12, at 602–03 (calling the opinion a “doctrinally empty reaffirmation of federal power, coupled with field and conflict preemption analysis”).

15. *Id.* at 618. Among examples of the Court’s use of this approach is *Graham v. Richardson*, in which the Court invalidated state laws limiting welfare eligibility to United States citizens or long-time lawful residents. 403 U.S. 365 (1971). See *Toll v. Moreno*, 458 U.S. 1, 12–13 (1982) (striking down state provision granting preferential tuition treatment to citizens and immigrant aliens over nonimmigrant aliens on the premise that states may not discriminate on the basis of alienage without Congressional sanction).

16. 424 U.S. 351 (1976).

17. 239 U.S. 33 (1915).

immigration law.<sup>18</sup> More recently, federal enforcement efforts by Immigration and Customs Enforcement (ICE) to reduce the undocumented population through “attrition through enforcement” and state laws directed at “self-deportation” of undocumented immigrants who become discouraged by their hostile environment raise similarly vexing challenges through their indirect implications for immigration law at the borders.<sup>19</sup>

Even if there are undoubtedly tough cases that blur the line between immigration law and laws that regulate immigrants, the reality is that not all immigration law takes place *at* the borders. Regulation of immigrants also takes place *between* borders. This Essay concerns regulations that touch on education, housing, drivers’ licenses, and health care, which are ostensibly matters of shared concern for state and federal government, if not traditionally the province of state government.<sup>20</sup> Regulating immigration in the sense of enforcing federal immigration law at the borders is not the same as regulating immigrants between borders.

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18. See HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (forthcoming June 2014) (discussing *Traux* example and housing analogies).

19. Examples of such policies indirectly regulating borders include local laws prohibiting landlords from renting apartments to immigrants to keep them from setting up home and laws prohibiting the establishment of immigrant businesses keep them from setting up shop. See *infra* notes 61–62. Scholars who have focused on these hard cases include Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074, 2109 (2013) (“[S]ubfederal action and federal lawmaking are inextricably linked, with the former exerting a gravitational pull on the latter”); Cristina Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 618 (2008) (cautioning against a “division of labor” approach toward state-federal relations); Adam Cox, *Immigration Law’s Organizing Principles*, 157 U. PA. L. REV. 341, 351–56 (2008) (enumerating plenary power, immigration versus alienage, and immigration federalism as three subjects organized around a distinction between rules that select immigrants and those that regulate outside of selection); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT’L L. 201, 202–03 (1994) [hereinafter *Immigration & Alienage*] (recognizing tension between immigration and alienage law and yet retaining the distinction).

20. For more examples of state regulation of immigration, see Gerald Neuman, *The Lost Century of Immigration Law (1776–1785)*, 93 COLUM. L. REV. 1833 (1993). Courts have also recognized state and local immigration power in *DeCanas v. Bica*, 424 U.S. 351, 354–56 (1976) (“[S]tanding alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration . . .”).

## II. IMMIGRATION AND COOPERATIVE FEDERALISM

How then should immigration preemption operate after *Arizona v. United States*? This Essay proposes that immigration federalism should be harmonized with the principles of cooperative federalism. Granted, the operation of cooperative federalism in the immigration context departs from traditional instances of cooperative federalism wherein states administer federal policy by statutory design.<sup>21</sup> Still, this Essay sets out a few guiding principles for cooperative federalism in the immigration context inspired by analogous contexts.

As a general matter, harmonization would require that when state laws regulate immigrants' everyday affairs, the usual presumptions would apply.<sup>22</sup> (For example, a presumption of concurrent jurisdiction and shared power between state and federal government.) This startling presumption—the reverse of what usually applies in immigration law—could then be overcome by setting out criteria specific to immigration-related considerations that justify federal primacy.

More specifically, this Essay offers these two guiding principles (and a caveat):

1. *Border Law vs. Law Between Borders*: Scholars first need to distinguish between immigration law as border law and the regulation of immigrants between borders, where it is possible to make a distinction.<sup>23</sup> If borders, foreign relations, or other national concerns that have justified the plenary power doctrine are clearly presented, the federal law trumps state law.

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21. See *Weiser*, *supra* note 5, at 668 (“[T]he Supreme Court has suggested that this term [cooperative federalism] best describes those instances in which a federal statute provides for state regulation or implementation to achieve federally proscribed policy goals.”).

