
BOOK REVIEW
MAKING IMMIGRATION LAW

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MAKING IMMIGRATION LAW

THE PRESIDENT AND IMMIGRATION LAW. By Adam B. Cox and Cristina M. Rodríguez. New York, N.Y.: Oxford University Press. 2020. Pp. xiii, 340. \$34.95.

*Reviewed by Hiroshi Motomura**

INTRODUCTION

Every scholar, writer, and observer must strive constantly to balance knowing something very well and not letting that knowledge be so confining that it inhibits understanding and wisdom. Some fields of law are so complex in fact and so exceptional in reputation that they inspire and reward specialization. Immigration law is such a field, but specialization brings the risk of tunnel vision and failure to appreciate fully the significance of what one comes to know. At the same time, a field as complex and exceptional as immigration law is a trap for scholars in other fields who parachute in, only to discover that their familiar conceptual frameworks find little traction or lead them into the blunders of dilettantes.

Some of the most valuable legal scholarship combines deep knowledge of an area of law with a breadth of understanding and vision that mines the broader lessons that the particular area has to offer. To be concrete, what can immigration law tell us about American public law in general, and what can American public law in general tell us about immigration law? From this perspective, *The President and Immigration Law*, by Professors Adam B. Cox and Cristina M. Rodríguez, is an essential example of this kind of valuable scholarship. By building a bridge between immigration law and U.S. administrative and public law more generally, it makes a major contribution in both fields.

As its title promises, the book analyzes the authority of the President of the United States to shape immigration law and policy. It is conceptually coherent and written with clarity and elegance. Even when Cox and Rodríguez cover ground that will be familiar or intuitive to many readers, they find subtlety and new meaning.

The President and Immigration Law makes two substantial contributions to scholarship and policy analysis. One contribution is its nuanced and persuasive historical account of the rise of presidential power over immigration. The other is its analysis of the current relationship

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between Congress and the President as “co-principals” in making immigration law (p. 193). Grounded in exhaustive research supplemented by interviews with former high-ranking executive branch officials, the book’s framework and analysis are illuminating. Cox and Rodríguez offer much that is thought-provoking — even to readers who do not agree fully with the authors’ historical account, analysis of the current situation, or prescriptions for the future. Virtually every page delivers arresting insights and probing questions.

The book’s analytical architecture has two dimensions. The first is temporal; Cox and Rodríguez look back at the past and ahead to the future. Their retrospective explains how presidential immigration power evolved from the late eighteenth century through its great expansion in the late twentieth century (pp. 17–46) to its current scope. The book also looks ahead to the future, exploring reforms that can mobilize the virtues of presidential power while curbing its vices (pp. 238–47).

The second dimension of *The President and Immigration Law* is geographical. Cox and Rodríguez show how Presidents have exercised their immigration power outward — at the border and beyond. Relying on several federal statutes,¹ Presidents have sometimes opened the border to certain newcomers and at other times barred certain others.² Cox and Rodríguez also show how Presidents have exercised their power over immigration inside the United States, especially through domestic immigration enforcement. The source of this power is not specific statutes but rather a massive immigration enforcement system marked with vast discretion to deport noncitizens, or to leave them be (pp. 79–130).

When Cox and Rodríguez explore the history of presidential immigration power, they examine both the domestic and the international. Especially in the domestic domain, their claim that they counter a “conventional wisdom” of congressional primacy in the making of immigration law (p. 5) seems exaggerated, as I explain in Part II of this Review. Few take any such wisdom seriously, even while mouthing the words. Moreover, much of Cox and Rodríguez’s analysis of the domestic aspects of presidential immigration power will be familiar to readers who know immigration law. But the book makes substantial contributions by reinterpreting what is familiar in immigration law to answer questions that immigration law scholars often overlook but are typical in public law scholarship. In this way, Cox and Rodríguez put immigration law scholars in conversation with scholars of U.S. public law more generally.

¹ See, e.g., Immigration and Nationality Act (INA) § 212(d)(5), 8 U.S.C. § 1182(d)(5) (authorizing parole); *id.* § 212(f), 8 U.S.C. § 1182(f) (authorizing suspension of entry).

