

From *Plyler* to *Arizona*: Have the Courts Forgotten about *Corfield v Coryell*?

John C. Eastman†

INTRODUCTION

The theme of the Symposium at which this Article was presented was Immigration Law and Institutional Design. Our mission, as Symposium participants, was to assess the efficacy of the institutions that adopt and enforce our immigration laws. But before we can possibly make an efficacy assessment, we must address a normative question, namely, just what is it that our immigration laws seek to accomplish? It seems to me that there are three mutually exclusive alternatives or, perhaps more accurately, three principal points on a continuum of policy alternatives: (1) open borders, with unconstrained immigration and naturalization; (2) closed borders, with no permanent immigration and naturalization, only temporary visas for students, tourists, and so forth; and (3) controlled borders, with limited immigration and naturalization according to some established standard.

In our nation's historical narrative, the first is best exemplified by the iconic words from the famous poem by Emma Lazarus, penned to help raise funds for the construction of the Statue of Liberty's pedestal in the 1880s: "Give me your tired, your poor, / Your huddled masses yearning to breathe free."¹ These

† Henry Salvatori Professor of Law & Community Service, and former Dean, Chapman University School of Law. Dr. Eastman is also the founding director of the Center for Constitutional Jurisprudence, a public interest law firm on whose behalf he has participated as amicus curiae in several Supreme Court cases related to the topic of the Symposium at which this Article was presented, including *Hamdi v Rumsfeld*, 542 US 507 (2004), and *Arizona v United States*, 132 S Ct 2492 (2012). He has testified before Congress (*Oversight Hearing on Dual Citizenship, Birthright Citizenship, and the Meaning of Sovereignty before the Subcommittee on Immigration, Border Security, and Claims of the House Committee on the Judiciary*, 109th Cong, 1st Sess 57 (2005)), the Arizona Legislature (both the Judiciary and Appropriations Committees on the Birthright Citizenship State Compact bill, Feb 7 and 22, 2011, respectively), and the California Legislature (Assembly Republican Task Force on Illegal Immigration, Oct 11, 2006), on matters related to the subject of this Symposium. The congressional testimony was subsequently published in the *Texas Review of Law & Politics* and the *University of Richmond Law Review*. John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 12 *Tex Rev L & Polit* 167 (2007); John C. Eastman, *Born in*

words are widely believed to reflect the purpose of the Statue of Liberty, beckoning to the world an open borders US immigration policy. And they harken back to the very first days of the Republic, when Thomas Paine called America “the asylum for the persecuted lovers of civil and religious liberty from every part of Europe.”²

On the other end of the continuum are the various nativist movements that have held sway at various points in our nation’s history, which have sought to severely curtail or even eliminate altogether immigration to the United States. Oftentimes tinged with racism or religious or ethnic bigotry, these movements have been most vibrant in reaction to large waves of immigration to the United States, particularly when combined with economic recessions or depressions. The American Party (or Know-Nothings) of the 1850s, with its opposition to Catholic immigrants from Ireland and Germany;³ the Workingmen’s Party of California and the Supreme Order of Caucasians, with their opposition to Chinese immigrants and successful advocacy for the Chinese Exclusion Act of 1882;⁴ the Immigration Restriction League of the 1890s,⁵ with its opposition to the influx of immigrants from southern and eastern Europe; and the second Ku Klux Klan of the 1920s and 1930s, with its opposition to Catholic

the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11, 42 U Richmond L Rev 955 (2008). Other related publications include: John C. Eastman, *The States Enter the Illegal Immigration Fray*, in Carissa Hessick and Jack Chin, eds, *Illegals in the Backyard: State and Local Regulation of Immigration Policy* (NYU forthcoming 2013); John C. Eastman, *Papers, Please: Does the Constitution Permit the States a Role in Immigration Enforcement?*, 35 Harv J L & Pub Pol 1 (2012); John Eastman and Ediberto Román, *Debate on Birthright Citizenship*, 6 FIU L Rev 293 (2011); John C. Eastman and Karen J. Lugo, *Arizona’s Immigration Storm*, 12 Engage 68 (June 2011). Portions of this Article have been drawn from some of those prior publications.

¹ Emma Lazarus, *The New Colossus*, in Emma Lazarus, 1 *The Poems of Emma Lazarus* 202, 203 (Houghton Mifflin 1889).

² Moncure Daniel Conway, ed, 1 *The Writings of Thomas Paine* 87 (Putnam 1894) (emphasis omitted).

³ See Bruce Levine, *Conservatism, Nativism, and Slavery: Thomas R. Whitney and the Origins of the Know-Nothing Party*, 88 J Am Hist 455, 470–71 (2001).

⁴ See Doyce B. Nunis Jr, ed, *The Demagogue and the Demographer: Correspondence of Denis Kearney and Lord Bryce*, 36 Pac Hist Rev 269, 277–78 & n 6 (1967); Connie Young Yu, “*The Indispensable Enemy*,” by Alexander Saxton, 8 Bull Concerned Asian Scholars 60, 60 (July–Sept 1976).

⁵ See Immigration Restriction League, *Constitution of the Immigration Restriction League* 1, online at <http://nrs.harvard.edu/urn-3:FHCL:949025> (visited Mar 3, 2013). See also Barbara Miller Solomon, *The Intellectual Background of the Immigration Restriction Movement in New England*, 25 New Eng Q 47 (1952).

and Jewish immigrants,⁶ primarily from southern and eastern Europe, are just a few.

In between is the controlled borders policy reflected by current federal immigration law—that is, the law on the books, not necessarily the law as it is enforced. And, truth be told, this is the policy reflected by the original Statue of Liberty story. The version of that story described above is actually anachronistic, driven more by Lazarus’s poem and the chance location of the Statue near the immigrant processing center that opened on Ellis Island in 1892 than by the Statue’s original purpose. Contrary to popular belief, the words are not engraved on the tablet Lady Liberty holds in her left arm—the inscription there is “July 4, 1776”—but are engraved on a bronze plaque that was affixed to the base of the Statue in 1903 (now housed inside the museum), thirty years after the Statue was built and seventeen years after it was dedicated.⁷

Instead, the Statue was intended to commemorate the success of the American Revolution and the vindication of the Revolution’s ideals in the then–recently ended Civil War. It was originally supposed to be dedicated in 1876 to mark the centennial of the Declaration of Independence. It was a gift from the people of France, who had helped make military success in the American Revolution possible, but Edouard de Laboulaye, who proposed the Statue, also hoped that the Statue would inspire the French people to revive their own democracy in the face of what had again become a repressive monarchy. The famous torch that Lady Liberty holds above her head, like the Statue’s original name, “Liberty Enlightening the World,” was not so much a beacon lighting the way for immigrants but rather a reflection of the shining “city on a hill”⁸ metaphor of America as an enlightened example of how to organize governmental institutions elsewhere in the world to secure the blessings of liberty for other nations’ own peoples.⁹

⁶ See Rory McVeigh, *Structural Incentives for Conservative Mobilization: Power Devaluation and the Rise of the Ku Klux Klan, 1915–1925*, 77 *Soc Forces* 1461, 1464 (1999) (“Most of the [Ku Klux Klan’s] venom was directed toward immigrants, Catholics, Jews, socialists, agrarian radicals, organized labor, urban machine politics, big business, vice, and immorality.”).

⁷ See T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 *Hastings Const L Q* 915, 915 (1995).

⁸ See Perry Miller, ed, *The American Puritans, Their Prose and Poetry* 78, 83 (Columbia 1982) (“For we must consider that we shall be as a city upon a hill, the eyes of all people are upon us.”).

⁹ See John Bodnar, et al, *The Changing Face of the Statue of Liberty*, *5–6 (unpublished paper, Indiana University, Dec 2005), online at <http://www.cesu.umn.edu>

Nevertheless, these two dramatically different views of the Statue of Liberty story are playing out today in our national debate over immigration policy. Many who hold the “give me your tired, your poor, your huddled masses” open borders position reject the very idea of borders as a throwback to a nation-state mentality that developed as Europe was emerging from the Dark Ages. For them, the developing norms of human rights should guarantee to every human being unfettered access to territory and resources anywhere on the globe.¹⁰ Why should anyone have access to a better life merely because of the chance circumstance of the location of their birth? This pseudo-Rawlsian view¹¹ has been explicitly advanced in the immigration debate in such recent works as *The Birthright Lottery* by Professor Ayelet Shachar.¹²

Those of both the controlled borders and closed borders positions adhere to the view that national sovereignty still matters. For them, the idea that “peoples” form governments in order to best secure the inalienable rights of their own members, so eloquently described in our Declaration of Independence, still prevails. Accordingly, just how much immigration to permit at any given time, and even from where, is a policy judgment that must be made by the nation’s sovereign authority, wherever that authority is vested. For the closed borders crowd, that policy judgment must yield a ban on further immigration. For the controlled borders advocates, some level of immigration is not only permissible but cherished, though the precise level and the terms may vary from generation to generation (or even from year to year), depending on the circumstances.

From this brief descriptive introduction, the following institutional questions arise. Which institution will make the basic policy judgment as to where on the continuum immigration policy will be placed at any given time? And which institution or institutions will best give effect to that policy judgment? Confu-

prod/groups/cfans/@pub/@cfans/@cesu/documents/asset/cfans_asset_360853.pdf (visited Mar 3, 2013).