22. Gabriel Chin has similarly called for a reworking of immigration exceptionalism. See Gabriel Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange But Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (1999). Cf. Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361 (1999).

23. Once again, the distinction underlying this principle is sometimes complicated and not always possible. See *supra* text accompanying note 19.

2. *Modified Preemption Analysis:* If plenary power justifications are not clearly presented, the preemption framework applies in a modified form. Initially courts applying preemption analysis should consider the possibility that Congress intended or was open to federal and state cooperation, rather than assuming at the outset that any state law will lead to conflict.<sup>24</sup> The federal government's purposes should be uncovered through usual techniques of statutory interpretation that might uncover statutory exceptions and gaps. If there is apparent conflict, the courts should take an additional step before dispensing with the preemption analysis. Courts should consider the states' purposes in effectuating its own law, in addition to the purpose of the federal law. If the purpose is cooperative, the law should more likely stand, consistent with the presumption against preemption. If the purpose is to thwart federal law, the law should more likely be stricken. The state purpose inquiry serves as a check on state laws that intend to be uncooperative with federal purposes.

The modified preemption analysis is subject to an important caveat. If the state law threatens Equal Protection safeguards,<sup>25</sup> the starting presumption of state governance is also overcome. This caveat provides a check on violations of the basic Constitutional rights of persons, which includes nondiscrimination against immigrants.<sup>26</sup>

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24. Part II of Gerald Neuman's article recounts an important episode in history when states and localities regulated immigration prior to the enactment of the first federal immigration legislation in 1875. See Neuman, *supra* note 20, at 841–83.

25. In *Yick Wo v. Hopkins*, the Court held that the Equal Protection Clause protects Chinese immigrants in a case concerning discriminatory enforcement of a San Francisco ordinance regulating laundries. 118 U.S. 356 (1886).

26. Importantly, this Essay's sequencing of rights concerns as the last step in the proposed framework does not mean to overlook the significance of Equal Protection challenges to state measures. It gives rights considerations shorter treatment given that they are not usually the central challenge in inclusionary state laws and because they have been written about extensively elsewhere. See, e.g., Jennifer Chacon, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 611–15 (2012) (discussing how Section 2(b) of Arizona's SB 1070 allows impermissible violations of immigrants' constitutional rights); *Immigration & Alienage*, *supra* note 19; see also T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 34 (1990) ("The immigration power should be brought within the fold of other congressional

This proposal requires a more nuanced approach to reconciling conflict than mechanically invoking plenary power or federal preemption every time the word “immigration” is spoken. The nuance inheres in trying to permit the possibility of state engagement while preserving important federal interests that are distinctively important to immigration law.

Continuing to develop this analysis requires systematically thinking through multiple case studies of cooperative federalism from several different areas of immigration law between borders, including both inclusive and exclusive state legislation. For the purposes of the Rothgerber Symposium, this Essay will conclude with a discussion of a single case study, state DREAM Acts, to illustrate the cooperative federalism framework in operation.

### III. APPLICATION OF THE FRAMEWORK: STATE DREAM ACTS

#### A. *Brief Background on State DREAM Acts*

In the mid-1990s, a flurry of state activity set the stage for events still unfolding today. California took the lead in limiting many benefits for immigrants in Proposition 187.<sup>27</sup> While a federal court struck down most of Proposition 187 in *LULAC v. Wilson*,<sup>28</sup> it retained the provision restricting educational benefits. Congress went on to emulate the state law in the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>29</sup> States responded in force. While states could not provide a pathway to citizenship, they could provide access to higher education on the theory

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powers and subjected to the constitutional limits normally applied to those powers.”).

27. 1994 Cal. Legis. Serv. Prop. 187 (West) (codified as CAL. PENAL CODE §§ 113, 114, 834b; CAL. WELF. & INST. CODE § 10001.5; CAL. WELF. & INST. PREC. § 130; CAL. HEALTH & SAFETY CODE § 130; CAL. EDUC. CODE §§ 18215, 66010.8; CAL. GOV'T CODE § 53069.65) (sections codified in order as they appear in the proposition).

28. 908 F. Supp. 755, 771, 772 (C.D. Cal. 1995).

29. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 7, 8, 21, 25, 42 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8, 18, and 28 U.S.C.).

that education would enhance the life chances of immigrants. Although they vary in scope, most of the state laws provide educational access in the form of college admissions without regard to status and discounted tuition to children of undocumented immigrants who meet certain qualifications, including that the students arrived at a young age, lack status through no fault of their own, and are making good faith attempts to attain lawful status.<sup>30</sup> More than fifteen states now have versions of these laws, known as state DREAM Acts in reference to proposed federal legislation that would provide the same beneficiaries with a pathway to citizenship.<sup>31</sup> The existence of this patchwork of state laws sets up the cooperative federalism problem: states provide a public benefit—in-state tuition—that seems to violate federal immigration law at least superficially.

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30. See generally Stephen Nelson et al., *Reduced Tuition Benefits for Undocumented Immigrant Students: The Implication of a Piecemeal Approach to Policymaking*, 53 SANTA CLARA L. REV. 898 (2013).

31. *Id.* These states are California, CAL. EDUC. CODE § 68130.5 (West 2013); Colorado, COLO. REV. STAT. § 23-7-110 (2013); Connecticut, CONN. GEN. STAT. § 10a-29(9) (2013); Illinois, 110 ILL. COMP. STAT. 305/7e-5 (2013); Kansas, KAN. STAT. ANN. § 76-731a(2) (2013); Maryland, MD. CODE ANN. EDUC. § 15-106.8 (West 2013); Nebraska, NEB. REV. STAT. § 85-502 (2013); New Mexico, N.M. STAT. ANN. § 21-1-4.6 (2013); New York, N.Y. EDUC. LAW § 355(2)(h)(8) (Consol. 2013); Oklahoma, OKLA. STAT. 70 § 3242.2 (2013); Oregon, OR. LAWS 2013 Ch. 17 § 2 (2013); Texas, TEX. EDUC. CODE ANN. § 54.052 (West 2005); Utah, UTAH CODE ANN. § 53B-8-106 (West 2013); and Washington, WASH. REV. CODE ANN. § 28B.15.012 (West 2012). Wisconsin's governor revoked its statute permitting in-state tuition for undocumented students in 2011. WIS. STAT. § 36.27(2) (2009) (repealed 2011). Additionally, the Board of Regents has implemented policies extending in-state tuition to undocumented immigrants in Hawaii, Massachusetts, and Michigan. See Univ. Haw. Board of Regents Policies & Bylaws, Ch. 6 § 6-9 (2013) (Hawaii); Richard Pérez-Peña, *Immigrants to Pay Tuition at Rate Set for Residents*, N.Y. TIMES, Nov. 19, 2012, [http://www.nytimes.com/2012/11/20/us/illegal-immigrants-to-pay-in-state-tuition-at-mass-state-colleges.html?\\_r=0](http://www.nytimes.com/2012/11/20/us/illegal-immigrants-to-pay-in-state-tuition-at-mass-state-colleges.html?_r=0) (Massachusetts); Kellie Woodhouse, *University of Michigan Approves In-State Tuition for Military, Unauthorized Immigrants*, ANN ARBOR NEWS (July 18, 2013, 5:00 PM), <http://www.annarbor.com/news/university-of-michigan-governing-board-passes-tuition-equality-for-military-unauthorized-immigrants/> (Michigan); Board of Governors of Higher Education Student Residency Policy (S-5.0) (Rhode Island). More recently, bills were introduced in New Jersey and Indiana that would extend in-state tuition to undocumented immigrants. They are currently being considered by the legislatures. See Tuition Equality Act, A4225, 215th Leg. (N.J. 2013) (New Jersey); S.B. 420, 118th Gen. Assem., 1st Sess. (Ind. 2013) (Indiana).

*B. Toward a Doctrinal Framework for Cooperative Federalism*

Operationalizing the principles of cooperative federalism is not easy<sup>32</sup> and has not frequently been attempted in the immigration context.<sup>33</sup> This part of the Essay takes initial steps toward forging a framework by applying the guiding principles of cooperative federalism to the state DREAM Acts.

1. Distinguishing Border Law and Regulation of Immigrants Between Borders

The operational framework begins with the critical analytical step of distinguishing education as regulation of immigrants between borders, rather than immigration law per se, because it does not really deal with issues related to the border.