² Compare the use of parole to allow entry from Cuba starting in the 1960s (pp. 55–56) with the Trump Administration’s ban on entry from several mostly Muslim-majority countries (pp. 62–63).

When Cox and Rodríguez look to the future, their main focus is domestic. They view presidential immigration power as a symptom of a “structural problem” in domestic enforcement (p. 4), and they end with a detailed domestic analysis.³ This discussion has great value, but it remains an incomplete assessment of the future. Viewed broadly, *The President and Immigration Law* looks historically at the domestic and the international, and ahead to domestic presidential immigration power. Its incomplete quadrant is the international future of presidential immigration power.

For all of its many virtues, then, the book does not engage fully with the international aspects of the migration-related challenges that Presidents are likely to face in the coming years and decades. Events and trends outside U.S. borders — war, civil unrest, and climate change, to mention just a few — are likely in the future to influence migration to the United States even more than they do today. Put differently, Cox and Rodríguez analyze the President’s immigration power inside the United States much more completely than they analyze the President’s outward-facing power. This asymmetry is puzzling, given the ambitious scope of their analysis in other respects, and especially given the prominent exercise of this outward-facing power in the Trump Administration. I will explain why this quadrant is incomplete, why it matters, and what else it might have said.

Part I of this Review examines the book’s historical account of presidential immigration power as it operates internationally at the border and beyond. This account is a very valuable part of Cox and Rodríguez’s analysis. Part II assesses the book’s treatment of presidential power in the context of domestic enforcement. Here, Cox and Rodríguez find new, broader meaning in arguments and analyses that may seem familiar. Part III concludes by suggesting why and how the future of presidential immigration power will most likely return to its international origins more than Cox and Rodríguez acknowledge. In the future, the most significant presidential decisions in responding to migration will probably not be domestic. They are more likely to be outward-facing decisions that influence the conditions that cause people to migrate, not just from their countries of origin but also through countries of transit to the United States and other destinations.

I. LOOKING OUTWARD

The President and Immigration Law starts by insightfully tracing the rise of presidential power over immigration from early in the nation’s

³ Any attempt to distinguish the domestic from the international will run into gray areas. Later in this Review, I address some situations that defy easy classification, but the distinction still has core substance.

history. Cox and Rodríguez observe: “The rise of presidential immigration law significantly predates our era of extreme partisanship” (p. 6) and goes back even further than the body of federal statutes now viewed as “federal immigration law” (p. 77). Congress passed several immigration-related statutes at the end of the eighteenth century and in the first half of the nineteenth century, but antebellum immigration regulation was the domain of state and local law.⁴

A coherent body of federal statutes addressing immigration emerged only after the American Civil War (p. 22). Until the end of slavery established that people could not be property, westward expansion raised what were already high stakes in antebellum immigration federalism (pp. 19–23). A federal scheme regulating the movement of people was politically impossible, as Cox and Rodríguez (pp. 20, 22) and others before them have noted.⁵ Only in 1875 did Congress pass the first of many federal immigration statutes (p. 27). But, as *The President and Immigration Law* explains, U.S. Presidents wielded influence and power in matters of migration long before Congress did.

A. Foreign Affairs

Cox and Rodríguez explain how Presidents actively addressed immigration even before the Civil War. Decades earlier, Presidents exercised their authority over foreign affairs to negotiate treaties with other nations “to actively recruit immigrants from abroad while securing trade advantages for the United States” (p. 23) and “to actively set the terms of immigrants’ entry and stay in the United States” (p. 24). The modern eye might not perceive these country-specific treaties as immigration laws, but Presidents used them to shape the flow of migrants (p. 7).

Soon after the Civil War, the United States and China concluded the Burlingame Treaty of 1868⁶ to support continued Chinese immigration and protect Chinese immigrants in the United States. In the same period, several Presidents used their foreign affairs power and U.S. treaty obligations to oppose exclusionary legislative proposals in Congress (pp. 26–30). A generation later, President Theodore Roosevelt negotiated the Gentlemen’s Agreement, a bilateral accord between the United States and Japan that effectively ended Japanese immigration to the U.S. mainland for a number of years without legislation to this effect (pp. 35–

⁴ See generally, e.g., HIDETAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* (2017); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993).