¹⁰ See, for example, Barbara Hines, *The Right to Migrate as a Human Right: The Current Argentine Immigration Law*, 43 Cornell Intl L J 471, 488–93 (2010); Michael Huemer, *Is There a Right to Immigrate?*, 36 Soc Theory & Prac 429, 430 (2010). International law does not currently recognize such a right to *migrate into* another country without that country’s consent, however, only the right to *migrate from* or within one’s own. See *Resolution 217A (III)*, UN General Assembly, 183d mtg (Dec 10, 1948), UN Doc A/810 74.

¹¹ See John Rawls, *A Theory of Justice* 60 (Belknap 1971).

¹² Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* 15 (Harvard 2009).

sion about the answers to those questions, and the overlap between them, lies at the heart of much of the current controversy over immigration policy.

I. WHO DECIDES: INTERNATIONAL LAW OR NATION-STATE?

There seem to be two principal alternative answers to the first question, which institution decides what immigration policy will be: (1) an international law body or (2) the sovereign authority of the nation. While the former could presumably establish something less than an open borders policy as the norm, the fact that, absent explicit treaty agreements by member nations (which would mean that the decision is really being authorized by the sovereign authority of those nations), the authority of such a body to act at all necessarily requires the recognition that there is a fundamental human right not just to emigrate (that is, leave one's country) but to immigrate (that is, enter into another country, without regard for the wishes of the existing occupants of that country).¹³ This would, of course, yield an open borders rule.

There have been some moves in that direction recently. The recent Argentinean law, described by University of Texas clinical law professor Barbara Hines in her article, *The Right to Migrate as a Human Right: The Current Argentine Immigration Law*, is one such example.¹⁴ But as Professor Hines herself correctly recognizes, the "principle [] is not found in the immigration laws of any other large immigrant-receiving country nor explicitly in any international human rights conventions."¹⁵ And for this, she cites a slew of authority, from the European Union's policy statement on immigration;¹⁶ to statutory law in Canada, Austral-

¹³ Although they seem to be the flip sides of the same coin, the right to emigrate (that is, leave one's country and even to disassociate from it by renouncing citizenship) and the right to immigrate present fundamentally different problems in determining whether they are fundamental human rights. The former, which is central to the American claim of independence from Great Britain (the dispute over which continued into the War of 1812), can be exercised unilaterally, but the latter imposes on those in the receiving nation and therefore should, under the consent rationale that undergirds the right to emigrate, require consent from the receiving nation. As such, one can speak of a right to seek to immigrate, but not an absolute right to immigrate even over the objection of the receiving nation.

¹⁴ Hines, 43 *Cornell Intl L J* at 488–510 (cited in note 10). See also Bruce A. Ackerman, *Social Justice in the Liberal State* 95 (Yale 1980).

¹⁵ Hines, 43 *Cornell Intl L J* at 472 (cited in note 10).

¹⁶ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a Common Immigration Policy* *5 (May 12, 2007), online at

ia, New Zealand, and Japan;¹⁷ to various international treaties and conventions.¹⁸ Most particularly, Professor Hines recognizes that the “international human right to immigrate” principle is not and has not been the rule in the United States.¹⁹ As the Supreme Court recognized long ago, “The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”²⁰

Whether the new Argentinean model *ought* to be the rule, therefore, it clearly is not the rule in the overwhelming number of jurisdictions, or in international law more broadly, or in the United States specifically. Rather, the principle set out in the US Declaration of Independence remains the almost universal international norm. “Peoples” form governments, “laying [their] foundation on such principles and organizing [their] powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”²¹ It seems, then, that sovereignty still matters and that the sovereign authority of each nation may still define the terms upon which peoples from other parts of the globe may become part of its body politic.

II. WHO DECIDES IN THE UNITED STATES?

That the sovereign authority of a nation can set immigration policy as it sees fit does not answer the question of where that authority resides in any particular nation, of course. In some, a hereditary monarch or despot under some claim of divine right or just raw power may exercise the sovereign authori-

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0780:FIN:EN:PDF> (visited Mar 3, 2013) (describing EU management of illegal immigration, asylum, and migration and border controls under the Tampere program).

¹⁷ Immigration and Refugee Protection Act, SC 2001, ch 27 § 27 (Can); Migration Act 1958, (Commonwealth), Act No 62 of 1958, Part 1 § 4(2) (Austl); Immigration Act 1987, Public Act 1987 No 74, Part 1 § 4 (NZ); Immigration Control and Refugee Recognition Act, Cabinet Order No 319 of 1951, Art 1 (Japan).

¹⁸ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, UN General Assembly, 45th Sess (Dec 18, 1990), UN Doc A/45/49 261; *Resolution 2200A (XXI)*, UN General Assembly, 1496th mtg (Dec 16, 1966), UN Doc A/6316 54; *Protocol No 4*, Eur Treaty Ser No 46, as amended by *Protocol No 11*, Eur Treaty Ser No 155 (1994), online at <http://www.conventions.coe.int/Treaty/en/Treaties/Html/046.htm> (visited Mar 3, 2013); *Convention on Human Rights*, 1144 UN Treaty Ser 123, 150–51 (Nov 22, 1969, entered into force July 18, 1978).

¹⁹ Hines, 43 Cornell Intl L J at 473 (cited in note 10).

²⁰ *Fong Yue Ting v United States*, 149 US 698, 707 (1893).

²¹ United States Declaration of Independence ¶ 2 (1776).

ty and unilaterally determine immigration policy for the nation. In republican forms of government such as that of the United States, however, the ultimate sovereign authority rests with the people.

Control over immigration and naturalization policy in the United States was, under the Articles of Confederation, originally left with the states. Article IV of the Articles merely required that each state afford to the free residents of other states the rights of ingress and egress and the basic privileges and immunities that it afforded to its own residents, leaving to each state the power to set its own immigration and naturalization policies beyond that. Unsurprisingly, that system proved unworkable. Not only did this result in widely varying practices—a problem that James Madison in Federalist 42 called a “defect” of the Articles²²—but the mandate that each State afford free ingress to the people of the other states meant, ultimately, that the state with the most permissive naturalization policy would set the rule for every other state. Accordingly, ever since 1789, the power over naturalization has, by constitutional design, been vested in the national government.

More precisely, the power is vested in Congress. Article I, Section 8, clause 4 expressly gives to Congress the power to “establish a uniform Rule of Naturalization.” For a short period under the new Constitution, there continued to be some dispute about whether the constitutional provision vested *exclusive* authority over naturalization in Congress. Alexander Hamilton, in Federalist 32, was of the view that the power was necessarily exclusive, or else there would not be a “uniform” rule.²³ But even after Congress adopted its first “uniform Rule of Naturalization” statute in 1790,²⁴ some states continued to naturalize citizens on their own. That changed in 1795, when Congress added the phrase, “and not otherwise,” to the federal immigration statute.²⁵

It should be emphasized that the power is vested specifically in Congress, not in the federal government more broadly. The Supreme Court has consistently held that the Constitution assigns “plenary” power over immigration policy to Congress,²⁶ not to the president or to the courts. The power to exclude foreigners

²² Federalist 42 (Madison), in *The Federalist* 279, 286–87 (Wesleyan 1961) (Jacob E. Cooke, ed).

²³ Federalist 32 (Hamilton), in *The Federalist* 199, 201 (cited in note 22).

²⁴ Naturalization Act of 1790, ch 3, 1 Stat 103.

²⁵ Naturalization Act of 1795, ch 20, 1 Stat 414.

²⁶ See, for example, *Kleindienst v Mandel*, 408 US 753, 766 (1972).

is an incident of sovereignty delegated by the Constitution to “the government of the United States, *through the action of the legislative department.*”²⁷ Indeed, the Court declared more than a century ago that “over no conceivable subject is the legislative power of Congress more complete than it is over” the admission of aliens.²⁸ “[T]hat the formulation of [immigration] policies is entrusted *exclusively to Congress* has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.”²⁹

Congress can therefore impose restrictions on immigration and make it unlawful to immigrate to this country in violation of those restrictions. But by constitutional design, Congress cannot exercise the full measure of its plenary power over immigration alone. It is lawmaker, but not prosecutor, judge, or jury. In our constitutional system of checks and balances, the executive and judicial departments both have a role to play. And in our complex system of federalism, the states may have a role to play as well, even after the Constitution displaced the Articles of Confederation. Ascertaining the boundaries of those various institutional roles is the source of much of the recent controversy over immigration policy and enforcement in recent decades.

III. THE FEDERALISM GLOSS

Let me take up the federalism issue first. There is no question that, in exercising its plenary power over immigration, Congress can preempt state laws to the contrary.³⁰ A state cannot authorize immigration into its territory by someone whom Congress has barred from admission to the United States, nor can a state bar someone whom Congress has authorized. But that basic, and uncontested, proposition does not solve two related issues. First, does the mere delegation to Congress of plenary power over naturalization preempt state laws, even before Congress has exercised that power? In other words, is there a sort of *dormant* Naturalization Clause limitation on states, comparable to the *dormant* Commerce Clause limitation?³¹ Sec-

²⁷ *Chae Chan Ping v United States*, 130 US 581, 603 (1889) (emphasis added).

²⁸ *Oceanic Steam Navigation Co v Stranahan*, 214 US 320, 339 (1909) (emphasis added). See also *Fiallo v Bell*, 430 US 787, 792 (1977).

²⁹ *Galvan v Press*, 347 US 522, 531 (1954) (emphasis added).