There is legal support for the proposition that education is not about borders. *Plyler v. Doe*<sup>34</sup> prohibited states from excluding undocumented children from public schools at the K–12 level.<sup>35</sup> While *Plyler* would need to be extended to cover higher education,<sup>36</sup> its reasoning distinguishes education as a non-border issue. The rationale of the case centers on the task of state integration once immigrants have entered the country, regardless of how they did so.<sup>37</sup> As the Court says, any other course of action would lead to the creation of an underclass: “the children who are plaintiffs in these cases are special members of [the] underclass” and without an education, “these undocumented children, [already] disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices . . . will become permanently locked into the lowest

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32. Abbe Gluck, Associate Professor, Yale University Law School, Address at the University of Colorado Law School Ira C. Rothgerber, Jr. Conference: Federalism without Doctrine (Nov. 8, 2013) (calling for the establishment of an organizational doctrinal structure with which to analyze issues of federalism).

33. Rodriguez, *supra* note 19, at 581.

34. 457 U.S. 202 (1982).

35. *Id.* at 230.

36. See generally MICHAEL OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED STUDENTS (2012).

37. MOTOMURA, *supra* note 18, at 137 (describing integration of unauthorized immigrants as a core theme of *Plyler*).

socio-economic class.”<sup>38</sup>

Similar reasoning appears in the bill history for California’s AB 540, a state law extending in-state tuition to undocumented students. The legislative committee considered that undocumented students were ineligible for federal and state financial aid and faced financial barriers to attending college.<sup>39</sup> Supporters of the bill argued that this measure would help talented California high school students, who could not otherwise afford to pay nonresident tuition, to afford college.<sup>40</sup> At both the K-12 and higher-education level, the reasoning for providing the benefit of educational access is *not* about avoiding the award of a public benefit that would attract unlawful migration across borders, as some argue an economic benefit would.<sup>41</sup> Consequently, the plenary power presumption does not apply.

## 2. Modified Preemption Analysis

Second, the operational framework would recognize the possibility that states have a place at the table when state regulation is not tantamount to border law. The starting point for this presumption is that states traditionally regulate education. Given that background assumption, the legitimacy of state regulation is a sensible place to start. In the example of education, the state scheme for including immigrants in higher education was in place before federal laws were enacted on the matter in 1996.<sup>42</sup> The AB 540 bill analysis says, “[t]he educational rights of undocumented students is a longstanding

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38. *Plyler*, 457 U.S. at 207–08, 219 (quoting *Doe v. Plyler*, 458 F. Supp. 569, 577 (E.D. Tex. 1978)).

39. Cal. B. An., A.B. 540, Assemb. Comm. Higher Educ., 2001–2002 Reg. Sess. (Cal., Apr. 17, 2001).

40. *See id.*

41. The *Plyler* decision accepts the district court’s distinction between undocumented immigrants trying to enter their children in public school and “those illegal aliens who entered the country alone in order to earn money to send to their dependents in Mexico, and who, in many instances, remained in this country for only a short period of time.” 457 U.S. at 207 & n.3. There is empirical support for the Supreme Court’s assumption that most people do not migrate for public schools; indeed, they typically know little about the public schools in the country they will enter. *See* Ming H. Chen, *Who Migrates and Why: Plyler v. Doe in the Modern Era* (May 7, 2007) (unpublished manuscript) (on file with author), abstract available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1557186](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557186).

42. *See* Proposition 187 discussion and accompanying text, *supra* notes 27–29.

issue that has been debated within legislative and judicial arenas for years.”<sup>43</sup> Underscoring the legitimate role of the states, the legislative materials surrounding the adoption of the bill pointed to proposed federal legislation that would have allowed states to set their own residency requirements and repealed IIRIRA section 1623.<sup>44</sup>