⁵ See, e.g., Neuman, *supra* note 4, at 1866.

⁶ See Treaty of Peace, Amity, and Commerce (Burlingame Treaty), China-U.S., art. V, July 28, 1868, 16 Stat. 739.

40).⁷ Presidents continued to rely on their foreign affairs power to address immigration well into the twentieth century. As Cox and Rodríguez explain, President Franklin Roosevelt's diplomatic negotiations with Mexico established the Bracero Program, which influenced much of twentieth-century immigration policy by bringing seasonal agricultural guestworkers from Mexico to the United States until 1964 (pp. 41–45).

B. *The Parole Power*

The President and Immigration Law next explains how the President's outward-facing immigration power evolved in the twentieth century and up to the present. Especially crucial have been two federal statutes. First, section 212(d)(5) of the Immigration and Nationality Act⁸ (INA) authorizes the President to “parole” noncitizens into the United States even if they do not fit into one of the admission categories enacted by Congress into federal statutes (pp. 50–59). Parole allows entry onto U.S. soil. Parole does not grant formal admission, though some parolees later became lawful permanent residents through legislation enacted by Congress.

From soon after World War II through the rest of the twentieth century, Presidents repeatedly used informal vehicles, most prominently parole, to let large groups of noncitizens — whom many considered refugees — into the United States. Cox and Rodríguez explain that although parole was originally designed for “discrete and exigent circumstances” (p. 51), President Truman favored more refugee resettlement than Congress seemed to authorize. By ordering the reallocation of unused visas to these noncitizens, Truman, acting in the context of the Cold War, “inaugurated the practice of [P]residents turning to refugee policy as a tool of foreign affairs” (p. 53).

The first newcomers to benefit from the use of parole and related vehicles were people who had fled unsettled conditions and Soviet occupation in Eastern Europe. The next large group to benefit, first from informal tolerance under President Eisenhower and later from grants of parole under President Johnson, were Cubans fleeing the Castro regime (p. 55). Presidents later paroled in new groups of Cubans and, thereafter, Haitians (pp. 55–59).

Parole is not a durable immigration status, and alone it does not lead to lawful permanent residence or citizenship. But, by granting parole, Presidents changed facts on the ground as new arrivals put down roots. As Cox and Rodríguez explain, Cuban parolees “transform[ed] the demography of South Florida” (p. 66), and presidential parole decisions shaped the agenda in Congress. The new reality often led to federal

⁷ See Exec. Order No. 589 (Mar. 14, 1907) (implementing the agreement's provisions blocking entry to the continental United States).

⁸ 8 U.S.C. § 1182(d)(5).

legislation granting durable status to parolees or others seeking protection against forcible return to countries of origin (p. 49).

Even when some members of Congress objected to the President's use of parole to circumvent the limits of statutory admission categories, Congress as a whole often ratified presidential responses to urgent migration situations (pp. 49, 54–56, 65–70). Congress did so to endorse the Bracero Program legislatively (p. 43), and the Refugee Act of 1980⁹ effectively ratified many presidential parole decisions up to that time (p. 49). In this way, presidential parole undermined Congress's theoretical monopoly on setting admission criteria. Essential in this story was the link between foreign affairs and immigration. The President's use of parole "reflected the maturation of the Executive's use of immigration as a foreign policy tool" (p. 56).¹⁰

C. *The Suspension Power*

The President and Immigration Law also examines section 212(f) of the INA, which is the other major statute granting outward-facing immigration power to the President. This provision, like the parole statute, operates internationally in tension with the admission categories in federal immigration statutes. Section 212(f) allows the President to suspend the entry of noncitizens, even if they seem to qualify for admission, for "such period" as the President "shall deem necessary," if entry "would be detrimental to the interests of the United States" (pp. 47–48, 60–63).¹¹ The President may also "impose on the entry of aliens any restrictions he may deem to be appropriate."¹²

Section 212(f) was part of the original version of the 1952 INA, but as Cox and Rodríguez explain, its precursors go back to the Alien Friends Act of 1798¹³ (p. 48). Much more recently, President Reagan cited section 212(f) as authority to interdict Haitians in international waters to keep them away from U.S. shores, where they could apply for asylum (p. 60).¹⁴ Later Presidents invoked section 212(f) as

⁹ Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 and 22 U.S.C.).