³⁰ See US Const Art VI, cl 2 (“[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

³¹ See *Willson v Black Bird Creek Marsh Co*, 27 US (2 Pet) 245, 252 (1829); *C & A Carbone, Inc v Town of Clarkstown, New York*, 511 US 383, 401–02 (1994).

ond, to what extent does Congress's Naturalization Clause power, whether exercised or dormant, impliedly preempt the states from exercising powers reserved to them, such as the police power, that though not a naturalization power itself nevertheless might touch on immigration? Or, phrased differently, just how broad is implied field preemption or "obstacle" preemption in the immigration context?³²

A. Is There a Dormant Naturalization Clause?

The first issue, is there a dormant Naturalization Clause, was presented to the courts in *Hines v Davidowitz*.³³ At issue in that case was an alien registration law passed by Pennsylvania in 1939, which required all aliens over the age of eighteen to register annually with the state, pay a one-dollar annual registration fee, and carry their registration card with them at all times.³⁴ A three-judge district court enjoined the law as unconstitutional, holding that the law denied aliens the equal protection of the laws and encroached upon legislative powers constitutionally vested in the federal government, essentially adopting a dormant Naturalization Clause theory because Congress had not yet legislated on the subject.³⁵ But before the Supreme Court could hear the state's appeal, Congress adopted its own alien registration act, requiring that all aliens over the age of fourteen register a single time (rather than annually) with federal immigration officials.³⁶ In addition to requiring less-frequent filing, the federal law did not require aliens to carry a registration card, and only *willful* failure (as opposed to Pennsylvania's *any* failure) to register was made a criminal offense.³⁷ Federal penalties, however, were more stringent. Violation of the federal statute was punishable by a fine of up to one thousand dollars, imprisonment of not more than six months, or both, while violation of the Pennsylvania law was punishable by a fine of up to one hundred dollars, sixty days in jail, or both.³⁸

Although those challenging the Pennsylvania law argued that the law was unconstitutional even before adoption of the

³² See *Rice v Santa Fe Elevator Corp.*, 331 US 218, 236 (1947); Caleb Nelson, *Preemption*, 86 Va L Rev 225, 227 (2000).

³³ 312 US 52 (1941).

³⁴ *Id.* at 59.

³⁵ *Id.* at 60.

³⁶ *Id.*

³⁷ *Hines*, 312 US at 60–61.

³⁸ *Id.* at 59–61.

federal law, the Supreme Court declined to rule on those claims, “expressly leaving open . . . the argument that the federal power in this field, whether exercised or unexercised, is exclusive.”³⁹ Instead, the Supreme Court held that

*When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute.*⁴⁰

There is language in the opinion suggesting that the Court might be open to a dormant Naturalization Clause analysis at some point. It explained the importance of leaving federal power in fields affecting foreign affairs “entirely free from local interference,” for example, lest the actions of one State create international repercussions that affect the entire nation.⁴¹ But the actual holding of the Court was more limited:

[W]here the federal government, *in the exercise of its superior authority in this field, has enacted a complete scheme of regulation* and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.⁴²

The question left open in *Hines* has never been fully answered, and given the expansive coverage of current federal immigration law,⁴³ it may never need to be answered. To be sure, the Supreme Court in *De Canas v Bica*,⁴⁴ decided thirty-five years after *Hines*, upheld the exercise of state police power in areas that touch on immigration, thereby rejecting a strong version of a dormant Naturalization Clause theory that would bar the states from exercising non-naturalization powers in ways that might have some impact on naturalization policy.⁴⁵ But that presents a somewhat different issue, taken up below. In the unlikely event that Congress should repeal the existing statutory scheme, whether the states could actually exercise a naturalization power, as some did in

³⁹ Id at 62.

⁴⁰ Id at 62–63 (emphasis added).

⁴¹ *Hines*, 312 US at 63–64.

⁴² Id at 66–67 (emphasis added).

⁴³ See, for example, 8 USC § 1103(a)(5), INA § 103(a)(5).

⁴⁴ 424 US 351 (1976).

⁴⁵ Id at 365.

the early years after the Constitution's adoption, apparently remains an open question.

B. Is There Implied Preemption of States' Non-naturalization Powers?

Even if there is a dormant Naturalization Clause that restricts states from exercising naturalization powers in the absence of Congressional action, that does not definitively resolve the related but distinct question of whether the states can exercise other powers that might overlap or touch on the objects of the naturalization power. The Constitution itself recognizes such a distinction in the analogous context of import taxes. The states are barred from levying import and export taxes "except what may be absolutely necessary for executing [their] inspection Laws."⁴⁶ In other words, the power to tax imports and exports has been delegated exclusively to Congress, but the States can, in the exercise of their separate police powers to protect the health of their citizens, impose such a tax.

Something similar is at work when the States exercise their police powers in ways that touch on immigration, but that do not actually amount to an exercise of a naturalization power. This is the key point of the holding in *De Canas*, in which the Supreme Court recognized that the states are not without authority to exercise core state police powers even in matters that touch federal immigration policy. *De Canas* presented a challenge to a state statute prohibiting employers from knowingly employing unlawful aliens on the ground that it amounted to state regulation of immigration and thus was preempted by federal law.⁴⁷ The Court held that federal immigration law did not prevent the states from regulating the employment of illegal aliens because states possess broad authority under their police powers to regulate employment and protect workers within the state.⁴⁸ "[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration,"⁴⁹ held the Court, thus apparently rejecting at least part of the challenge left unaddressed in *Hines*, namely, whether "the federal power in this field, whether exercised or unexercised, is exclusive."⁵⁰

⁴⁶ US Const Art I, § 10, cl 2.

⁴⁷ *De Canas*, 424 US at 352–53.

⁴⁸ *Id* at 356–58.

⁴⁹ *Id* at 355.

⁵⁰ *Hines*, 312 US at 62.

That principle was applied in *Chamber of Commerce of the United States v Whiting*,⁵¹ in which the Supreme Court upheld the Legal Arizona Workers Act⁵² against challenges based on federal immigration law preemption.⁵³ The Court held that the state law, which penalized employers of illegal aliens by withdrawing permission to do business in the state, a penalty much harsher than the fines imposed under federal immigration law, was not expressly preempted by federal law.⁵⁴ On the contrary, the federal statute's preemption clause had an explicit exemption for state licensing laws, and the Court rejected the argument that the exemption should be read narrowly, in part because the state was operating in an area of traditional state concern.⁵⁵ More pertinent for present purposes, though, the Court also held that the state law was not *implicitly* preempted.⁵⁶ The Supreme Court has become increasingly suspicious of implied preemption claims in general, and that trend was manifested in the immigration context in *Whiting*: "Implied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law."⁵⁷ A slight detour into preemption doctrine is therefore necessary to further the analysis.

A "fundamental principle of the Constitution is that Congress has the power to preempt state law."⁵⁸ Absent clearly expressed intent by Congress, however, state law is not preempted.⁵⁹ Particularly in areas of traditional state regulation, the assumption is that a federal statute will not supersede state law, unless Congress has made such intention clear.⁶⁰

Indeed, the Supreme Court has maintained a *presumption against preemption* when analyzing preemption challenges pertaining to areas of law traditionally occupied by the states, such

⁵¹ 131 S Ct 1968 (2011).

⁵² 2007 Ariz Sess Laws 1312, codified at Ariz Rev Stat Ann § 23-211 et seq.

⁵³ *Whiting*, 131 S Ct at 1981.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1979–80.

⁵⁶ *Id.* at 1985.

⁵⁷ *Whiting*, 131 S Ct at 1985 (quotation marks and citations omitted).

⁵⁸ *Crosby v National Foreign Trade Council*, 530 US 363, 372 (2000).

⁵⁹ See *Rice*, 331 US at 230.

⁶⁰ See *id.* See also *Medtronic, Inc v Lohr*, 518 US 470, 485 (1996) (presuming that Congress does not "cavalierly" preempt state law, particularly in areas of law where the states have strong authority); *Bates v Dow AgroSciences LLC*, 544 US 431, 449 (2005) (stating that the Supreme Court has a duty to accept a reading that disfavors preemption).

as employment relations.⁶¹ Such a presumption against preemption would seem to be a necessary corollary to the basic structure of federalism, for it is a mainstay of our federal system of government that, as James Madison himself observed in Federalist 45, “[t]he powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.”⁶²

Immigration is not an area traditionally occupied by the states, of course, but employment relations, health and safety concerns, and other areas affected by immigration are. The issue, then, is whether the traditional presumption against preemption should be applied when those areas of traditional state concern touch on immigration matters.⁶³

The Court’s decision in *De Canas* is instructive on this point. As noted above, that case involved a group of migrant farm workers who alleged that certain labor contractors were hiring undocumented workers in violation of a California statute.⁶⁴ Respondents challenged the statute on the ground that it amounted to regulation of immigration and was therefore preempted by federal law. In a unanimous decision, the Court held that the federal Immigration and Nationality Act (INA) did not preempt the California statute because the state statute was in harmony with federal regulation.⁶⁵ The Court further concluded that respondents failed to identify anything in the plain language of the INA or its legislative history that warranted the conclusion that the INA was intended to preempt “harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular.”⁶⁶ In other words, the Court applied a presumption against preemption even in areas that touch upon immigration, stating,

[W]e will not presume that Congress, in enacting the INA, intended to oust state authority to regulate . . . in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power—including state

⁶¹ See, for example, *Napier v Atlantic Coast Line Railroad Co*, 272 US 605, 611 (1926); *Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v Wisconsin Employment Relations Board*, 315 US 740, 749 (1942).