Placed alongside federal immigration law, the potentially conflicting state DREAM Acts necessitate a preemption analysis. Most of the cases evaluating state DREAM Acts have been agreeable to state regulation<sup>45</sup> and employ a conventional preemption inquiry. That conventional preemption inquiry can be modified to better support the possibility of state involvement. The modified preemption analysis would begin with direct delegations of authority from the federal government. This is the easy part of the analysis in which courts consider that Congress intended the possibility of state regulation through its express statutory language and exceptions. For the DREAM Act example, in 1996, Congress enacted two laws expressly limiting the ability of states to offer in-state tuition to undocumented immigrants. The 1996 welfare reform (PRWORA) established a means for determining whether aliens are eligible for public benefits administered by local, state, and federal governments. Section 1621(a) says that any alien who is not legally in the country “is not eligible for any State or local public benefit.”<sup>46</sup> “Public benefit” is further defined to include postsecondary education benefits “for which payments or assistance are provided by . . . an agency of a State or local government or by appropriated funds of a State or local government.”<sup>47</sup> However, § 1621(d) offers an exception: it permits states to offer benefits to unlawful immigrants *if* they enact a state law that “affirmatively provides” for such eligibility.<sup>48</sup> Many of the state DREAM Acts are enacted pursuant to this “affirmatively provides” language.

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43. Cal. B. An., A.B. 540, Assemb. Comm. Higher Educ., 2001–2002 Reg. Sess. 2 (Cal., Apr. 17, 2001), *available at* [http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab\\_0501-0550/ab\\_540\\_cfa\\_20010909\\_121021\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0501-0550/ab_540_cfa_20010909_121021_sen_floor.html).

44. See H.R. 1918, 107th Cong. (2001).

45. Challenges have been brought in Texas, Arizona, North Carolina, and other states, and most have either been upheld or dismissed for lack of standing. Nelson et al., *supra* note 30, at 919–29.

46. 8 U.S.C. § 1621(a) (2013).

47. *Id.* § 1621(c)(1)(B).

48. *Id.* § 1621(d).

Matters become more difficult when PRWORA's statutory exception is placed alongside the IIRIRA.<sup>49</sup> IIRIRA was enacted the same year (1996) as PRWORA, and it expressly restricts access to postsecondary education benefits for undocumented students.<sup>50</sup> Section 1623 says that unlawful aliens "shall *not* be eligible on the basis of residence within a State . . . for any postsecondary education benefit *unless* a citizen or national is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident."<sup>51</sup> In other words, the language prohibits states from granting in-state tuition to undocumented immigrants on the basis of in-state residency.<sup>52</sup> State laws that award in-state tuition on the basis of residency "conflict" with the federal statute.

At this point, courts turn to an even more difficult part of the analysis—implied preemption—to reconcile the apparent conflict between state and federal law. The modified analysis would look to state purpose as well as federal purpose in its confrontation with the apparent conflict. Of the handful of judicial challenges concerning state DREAM Acts, *Martinez v. Regents of the University of California*<sup>53</sup> exemplifies this approach. In *Martinez*, the California Supreme Court grappled with implied preemption before upholding AB 540, California's DREAM Act,<sup>54</sup> on modified preemption grounds. The Court conceded an apparent conflict between AB 540 and IIRIRA's prohibition on the residency-based public benefits such as in-state tuition.<sup>55</sup> However, the California Supreme Court reasoned that the state's grant of in-state tuition was based on requirements *other* than residency (e.g., attendance and graduation from a California high school).<sup>56</sup> In reaching this conclusion, the California Supreme Court found that "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not

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49. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8, 18, and 28 U.S.C.).

50. 8 U.S.C. § 1623(a) (2013).

51. *Id.*

52. *Id.*

53. 241 P.3d 855 (2010).

54. *Id.* at 868. See CAL. EDUC. CODE, § 68130.5 (West 2013).

55. *Martinez*, 241 P.3d at 861.

56. *Id.*

preempted.”<sup>57</sup> This exercise in statutory interpretation demonstrates the *presumption against preemption* that operates in general, but it stands in tension with the operation of preemption in immigration federalism cases.<sup>58</sup>

As for California’s purpose in enacting AB 540, it was arguably not to undermine a broad definition of federal regulation of immigrants. Indeed, the California state legislature was being responsive to the same social movements that prompted the Congress to introduce comprehensive immigration reform proposals that would include federal DREAM Acts and that also prompted executive action to protect would-be beneficiaries of the federal DREAM Act from deportation.<sup>59</sup>

Applying the final check for state regulation that would undermine federal law, AB 540 did not intend to discriminate and would not run afoul of the Equal Protection Clause or other Constitutional protections of “persons” that extend to undocumented immigrants. Indeed, state laws of an inclusionary nature such as state DREAM Acts are unlikely to be struck down for unlawfully discriminating against immigrants.<sup>60</sup>

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57. *Id.* at 868.