¹⁰ Cox and Rodríguez explain that courts have rejected challenges to the President's use of the parole power, even if some lower federal courts have found that the actual use of parole raised serious procedural due process or equal protection problems (pp. 73–76). *See, e.g.,* Amanullah v. Nelson, 811 F.2d 1, 12–14 (1st Cir. 1987); Garcia-Mir v. Meese, 788 F.2d 1446, 1451–53 (11th Cir. 1986); Jeanty v. Bulger, 204 F. Supp. 2d 1366, 1380–82 (S.D. Fla. 2002); Singh v. Nelson, 623 F. Supp. 545, 552–53, 556 (S.D.N.Y. 1985).

¹¹ INA § 212(f), 8 U.S.C. § 1182(f).

¹² *Id.*

¹³ Ch. 58, 1 Stat. 579.

¹⁴ *See* High Seas Interdiction of Illegal Aliens, Proclamation No. 4865, 3 C.F.R. § 50 (1981); Interdiction of Illegal Aliens, Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981). *See generally* JEFFREY S. KAHN, ISLANDS OF SOVEREIGNTY: HAITIAN MIGRATION AND THE BORDERS OF EMPIRE (2019).

the legal basis to continue Haitian interdiction (p. 62).¹⁵ Other uses of section 212(f) have been much narrower, banning small groups of noncitizens closely tied to objectionable regimes or actions by those regimes (p. 62). Perhaps because of this history, section 212(f) has been closely linked, at least in the minds of Presidents, with their foreign affairs power (p. 56).

As Cox and Rodríguez discuss, President Trump cited section 212(f) to justify several broad entry restrictions (p. 62). In his first week in office in January 2017, Trump issued an executive order that relied on section 212(f) to ban noncitizens from seven majority-Muslim countries.¹⁶ This order was superseded by a second executive order¹⁷ and later a presidential proclamation,¹⁸ each articulating national security justifications more fully than its predecessor ban.

Several lower court preliminary injunctions blocked the implementation of the bans,¹⁹ but in June 2018 the Supreme Court let the September 2017 version take effect in *Trump v. Hawaii*.²⁰ The Court reasoned that section 212(f) gives the President very broad power to ban noncitizens, even if they qualify for admission in the categories established by federal statutes.²¹ The Court also held that President Trump's exercise of section 212(f) authority was constitutional in spite of evidence of religious animus that the challengers presented to argue that the ban violated the Establishment Clause.²²

Cox and Rodríguez also discuss how President Trump later cited section 212(f) to justify a presidential proclamation written to bar from the United States immigrants without proof of health insurance or the financial means to pay premiums (pp. 62, 74).²³ After *The President and Immigration Law* went to press, Trump relied on section 212(f) several

¹⁵ See, e.g., Interdiction of Illegal Aliens, Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (May 24, 1992). The U.S. Supreme Court upheld the use of section 212(f) as the authority for interdiction in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 187 (1993).

¹⁶ See Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

¹⁷ See Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

¹⁸ See Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017).

¹⁹ *Trump v. Hawaii*, 138 S. Ct. 2392, 2404, 2406 (2018).

²⁰ 138 S. Ct. 2392.

²¹ *Id.* at 2408–12.

²² See *id.* at 2415–23.

²³ Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System, in Order to Protect the Availability of Healthcare Benefits for Americans, Proclamation No. 9945, 84 Fed. Reg. 53,991 (Oct. 4, 2019). The Ninth Circuit held that this proclamation was within the President's authority under section 212(f) in *Doe #1 v. Trump*, 984 F.3d 848, 855 (9th Cir. 2020).

more times to block the entry of noncitizens from countries with widespread COVID-19.²⁴ Another pandemic-related proclamation swept more broadly to ban some noncitizens in immigration admission categories. This proclamation cited the need to safeguard not public health, but rather U.S. citizens' access to jobs during a pandemic.²⁵

D. International Immigration Power

The analysis of the President's exercise of parole and suspension authority in *The President and Immigration Law* is innovative and path-breaking as a window on the history of presidential immigration power's international dimension. To be sure, the use of parole to shape refugee policy in spite of constraints in federal legislation is a familiar topic,²⁶

²⁴ E.g., Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus, Proclamation No. 9996, 85 Fed. Reg. 15,341, 15,342 (Mar. 14, 2020); see *id.* at 15,341 (summarizing prior proclamations).