⁶² Federalist 45 (Madison), in *The Federalist* 308, 313 (cited in note 22).

⁶³ See *Rice*, 331 US at 230–31.

⁶⁴ *De Canas*, 424 US at 353.

⁶⁵ *De Canas*, 424 US at 357–58 n 5.

⁶⁶ *Id* at 358.

power to promulgate laws not in conflict with federal laws—was the clear and manifest purpose of Congress would justify that conclusion.⁶⁷

The Arizona SB 1070⁶⁸ statute that has generated so much controversy of late is for the most part to the same effect. Arizona did not purport to make any policy over who should be admitted or allowed to stay in this country. Instead, the Arizona law for the most part expressly followed congressional policy—and indeed *mirrored* the provisions of the federal law.⁶⁹ Arizona’s law incorporates provisions from federal law and promotes compliance with those provisions.⁷⁰ Subsection (L) of § 2 of the Act specifically provides that the section “shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.”⁷¹ And the law expressly provides that its terms “shall be construed to have the meanings given to them under federal immigration law”⁷² and that the “act shall be implemented in a manner consistent with federal laws regulating immigration.”⁷³ Arizona’s SB 1070 is therefore not a direct regulation of immigration, nor does it conflict with congressional policy, at least for the most part. The Supreme Court did uphold a preliminary injunction against three of the roughly twenty substantive sections and subsections of the Act in *Arizona v United States*,⁷⁴ of course, but the remainder of the Act, including the “show me your papers” section, was allowed to go into effect.⁷⁵

⁶⁷ Id at 357 (quotation marks omitted).

⁶⁸ Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070), 2010 Ariz Sess Laws 113, as amended by HB 2162, 2010 Ariz Sess Laws 211.

⁶⁹ See *Plyler v Doe*, 457 US 202, 225 (1982) (recognizing that states have authority to act with respect to illegal aliens where action “mirrors federal objectives and furthers a legitimate state goal”).

⁷⁰ See Ariz Rev Stat Ann § 41-1724(B)–(C).

⁷¹ Ariz Rev Stat Ann § 11-1051(L).

⁷² Ariz Rev Stat Ann § 41-1724(B).

⁷³ Ariz Rev Stat Ann § 41-1724(C).

⁷⁴ 132 S Ct 2492 (2012).

⁷⁵ Compare 8 USC § 1324(a), with Ariz Rev Stat Ann § 13-1509, preemption recognized in *Arizona*, 132 S Ct at 2503; Ariz Rev Stat Ann § 13-2928(C), preemption recognized in *Arizona*, 132 S Ct at 2505; Ariz Rev Stat Ann § 13-3883, preemption recognized in *Arizona*, 132 S Ct at 2507. The three provisions that were enjoined include § 3, which created a separate state law crime for failure to carry immigration papers as required by federal law. That section expressly “does not apply to a person who maintains authorization from the federal government to remain in the United States,” and it imposed the identical punishment provided by federal law. Ariz Rev Stat Ann § 13-1509, preemption recognized in *Arizona*, 132 S Ct at 2503. Justice Anthony Kennedy, writing for the Court

Arizona is not alone in seeking to exercise non-naturalization powers to deal with the consequences of lackluster enforcement of existing federal immigration law. In 2011 alone, state legislators across the nation introduced 1,607 bills and resolutions relating to immigrants and refugees in all fifty states and Puerto Rico.⁷⁶ This is a significant increase compared with 2010, when forty-six states considered more than 1,400 bills and resolutions pertaining to immigrants.⁷⁷ Several states have introduced legislation that is substantially similar to Arizona's SB 1070.⁷⁸ Out of these efforts have come new laws in

in *Arizona*, erroneously held that the Arizona law imposed a more severe sanction than federal law because, in an entirely unrelated part of the United States Code, a generic criminal provision provided for probation for misdemeanor offenses. Justice Kennedy claimed that because the Arizona law provided no such alternative, it was not a mirror of federal law and was therefore invalid. But Justice Kennedy overlooked the savings clause of the Arizona statute, § 11(C), which provides that the "act shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens." Ariz Rev Stat Ann § 41-1724. If the generic federal probation provision in Title 18 modified the federal immigration laws in Title 8, as Justice Kennedy interpreted, then that became a "federal law regulating immigration" that should have triggered the Arizona statute's savings clause and imported a probation option to the Arizona statute as well. Nevertheless, because the Arizona statute also potentially subjected offenders to double prosecution on a specific matter already governed by federal law, it could do more than just mirror the federal law, and was constitutionally suspect on that ground.

Section 5(C) was also enjoined. That section imposed sanctions on *employees* who have entered into an employment relationship not authorized by federal law, whereas federal law imposes sanctions only on *employers*. Ariz Rev Stat Ann § 13-2928(C), preemption recognized in *Arizona*, 132 S Ct at 2505. Congress considered sanctions on employees as well but specifically declined to adopt such sanctions as part of the federal statutory scheme. The *Arizona* Court found that legislative history sufficient to preempt these provisions of the Arizona law. For the reasons that I explore in greater detail in John C. Eastman, *Papers, Please: Does the Constitution Permit the States a Role in Immigration Enforcement?*, 35 Harv J L & Pub Pol 569, 585–86 (2012), I think the Court's analysis missed the federalism principle that the Court understood correctly in *De Canas*.

⁷⁶ See National Conference of State Legislatures, *Immigration Policy Project: 2011 Immigration-Related Laws and Resolutions in the States* (2011), online at <http://www.ncsl.org/issues-research/immig/state-immigration-legislation-report-dec-2011.aspx> (visited Mar 3, 2013).

⁷⁷ See *id.*

⁷⁸ See, for example, Beason-Hammon Alabama Taxpayer and Citizen Protection Act (HB 56), 2011 Ala Laws 535, codified at Ala Code § 31-13-1 et seq; Illegal Immigration Reform and Enforcement Act of 2011 (HB 87), 151st Ga General Assembly (2011); SB 590, 117th Ind General Assembly (2011); State of New Jersey Office of the Attorney General, *Attorney General Law Enforcement Directive No 2007-3* (Aug 22, 2007); Support Our Law Enforcement and Safe Neighborhoods Act (HB 4305), 96th Mich Legis (2011); Support Our Law Enforcement and Safe Neighborhoods Act (HF 3830), 86th Minn Legis (2010); State of Rhode Island and Providence Plantations, *Executive Order 08-01: Illegal Immigration Control Order* (Mar 27, 2008); South Carolina Illegal Immigration Reform Act (HB 4400), 2008 SC Acts & Resol 280; Utah Illegal Immigration Enforcement Act (HB 116, HB 466, HB 469, and HB 497), 59th Utah State Legis (2011).

several states dealing with the collateral effects of illegal immigration. These state enactments enhance enforcement of federal immigration law in an effort to avoid economic hardship, as well as to ensure safe living and work environments for all residents.

In 2007, New Jersey enacted Directive 2007-3,⁷⁹ which provides guidelines establishing the manner in which local, county, and state law enforcement agencies interact with federal immigration authorities.⁸⁰ The Directive states that “[s]tate, county, and local law enforcement agencies necessarily and appropriately should inquire about a person’s immigration status,” specifically when a person has been arrested for a serious violation of state criminal law.⁸¹

Rhode Island enacted Executive Order 08-01⁸² (Illegal Immigration Control Order) in 2008. The Order states:

WHEREAS, Congress and the President have been unable to resolve the problem of illegal immigration, leaving the states to deal with the consequences of 11 to 20 million illegal immigrants residing in the United States . . . it is urged that all law enforcement officials, including state and local law enforcement agencies take steps to support the enforcement of federal immigration laws by investigating and determining the immigration status of all non-citizens.⁸³

Rhode Island found it necessary to enact this Order because “the presence of significant numbers of people illegally residing in the state of Rhode Island creates a burden on the resources of state and local human services, law enforcement agencies, educational institutions and other governmental institutions,” as well as diminishes opportunities for citizens and legal immigrants of Rhode Island.⁸⁴ Additionally, Rhode Island’s Order specifically states that nothing in the Order “shall be construed to supersede, contravene or conflict with any federal or state law or regulation” and that state and local law enforcement agencies are “urged . . . [to] take steps to support the enforcement of federal immigration laws.”⁸⁵

⁷⁹ State of New Jersey Office of the Attorney General, *Attorney General Law Enforcement Directive No 2007-3* (Aug 22, 2007) (“NJ AG Directive No 2007-3”).

⁸⁰ NJ AG Directive No 2007-3 at 1.

⁸¹ NJ AG Directive No 2007-3 at 1.

⁸² State of Rhode Island and Providence Plantations, *Executive Order 08-01: Illegal Immigration Control Order* (Mar 27, 2008) (“RI EO 08-01”).

⁸³ RI EO 08-01 at 1, 3.

⁸⁴ RI EO 08-01 at 1.

⁸⁵ RI EO 08-01 at 3.