58. See generally Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 4–5 (2007) (explaining the presumption against preemption and arguing that it is essential in a world where state and federal governments share concurrent jurisdiction).

59. On June 12, 2012, President Obama announced his administration’s intentions to grant deferred action to certain undocumented immigrants brought into the United States at a young age. See Barack Obama, President of the United States, Remarks by the President on Immigration (June 15, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>. Applicants who are granted Deferred Action for Childhood Arrivals (DACA) can reside openly in the country and may seek either postsecondary education or employment for a period of two years; they typically receive work authorization during this period to avoid running afoul of IRCA prohibitions on working without lawful status. See Memorandum from Janet Napolitano, Sec’y of Homeland Sec., U.S. Dep’t of Homeland Sec., to David Aguilar, Acting Comm’r, U.S. Customs & Border Prot., Alejandro Mayorkas, Director, U.S. Citizenship & Immigr. Servs., and John Morton, Director, U.S. Immigr. & Customs Enforcement, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. Notably, DACA recipients do not adjust to lawful immigration status by virtue of the executive order; they merely receive a temporary reprieve. See *id.* (“This memorandum confers no substantive right, immigration status, or pathway to citizenship.”).

60. *But cf.* Brief of Washington Legal Found. et al., as Amici Curiae in

While the *Martinez* preemption analysis goes further than most judicial decisions reconciling federal and state law, it stops short of embracing cooperative federalism in the fullest form. A fuller reworking would venture beyond the preemption analysis in evaluating shared regulation of immigrants between borders.

#### CONCLUSION

This Essay has argued that cooperative federalism is needed. Even in immigration. Especially in immigration. To be clear, my point in setting forth a modified analysis is not to trade federal exclusivity for state exclusivity; it is to recognize that there are models for cooperative federalism in which multiple levels of government work together in some instances. The proposed model makes explicit presumptions that create space for states to legitimately regulate immigrants between borders in those instances. It also makes explicit how those presumptions in favor of states can be overcome when needed and appropriate.

Readers may ask whether the proposed framework too conveniently favors inclusive rather than exclusive state regulations. It is true that the Essay uses the example of an inclusive state law to demonstrate a framework of cooperative federalism. The choice of an inclusive state law reflects the Essay's premise that broadening the analytical lens beyond the exclusionary state laws typically scrutinized in immigration federalism scholarship opens up new possibilities. However, the proposed framework is not necessarily limited to inclusive state regulation, even if it is limited to instances of states regulating immigrants between borders. States and municipalities can and do enact restrictive regulations for immigrants between borders, such as city ordinances to restrict rental housing for undocumented immigrants<sup>61</sup> or state laws exercising discretion to prohibit financial assistance or

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Support of Petitioners at 14–20, *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007) (No. 05-3309), *reh'g denied*, 511 F.3d 1030 (10th Cir. 2007), *and cert. denied*, 554 U.S. 918 (2008) (alleging that Kansas's in-state tuition rate discriminated against granted United States citizen non-resident taxpayers in favor of undocumented immigrants in violation of the Equal Protection Clause).

61. See *Rodriguez*, *supra* note 19, at 592 n.106 (citing and describing the Hazleton, Pennsylvania municipal ordinances).

admissions of undocumented students into colleges and universities.<sup>62</sup> Sometimes those state regulations function indirectly to enforce border laws (complicating the implementation of the guiding principles proposed in this Essay), but sometimes restrictionist state laws properly regulate matters legitimately within the state's domain. In those instances, the doctrinal framework should apply. On the one hand, the possibility of both "good" and "bad" state laws—to use the most reductionist formulation—is not new to cooperative federalism. Variation is part and parcel of adopting a decisional framework that focuses on *who* decides rather than *what* they should decide. On the other hand, the possibility of states enacting "bad" laws that infringe on the rights of immigrants is particularly problematic. Cooperative federalism in other contexts often calls for policy and decision-making to move from courts to the political process. For example, Heather Gerken acknowledges the risks to "minorities" and "dissenters" and claims that "minority *rule*" may serve up benefits beyond what "minority *rights*" can offer, particularly given that states and localities outperform the federal government in integration.<sup>63</sup> The problem when applying this logic to immigration is that democracy may not iron out the wrinkles for immigrants who cannot vote and have limited political power at every level of government.<sup>64</sup> That is why the caveat in the proposed model includes a check for constitutional rights

