Enforcement Redundancy and the Future of Immigration Law

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ENFORCEMENT REDUNDANCY AND
THE FUTURE OF IMMIGRATION LAW

It is commonplace for states to help enforce federal law. Local police regularly arrest people for violating federal criminal law, and state actors frequently alert federal prosecutors and agencies when they discover violations of federal law. Similarly, states criminalize wide swaths of conduct, like dealing drugs, that are also federal offenses. They also often attach civil penalties to conduct, such as workplace discrimination, already proscribed by federal law. Enforcement redundancy, as we might call it, is the norm.

Typically, this aspect of American federalism is treated as unremarkable. In recent years, however, it has spawned divisive debates and extensive litigation in one context: immigration law. Amid growing disagreement over immigration policy, a number of states recently passed laws that provide for redundant enforcement of immigration law. These laws authorize state officials to arrest non-citizens for violating federal immigration law. They also impose penalties under state law for violations of the federal immigration code. As soon as they were enacted, the laws triggered a wave of lawsuits. The most prominent suits were brought, quite unusually, by the United States itself. Suing six states, the United States argued

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that their redundant enforcement measures conflicted with federal law and were therefore preempted.

Given how common enforcement redundancy is in American law, one might have thought that the federal government was sure to lose. But it did not. In *Arizona v United States*, the Supreme Court struck down the core provisions of Arizona’s law. The law, SB 1070, had done four things: criminalized violations of the federal alien registration statute; criminalized violations of federal law’s prohibition on unauthorized employment; authorized local officials to arrest (some) deportable noncitizens; and required local officials to check the immigration status of noncitizens detained or arrested on criminal charges. Every provision but the last was invalidated by the Court. And underlying the Court’s discussion of each provision was an implicit rejection of the idea of enforcement redundancy.

This article explores the significance of the Court’s rejection of enforcement redundancy in *Arizona* despite its pedigree in the practice and jurisprudence of American federalism. Some might think that the Court’s departure from conventional practice requires no explanation beyond the subject matter of the suit—immigration law. The long (though sometimes mistaken) intellectual tradition of “immigration exceptionalism” among legal scholars has led many to conclude that the Court’s approach in *United States v Arizona* is simply the result of the fact that, when it comes to immigration law, everything is exceptional. But while that approach can provide a label for a phenomenon, it does not itself explain it. What we need is an explanation of why the Court might deviate so dramatically from the ordinary acceptance of enforcement redundancy and of the implications of that departure. To generate such an explanation, we need to focus on the roots of that principle.

My central claim is that the *Arizona* Court rejected redundant enforcement by conceptualizing law as a set of prices rather than a series of obligations. This Holmesian view is foreign to the Court’s typical thinking about redundant enforcement, and it has two dramatic consequences. First, this approach leads inevitably to the conclusion that any action by state officials to assist in the enforcement of federal law is impermissible: conceptualized as a price, law is nothing more than the expected sanction associated with particular

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1 132 S Ct 2492 (2012).
conduct, and anything a state actor does to enforce federal law will alter either the chance of getting caught or the severity of punishment. Second, the approach elevates every act of prosecutorial discretion by an executive branch official to the status of supreme federal law for purposes of preemption analysis. This is a radical departure from conventional approaches to preemption, and it makes clear why the Court cannot plausibly embrace the law-as-price conception as a general way of analyzing intergovernmental conflicts. Doing so would dramatically restrict the regulatory authority of states and radically reshape federalism doctrine.

The Court’s approach makes Arizona as much a case about separation of powers as about federalism. It consolidates tremendous immigration policymaking power in the executive branch, endorsing the idea that immigration law is centrally the product of executive “lawmaking” that bears little relation to immigration law on the books. This view is consistent with recent developments in immigration law. Formal immigration law has become less and less important in a world where roughly one-third of all immigrants are formally deportable. Moreover, executive branch actions demonstrate that the failure to deport all of these noncitizens is a deliberate choice—not simply the result of resource constraints or enforcement failures. In other words, the president has made clear that a perfect world is not a world of perfect compliance with existing immigration statutes. The Court need not have endorsed that view, but Justice Kennedy’s majority opinion in effect does so.

The Court’s decision to ratify this sort of presidential control over migration policy has important implications for the future of immigration law. Presidents tend to be more open to immigration than Congress. Perhaps this institutional predisposition of the president flows from her distinctively national electoral mandate, or perhaps from her more direct engagement in foreign affairs. Whatever the source, the historical pattern is remarkable: since the 1880s, presidents from Woodrow Wilson, to Harry Truman, to George W. Bush have all promoted immigration policies more generous and less discriminatory than those that emerged from Congress.

This fact is centrally important today, as the nation again turns its attention to once-in-a-generation immigration reform. Right now public debate is focused largely on flashpoint issues like legalizing the more than 10 million immigrants living without status in the United States. But lurking in the background are reform’s
potentially sweeping consequences for the president’s power over immigration policy. Congress could further extend the trajectory advanced in Arizona—perhaps by formally delegating to the president the power to set visa quotas. Or Congress could roll Arizona’s reasoning back, attempting to claw back authority that has slowly accreted to the executive over the last three or four decades. Which path is taken could profoundly affect the long-term success of comprehensive immigration reform.

This article fleshes out these arguments in four parts. Part I describes the concept of enforcement redundancy. Part II highlights the widespread acceptance of the redundant enforcement of federal law, despite the federalism and separation-of-powers arguments that might plausibly be raised against it. Part III argues that the Court’s decision in United States v Arizona is best understood as nothing less than a rejection of enforcement redundancy in the context of immigration law. Part IV evaluates this rejection and explores its implications for the future of immigration law.

I. What Is Redundant Enforcement?

Legal rules typically need to be enforced by someone. In most classic treatments of law, that someone is a monolithic state. But this stylized understanding is far from reality. The state is a they, not an it, with myriad officials who could be involved in the enforcement of legal rules. In federal systems, the number of states is multiplied. Beyond the state itself, private parties are also available as agents of enforcement.

The proliferation of available agents raises an important question of institutional design: which agent or agents should do the enforcing? A public agent might be chosen, or instead a private one. In federal systems, there is a choice between state and federal officials. And, of course, more than just one agent could be chosen: rather than giving an enforcement monopoly to a single agent, many agents might be involved, either jointly or independently, in the task of enforcing a legal rule. This can facilitate either a cooperative or a competitive environment of enforcement.

Several large literatures are concerned, either directly or indirectly, with the question of which institutional arrangements are optimal in which settings. These include scholarship on private
attorneys general, federalism, and administrative law, as well as more general scholarship like that prompted by Gary Becker and George Stigler’s classic piece on the private enforcement of law. This work confirms the wide array of potential advantages and disadvantages of different arrangements: for example, private enforcement can lead to higher (and more efficient) levels of enforcement, or it can lead to insufficient enforcement because of free-riding problems; it can put enforcement power in the hands of those with superior information about the existence of legal violations, or it can empower those more likely to make mistakes in meting out punishments; it can reduce agency slack within government and thus help perfect democracy, or it can undermine the responsiveness and accountability of enforcement efforts and thus distort democracy.

Whatever theoretical case might be made for one approach or another in any particular context, in practice monopolistic enforcement is much less common than one might expect. To be sure, there are parts of the criminal law where a single state actor—like a local district attorney—has a meaningful monopoly on enforcement within a particular jurisdiction. Relatedly, some legal rules are typically enforced only by the injured private party. Classic tort and

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4 See, for example, Jacob E. Gersen, Overlapping and Underlapping Jurisdiction in Administrative Law, 2006 Supreme Court Review 201; Jonathan R. Macey, Organizational Design and Political Control of Administrative Agencies, 8 J Law Econ & Org 93 (1992).


6 For a summary of these arguments, see Matthew C. Stephenson, Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies, 91 Va L Rev 94 (2005); Polinsky, 9 J Legal Stud 105 (cited in note 5).

7 Of course, even here things are more complicated than they might initially seem. Criminal law involves at least three partially distinct institutions—the police, the prosecutors, and the courts—that each play roles in enforcing criminal law. See, for example, Daniel Richman, Prosecutors and Their Agents, Agents and Their Prosecutors, 103 Colum L Rev 749 (2003). In an important sense, then, there are essentially no situations in modern legal systems where a legal rule is truly enforced by a single actor.
contract claims of the sort taught to first-year law students are a good example. But many, many legal rules are enforced simultaneously by more than one enforcement agent. Simultaneous enforcement by both public and private parties, for example, is common in environmental law, securities law, antitrust, and many other arenas.8

For present purposes, I want to emphasize the prevalence of a different sort of simultaneous enforcement—where both state and federal actors participate in enforcement. In our federal system, enforcement redundancy is the norm. States and the federal government often participate in enforcing the same legal norms.