South Carolina's HB 4400⁸⁶ (South Carolina Illegal Immigration Reform Act) requires employers doing business in South Carolina to either participate in the federal E-Verify program, or only hire employees who possess or qualify for a South Carolina driver's license (or another state license with similar requirements).⁸⁷ This legislation protects those who are not legal residents of the state from the potential of abuse from employers who may wish to hire them at low wages or force them to work in unsafe and unhealthy conditions.⁸⁸

In Michigan, lack of immigration enforcement led to a drain on the state's economy, causing one of the nation's highest unemployment rates and an exodus of its own residents. This prompted Michigan to introduce the Support Our Law Enforcement and Safe Neighborhoods Act,⁸⁹ which requires government agencies to verify the immigration status of people eighteen years old or older who apply for federal, state, or local public benefits.⁹⁰ The Act specifically states that "the provisions of this [A]ct shall be implemented in a manner consistent with federal laws regulating immigration while protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens."⁹¹ Additionally, the Act makes clear that no agency or political subdivision of the state of Michigan is allowed to adopt a policy that limits or restricts the enforcement of federal immigration laws.⁹²

In order to deal with the strain on its economy, Alabama introduced HB 56⁹³ (Beason-Hammon Alabama Taxpayer and Citizen Protection Act). This legislation requires police to check the status of anyone they suspect may be in the country illegally when they are stopped for another reason.⁹⁴ It also makes it a criminal offense to provide transportation or housing to anyone not legally in the United States⁹⁵ and enforces penalties on any business that knowingly employs any person who is in the country unlawfully.⁹⁶ Perhaps most significantly, it requires school

⁸⁶ 2008 SC Acts & Resol 280.

⁸⁷ SC Code Ann § 41-8-20(B)(1)-(2).

⁸⁸ SC Code Ann § 41-8-20(B)(1)-(2).

⁸⁹ HB 4305, 96th Mich Legis (2011).

⁹⁰ HB 4305 § 3, 96th Mich Legis (2011).

⁹¹ HB 4305 § 2, 96th Mich Legis (2011).

⁹² HB 4305 § 4(1), 96th Mich Legis (2011).

⁹³ Beason-Hammon Alabama Taxpayer and Citizen Protection Act (HB 56), 2011 Ala Legis 535, codified at Ala Code §31-13-1 et seq.

⁹⁴ Ala Code § 31-13-12(a).

⁹⁵ Ala Code § 31-13-13.

⁹⁶ Ala Code § 31-13-15(a).

districts to gather data about the number of illegal immigrant children who were attending the public schools of the state.⁹⁷

Alabama's decision to introduce this legislation was based on the economic hardship due to costs incurred by school districts for public elementary and secondary education of children who are "aliens not lawfully present in the United States."⁹⁸ The drain on Alabama's educational funding was adversely affecting the availability of public education resources to students who are US citizens or who are aliens that are lawfully present in the United States.⁹⁹ Alabama determined that there was a "compelling need" for the State Board of Education to accurately measure and assess the population of students that are aliens unlawfully present in the United States.¹⁰⁰ This measure of the population was not instituted as a way to deport those who are unlawfully present or exclude them from public education. Rather, it allows the state to forecast and plan for any impact that the presence of such a population may have on publicly funded education. Furthermore, Alabama enacted this legislation in an effort to fully comply with federal law.¹⁰¹ Alabama found that certain practices previously allowed were actually impeding the enforcement of federal immigration law. Therefore, Alabama adopted the Act to require all agencies within the state to fully cooperate with federal immigration authorities in the enforcement of federal immigration laws.¹⁰²

Minnesota's HF 3830¹⁰³ (Support Our Law Enforcement and Safe Neighborhoods Act) was introduced in response to the state's finding that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout Minnesota.¹⁰⁴ The provisions of the Act are intended to work together "to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."¹⁰⁵

Utah's HB 497¹⁰⁶ addresses law enforcement, REAL ID (a program that sets forth the requirements necessary for a state

⁹⁷ Ala Code § 31-13-27.

⁹⁸ Ala Code § 31-13-2.

⁹⁹ Ala Code § 31-13-2.

¹⁰⁰ Ala Code § 31-13-2.

¹⁰¹ Ala Code § 31-13-2.

¹⁰² Ala Code § 31-13-2.

¹⁰³ HF 3830, 86th Minn Legis (2010).

¹⁰⁴ HF 3830 § 2, 86th Minn Legis (2010).

¹⁰⁵ HF 3830 § 2, 86th Minn Legis (2010).

¹⁰⁶ HB 497, 59th Utah State Legis (2011).

driver's license or ID card to be accepted by the federal government for official purposes, as defined by the Secretary of Homeland Security), and public benefits.¹⁰⁷ The legislation requires the verification of immigration status regarding application for public services or benefits provided by a state or local governmental agency or subcontractor, "except as exempted by federal law."¹⁰⁸

Indiana's SB 590¹⁰⁹ establishes state crimes for the possession of false identification, identity fraud, and the transport or harboring of those unlawfully in the state.¹¹⁰ Additionally, state agencies, political subdivisions, and contractors with public contracts for services with the state or political subdivision are required to use E-Verify (an Internet-based, free program run by the US government that compares information from an employee's Employment Eligibility Verification Form I-9 to data from US government records).¹¹¹ State agencies and localities must verify eligibility for federal, state, and local benefits, and unemployment compensation.¹¹²

And Georgia's HB 87¹¹³ (Illegal Immigration and Enforcement Act of 2011) requires employers with more than four workers to verify the immigration status of new hires using the federal E-Verify database.¹¹⁴

Each state has enacted legislation that is completely consistent with federal law and has done so based on legitimately serious concerns over the consequences of nonenforcement of federal immigration policies. These concerns implicate police powers, not naturalization powers. Thus, while all of these state laws touch on immigration, under the line of demarcation set out in *De Canas*, most of the provisions should be constitutionally valid. The Supreme Court's decision in *Arizona* has now blurred that line, however.

The seeds for the Supreme Court's decision in *Arizona* were sown in the Ninth Circuit's opinion in the case. That opinion was, as I have noted elsewhere, based on a glaring and broad conceptual error about the import of the distinction between police powers, which are reserved to the states, and naturalization

¹⁰⁷ HB 497 §§ 4–8, 59th Utah State Legis (2011).

¹⁰⁸ HB 497 at 2, 59th Utah State Legis (2011) (emphasis added) (highlighted provisions).

¹⁰⁹ SB 590, 117th Ind General Assembly (2011).

¹¹⁰ SB 590 §§ 19, 23–24, 117th Ind General Assembly (2011).

¹¹¹ SB 590 § 17, 117th Ind General Assembly (2011).

¹¹² SB 590 § 15, 117th Ind General Assembly (2011).

¹¹³ HB 87, 151st Ga General Assembly (2011).

¹¹⁴ HB 87 §§ 2, 12, 151st Ga General Assembly (2011).

powers, which are not.¹¹⁵ The Ninth Circuit panel noted early in the opinion, for example, that “Congress has instructed under what conditions state officials are permitted to assist the Executive in the enforcement of immigration laws.”¹¹⁶ Later, it held that “Subsection (g)(10) [of 8 USC § 1357] does not operate as a broad alternative grant of authority for state officers to systematically enforce the INA outside of the restrictions set forth in subsections (g)(1)-(9).”¹¹⁷ And it contended that its restrictive interpretation of the derivation of state authority is bolstered by 8 USC § 1103(a)(10), which authorizes the attorney general to deputize state and local law enforcement officers “[i]n the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response.”¹¹⁸ “If subsection (g)(10) meant that state and local officers could routinely perform the functions of DHS officers outside the supervision of the Attorney General,” the court asserted, “there would be no need for Congress to give the Attorney General the ability, in § 1103(a)(10), to declare an actual or imminent mass influx of aliens, and to authorize any State or local law enforcement officer to perform the functions of a DHS officer.”¹¹⁹

These statements reveal a fundamental conceptual misunderstanding of federalism. States do not derive their authority to act from the federal Constitution, nor do they require the approval of federal officials or an Act of Congress to exercise police powers in their own states. The federal Constitution serves only to limit state authority where specified.¹²⁰ Conversely, the federal government both derives its authority from the federal Constitution and is limited by it. It is no surprise, then, that in each of the statutes that the Ninth Circuit cited dealing with federal-state enforcement cooperation, authorization is given to federal officials to enter into such agreements.¹²¹ No such authorization

¹¹⁵ See Eastman, 35 Harv J L & Pub Pol at 585–86 (cited in note 75).

¹¹⁶ *United States v Arizona*, 641 F3d 339, 348 (9th Cir 2011).

¹¹⁷ *Id* at 349.

¹¹⁸ *Id* at 350 n 9, citing INA § 103(a)(10), 8 USC § 1103(a)(10).

¹¹⁹ *Arizona*, 641 F3d at 350 n 9 (quotation marks omitted).

¹²⁰ As originally written, the Constitution’s restrictions on state authority are in Article I, § 10. The list of restrictions was broadened rather dramatically with the Civil War Amendments and the subsequent incorporation of the Bill of Rights, but neither of those developments altered the fact that the states do not derive their authority to act from the federal Constitution.

¹²¹ See INA § 103(a)(10), 8 USC § 1103(a)(10); INA § 287(g)(1), 8 USC § 1357(g)(1).

is given to the states, because none is needed. Indeed, quite the opposite is true. For example, as INA § 103(a)(10) makes clear, the Attorney General's ability to enlist officials in *federal* enforcement efforts is contingent on "the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving."¹²² To hold otherwise, as the Ninth Circuit did, is to answer the question left open by the Supreme Court in *Hines* in the negative and to repudiate the Supreme Court's holding in *De Canas*.

While not as stark, the Supreme Court's decision in *Arizona* also rested on that fundamental error.¹²³ Nevertheless, by upholding § 2(B) of the Arizona statute, and leaving in place the lower court's decision not to enjoin the bulk of the statute, much of the principled line drawn in *De Canas* remains intact. Many of the state statutes referenced above should therefore survive constitutional challenge.