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62. See, e.g., ARIZ. REV. STAT. ANN. § 15-1803(B) (2012) (prohibiting colleges and universities from classifying undocumented immigrants as in-state students for tuition purposes); see also John B. Lee et al., *Study on the Admission of Undocumented Students into the North Carolina Community College System*, N.C. COMMUNITY COLLEGE SYSTEM (Apr. 16, 2009), at 13–19, available at [http://www.nccommunitycolleges.edu/News\\_Releases/NCCCS%20Final%20Report.pdf](http://www.nccommunitycolleges.edu/News_Releases/NCCCS%20Final%20Report.pdf) (explaining the history and timeline of North Carolina's policy restricting the admission of undocumented immigrants to community colleges, as well as the state's communication with the Department of Homeland Security on the matter).

63. Heather Gerken, *A New Progressive Federalism*, DEMOCRACY: A JOURNAL OF IDEAS (2012), available at <http://www.democracyjournal.org/24/a-new-progressive-federalism.php?page=all>.

64. That being said, states and localities perform integrative functions for immigrants comparable to those performed for minorities and dissenters. Also, the enactment of DREAM Acts in several states demonstrates that political alliances can be forged between voters and immigrants, and that mobilized immigrants can influence the political process. However, the vulnerability of immigrants means that rights-protections cannot be ignored while promoting cooperative federalism in immigration law. Increasing faith in state regulators is encouraged, so long as it is not a blind faith that overlooks distinctive federal protections.

violations and emphasizes that the Equal Protection Clause operates as an outer bounds on the mischief a state can make.

Continued elaboration of the operational framework for cooperative federalism in immigration law would delineate the parameters of the argument in this and other ways. Including more examples of cooperative federalism in the immigrant context would furnish a greater variety of power-sharing arrangements between state-federal relationships and statutes upon which the modified plenary power and preemption doctrines can be applied. Future research in this vein should set forth a typology of cooperative federalism that demonstrates some important variations in statutory design: federal statutes that expressly reach into domains regulated by states and that enlist states in implementation of federal goals; federal statutes that provide a meaningful opt-out provision that permits parallel state regulation; and federal statutes that empower or invite state regulation where the federal government has been limited or dormant.<sup>65</sup> As well, future research should acknowledge that cooperative federalism occurs not only by statutory design but also through de facto circumstances.

This initial, brief account of cooperative federalism operating through state DREAM Acts simplifies the relationship between state and federal government in the service of elucidating guiding principles that may apply more generally. Among the simplifying assumptions is its depiction of a direct relationship between two governmental entities: state and federal legislatures. The reality is that DREAM Act policy involves multiple actors, multiple branches of government, and multiple types of law. As the Essay goes to print, new scholarship is emerging that unpacks these assumptions and teases out the dimensions of cooperative federalism that implicate federal agencies in policy arenas concurrently overseen by states.<sup>66</sup> While this Essay does not by

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65. These ideas are inspired by Abbe Gluck's typology of cooperative federalism in the Affordable Care Act. See Abbe Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L. J. 534, 583–88 (2011).

66. For promising examples, see Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*, 90 NOTRE DAME L. REV. (forthcoming 2014) (unpublished manuscript at 40, on file with author) (contending that considerations unique to the immigration context undermine the utility of existing doctrinal approaches to cabining executive preemptive authority).

itself provide a full doctrinal reworking of immigration federalism, its modest contribution is twofold: to make the case that a theoretical framework for cooperative federalism in immigration law is needed, and to operationalize portions of that framework in a way that can be applied, elaborated, and improved on in future research.

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and require a new approach to resolving immigration-related conflicts between the executive branch and states) and David Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81 (2013) (setting forth a theory of immigration structuralism to resolve separation of powers problems without hindering vertical federalism analysis). I am also working on an article that fits into this emerging thread of scholarship. See generally Ming H. Chen, *Immigration and Administrative Federalism* (Mar. 23, 2014) (unpublished manuscript, on file with author).