Enforcement redundancy is most widely noticed and discussed when the federal government tries to encourage or coerce states to enforce federal law. Compelling states to serve as enforcement agents is now prohibited by the anticommandeering rule. So, for example, Congress cannot force state officials to do things like perform federal background checks for gun purchasers, and it probably cannot force local law enforcement officials to hold immigration violators who otherwise would be released from county jails.9 But the anticommandeering rule does not prevent Congress from inviting state officials to serve as enforcement agents, and Congress often does so. The enforcement role states are asked to play varies widely. Sometimes states are integrated deeply into a regulatory regime created by the federal government. For example, the Affordable Care Act authorizes states to set up health care exchanges to enforce the insurance carriage provisions of the new federal health care law.10 In other cases state actors play the same role that might be played by private parties. This is the case for many federal consumer protection laws, which deputize state officials as enforcement agents by creating private rights of actions that permit those officials to sue (typically, though not always, in federal court) to

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enforce federal law. Interestingly, a fair amount of this sort of redundant enforcement is authorized even in situations where the federal government has explicitly preempted state lawmaking authority.

While enforcement redundancy is most widely noticed when explicitly authorized, most redundant enforcement by states is never expressly authorized by Congress. One type occurs when a state penalizes conduct that also violates federal law. This is very common in our federal system, in both the criminal and civil arenas. Consider, for example, drug offenses. Every state prohibits possession of cocaine with intent to distribute it. So does the federal government. Thus, two different sets of agents—one set state and one set federal—enforce the same formal legal norm. To be sure, these enforcement agents may have different priorities and resources, and there is no reason to think that they will enforce the ban on cocaine distribution in the same fashion or contexts. That is, of course, precisely the point of the large literature on picking enforcement agents—that different ways of institutionalizing the enforcement of the same legal norm will produce different patterns of enforcement. But it is, nonetheless, redundant enforcement as I have defined it: a situation in which the same legal rule is enforced by both states and the federal government. And while drug enforcement is one of the most obvious criminal law examples, there are many others, including gun laws, prohibitions against the possession of child pornography, and so on.

Outside the criminal context, state law often also makes illegal, and subject to civil sanction, conduct identical to that prohibited by federal law. Consider state antidiscrimination laws. Most states prohibit discrimination on the basis of race and sex in the employment context, just as the federal government does under Title

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12 Lemos, 86 NYU L Rev at 703 (cited in note 8).

13 See, for example, Cal Health & Safety Code §§ 11055, 11351 (West 2012); NY Penal Law § 220.06 (McKinney 2003); NY Pub Health Law § 3306 (McKinney 2013).

14 See 21 USC § 841.

VII of the 1964 Civil Rights Act. Some state antidiscrimination laws sweep more broadly, defining discrimination in a more expansive fashion, or permitting larger damage awards for the same misconduct. But large parts of many state laws seek to enforce the same legal norm—the same primary rules of conduct—as does federal law. States even sometimes directly incorporate the federal antidiscrimination rules by reference: state courts enforcing state antidiscrimination law frequently conclude that the law tracks Title VII, and therefore rely on federal case law interpreting Title VII in order to resolve state-law employment discrimination suits.


17 State law may do this either by adding additional protected classifications, such as sexual orientation, or by defining discrimination on the basis of race or sex to include behavior that would not be prohibited by Title VII. On the former, see, for example, DC Code Ann § 1-2512(a) (1981) (sexual preference); Mass Gen Laws Ann ch 151B, § 40A (West 1976) (history of treatment for mental disorder); Mich Stat Ann § 3.548(202) (Calaghan Supp 1981) (weight); Cantania, 32 Am U L Rev at 784 n 27 (cited in note 16). On the latter, see, for example, Goodyear Tire & Rubber Co. v Dept. of Indus. Labor & Human Relations, 87 Wisc 2d 56, 273 NW2d 786 (Ct App 1978) (holding that the exclusion of pregnancy from disability benefits plan violates the Wisconsin fair employment practices act even though it does not violate federal law). In addition to having broader substantive provisions, state antidiscrimination laws also sometimes have broader scope, reaching small employers not covered by federal law. See, for example, Alaska Stat § 18.80.300 (1999); Ark Code Ann § 16-123-102 (1993); Del Code Ann title 19, § 710 (1998); Iowa Code § 216.6 (2009).


19 Of course, the ability (and often obligation) of state courts to adjudicate many federal causes of action—including those that arise under Title VII—means that state courts will sometimes act identically regardless of whether state law includes antidiscrimination provisions that track Title VII. See Testa v Katt, 330 US 386 (1947) (obligating state courts in many cases to enforce federal law); Yellow Freight System v Donnelly, 494 US 820 (1990) (holding that state courts have concurrent jurisdiction over Title VII causes of action). But this simply shows another way in which redundant enforcement of federal legal norms is even more pervasive than we often notice. State courts operate pervasively to enforce federal law that is also enforced by federal courts.

20 See, for example, Valenzuela v Globe Ground North America, 18 So 3d 17 (Fla 3d DCA 2009) (concluding that, because the Florida state law is patterned after Title VII, federal case law is authoritative—right down to federal case law’s McDonnell Douglas burden-shifting framework of proof in employment discrimination cases); Williams v Wal-Mart Stores, 184 SW3d 492, 495 (Ky 2005) (stating that Kentucky courts have “consistently interpreted the civil rights provisions of [Kentucky state law] consistent with the applicable federal antidiscrimination laws”); Kings v Phelps Dodge, 743 So 2d 181, 187 (La 1999) (stating that “Louisiana courts have looked to federal jurisprudence to interpret Louisiana discrimination laws” because they are “similar in scope”); Schroeder v Texas Iron Works, 813 SW2d 483 (Tex 1991) (stating that the Texas state employment discrimination statute
Nor is antidiscrimination law an outlier. Across many regulatory areas—from antitrust to education law—state and federal law frequently prohibit identical conduct.\footnote{21} This overlap even extends to constitutional law. Many states incorporate federal constitutional norms by reference, interpreting the individual rights guarantees in their state constitutions to be coextensive with the federal guarantees.\footnote{22} In Ohio, for example, courts have held that the state constitution’s protection of free speech should be interpreted to be identical to the First Amendment of the U.S. Constitution.\footnote{23}

Another type of redundant enforcement occurs when state officials participate in the enforcement of federal law even though the state does not formally prohibit the same conduct as does federal law. This occurs most commonly when state and local law enforcement officials make arrests for violations of federal law. When federal law criminalizes certain conduct—and authorizes federal officials to arrest people who engage in that conduct—state law also often authorizes state and local officials to make arrests for those very same violations of federal criminal law. In many instances arrests by state or local law enforcement are triggered by the existence was patterned after Title VII), overruled on other grounds by In re United Services Automobile Assn., 307 SW3d 299 (Tex 2010).

\footnote{21} See, for example, Barry E. Hawk and James D. Veltrop, Dual Antitrust Enforcement in the United States: Positive or Negative Lessons for the European Community, in Slot and McDonnell, eds, Proceedings of the Leiden Europa Institut Seminar on User-Friendly Competition Law 21, 28 (1993) (“Many state [antitrust] statutes provide that they are to be interpreted consistently with federal precedent and most are generally so interpreted.”); Minn HR Research Dept, Information Brief on Federal and State Laws Governing Access to Student Records (2000), online at http://www.house.leg.state.mn.us/hrd/pubs/studrec.pdf (discussing how the Minnesota statutes “largely parallel [Family Educational Rights and Privacy Act] FERPA provisions” and noting that “a number of subdivisions specifically incorporate FERPA provisions by referring to federal statutory citations in the state law”).

\footnote{22} See, for example, Love v Borough of Stroudsburg, 597 A2d 1137 (Pa 1991) (equal protection provision); State v Robinette, 685 NE2d 762 (Ohio 1997) (searches and seizures). See generally Robert F. Williams, State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping, 47 Wm & Mary L Rev 1499, 1502 (2005); James A. Gardner, The Positivist Revolution That W asn’t: Constitutional Universalism in the States, 4 Roger Williams U L Rev 109 (1998) (arguing that the convergence of state and federal constitutional doctrines is in part the “natural continuation of a long, powerful tradition on the state level of constitutional universalism”); James A. Gardner and Jim Rossi, Foreword to New Frontiers of State Constitutional Law (Oxford, 2009); Developments in the Law—The Interpretation of State Constitutional Rights, 95 Harv L Rev 1324, 1348 (1982) (“More often, the [state] court legitimates its holding either by matching the state law result with a corresponding result under federal law or by incorporating federal law doctrine into state constitutional analysis.”).