IV. THE SEPARATION OF POWERS GLOSS

Let me turn now to the issues that flow from the constitutional separation of powers between the branches of the federal government, first regarding the role of the executive and ultimately regarding the role of the judiciary as part of the whole institutional design that was the subject of the symposium at which this Article was presented.

A. The Role of the President

If one accepts the historically recognized proposition that the Constitution vests plenary power to set immigration and naturalization policy in the Congress and the further *De Canas* proposition that, while the states may not be able to exercise naturalization powers, they do have significant authority to exercise their police powers even in areas that touch upon immigration, then the basic premise advanced by the Department of Justice in the *Arizona* litigation is rather startling. That premise was essentially that, despite existing federal immigration laws on the books, a unilateral determination by the president *not to enforce* those laws preempts any state efforts to augment enforcement if they deem such efforts helpful in the exercise of their police powers. Happily, the Supreme Court's reasoning in the case did not embrace that proposition.

¹²² INA § 103(a)(10), 8 USC § 1103(a)(10).

¹²³ *Arizona*, 132 S Ct at 2506.

The president has the same discretion in enforcing the provisions of the INA as he does with enforcing other federal statutes, of course. But the contention that such discretion permits the president to override state laws that are consistent with a policy set down by Congress is a rather broad expansion of prosecutorial discretion (albeit one hinted at by Justice Antonin Scalia in *Printz v United States*¹²⁴).

Such a claim seems inconsistent with the statutory scheme actually adopted by Congress, and it therefore undermines the long-standing position that power to set naturalization and immigration policy is a plenary power of Congress. The statutory provisions acknowledge important roles for state and local officials to play in the enforcement of federal immigration law. The Attorney General is to communicate with state officials regarding the immigration status of individuals, for example, even if there is no agreement with the federal government for a formal cooperative enforcement program.¹²⁵ Additionally, Congress imposed a duty on federal immigration officials to “respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual.”¹²⁶ If Congress wanted to give federal immigration officers discretion as to whether to answer state and local citizenship inquiries, it could have used the word “may” instead of “shall” in § 1373(c).

Indeed, Congress’s requirement that the federal government respond to state and local inquiries into immigration status quite clearly indicates that states are free to “cooperate with the Attorney General in the identification, apprehension, detention, or removal of [illegal] aliens.”¹²⁷ It is thus clear from the text of § 1373(c) that Congress wanted states to help enforce its immigra-

¹²⁴ 521 US 898, 922–23 (1997):

The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, shall take Care that the Laws be faithfully executed The Brady Act effectively transfers this responsibility to thousands of [state officers] in the 50 States, who are left to implement the program without meaningful Presidential control The insistence of the Framers upon unity in the Federal Executive . . . is well known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.

¹²⁵ INA § 287(g)(10)(A), 8 USC § 1357(g)(10)(A).

¹²⁶ 8 USC § 1373(c).

¹²⁷ INA § 287(g)(10)(B), 8 USC § 1357(g)(10)(B).

tion policy, and it is for this reason that the Supreme Court did not uphold the injunction against § 2(b) of the Arizona statute.¹²⁸

A claim of extensive executive power or “global” enforcement discretion in the immigration arena that is contrary to the expressed policy of Congress is unsupported by Supreme Court precedent that has recognized executive branch prosecutorial discretion. Rather, the discretion that has been afforded to the executive itself derives from acts of Congress.¹²⁹ There is thus no basis for the claim that the president has the power to pursue a comprehensive and sweeping immigration scheme that runs counter to the statutory provisions already created by Congress. Although Congress has indeed vested the executive branch with a considerable degree of discretion for purposes of enforcing the INA, this discretion has historically been limited to individual remedies in particular cases.¹³⁰ Executive discretion simply is not sufficient for the president to override state laws that are consistent with the expressed policy of Congress. As Justice Samuel Alito recognized in his concurring opinion in the *Arizona* case, “The United States’ argument that § 2(B) [of the Arizona statute] is pre-empted, not by any federal statute or regulation, but simply by the Executive’s current enforcement policy is an astounding assertion of federal executive power that the Court rightly rejects.”¹³¹

In the *Arizona* litigation, the Department of Justice also relied on the president’s foreign policy powers in addition to his prosecutorial powers. It contended that the president’s policy of nonenforcement was permitted by the president’s powers in the realm of foreign affairs, and that any attempt by any state to assist in the enforcement of immigration statutes adopted by Congress would interfere with those powers and necessitate preemption.¹³²

¹²⁸ See *Arizona*, 132 S Ct at 2508.

¹²⁹ See *Knauff v Shaughnessy*, 338 US 537, 540 (1950) (upholding a determination by the attorney general acting pursuant to authority conferred by statute to bar entry on national security grounds to an individual immigrant); *INS v Aguirre-Aguirre*, 526 US 415, 425 (1999) (upholding a determination by the Board of Immigration Appeals acting pursuant to authority conferred by statute not to withhold deportation of an individual alien who faced possible political persecution when that alien had been involved with nonpolitical crimes).

¹³⁰ See, for example, *Knauff*, 338 US at 540; *Aguirre-Aguirre*, 526 US at 431; *INS v Chadha*, 462 US 919, 923 (1983).

¹³¹ *Arizona*, 132 S Ct at 2524 (Alito concurring).

¹³² See Brief for the United States, *Arizona v United States*, No 11-182, *13–14 (US filed Mar 19, 2012) (available on Westlaw at 2012 WL 939048).

Although the Department's premise was correct—the president is the nation's chief organ in the field of foreign affairs¹³³—the superstructure it attempted to erect on that premise would have pushed the authority well beyond the breaking point.

The president can of course negotiate a treaty that touches on a policy such as immigration, and once ratified by the Senate, that treaty has the force of law.¹³⁴ However, until this happens, an un-ratified treaty does not preempt state law. Necessarily, then, informal diplomatic discussions cannot do so. Moreover, even a ratified treaty must give way to a subsequent act of Congress in an area within the legislative authority of Congress, particularly Congress's plenary power over immigration.¹³⁵

*Medellin v Texas*¹³⁶ is on point. There, the President sought to transform international obligations under a non-self-executing treaty into binding federal law that was operative against the states, without an act of Congress. Although the Supreme Court recognized that the president has an array of political and diplomatic means available to enforce international obligations, it held the ability to unilaterally convert a non-self-executing treaty into a self-executing one is not among them. The responsibility for “transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.”¹³⁷ The Court emphasized that the president's authorization to represent the United States in an international context speaks only to his international responsibilities—it does not grant him the unilateral authority to create domestic law.¹³⁸

What the Court held in *Medellin* was even truer in the *Arizona* case because the United States in that case was not relying on any treaty, but merely on a theory of the president's amorphous authority over foreign affairs and diplomacy. As *Medellin* makes clear, more than simply the president's say-so would be required if such an interest could ever be sufficient to negate a state's attempt to assist with the enforcement of immigration laws that have been duly enacted by Congress.

Without the more formal process for creating domestic law that *Medellin* requires, state judges and officials must enforce federal law as it is written, and not as the president would like

¹³³ See *United States v Curtiss-Wright Export Corp.*, 299 US 304, 319 (1936).

¹³⁴ US Const Art VI, cl 2 (declaring that treaties made under the “[a]uthority of the United States” are the supreme law of the land).

¹³⁵ See *Chae Chan Ping v United States*, 130 US 581, 600 (1889).

¹³⁶ 552 US 491 (2008).

¹³⁷ *Id.* at 525–26.

¹³⁸ *Id.* at 529–30.

it to be, a point made explicit by Article VI of the Constitution.¹³⁹ Arizona had simply authorized its own officials to assist in that effort. Because that vindicates rather than undermines the policy determinations made *by Congress*, despite an apparently different set of policy determinations emanating from the Executive branch, the institutional design we have, which assigns plenary power in this area to Congress, could not countenance that aspect of the president's claims.

B. The Role of the Supreme Court

Finally, we turn to the tantalizing question suggested by the title of this Article. If we accept the premise that Congress has plenary power in this area, the adjudicative function of the courts must further, rather than undermine, the policy judgments made by Congress, to the extent permitted by other provisions of the Constitution. So just what is the role of the courts in the institutional design, and have they performed that role properly?

In addressing that question, I want to focus on what I consider to be the three principal magnets for illegal immigration, which is to say, the three principal challenges to implementation of the policy decisions that Congress has made: (1) better employment prospects in the United States than exist in the illegal immigrant's country of origin; (2) access to better social welfare benefits (education, health care, infrastructure, poverty-support programs, and so forth); and (3) citizenship for the illegal immigrant's children and, perhaps, for the illegal immigrant himself.

And here, I'd like to advance the proposition that the Supreme Court's decisions in all three areas have enhanced the magnetic attraction for illegal immigration and have thereby undermined congressional policy choices. If those decisions are truly compelled by the Constitution, then the impediment is one with which Congress simply must live. But if they misconstrue the Constitution's limits on congressional power, they needlessly thwart Congress's efforts, resulting in institutional conflict that flows from advancing contradictory policy goals. Although I think the employment magnet may provide the strongest attraction for illegal immigration, I'd like to start with the social welfare magnet because I think the Court's major decision on that

¹³⁹ US Const Art VI, cl 2 (mandating that "the Judges in every State shall be bound" by the Constitution, laws, and treaties of the United States); US Const Art VI, cl 3 (proclaiming that "all executive [officers] . . . of the several States, shall be bound by Oath or Affirmation, to support this Constitution").

issue most clearly demonstrates the Court's erroneous constitutional premise.