²⁵ See Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak, Proclamation No. 10014, 85 Fed. Reg. 23,441 (Apr. 22, 2020). Several other proclamations relied on statutes similar to section 212(f) to authorize broad presidential power to limit entry of some noncitizens. On March 20, 2020, U.S. Customs and Border Protection suspended nonessential travel — except by U.S. citizens and lawful permanent residents — through land ports of entry with Canada and Mexico, based on the Tariff Act of 1930, 19 U.S.C. § 1318(b)(1)(C), (b)(2). See Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico, 85 Fed. Reg. 16,547 (Mar. 24, 2020) (to be codified at 19 C.F.R. ch. 1); Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada, 85 Fed. Reg. 16,548 (Mar. 24, 2020) (to be codified at 19 C.F.R. ch. 1). The initial thirty-day suspension has been extended. See, e.g., Press Release, Chad Wolf, Acting Sec'y, Dep't of Homeland Sec., Statement on Non-essential Travel (Apr. 20, 2020), <https://www.dhs.gov/news/2020/04/20/acting-secretary-chad-wolf-statement-non-essential-travel> [<https://perma.cc/3VJ8-ATHC>]. The same day, the federal government invoked section 362 of the Public Health Service Act, 42 U.S.C. § 265, enacted in 1944, to bar the entry of noncitizens without valid travel documents, which describes most asylum seekers on the U.S. southern border. See Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17,060, 17,061 (Mar. 26, 2020). On May 20, 2020, the government extended this order indefinitely. See Amendment and Extension of Order Under Sections 362 and 365 of the Public Health Service Act; Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists, 85 Fed. Reg. 31,503 (May 26, 2020).

These proclamations may have used the pandemic as a pretext to implement a pre-existing agenda to restrict lawful immigration to the United States. See Lucas Guttentag, *COVID-19 and Immigration Border Enforcement: Understanding CDC "Expulsions" of Asylum Seekers and Unaccompanied Minors*, BENDER'S IMMIGR. BULL., June 1, 2020, at 1. President Biden revoked Proclamation 10014 on February 24, 2021. See Revoking Proclamation 10014, Proclamation No. 10149, 86 Fed. Reg. 11,847 (Feb. 24, 2021).

²⁶ See, e.g., T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON, JULIET P. STUMPF & PRATHEEPAN GULASEKARAM, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 299–301 (9th ed. 2021).

and other scholars have analyzed parole to delve into U.S. law and policy on refugees and asylum.²⁷ But Cox and Rodríguez may be the first to examine parole as part of a detailed and comprehensive study of the President's power over immigration.

The analysis of the President's suspension power in *The President and Immigration Law* is also a major contribution. Some scholars have examined section 212(f) in specific contexts, most prominently the interdiction of asylum seekers.²⁸ Many scholars have explored whether President Trump's invocation of section 212(f) went beyond what that provision authorizes²⁹ and whether his exercise of that authority was constitutional.³⁰ But in general, these scholars have been primarily concerned with constitutional rights claims by noncitizens or by affected citizens. Like scholars writing about the President's parole authority, scholars writing about suspension have not tried to fit it into a comprehensive picture of presidential immigration power as a matter of institutional design.

One key lesson from Cox and Rodríguez's exploration of the President's parole and suspension authority — and, more generally, of the international aspects of the presidential immigration power — is the close connection between immigration and foreign affairs. This link appears in Cox and Rodríguez's historical examples going back to the Burlingame Treaty of 1868 and earlier. President Eisenhower's welcome of about 32,000 Hungarians after the 1956 revolution was U.S. foreign

²⁷ See, e.g., GIL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT*, at 72 (1986).