\footnote{23} See, for example, Eastwood Mall, Inc. v Slanco, 626 NE2d 59 (Ohio 1994) (holding that the “free speech guarantees accorded by the Ohio Constitution are no broader than the First Amendment, and that the First Amendment is the proper basis of interpretation.”).
of a federal warrant for the person apprehended. This often happens in traffic stops: a local police officer stops a person for speeding, discovers that the person has an outstanding federal arrest warrant, and arrests the person. Moreover, state and local arrest authority is often much broader. Even in the absence of an outstanding warrant, many states authorize arrests for violations of federal criminal law.

In any of the above examples of redundant enforcement, some might quibble about what, exactly, counts as state enforcement rather than federal. When state officials make an arrest for a violation of federal law, it is ultimately federal prosecutors who decide whether to proceed with the case, and it is a federal court which ultimately will resolve the guilt or innocence of the accused. Similarly, when state attorneys general file civil actions to enforce consumer protection laws, those suits are often litigated (and sometimes are required by federal statute to be litigated) in federal court. Thus, state agents are not enforcing the federal legal norm all by themselves.

Where a federal warrant has issued, courts historically have interpreted Federal Rule of Criminal Procedure 4, along with 18 USC § 3041, as authorizing state and local law enforcement officers to execute federal warrants. See United States v Bowdach, 561 F2d 1160, 1167–68 (1977); Gill v United States, 421 F2d 1353, 1355 (1970); Fed R Crim P 4 (“only a marshal or other authorized officer may execute a warrant”); 18 USC § 3041 (authorizing many different officials, including local judges and mayors, to authorize the arrest of an offender for “any offense against the United States”). These officers must also, of course, be authorized by state law to make an arrest under the circumstances. See People v LaFontaine, 92 NY2d 470 (1998).

Local officers regularly use the FBI’s National Crime Information Center database to check for outstanding warrants and many other sorts of information indicating that a person is wanted by law enforcement. See National Crime Information Center, online at http://www.fbi.gov/about-us/cjis/ncic.

See, for example, Conn Gen Stat §§ 53a-24(a), 54 (2013) (authorizing arrest for violation of any criminal offense within the state, regardless of whether the offense is a violation of the law of that state, the law of another state, or federal law). In a series of cases, federal courts upheld the authority of state officers to make warrantless arrests for federal crimes under similar provisions of state law. See Marsh v United States, 29 F2d 172 (2d Cir 1928); United States v Di Re, 332 US 581 (1948); Johnson v United States, 333 US 10, 15 (1948). In those cases, decided around the time that Erie R.R. v Tompkins was handed down, the Court struggled with the question of what law authorized and regulated these arrest practices: were they regulated by uniform federal common law, there being no general federal statute governing warrantless arrests for federal offenses? Or were the officers regulated by state laws relating to arrest authority? Over time, the Court came to conclude that in the absence of a federal statute, state law governed—perhaps an unsurprising conclusion given Erie’s impact on constitutional law in this period. See Di Re, 332 US at 589–90 (rejecting the idea that there is “any general federal law of arrest”). Thus, if a state officer makes a warrantless arrest for a federal offense, it will be upheld so long as it accords with state law and, of course, whatever requirements the Constitution imposes. See Marsh, 29 F2d at 714; Di Re, 332 US at 589–91; Miller v United States, 357 US 301, 305–06 (1958).
But the same thing could be said about the private enforcement of the law. What others mean when they talk about choosing private agents to enforce the law—as in debates about “private attorneys general”—is never that a private party will enforce a legal rule \textit{without any state intervention}. The most commonly discussed form of private enforcement is a civil suit by an injured private party in a court system run by the state. Another form of “private enforcement,” qui tam litigation, often involves even more participation by government officials, as they are frequently permitted to intervene in or otherwise control the lawsuit after it is filed.\textsuperscript{27} Thus, in most modern states it will seldom be the case that the choice of enforcement agents includes the option of having a single human agent—private or public—hold a literal monopoly on enforcement; enforcement almost inevitably involves the participation of more than one agent. But that does not mean that there is no meaningful distinction between different combinations of enforcement agents, or that it is incoherent to talk about the choice between public and private enforcement. And for that reason, the involvement of federal officials in some of my examples above does not lessen the sense in which they constitute instances of redundant enforcement by states.

II. The Constitutional Status of Enforcement Redundancy

There are two obvious questions we might ask about redundant enforcement of federal law by states. First, is it desirable? Second, is it constitutional? The first question is a hugely important one, but one that I want to bracket here. As I mentioned above, there is already a large, and largely inconclusive, theoretical literature on the choice of enforcement agents. Which actors have the best incentives and information, whether an enforcement monopoly produces under- or overdeterrence, whether nonfederal enforcement can improve the political functioning of the federal government (by reducing agency slack, shaping the federal agenda, and so on) are all important and difficult questions—questions for which pure theory is unlikely to provide conclusive answers.

Instead, I want to note here that, whatever the optimal structure

\textsuperscript{27} See \textit{False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits}, US Dept of Justice, online at http://www.justice.gov/usao/pac/Civil_Division/Internet Whistleblower\%20update.pdf; 31 USC §§ 3730(b)(4)(A), (c), 3731(c) (laying out the statutory framework for the intervention of the DOJ in False Claims Act litigation).
of enforcement, redundant enforcement by states is widely accepted as constitutional. That is not to say, of course, that it is universally accepted. There are two obvious constitutional concerns that enforcement redundancy might trigger: that it violates principles of federalism on the one hand, and principles of separation of powers on the other.

Consider constitutional norms of federalism first. Most everyone believes that Congress has the authority to explicitly authorize states to enforce federal law (even though it cannot compel them to do so). Moreover, even in the absence of any congressional authorization or delegation, few question the constitutionality of state measures that provide for redundant enforcement. The authority of state and local officials to make arrests for federal offenses is uniformly accepted.\footnote{See notes 24–26 and accompanying text above.} No one thinks that the creation of federal drug laws rendered unconstitutional state laws criminalizing the same conduct, or that state employment discrimination statutes are ousted by federal statutes covering the same ground. In other words, enforcement redundancy is the conventional default position in most regulatory arenas.

This does not mean Congress cannot alter the default. Were Congress prohibited from depriving states of their power of redundant enforcement, enforcement redundancy would be a constitutional entitlement of states. Such an enforcement entitlement is conceivable. It would operate as a kind of compliment to the anticommandeering doctrine in modern federalism jurisprudence: the anticommandeering doctrine prohibits Congress from \textit{conscripting} states as enforcement agents;\footnote{See \textit{Printz v United States}, 521 US 898 (1997); \textit{New York v United States}, 505 US 144 (1992); see also Evan H. Caminker, \textit{State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Laws?}, 95 Colum L Rev 1001 (1995).} a state entitlement to engage in redundant enforcement would prohibit the national government from \textit{excluding} states from participating in the enforcement of federal law. That said, there is little or no support in modern federalism jurisprudence for such a rule. Instead, the Supremacy Clause is conventionally understood to empower the federal government in many regulatory arenas to oust states entirely and monopolize enforcement for itself.

Ordinarily, of course, Congress is silent about redundant enforcement. In those cases, as I have said, constitutional law typically
treats enforcement redundancy as the norm. But why this is the accepted convention in our federal system is far from obvious. Most modern accounts of the Supremacy Clause—in preemption doctrine and elsewhere—emphasize that the permissibility of state law turns on whether that law creates a “conflict” with federal law. Where a conflict arises, state law must give way to superior federal law. Seen through this lens, there are two polar opposite perspectives one might take toward enforcement redundancy:

• On the one hand, one might say that state enforcement of federal law could not possibly create a conflict between state and federal law. State law literally duplicates federal law, enforcing precisely the same legal rule. On this account, redundant enforcement presents the clearest case against preemption one can imagine, because there is no conceptual space between state and federal law.

• On the other hand, one might say that state enforcement of federal law inevitably creates a conflict between state and federal law. State law piles on an additional sanction when it prohibits conduct already prohibited by federal law. And states ratchet up the likelihood of imposing a sanction when they authorize state officials to enforce federal law, by making arrests for federal crimes, by suing in court to enforce federal rules, or by engaging in any other enforcement-related behavior. Altering either the sanction or the probability of sanction, one might conclude, amounts to changing federal law.