The leading Supreme Court case addressing restrictions on delivery of government services to illegal immigrants, of course, is *Plyler v Doe*,¹⁴⁰ in which the Supreme Court held unconstitutional a Texas statute withholding state funding from local school districts for the education of children not legally admitted into the United States and authorizing local school districts to deny enrollment to such children.¹⁴¹ A decade and a half after the decision, Congress expressly sought to counteract the holding in the case, adopting in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996¹⁴² that it was the official immigration policy of the United States that "the availability of public benefits not constitute an incentive for immigration to the United States" and that there is "a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits."¹⁴³ But the error in *Plyler* precedes this explicit statement of congressional policy to the contrary, and here, finally, we get to the *Corfield v Coryell*¹⁴⁴ analogy and the sub silentio rejection of *Corfield* by both the Supreme Court in *Plyler* and the modern internationalists discussed at the outset of this Article who would eliminate national borders altogether.

Granted, *Corfield* is a Privileges and Immunities Clause case, while *Plyler* is an Equal Protection case,¹⁴⁵ but the claim by citizens for access to another state's resources that was rejected in *Corfield* should be *stronger*, not weaker, than the claim by *illegal immigrants* for access to a state's resources that was accepted in *Plyler*. The Privileges and Immunities Clause must provide something more to "citizens" than the Equal Protection Clause provides to all "persons," citizen and non-citizen alike, lest the Privileges and Immunities Clause—actually, both Clauses, that of Article IV and that of § 1 of the Fourteenth Amendment—be rendered entirely superfluous.

¹⁴⁰ 457 US 202 (1982).

¹⁴¹ *Id.* at 205.

¹⁴² Pub L No 104-193, 110 Stat 2105.

¹⁴³ 8 USC § 1601(2)(B), (6).

¹⁴⁴ 6 F Cases 546 (CC ED Pa 1823).

¹⁴⁵ It should also be noted that *Plyler* is a decision of the Supreme Court while *Corfield* is merely a decision rendered by a Supreme Court Justice while riding circuit. But given the heavy reliance placed on *Corfield* during the debates over the adoption of the Fourteenth Amendment's Privileges or Immunities Clause, I think it fair to elevate the case's standing for purposes of the present discussion.

Corfield involved a claim by a citizen from another state that the Privileges and Immunities Clause of Article IV,¹⁴⁶ which requires each state to afford to citizens of other states the same privileges and immunities as it affords to its own citizens, entitled him to fish for oysters in the waters of New Jersey despite state law limiting such activity to the citizens of New Jersey.¹⁴⁷ Justice Bushrod Washington rejected the claim, noting that the court could not

accede to the proposition . . . that, under [the Privileges and Immunities Clause], the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such state, the legislature is bound to extend to the citizens of all the other states the same advantages as are secured to their own citizens.¹⁴⁸

The citizens of New Jersey, Justice Washington further explained, “may be considered as tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent, or the express permission of the sovereign who has the power to regulate its use.”¹⁴⁹

What was true of oysters in New Jersey is at least equally true of the public resources at issue in *Plyler*. Those public resources were owned by the citizens and lawful residents of Texas as something like tenants in common, who were thereby exclusively entitled to their use. The enjoyment of those public resources by others, therefore, could be had only with the tacit consent, or the express permission, of the sovereign. As the Texas law at issue in *Plyler* made clear, no such consent was forthcoming. The outcome in *Plyler* should therefore have been the same as the outcome in *Corfield*. Just as it was not a denial of the privileges and immunities of citizens from neighboring states not to be able to take New Jersey’s oysters, and just as it would not be a denial of the privileges and immunities of citizens from neighboring states if Texas chose not to provide free public education to residents just across the Texas border in

¹⁴⁶ US Const Art IV, § 2, cl 1.

¹⁴⁷ *Corfield*, 6 F Cases at 550.

¹⁴⁸ *Id* at 552.

¹⁴⁹ *Id*.

Louisiana, Arkansas, Oklahoma, or New Mexico were they to seek to come daily to Texas to avail themselves of the Texas education system, neither should the Court in *Plyler* have held that those from foreign nations who were unlawfully present in Texas had an equal protection entitlement to a share of the common property of the lawful citizens and residents of that state.

Justice William Brennan, who wrote the opinion for the Court in *Plyler*, noted that “few if any illegal immigrants come to this country, or presumably to the State of Texas, in order to avail themselves of a free education.”¹⁵⁰ But the holding in the case turned what may at the time have been a relatively incidental benefit into one of the three great magnets for illegal immigration. Since that decision, the rationale of the holding has been extended to medical services, housing, and other forms of public assistance.¹⁵¹ The magnet thereby created by the Court in *Plyler* runs at cross-purposes with the immigration policies set by Congress.

A similar analysis can be applied to some court decisions in the employment context. As the Supreme Court recognized in *Sure-Tan, Inc v NLRB*,¹⁵² a “primary purpose in restricting immigration is to preserve jobs for American workers.”¹⁵³ While the job market is not as clearly a public good as, say, oysters in New Jersey or free public education in Texas, there is certainly a sense in which the legal institutions of this nation provide, at some significant cost to the taxpayers, the rule-of-law climate that fosters a favorable economy and job market. Judicial decisions that encourage participation in that market by those who are not authorized by Congress to be legally employed in this country, therefore, also run at cross-purposes to congressional immigration and naturalization policy. Indeed, “it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies.”¹⁵⁴

The prime example is the judicial developments that have occurred in the wake of *Sure-Tan* and *Hoffman Plastic Com-*

¹⁵⁰ *Plyler*, 457 US at 228.

¹⁵¹ See *Lewis v Grinker*, 794 F Supp 1193, 1203–04 (EDNY 1991) (invoking the decision in *Plyler* in holding that denial of prenatal care to children of aliens violated the Equal Protection Clause).

¹⁵² 467 US 883 (1984).

¹⁵³ *Id* at 893.

¹⁵⁴ *Hoffman Plastic Compounds, Inc v NLRB*, 535 US 137, 148 (2002).

pounds, Inc v NLRB.¹⁵⁵ In *Sure-Tan*, Justice Sandra Day O'Connor, writing for the Court, held that it was an unfair labor practice, in violation of the National Labor Relations Act,¹⁵⁶ for an employer to notify federal immigration officials of the undocumented statuses of his employees, "solely because the employees supported the Union."¹⁵⁷ But she specifically acknowledged that the employer knew of the employees' illegal status before the union organizing activities,¹⁵⁸ and also that federal immigration law at the time did not make it illegal for employers to employ illegal immigrants or for illegal immigrants to accept employment.¹⁵⁹ Those important caveats have not proved to limit the reach of the decision, however. Nor has the Supreme Court's subsequent ruling in *Hoffman Plastics*, holding that those who are ineligible for employment because of their undocumented status are not entitled to back pay following a successful unfair labor practices claim.¹⁶⁰

Shortly after *Hoffman Plastics*, for example, the Ninth Circuit considered, in *Rivera v NIBCO, Inc*,¹⁶¹ an employer's challenge to a protective order forbidding discovery about immigration status.¹⁶² The case involved alleged national origin discrimination in violation of Title VII; the employer had given a basic job skills examination in English. Despite the fact that plaintiffs' requested relief included back pay, relief that would be foreclosed for any plaintiff who was unlawfully present in the United States, the Ninth Circuit upheld the protective order, finding that such discovery would have a chilling effect even on documented workers.¹⁶³

Similarly, in the 2006 case of *EEOC v Restaurant Co*,¹⁶⁴ the District Court for Minnesota denied an employer's motion to compel discovery about the immigration status of a former employee who had filed a Title VII complaint for sexual harassment and retaliation.¹⁶⁵ The record reflected that whatever sexual harassment there may have been was committed by the employ-

¹⁵⁵ 535 US 137 (2002).

¹⁵⁶ Pub L No 74-198, ch 372, 49 Stat 449 (1935), codified at 29 USC § 151 et seq.

¹⁵⁷ *Sure-Tan*, 467 US at 888, 894-95.

¹⁵⁸ *Id* at 887.

¹⁵⁹ *Id* at 892-93. See also INA § 101 et seq, 8 USC § 1101 et seq.

¹⁶⁰ *Hoffman*, 535 US at 149.

¹⁶¹ 364 F3d 1057 (9th Cir 2004).

¹⁶² *Id* at 1061.

¹⁶³ *Id* at 1065.

¹⁶⁴ 448 F Supp 2d 1085 (D Minn 2006).

¹⁶⁵ *Id* at 1088.

ee's supervisor without knowledge or sanction by the employer, and that the employer immediately undertook to investigate the charges, likely rendering the harassment charge against the company itself unlikely of success.¹⁶⁶ But the retaliation claim was another matter. The record reflects that during the course of the investigation, the employee revealed to the employer that she had not complained previously of the harassing conduct because she was unlawfully present in the country and therefore feared deportation.¹⁶⁷ Because continued employment of such an individual would have been a criminal offense by the employer at the time the events occurred (unlike in 1984, when *Sure-Tan* was decided), the employer advised the employee that federal law required it to have valid I-9 forms on each employee,¹⁶⁸ and asked her to complete a new one. She never returned to work, claiming instead that the I-9 request was a constructive discharge and therefore unlawful retaliation. The EEOC, which was pursuing the claim on behalf of the employee, opposed the employer's discovery request on the ground that it was unduly burdensome, and the District Court rejected the employer's motion to compel.¹⁶⁹

As a consequence of these rulings, employers can be held liable for retaliation merely for seeking to ascertain the lawful immigration status of their employees, thereby insulating illegal immigrant employees from such inquiries. The employment magnet for illegal immigration thus grows stronger.