²⁸ See generally, e.g., Joyce A. Hughes & Linda R. Crane, *Haitians: Seeking Refuge in the United States*, 7 GEO. IMMIGR. L.J. 747 (1993) (discussing the interdiction of Haitian refugees); Anne Y. Lee, *The Unfettered Executive: Is There an Inherent Presidential Power to Exclude Aliens?*, 39 COLUM. J.L. & SOC. PROBS. 223 (2005) (examining the source and nature of the President's power); Dan Ordorica, Note, *Presidential Power and American Fear: A History of INA § 212(F)*, 99 B.U. L. REV. 1839 (2019) (exploring the legislative history of section 212(f)).

²⁹ See generally, e.g., Josh Blackman, *The Travel Ban, Article II, and the Nondelegation Doctrine*, LAWFARE (Feb. 22, 2018, 9:00 AM), <https://www.lawfareblog.com/travel-ban-article-ii-and-nondelegation-doctrine> [<https://perma.cc/4H59-U368>]; Peter Margulies, *The Fourth Circuit Travel Ban Argument: Framing the Challengers' Case for the Supreme Court*, LAWFARE (Dec. 12, 2017, 1:00 PM), <https://www.lawfareblog.com/fourth-circuit-travel-ban-argument-framing-challengers-case-supreme-court> [<https://perma.cc/4FES-D6C8>]; Deborah Pearlstein, *The Deference Arguments*, BALKINIZATION (Feb. 8, 2017, 6:09 PM), <https://balkin.blogspot.com/2017/02/the-deference-arguments.html> [<https://perma.cc/7YL3-27WL>]; Ilya Somin, *Trump's Expanded Travel Ban Compounds the Wrongs of Previous Versions*, REASON: VOLOKH CONSPIRACY (Feb. 2, 2020, 4:39 PM), <https://reason.com/volokh/2020/02/trumps-expanded-travel-ban-compounds-the-wrongs-of-previous-versions> [<https://perma.cc/FRK5-SL2A>].

³⁰ See generally, e.g., Jennifer M. Chacón, Essay, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 257–60 (2017); Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 CASE W. RESV. L. REV. 1183 (2018); Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1217, 1268 (2018); Leslie Kendrick & Micah Schwartzman, *The Supreme Court, 2017 Term — Comment: The Etiquette of Animus*, 132 HARV. L. REV. 133, 168–69 (2018); Mark Tushnet, *Trump v. Hawaii: "This President" and the National Security Constitution*, 2018 SUP. CT. REV. 1.

policy, but it was also U.S. immigration policy (p. 54). The same intermingling of foreign affairs and immigration has been a constant feature of U.S. interdiction in the Caribbean.

Cox and Rodríguez provide a perceptive historical account of the international dimensions of presidential immigration power. But they do little to build on this history when they address the future of presidential immigration power. In Part III of this Review, I critique this omission. But in order to lay a foundation for explaining why this omission is anomalous and significant, I need first to examine the book's treatment of the domestic aspects of presidential power over immigration.

II. LOOKING INWARD

After analyzing the President's parole and suspension powers, Cox and Rodríguez turn their gaze inward toward the domestic aspects of immigration law, explaining how immigration enforcement — “the rise of the deportation state” (p. 8) — has enlarged presidential immigration power (pp. 79–102). This part of *The President and Immigration Law* starts by noting that the United States has a large noncitizen population without lawful status. Moreover, a large number of lawful permanent residents may be removable, typically due to criminal convictions. This means that a very large number of people on U.S. soil — at least ten million — are potentially subject to arrest and removal.³¹ The executive branch lacks the capacity to arrest and remove all of them, so the President exercises enforcement discretion — the power to decide when, against whom, and how to enforce immigration laws. The bigger the gap between resources and what full enforcement would require, the more power the President has over immigration by exercising discretion in making decisions about enforcement.

Cox and Rodríguez's analysis of parole and suspension focuses on the Congress-President relationship, but their analysis of the domestic presidential power unpacks the executive branch. Pushing beyond any view that the power of the President and the power of the federal executive branch over immigration are the same thing, the book examines the key links between the President and the higher levels of the executive branch. These links can centralize and control enforcement discretion (p. 162). Or executive branch leaders can delegate discretion to federal agency field offices, or even to street-level officers, to decide which noncitizens to target for enforcement. Relatedly, *The President and Immigration Law* explores delegation of enforcement discretion outside the federal government, especially to states and localities (pp. 133–

³¹ See Jens Manuel Krogstad, Jeffrey S. Passel & D'Vera Cohn, *5 Facts About Illegal Immigration in the U.S.*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s> [<https://perma.cc/PZ6X-JE5P>].