Which of these accounts is more persuasive? Notice that what separates them is their conception of law. The first account conceptualizes law—for purposes of thinking about intergovernmental conflict and preemption—as centrally about the formal obligations imposed by legal rules. The content of the legal rule is marked by the scope of obligation, irrespective of the particular sanction that may or may not follow from failing to obey the legal rule. On that understanding, if a state imposes a legal obligation that is identical to the legal obligation imposed by the federal government, there can be no conflict between the state and federal law. Thus, instances of redundant enforcement are preserved from preemption.

30 A slightly different way to conceptualize this is to say that the law-as-obligation idea assumes that the world would be best if there were perfect compliance with legal rules. I rely a bit on this related idea below.
In contrast, the second account conceptualizes law in a way that is typical within the law-and-economics tradition: as a “price” for engaging in particular conduct. This view, associated most famously with Oliver Wendell Holmes, treats the state’s sanction as nothing more than the price for doing what would otherwise be prohibited. More precisely, the price for engaging in particular conduct is the expected sanction, which is equal to the sanction for doing what is prohibited multiplied by the likelihood that the sanction will be applied. On this account, anything a state does that alters the total sanction or the probability of sanction for particular conduct alters the content of the law. Thus, when a state criminalizes conduct that is also criminalized under federal law, or when it authorizes arrests for violations of federal law, the state’s actions always conflict with federal law: those actions change the content of federal law by altering either the sanction or the likelihood of punishment.

Seen in this light, it is easy to see why courts have not (and cannot plausibly) embrace the law-as-price approach when thinking about federalism and preemption. Consider what would happen if they did unequivocally embrace this view: across sweeping domains, there would be literally no space for state regulation. Once the federal government adopted a particular legal prohibition, such as a prohibition on the possession of cocaine, anything a state did to enforce that prohibition would change the expected sanction. The adoption of federal drug laws would thus necessitate the preemption of state drug laws, and even prohibit efforts by state officials to arrest persons in violation of federal drug laws. In short, states would be neutered in any arena into which the federal government stepped. Such a rule would replicate the vision of dual sovereignty imagined by Gibbons v. Ogden, in which states and the federal government operated in mutually exclusive regulatory spheres. The implausibility of this vision, which even in the Gibbons era did not accurately describe the practice of American federalism, explains why it has little purchase on the way courts typically think about enforcement redundancy.

Before proceeding, recall that federalism concerns were not the only constitutional concern one might have about enforcement re-

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31 See, for example, Robert Cooter, Prices and Sanctions, 84 Colum L Rev 1523 (1984).
32 See Oliver Wendell Holmes, The Path of the Law, 10 Harv L Rev 457 (1897).
33 22 US 1 (1824).
dundancy. One might also worry that it is inconsistent with impor-
tant separation-of-powers principles. Article II vests the “ex-
cecutive power” exclusively in the president of the United States and
directs that the president “shall take care that the laws be faithfully
executed.” Over the past few decades, some have argued that this
language makes clear that the Constitution establishes a “unitary
executive.” While belief in a unitary executive might mean many
things, a number of prominent scholars and judges have contended
that it means that the Constitution makes the president of the
United States a single human agent to whom all control over (and
responsibility for) the execution of federal law must ultimately be
traced. While this understanding is controversial, if taken seriously
it precludes anyone other than the president or his subordinates
from enforcing federal law.

Interestingly, those who subscribe to the unitary executive hy-
pothesis frequently overlook the pervasiveness of redundant en-
forcement within our federal system. Some of this can be chalked
up to their formalist priors. They likely would not consider some
forms of enforcement redundancy, such as a state’s prohibiting con-
duct identical to that prohibited by federal law, to implicate Article
II at all, on the ground that the states are enforcing a state rather
than a federal legal rule—albeit legal rules with content identical
to federal law, and sometimes drawn specifically from federal law.
But other redundant enforcement practices, such as qui tam suits
filed by state officials, are harder to ignore. In such cases, unitary
executive theorists have sometimes tried to explain how such prac-
tices remain subject to presidential control, though there is also the

34 US Const, Art II, § 1, 3.
37 See id; Calabresi and Prakash, 104 Yale L J at 661 (cited in note 35) (“Without going into great detail, suffice it to say that qui tam actions are rather problematic.”); Harold J. Krent and Ethan G. Shenkman, Of Citizen Suits and Citizen Sunstein, 91 Mich L Rev 1793, 1820–21 (1993) (suggesting qui tam suits raise Article II problems—though perhaps not fatal ones given the existing level of executive control over such suits).
frequent suggestion that such practices are at worst an “extremely limited exception to the rule of presidential control of all aspects of” federal law enforcement.38

Far from being an extremely limited exception, the practice of redundant enforcement creates a deep and pervasive conflict with the rule of absolute presidential control. Consider the enforcement of federal criminal law. As Justice Scalia, the theory’s leading proponent on the bench, argued in his famous dissent in *Morrison v Olsen*: “the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) [is] the exercise of purely executive power” and that, as a consequence, the president must have “exclusive control over the exercise of that power.”39 This categorical view that the president must have absolute control over criminal investigations would preclude state officials from participating in the enforcement of federal criminal law, since these officials are not within what Justice Scalia would understand to be the “exclusive control” of the president. To be sure, this theory of absolute control appears to contradict widespread historical practice, as state officials and even private citizens have participated in the enforcement of federal criminal law from the founding period forward.40 And perhaps the theory itself is not perfectly pure: after all, Justice Scalia argued in his *Arizona* dissent that state officers should be able to investigate violations of federal immigration law

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38 See Calabresi and Prakash, 104 Yale L J at 661 (cited in note 35) (“At most, English practice suggests that *qui tam* actions can be understood as but an extremely limited exception to the rule of presidential control of all aspects of prosecution. This exception is hardly fatal to the rule of presidential superintendence of federal and state prosecutors.”); Calabresi and Yoo, *The Unitary Executive* at 51–52 (cited in note 35) (arguing that “there is no reason to think [President] Washington could not have extinguished any privately brought *qui tam* actions during his tenure as president had he chosen to do so.”).

39 *Morrison v Olsen*, 487 US 654, 705 (1989) (Scalia, J, dissenting). Justice Scalia went on to say that “the President’s constitutionally assigned duties include complete control over investigation and prosecution of violations of the law, and that the inexorable command of Article II is clear and definite: the executive power must be vested in the President of the United States.” Id at 710 (emphasis added).

40 See Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 Am U L Rev 275, 278 (1988) (discussing founding era participation in criminal enforcement by private parties and state officials, and concluding that the delegation of some criminal law enforcement powers to nonexecutive actors does not violate separation-of-powers principles because “at least from a historical perspective, criminal law enforcement cannot be considered a core or exclusive power of the executive branch.”); but see Calabresi and Yoo, *The Unitary Executive* at 50 (cited in note 35) (disagreeing with Krent about whether the president in the founding period exercised control over state prosecutors and federal district attorneys who enforced federal law). See also notes 23–26 above (discussing widespread practice of arrests by state officers for federal offenses); Sunstein, 92 Mich L Rev at 134–35 (cited in note 35).
enforcement redundancy and immigration law 47

and make arrests for suspected violations. Nonetheless, for those who take the theory seriously, this understanding of the unitary executive is in deep tension with Arizona’s efforts to participate in the enforcement of federal immigration law.

For theorists who subscribe to such a strong version of the unitary executive, there are only two solutions to this Article II problem: prohibit states across the board from engaging in redundant enforcement, or bring state actors under the direct supervision of the president. Either solution would require a radical change in existing constitutional norms. The first would wipe out widespread state practices and move our pervasively cooperative federalism sharply in the direction of Gibbons v. Ogden’s mythical world of completely separate spheres of action for states and the federal government. The second is no less dramatic: it would empower the president to directly control state officials. As Evan Caminker has persuasively argued, meaningful supervisory power over state officials would, for those who subscribe to the unitary executive theory, almost surely require the power to fire these officials for insubordination.41 (The power to fire is precisely the power these theorists argue the president must have in order to control the federal bureaucracy, and it is the absence of this authority that grounds their claim that independent agencies are unconstitutional.) But giving the president the power to remove state officials is unfathomable in a doctrinal landscape that includes a prohibition on the federal government “commandeering” state officials. This conclusion makes it all the more remarkable that Justice Scalia supports the power of Arizonian officials to enforce federal immigration law.42

In short, therefore, there are available theories on which redundant enforcement by states might violate either federalism or separation-of-powers principles. Yet accepting these theories would have radical implications for the structure of federal-state relations.