Finally, there is the issue of birthright citizenship, the third most important magnet for current illegal immigration. Although the common understanding is that mere birth on US soil is sufficient to gain US citizenship, the language of the Fourteenth Amendment actually contains two requirements: "All persons born . . . in the United States *and subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside."¹⁷⁰ Modern parlance interprets the phrase, "subject to the jurisdiction," to mean simply subject to our laws, rendering it almost entirely redundant to the first phrase. The

¹⁶⁶ *EEOC v Restaurant Co*, 490 F Supp 2d 1039, 1044–45 (D Minn 2007).

¹⁶⁷ *Id.* at 1045.

¹⁶⁸ See INA § 274A(b), 8 USC § 1324a(b). See also INA § 274A(a)(2), 8 USC § 1324a(a)(2) (stating that an employer must discharge an employee upon discovery of his undocumented status); INA § 274A(e)(4)(A), 8 USC § 1324a(e)(4)(A) (establishing civil penalties for employer's failure to comply); INA § 274A(f)(1), 8 USC § 1324a(f)(1) (establishing criminal penalties for employer's failure to comply).

¹⁶⁹ *Restaurant Co*, 448 F Supp 2d at 1088.

¹⁷⁰ US Const Amend XIV, § 1 (emphasis added).

debates in Congress during the adoption of the Fourteenth Amendment suggest a different interpretation, however, one that distinguishes between mere territorial jurisdiction and a broader, more complete, allegiance-owing jurisdiction.¹⁷¹ Think of it this way: A foreign tourist visiting the United States subjects himself to the laws of the United States while here. An Englishman must drive on the right side of the road rather than the left, for example, when visiting here. But he cannot be prosecuted for treason if he takes up arms against the United States because he owes no allegiance to the United States. He is subject to the partial, territorial jurisdiction while here but not to the broader jurisdiction that would follow him beyond the borders.

The issue whether the children of illegal immigrants are “subject to the jurisdiction” of the United States in the way intended by this language has never been definitively addressed by the Supreme Court. That is, there is no *holding* to that effect by the Supreme Court, only *dicta* in three cases: *United States v Wong Kim Ark*,¹⁷² *INS v Rios-Pineda*,¹⁷³ and *Plyler*.¹⁷⁴ In *Wong Kim Ark* the Court held that the children of lawful, permanent residents were automatic citizens by virtue of their birth,¹⁷⁵ but it had previously held in *Elk v Wilkins*,¹⁷⁶ a decision left in place by *Wong Kim Ark*, that the children of Native Americans were *not* automatic citizens by birth because, owing primary allegiance to their tribe, a separate sovereign, they were not subject to the full and complete jurisdiction of the United States.¹⁷⁷

So what exactly does the Citizenship Clause of the Fourteenth Amendment mean? As I have argued elsewhere, I think the legislative history is more consistent with the view that in adopting the Citizenship Clause, as with its predecessor in the Civil Rights Act of 1866,¹⁷⁸ Congress did *not* intend to provide for a broad and absolute birthright citizenship.¹⁷⁹ The 1866 Act provides, “All persons born in the United States *and not subject to any foreign power*, excluding Indians not taxed, are hereby de-

¹⁷¹ See HR 127, 39th Cong, 1st Sess (May 30, 1866), in Cong Globe 2893.

¹⁷² 169 US 649, 693 (1898).

¹⁷³ 471 US 444, 450 (1985).

¹⁷⁴ *Plyler*, 457 US at 215.

¹⁷⁵ *Wong Kim Ark*, 169 US at 705.

¹⁷⁶ 112 US 94 (1884).

¹⁷⁷ *Id* at 118–19.

¹⁷⁸ Ch 31, 14 Stat 27, codified as amended in various sections of Title 42.

¹⁷⁹ See, for example, John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 12 Tex Rev L & Polit 167, 170–74 (2007).

clared to be citizens of the United States.”¹⁸⁰ As this formulation makes clear, any child born on US soil to parents who were temporary visitors to this country and who, as a result of the foreign citizenship of the child’s parents, remained a citizen or subject of the parents’ home country, was not entitled to claim the birthright citizenship provided in the 1866 Act. That was the view first espoused by the Supreme Court, albeit in dicta, in the *Slaughter-House Cases*;¹⁸¹ it was the view espoused by the Court, this time as a holding, in *Elk*;¹⁸² and it was the view articulated by the most prominent constitutional commentator of the era, Thomas Cooley.¹⁸³

Nevertheless, the Supreme Court’s holding in *Wong Kim Ark*, or more precisely the expansive gloss that has subsequently been given to that holding, established the magnet of birthright citizenship that also serves to undermine congressional immigration policy. Moreover, Justice Horace Gray’s position for the Court in that case is simply at odds with the notion of consent that underlay the sovereign’s power over naturalization. What it meant, fundamentally, was that foreign nationals could secure American citizenship for their children unilaterally, merely by giving birth on American soil, whether their arrival on America’s shores was legal or illegal, temporary or permanent.

In dicta, Justice Gray contended that the children of two classes of foreigners were not entitled to the birthright citizenship he thought guaranteed by the Fourteenth Amendment: first, the children of ambassadors and other foreign diplomats who, as the result of the fiction of extraterritoriality, were not even considered subject to the territorial jurisdiction of the United States; and second, the children of invading armies born on US soil while it was occupied by the foreign army.¹⁸⁴ But apart from that, all children of foreign nationals who managed to be born on US soil were, in his formulation, citizens of the United States. Children born of parents who had been offered permanent residence but were not yet citizens and who, as a result, had not yet renounced allegiance to their prior sovereign

¹⁸⁰ Civil Rights Act of 1866 § 1, ch 31, 14 Stat at 27.

¹⁸¹ 83 US (16 Wall) 36, 91 (1873).

¹⁸² *Elk*, 112 US at 101–02.

¹⁸³ See Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 270 (Little, Brown 3d ed 1898) (noting that, “subject to the jurisdiction” of the United States “meant [] full and complete jurisdiction to which citizens [are generally] subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government”).

¹⁸⁴ *Wong Kim Ark*, 169 US at 686.

would become citizens by birth on US soil. This was true even if, as was the case in *Wong Kim Ark* itself, the parents were, by treaty, unable ever to become citizens. This was the extent of the actual holding of the case.¹⁸⁵

The dictum was much broader, of course. Children of parents residing only temporarily in the United States on a work or student visa would also become US citizens if the dictum were to become binding precedent. Children of parents who had overstayed their temporary visa would also become US citizens, even though born of parents who were now here illegally. And, perhaps most troubling from the consent rationale, children of parents who never were in the United States legally would also become citizens as the direct result of the illegal action by their parents. This would be true even if the parents were nationals of a regime at war with the United States and even if the parents were here to commit acts of sabotage against the United States, at least so long as the sabotage did not actually involve occupying a portion of the territory of the United States.¹⁸⁶ The notion that the framers of the Fourteenth Amendment, when seeking to guarantee the right of citizenship to former slaves, also sought to guarantee citizenship to the children of enemies of the United States who were in our territory illegally is simply too absurd to be a credible interpretation of the Citizenship Clause.

This is not to say that Congress could not, pursuant to its naturalization power, choose to grant citizenship to the children of foreign nationals. But thus far it has not done so. Instead, the language of the current naturalization statute simply tracks the minimum constitutional guarantee—anyone born in the United States, *and subject to its jurisdiction*, is a citizen.¹⁸⁷ Understanding that constitutional phrase is therefore as necessary now as it was in 1884 and 1898.

By effectively writing that clause out of the Constitution, beyond the actual holding of *Wong Kim Ark* to the assumptions in obiter dicta contained in *Rios-Pineda*¹⁸⁸ and *Plyler*,¹⁸⁹ the Court has given to alien Corfields not just the oysters that the people of the United States own in common, but the pearl itself, a share in the sovereignty of another people, without having to go through the trouble of obtaining consent or otherwise pursu-

¹⁸⁵ *Id.* at 705.

¹⁸⁶ *Id.* at 693.

¹⁸⁷ INA § 301(a), 8 USC § 1401(a).

¹⁸⁸ *Rios-Pineda*, 471 US at 446.

¹⁸⁹ *Plyler*, 457 US at 215.

ing the path toward legal naturalization. Such a rule undermines not only the immigration policy choices made by Congress and the plenary authority given to Congress in Article I of the Constitution to make them, but the very principle of “consent of the governed” that lies at the heart of the Declaration of Independence. Only an unambiguous constitutional text should compel such a result. Given that the ratification history of the Citizenship Clause is at least open to, and in my view leans heavily toward, the meaning that “subject to the jurisdiction” was not synonymous with “born in the United States”—that it meant subject to the complete, rather than merely partial or territorial, jurisdiction—that standard has not been met.

CONCLUSION

In sum, recent judicial decisions dealing with benefits, employment, and even citizenship itself have strengthened the magnetic lure of illegal immigration. This has undermined the policy choices made by Congress and, effectively, treated the resources, opportunities, and sovereignty of this nation not as the common property of the people of the United States, but as fair game for anyone the world over who can cross our borders and stake their claim. Justice Washington’s reasoning in *Corfield* needs a revival!