41 See Caminker, 45 U. Kan. L. Rev. at 1088–91 (cited in note 36); Morrison v. Olson, 487 US at 715 (Scalia, J., dissenting) (concluding that the independent counsel statute was unconstitutional in part because it restricted the president’s power to remove the independent counsel).

42 To be sure, Justice Scalia believes that Arizona has the authority to craft its own immigration law as well—and likely sees this as an important (if formalistic) distinction that avoids certain Article II issues. See Arizona, 132 S Ct at 2511–13. But even when he puts aside this possibility and considers directly the possibility that state officials will enforce federal law, he is surprisingly unconcerned about the Article II obstacles that figure so prominently in the rest of his jurisprudence.
It is unsurprising, therefore, that our existing constitutional norms generally accept enforcement redundancy.

III. Arizona’s Rejection of Enforcement Redundancy

The preceding discussion makes the federal government’s position in the Arizona litigation look pretty anemic. Arizona’s SB 1070 looks like a classic example of enforcement redundancy. Sections 3 and 5 of the act track the first form of redundancy I focused on above: these provisions prohibit conduct already proscribed by federal law. Section 3 prohibits the “willful failure to complete or carry an alien registration document . . . in violation of 8 United States Code section 1304(e) or 1306(a).” The provision literally incorporates the federal prohibition by reference. As the Supreme Court itself described, this provision “adds a state-law penalty for conduct proscribed by federal law.” Similarly, Section 5(C) prohibits noncitizens without work authorization from working in Arizona, conduct already barred by federal immigration law. Sections 2 and 6 track the second form of redundant enforcement I emphasized earlier: rather than prohibit any conduct directly, these provisions authorize law enforcement officials to participate in the enforcement of federal law by investigating and making arrests for suspected violations. Section 2(B) requires that state law enforcement officers check the immigration status of some non-

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44 Arizona, 132 S Ct 2501.
45 See Ariz Rev Stat Ann § 13-2928(C) (forbidding “an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor”). The INA forbids noncitizens without work authorization from working in the United States through a complex combination of statutory provisions. Lawful permanent residents (“LPRs”) are in effect given permanent and unlimited work authorization as a matter of federal law. Lawful nonimmigrants—that is, those who enter the country on temporary visas—are eligible to work only in accordance with the terms of their visas, and become deportable if they violate the terms of those visas. See INA § 237(a)(1)(C). Those who enter the country without any authorization or fall out of status after entering may also obtain work authorization, even before they receive a visa that regularizes their immigration status, but that authorization must be affirmatively granted by the government. Such authorizations are most frequently provided to noncitizens working their way through the asylum process, or waiting to adjust their status to that of an LPR on the basis of marriage to an American citizen. See, for example, INA §§ 208, 245; 8 CFR 208.7. Recently, however, such authorizations have also been provided to noncitizens who are eligible for new Obama administration programs such as Deferred Action for Childhood Arrivals. See Memorandum from Janet Napolitano, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), online at http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.
citizens they encounter in their ordinary law enforcement duties.46 Section 6 authorizes the arrest of a noncitizen on probable cause that she is deportable for being in violation of the criminal deportability grounds of immigration law.47 Suspected deportability is also an arrestable offense under the Immigration and Nationality Act.48

In short, Arizona’s SB 1070 sought to use state officials to enforce the same legal prohibitions that are already a part of federal immigration law. This is part of what made the Arizona litigation so different from the canonical cases of immigration federalism. These cases—lawsuits like *Chy Lung v Freeman*49 and *Hines v Davidowitz*50—did not involve redundant enforcement. Instead they involved state laws imposing legal obligations different, or entirely absent, from federal law. Consider *Chy Lung*. That case concerned a California law authorizing state immigration inspectors to deny admission to several classes of immigrants—among them certain criminals and “lewd and debauched women”—unless the master of the ship transporting those immigrants paid a bond to indemnify the state.51 At the time California passed the law, there was no federal statute requiring such bonds, and in fact no federal exclusion law of any kind.52 So there was no sense in which California was enforcing legal norms also imposed by the federal government.53

46 See Ariz Rev Stat Ann § 11-1051(B) (West 2012) (requiring officers to make a “reasonable attempt . . . to determine the immigration status” of any person they stop, detain, or arrest on some other legitimate basis if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.”). See also id (“Any person who is arrested shall have the person’s immigration status determined before the person is released.”).

47 Section 6 provides that a state officer "without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [her] removable from the United States." Ariz Rev Stat Ann § 13-3883(A)(5).

48 See INA § 236(a).

49 92 US 275 (1876).

50 312 US 52 (1941).

51 See *Chy Lung*, 92 US at 277.

52 California enacted the provisions at issue in 1873. See id (citing “c. 1, art. 7, of the Political Code of California, as modified by sec. 70 of the amendments of 1873, 1874”). The first federal exclusion law, the Page Act, was adopted in March of 1875. See An Act Supplementary to the Acts in Relation to Immigration, 43d Cong, 2d Sess, c. 141, 18 Stat 477.

53 One interesting wrinkle is that the Page Act, which among other things made inadmissible women "imported for the purposes of prostitution," was passed by Congress while *Chy Lung* was pending before the Supreme Court. See *Ex Parte Ab Fook*, 49 Cal 402 (Ca 1874) (noting that the steamer Japan, whose passengers filed *Ab Fook* and appealed
Moreover, when the federal government started enacting restrictive immigration laws just a few years later, some of those laws were initially enforced by state officials. The Immigration Act of 1882, for example, “authorized the secretary of the Treasury to ‘enter into contracts with such State commission, board, or officers as may be designated for that purpose by the governor of any State’ to administer federal immigration policy.” The federal government lacked a standing enforcement bureaucracy up to the task, so it relied on state officials. This reinforces the notion that the concern in *Chy Lung* was not about state officials participating in the enforcement of federal law.

*Hines* was similar. In that case, Pennsylvania set up a mandatory system of alien registration when no such requirement existed under federal law. Among other things, the scheme required every adult noncitizen to register with the state each year, carry an alien registration card at all times, and show the card whenever demanded by any police officer. *Hines*’s posture is complicated a bit by the fact that Congress did pass a registration statute—the Alien Registration Act of 1940—while the litigation was pending. But the federal scheme contained different requirements, and it pointedly did not require that noncitizens carry registration papers on them at all times and show them on demand. This requirement—backed by a criminal penalty in Pennsylvania—was rejected by Congress for being “at war with the fundamental principles of our free government.” Even after the enactment of the federal Alien Registration Act, therefore, the concern was that Pennsylvania, far from enforcing federal obligations, was imposing obligations quite deliberately rejected by Congress.

Given the different posture of these earlier cases, as well as the
widespread acceptance of redundant enforcement in American federalism, one might have expected the United States to lose when it sued Arizona. So what happened? Why did the Court side with the federal government and strike down the core provisions of SB 1070? The short answer is that the Court’s opinion in United States v Arizona rejects the logic of enforcement redundancy.

Consider, for example, the Court’s discussion of the provision of SB 1070 that penalizes violations of the federal alien registration law. As I noted above, the Court acknowledges that the provision simply “adds a state-law penalty for conduct proscribed by federal law.” Its legal obligations are identical to those imposed by federal law. Nonetheless, the Court finds the provision problematic because it empowers state officials to sanction noncitizens for violating federal immigration law in situations where federal officials have decided (or hypothetically might decide) not to punish the violation on the ground that enforcing the letter of the law would frustrate federal policies: “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.”58 In other words, the problem is that a state official may choose to punish a person for violating the immigration code when a federal official might choose not to do so. But this is, by definition, true in every single instance where more than one agent is empowered to enforce the law. It is the conceptual foundation of the large literature on the choice of enforcement agents. Only by rejecting enforcement redundancy entirely can this “problematic” possibility be avoided.

This line of reasoning is not limited just to an isolated passage; nor is it limited just to the evaluation of Section 3. It is the analytic thread that ties together the entire opinion. Identifying the problem with Section 6, which authorizes state officers to arrest deportable noncitizens, the Court writes in the same vein: “This state authority could be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case,” undermining the federal government’s ability to make discretionary determinations about whether to arrest a particular noncitizen who

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58 Arizona, 132 S Ct at 2503.
is in violation of immigration law. The Court is absolutely correct, of course. But the same is also true anytime a state officer arrests a person for a suspected federal criminal violation—authority no one doubts state officers possess even though it may interfere with the discretionary decisions of federal officials.

Implicitly, this reasoning is a rejection of the view that law should be conceptualized as a series of obligations. The majority rejects redundant enforcement in Arizona precisely by conceptualizing federal immigration law as a set of prices. On that understanding, even if Arizona mimics perfectly the obligations contained in federal immigration law, that is not enough to save it from preemption. Instead, the “law” against which state action must be compared is every hypothetical action that might influence the “expected sanction” for violating the INA—that is, everything that could conceivably influence either the severity of the sanction or the probability that the sanction is actually imposed for a particular violation.

In other words, every time the Court emphasizes that Arizona’s efforts interfere with a careful federal “balance” about immigration law, it is not saying that the state has disrupted the balance by creating legal obligations that the federal government declined to create as part of its carefully crafted scheme. Arizona quite deliberately mimicked the INA’s legal obligations precisely to avoid this complaint. Instead, the Court is saying that Arizona has interfered with the balance by attaching an additional sanction to an identical legal obligation, or by raising the likelihood that a person will be sanctioned for violating that federal legal obligation. Certainly no court would accept the legal argument that a state prosecution for

59 Id at 2506; see also id (“§ 6 violates the principle that the removal process is entrusted to the discretion of the Federal Government.”).

60 Note that there are two ways of thinking about this concern—as about preserving policy control on the one hand, and preventing enforcement mistakes on the other. The Court focuses on the former, but the latter is also important. As the literature on the selection of enforcement agents emphasizes, a monopoly on enforcement is sometimes justified by the risk of enforcement mistakes that might arise if other actors (like private parties, or states) are allowed into the enforcement game. See sources cited in notes 2–8 above. The concern that state officials will make mistakes when they try to enforce immigration law is not a trivial one, especially in light of the complexity of immigration law. But this risk is not unique to immigration law; it is present in many of the areas where enforcement redundancy is our constitutional norm. More importantly, the Court’s approach makes clear that it would not be comfortable with redundant immigration enforcement even were there no mistakes by states.

61 Moreover, were misfit of legal obligation the real problem, Arizona could eliminate the concern by being more careful about tracking perfectly federal obligations. Justice Kennedy most definitely does not think this is the case.
cocaine possession should be impermissible whenever federal officials have decided (or hypothetically would decide) to decline to prosecute the possession offense under federal drug laws criminalizing the same conduct. Yet that is the result of the Court’s decision in Arizona.

If the Court had conceptualized immigration law as a set of obligations rather than prices, then under conventional preemption logic it would have accepted Arizona’s efforts for the same reasons that redundant enforcement is typically thought to be fine. It is hard to see how there is a conflict between federal and state law in this traditional sense, because state law proscribes exactly the same conduct as federal law. State action simply serves to increase compliance with federal law—something that should further federal interests to the extent that the letter of federal immigration law embodies a series of obligations that, in the best of worlds, would be followed perfectly.

Moreover, it is hard to argue that state sanctions, arrests, or information sharing would interfere with federal officials, consume federal resources, or change federal priorities. The imposition of state sanctions would use state, not federal resources, and leave the federal officials free to pursue whatever priorities they like. The same is true for arrests. State officials consume their own resources, not federal ones, when they arrest suspected immigration violators. And if federal officials conclude that it is not worth initiating removal proceedings against the person, they can simply decline. State involvement may, of course, change the political economy of federal enforcement, leading federal officials to behave differently. But as I explained above, that is true of all instances of redundant enforcement. (In fact, some scholars see this as the most powerful argument in favor of redundant enforcement.62) And even in Arizona it is equally true of SB 1070’s information-sharing provision, the only one the Court did uphold. That provision, Section 2(B), requires state officers to make a status “inquiry even in cases where

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it seems unlikely that the Attorney General would have the alien removed. Yet the fact that “§2(B) does not allow state officers to consider federal enforcement priorities” does not trouble the Court, because the federal government is formally free to do nothing with the information about immigration violators that it receives from the state.

In short, the Court’s treatment of law as a price rather than an obligation leads it to reject redundant enforcement. But this reasoning comes with a radical consequence: it gives executive branch officials near complete control over the content of immigration law. Federal immigration law on the books becomes mostly a sideshow. In the Court’s Holmesian world, the content of the code is no longer the central determinant of “immigration law.” Instead, immigration law is determined by the actual or hypothetical decisions of executive branch officials. These actions set the official “price” for particular conduct, and hence control the shape of immigration law understood as a price.

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. This is a possibility the Court has explicitly rejected before—in Gonzales v Oregon and other cases—and it is part of what makes the Court’s approach in Arizona so unusual. Moreover, the reason for the Court’s prior rejection should be clear from the preceding discussion: were every enforcement decision by an executive branch official “law” for purposes of preemption analysis, no state regulation would be permissible in any regulatory arena into which the federal government had stepped. Anything the state did would conflict with either an action or an inaction of some federal official. To return to the drug possession analogy: the number of federal possession

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63 Arizona, 132 S Ct at 2508.
64 Id.
65 546 US 243 (2006). In Gonzales v Oregon, the Court refused to allow the attorney general to use his exercise of prosecutorial discretion under the federal drug laws to preempt Oregon state law that permitted physicians to prescribe drugs to facilitate assisted suicide by terminally ill patients. This did not mean that the attorney general was prohibited, in a federal prosecution, from arguing that such prescriptions do in fact violate criminal law. Rather, the Court’s point was that the attorney general’s exercise of prosecutorial discretion, like any other run-of-the-mill exercise of charging discretion, could not properly be conferred with the force of law necessary to preempt state law affirmatively permitting physicians to prescribe Schedule II drugs in order to facilitate assisted suicide. See id at 255–56, 274; see also Crandon v United States, 494 US 152, 177 (1990) (Scalia, J, concurring in judgment).
prosecutions would itself define the “law” against which potential state conflicts would be judged. Since any state prosecutions would alter that number, they would lead inexorably to conflict preemption. In this fashion, applying the Arizona Court’s approach broadly would collapse conflict preemption into field preemption and destroy broad swaths of state regulatory authority.

IV. Federalism as Separation of Powers

*United States v Arizona* is thus as much a case about separation of powers as it is a case about federalism. Note how far the Court’s approach takes us away from traditional ideas about separation-of-powers problems. This is not a context in which Congress has failed to speak—certainly not in any conventional sense. Nor is the executive interpreting ambiguous statutory language. The immigration code makes crystal clear that the noncitizens targeted by Arizona’s law are in violation of federal statutes. But even in this context, the Court has authorized the executive, through the ordinary exercise of prosecutorial discretion, to make immigration law that preempts state laws that appear perfectly consistent with (and in some cases literally incorporate by reference) the black-letter commands that Congress wrote into the Immigration and Nationality Act. *Youngstown* this is not.66

How should we evaluate the Court’s approach? As the earlier discussion makes clear, the Court’s approach is deeply inconsistent with a convention that ordinarily operates in federalism jurisprudence—a convention whose widespread rejection would have radical implications for the role of states in our federal system. Thus, we might just stop there and criticize the Court for ignoring this convention and giving the executive the radical power to preempt state law through the use of ordinary prosecutorial discretion. Instead, I want to suggest that the Court’s approach may be defensible—but only if one holds a particular view about the structure of modern immigration law. Thus, the Court’s approach in *United States v Arizona* may reveal its thinking about this structure.

To see this, consider the legal conclusion that flows from the underlying logic of the Court’s opinion—that the discretionary decisions of executive branch officials are elevated to the status of law for purposes of preemption analysis. While this conclusion may

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66 See *Youngstown Sheet and Tube v Sawyer*, 343 US 579 (1952).
seem untenable in many contexts, for the Court it seems to comport with the structure of modern immigration law. Even in the modern regulatory state, where the executive holds broad lawmaking power, immigration law stands out. Immigration law can be seen today to be rooted principally in unilateral executive action. It is easy to miss this fact, because the prolix immigration code appears to describe in painstaking detail, over hundreds of pages, the legal rules that regulate the details of noncitizens’ lives. As I have explained elsewhere, however, in work with Eric Posner and Cristina Rodriguez, this perspective is misleading. The reason is that the central features of modern immigration law—including exceptionally broad grounds of deportability and long-standing acceptance of high levels of unauthorized migration—have left huge numbers of noncitizens formally deportable. Today there are almost certainly more than 10 million such people—roughly one out of every three noncitizens living in the United States. In addition, other recent changes to the immigration code have consolidated executive branch authority to decide whether formally deportable noncitizens get to stay. In such a world the formal rules of deportability are irrelevant across a huge swath of cases. All that matters is whom the president decides to deport.

This singular, defining feature of modern immigration law is not just the product of a lack of resources. The executive is not declining to pursue so many deportable noncitizens solely because it lacks the information or personnel it needs to locate, apprehend, and deport immigration law violators. To be sure, the administration does often say publicly that immigration enforcement looks the way it does because of resource constraints: prosecutorial discretion is the only option, the government says, in a world where the Department of Homeland Security has finite time and money. These resource constraints are real, and they can explain some aspects of underenforcement in immigration law. Nonetheless, these public explanations are inconsistent with what the government is actually doing.

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68 See Cox and Rodriguez, 119 Yale L. J at 510–19 (cited in note 67). For a discussion of the executive’s large-scale project to systematize and centralize the exercise of this vast discretion, see Adam B. Cox and Thomas J. Miles, Policing Immigration, 80 U Chi L Rev 87 (2013).
Instead, the executive’s actions drive home the fact that, for immigration law today, a perfect world is not a world of perfect compliance. Many people who are formally deportable are not thought to be deserving of deportation, and in fact the executive branch affirmatively does not want to deport many of these noncitizens. We might describe this as a gap between formal deportability and normative deportability—a gap that is similar, perhaps, to the gap that Bill Stuntz and others believe exists in some parts of criminal law.69 This gap is a pervasive part of our “illegal immigration” system, which operates in the United States as a shadow guest-worker program in which millions of migrant workers enter and live in the country without formal permission. The executive screens out a tiny fraction of these workers on the back end of the system, most prominently by removing those who are arrested on or convicted of state criminal charges.70 The gap is also prominent in many recent decisions by the Obama administration. The most salient was President Obama’s announcement in June 2012 that the administration would grant “deferred action”—a two-year promise not to deport—to as many as 1.5 million young immigrants.71 The president did not say that his decision was driven by a lack of enforcement resources. To the contrary: he defended deferred action for childhood arrivals as “the right thing to do,” because “it makes no sense to expel talented young people who, for all intents and purposes, are Americans.”72 This is not the language of limited resources.

Even the government’s position in the Arizona litigation itself highlights the gap between formal and normative deportability. After all, if the nature of legal obligation in the immigration arena were understood by the executive in a way that made perfect compliance with immigration law optimal, then it would be very hard to explain why state efforts that increase compliance at no cost to

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72 See the White House, Office of the Press Secretary, Remarks by the President on Immigration (June 15, 2012), online at http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration.
the federal government would be spurned by the Justice Department. The rejection of these efforts is tacit acknowledgment that, in the executive’s view, perfect compliance with the immigration rules on the books is not desirable.

There is, then, a tremendous gap between immigration law on the books and immigration law in practice. Why immigration law came to look like this is a complicated question. It is easy to imagine why a large number of actors in the political system might favor such a structure: it secures a cheap workforce for employers, preserves flexibility for the government, and provides opportunities for many more migrants than the country has been willing thus far to accept within the formal allotment of labor visas. Nonetheless, it is far from clear how much of the status quo reflects the deliberate choices of some set of political actors or instead is the product of happenstance and path dependency. Whatever the root causes, the important point is that a large number of actors within the system accept the idea that this gap exists.

*United States v Arizona,* in my view, shows that the Supreme Court now also accepts and endorses the existence of this gap. Justice Kennedy’s majority opinion implicitly rejects the idea that the underenforcement of immigration law’s formal obligations is simply the result of insufficient resources or a lack of information that would allow the government to locate immigration law violators. Had the Court thought that, it would have been much more likely to embrace Arizona’s efforts—efforts designed to use redundant enforcement to improve compliance with federal law. Instead, the Court treats the deliberate decisions by federal officials to underenforce the INA as reflecting the contours of immigration law more accurately than the formal rules laid down in the immigration code.

At bottom, this is a big part of what separates the majority from the dissent. Many have criticized Justice Scalia’s dissent for its anachronistic account of the power states have to close their own borders, as well as for the strident tone of the dissent’s concluding

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73 Justice Scalia takes the position that “[a]s a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress.” *Arizona,* 132 S Ct at 2511 (Scalia, J, dissenting). The possibility that states might wield significant authority over the exclusion and expulsion of noncitizens was a real one during the nineteenth century. See Gerald L. Neuman, *The Lost Century of American Immigration Law* (1776–1875), 93 Colum L. Rev 1833 (1993). But there was never the clear consensus that Justice Scalia attempts to extract from the founding period.
remarks, which some have taken as little more than a screed against the Obama administration’s recent immigration policies. But these features of the dissent have distracted attention from the fact that Justice Scalia’s central argument is that black-letter immigration law describes a series of obligations that demand perfect compliance—by immigrants and, it seems, by the federal enforcement bureaucracy. This is clear in Justice Scalia’s scathing critique of the Obama administration’s announcement of deferred action for young immigrants:

> It has become clear that federal enforcement priorities—in the sense of priorities based on the need to allocate “scarce enforcement resources”—is not the problem here. . . . The President said at a news conference that the new program is “the right thing to do” in light of Congress’s failure to pass the Administration’s proposed revision of the Immigration Act. Perhaps it is, though Arizona may not think so. 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.

Thus, rather than accepting the actions of the executive as evidence of a gap between formal and normative deportability, Justice Scalia sees them as evidence of “[a] Federal Government that does not want to enforce the immigration laws as written,” of an executive whose “priorities include willful blindness or deliberate inattention to the presence of removable aliens in Arizona.”

One might chalk up Justice Scalia’s position to his self-professed commitment to a positivist vision of the nature of legal rules. Whether or not it is possible to show that Justice Kennedy’s price conception of law is in some way inconsistent with positivism, it is interesting to note that Justice Scalia’s dissenting views are in deep

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75 *Arizona*, 132 S Ct at 2521. Note that this is why Justice Scalia correctly understands that the real disagreement with the majority is not over whether immigration law is field preemptive in any ordinary sense. The majority’s claim is not as a general matter that federal regulation of immigration is so comprehensive that it leaves no room for state involvement. Instead, it rests on the premise that there is a gap between formal deportability and normative deportability. Justice Scalia simply believes that there is no such gap.

76 Id. See also id (“Are the sovereign States at the mercy of the Federal Executive’s refusal to enforce the Nation’s immigration laws?”).

77 Id at 2517.
tension with positions he has taken elsewhere. In the above passage, for example, he sees something legally objectionable about the executive’s failure to fully enforce federal immigration law. But such concern is hard to square with his view about the Constitution’s commitment to a unitary executive. Elsewhere Justice Scalia has heralded the idea that the executive is free to underenforce laws with which he disagrees—and that Congress should be prohibited from empowering private citizens to sue to ensure that the executive strictly enforces the law.78 If so, then what business do states have “enforcing applications of the Immigration Act that the President declines to enforce”?2

In addition to illuminating the root of the disagreement between the majority and dissent, this account can also help explain why the Supreme Court upheld one provision of SB 1070—Section 2(B). That information-sharing section, which has been referred to widely as the “show your papers” provision, requires that state and local law enforcement officials check the immigration status of people they encounter in the ordinary course of their law enforcement duties, wherever there is reasonable suspicion that the person might be in violation of immigration law.79 At first glance, the majority’s decision to sustain this provision appears puzzling. On the majority’s reasoning, any action that increases the “expected sanction” for violating the immigration code—either by increasing the total sanction or by increasing the likelihood of sanction—interferes with federal prosecutorial discretion and alters the content of immigration law. That logic explains the invalidation of the arrest provision in SB 1070: even though the federal government could decline to pick up and charge a person arrested by state officers, the arrest plausibly might change the expected sanction. But that logic seems

78 As he has written:

Does what I have said mean that, “important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy”? Of course it does—and a good thing, too. . . . [L]ots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere. . . . The ability [of the executive] to lose or misdirect laws can be said to be one of the prime engines of social change. . . . Sunday blue laws, for example, were widely unenforced long before they were widely repealed—and had the first not been possible the second might never have occurred.


79 See Ariz Rev Stat Ann § 11-1051(B).
like it should lead to the same conclusion about the information-sharing provision. Identifying a suspected immigration violator to the federal government certainly might raise the likelihood that that person is ultimately removed. Moreover, asking for papers might even itself be seen as a “sanction”—a form of harassment that imposes costs on those suspected by state officers of being in violation of immigration law. Certainly some Arizona officials appear to have hoped that the provision would have this effect, instilling fear in out-of-status immigrants and thereby driving them out of the state.

While there may be little functional difference between the arrest and information-sharing provisions, the Court’s decision to uphold the latter might reflect the fact that this provision is the one that most clearly facilitates the consolidation of authority in the hands of the federal executive. It is, in some ways, critical to the rationalization of immigration law’s application in a world where a tremendous gap exists between formal and normative deportability. In such a world, the biggest challenge for the executive is informational: how does it acquire information about where all the formally deportable noncitizens are, and what they are up to, in order for the executive to make systematic rather than arbitrary decisions about whom to deport? How can it identify and locate the migrants

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80 In fact, there might be literally no distinction in a world where local law enforcement officials have very broad discretion to make arrests, even for minor offenses like traffic infractions. For this reason, the Court is probably mistaken when it suggests in dicta that the Fourth Amendment may operate as a significant constraint on the implementation of Section 2(B) by prohibiting officers from extending an otherwise permissible encounter solely to check immigration status. The Fourth Amendment might well do so, but an officer can obviate any potential Fourth Amendment concern by simply arresting the person for the infraction that led to the encounter in the first place. Thus, the possibility of pretextual arrest might trivialize the formal availability of a Fourth Amendment constraint. In other words, given the breadth of arrest authority, there may be very little practical difference between (1) a provision that authorizes local officials to arrest non-citizens who are in violation of immigration law (authorized by Section 6 of SB 1070), (2) a provision that permits local officials to check the status of a person who is stopped on some other basis (authorized by Section 2(B) of SB 1070), and (3) a provision that permits local officials to check the status of a person arrested on some other basis (authorized by the Secure Communities program discussed below).

81 This is the sort of challenge that by and large did not exist in the late nineteenth century, when immigration law screened people only at the borders (there were no deportation laws) and most migrants passed through points of entry. See Salyer, Laws Harsh as Tigers (cited in note 54); Mae Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America (2005). The government still faced an informational problem in those days, but it had much less to do with identifying immigrants for purposes of screening and much more to do with getting information about identifiable immigrants—except in instances where the immigration rules screened migrants on the basis of visible characteristics like race or ethnicity.
it wants to put through this screening process? Without comprehensive information it is much harder for the executive to implement a fine-grained system of ex post screening; the screening system becomes progressively more arbitrary, reflecting chance more than the president’s priorities.

Arizona’s information-sharing provision helps overcome this informational deficit. States have many, many more contacts with noncitizens than the federal government can ever hope to have—even in a world like today’s, where the immigration enforcement budget is bigger than the combined budgets of all of the criminal federal law enforcement agencies.82 Thus, preserving the information-sharing role of states is consistent with the consolidation of immigration power in the executive branch. In fact, that is precisely why the government recently rolled out a federal program quite similar to Arizona’s section 2(B), even while it was litigating against section 2(B) in the Supreme Court. The new federal program is designed to ensure that every single person arrested anywhere in the country by a state or local law enforcement official will have her immigration status checked upon arrest. Called Secure Communities, the program is basically a giant information-sharing regime designed to leverage the contacts people have with state and local law enforcement in order to provide the federal government with much more information about the identities of those in violation of the immigration code.83 That information, provided by state officials, could of course change the expected sanctions faced by immigrants for violations of immigration law. Yet that possibility appears less important to the executive than the fact that this information sharing helps promote the possibility that federal discretion can be wielded in a comprehensive fashion. It therefore serves more as a precondition than an obstacle to executive branch control over immigration policy.

V. Conclusion

Ultimately, the Supreme Court’s decision in United States v

82 See Doris Meissner et al, Immigration Enforcement in the United States: The Rise of a Formidable Machinery, Migration Policy Institute (January 2013), online at http://www.migrationpolicy.org/pubs/enforcementpillars.pdf (“[T]he US government spends more on its immigration enforcement agencies than on all its other principal criminal federal law enforcement agencies combined.”).

83 For a comprehensive description of Secure Communities, see Cox and Miles, 80 U Chi L Rev at 90–102 (cited in note 68).
Arizona may be less significant for its impact on state immigration initiatives than for ratifying and furthering the consolidation of immigration authority in the executive branch. Evaluating this shift is well beyond the scope of this article (though I have written about certain aspects elsewhere).84 One result is, however, fairly clear: systematic policy consequences are likely to flow from jurisprudential developments that shift the locus of immigration policymaking power toward the president and away from Congress.

Historically, presidents have generally been more open to immigration than Congress. Chester A. Arthur vetoed the first Chinese Exclusion bill passed in 1882 on the ground that its twenty-year ban on migration was excessively restrictionist and that the act’s registration requirements were “undemocratic and hostile to the spirit of our institutions.”85 Woodrow Wilson and his predecessors repeatedly vetoed efforts in the early twentieth century to require literacy tests for immigrants.86 Congress eventually overrode Wilson’s veto. Harry Truman fought with Congress over the Displaced Persons Act of 1948 on the ground that it was discriminatory and unfair to refugees,87 and he later vetoed the McCarran-Walter Act of 1952 because it retained the restrictive national origins quota system.88 Again Congress overrode the veto, and the national origins quota system continued until its abolition was pushed for by John F. Kennedy and secured in part by the efforts of Lyndon Johnson.89

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84 See id at 131–35; Cox and Posner, 59 Stan L. Rev at 844–52 (cited in note 67); Cox and Rodriguez, 119 Yale L.J at 528–46 (cited in note 67).
85 See Chester A. Arthur, Chinese Immigration—Veto Message, 13 Cong Rec 2551 (1882). President Arthur also argued that the bill breached treaty amendments that had recently been negotiated with China. See id. Those amendments to the Burlingame Treaty of 1868 permitted only a reasonable suspension of immigration. See Kitty Calavita, Chinese Exclusion and the Open Door with China: Structural Contradictions and the “Chaos” of Law, 1882–1910, 10 Social and Legal Stud 204, 207 (2001). Moreover, before those amendments were agreed to, President Hayes had vetoed earlier congressional attempts to restrict Chinese migration. See E. P. Hutchinson, Legislative History of American Immigration Policy 1798–1965, at 73 (1981).
87 See Roger Daniels, ed, Immigration and the Legacy of Harry S. Truman (2010).
88 Truman argued that the act was discriminatory, violating “the great political doctrine of the Declaration of Independence that ‘all men are created equal.’” See Message from the President of the United States to the House of Representatives, 82d Cong, 98 Cong Rec 8082 (1952). For more on Truman’s seeming openness to higher levels of immigration, see Cox and Rodriguez, 119 Yale L.J at 485–91 & n 271 (cited in note 67).
89 See Motomura, Americans in Waiting at 131–32 (cited in note 86); see also John F. Kennedy, A Nation of Immigrants (1958).
I certainly do not mean to suggest that presidents have been immune to restrictionist sentiment. After all, President Arthur did go on to sign the Chinese Exclusion Act of 1882 after it was amended by Congress to reduce the period of exclusion.90 Nor do I mean to suggest that presidents are inevitably less restrictionist than Congress. Counterexamples certainly occur, and perhaps they are ever more likely in an era in which political parties have become more polarized and staked out sharply divergent positions on immigration policy.91 Nonetheless, presidents are 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.92

The fact that presidents are likely to have different preferences about immigration policy than Congress is critical for understanding the consequences of United States v Arizona. It is also crucial to the ongoing discussions about comprehensive immigration reform. Immigration reform is a top priority for President Obama as his second term gets under way. Congressional Democrats are also renewing their reform push. To this point, public reform discussions have focused principally on flashpoint issues like legalizing the more than 10 million immigrants living without status in the United States. But lurking behind these discussions are reform’s potentially sweeping consequences for the president’s power over immigration policy. A large legalization program, combined with a substantial temporary worker program for low-skilled workers, could as a func-

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90 Act of May 6, 1882 (Chinese Exclusion Act), ch 126, 22 Stat 58.
91 See, for example, Alan I. Abramowitz, The Disappearing Center (2010); Nolan McCarty et al, Polarized America: The Dance of Ideology and Unequal Riches (2006).
tional matter dramatically reduce the president’s power by shrinking the gap between formal and normative deportability. On the other hand, Congress could choose to extend and formalize the president’s power—for example by delegating to the president the authority to set annual admissions quotas for many categories of labor migrants. This power would help solve the pervasive problem that the legislative process is simply too sclerotic to respond in a timely way to changes in domestic labor market conditions. But it would also solidify the president’s role as immigration-law-maker-in-chief.

In short, 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. Immigration federalism has gotten all of the attention, but it should be treated as the sideshow that it often is. *United States v. Arizona* implicitly acknowledges this reality. Members of Congress contemplating once-in-a-generation changes to immigration law should do the same.