34). Cox and Rodríguez also look at federal efforts to enlist state and local help with immigration enforcement (pp. 135–47) and, at the same time, to maintain federal control over the myriad decisions that shape enforcement (pp. 147–54).

The novel contributions of Cox and Rodríguez’s analysis of the President’s domestic immigration power are subtle, and assessing them is a complex task. An essential first step is to observe that many of the ideas, arguments, and observations in this part of *The President and Immigration Law* have been in broad circulation for some years. This was already true by the middle of the first decade of the 2000s, when Cox and Rodríguez started the work that would lead to the book, and was especially true by the time the book was published in 2020.³² But this opening observation should not detract from the originality of what Cox and Rodríguez offer — to both immigration law specialists and generalists in public law — in analyzing the President’s domestic power over immigration. The rest of this Part II explains their contribution more fully.

A. Beyond “Conventional Wisdom”

Central to Cox and Rodríguez’s analysis of the President’s domestic immigration power is their own description of their entire book — as responding to the conventional wisdom that Congress is dominant in the making of immigration law (pp. 5–7). But especially with regard to the domestic aspects of presidential power over immigration, it would give most immigration law scholars pause to hear of this conventional wisdom or “classical conception” (p. 192). Immigration law scholarship and policy debates largely moved beyond any such assumption of congressional primacy a long time ago.

That said, whether *The President and Immigration Law* responds to conventional wisdom is a question with many nuances. “Conventional wisdom” can mean different things. Though the term might suggest unthinking acceptance of false propositions, a conventional wisdom can contain much that is true. In immigration law, federal statutes enacted by Congress still set the terms of debate. Even if potentially removable noncitizens inside the United States benefit from executive branch discretion not to enforce immigration law, it is Congress that put them in

³² *The President and Immigration Law* was published in 2020, but it builds on two articles that Cox and Rodríguez published in 2009 and 2015, respectively. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015). Some of the scholarship that I mention in this Part II was published before 2009, and some between 2009 and 2020.

the precarious zone of enforcement discretion in the first place.³³ And nonenforcement is cold comfort for noncitizens who must live their lives in the shadows of statutes. Moreover, the very “co-principals” model explained later in *The President and Immigration Law* (p. 193) suggests a major role for Congress, and thus that the conventional wisdom is at least half true.³⁴

So when Cox and Rodríguez cast their book as responding to conventional wisdom of congressional primacy in immigration law, they seem to suggest not that the wisdom is entirely wrong, but instead that it is a wisdom of such generality that it masks nuances that immigration law specialists or general public law scholars may not appreciate. Likely few observers believe that Congress is so dominant in making immigration law that statutes leave little or no room for the President to make meaningful immigration law decisions. Congress sets the framework, to be sure, but the President makes decisions that make immigration law, and much about that decisionmaking deserves close study.

Cox and Rodríguez are also right in a different sense of conventional wisdom. This is a wisdom that might not survive close scrutiny even by those who invoke it, and yet is influential because it is cited routinely, for example, by political combatants (p. 2) or the U.S. Supreme Court (p. 5).³⁵ This may be the most unsettling sort of conventional wisdom because it leads to an unthinking economy of misleading thought.

The book supports its critique of this sort of conventional wisdom by noting the sizeable body of scholarship that has examined court responses to lawsuits claiming that government immigration decisions are unconstitutional (pp. 11–12). These scholars have been focused — perhaps sometimes even “fixated” as Cox and Rodríguez put it (p. 5) — on the plenary power doctrine.³⁶ This doctrine is usually said to restrict

³³ Professor Bijal Shah has observed that Congress retains a fundamental role by setting up the basic structure of the immigration system. See Bijal Shah, *Investigating a Unitary Executive Model of Immigration*, BALKINIZATION (Dec. 4, 2020, 9:30 AM), <https://balkin.blogspot.com/2020/12/investigating-unitary-executive-model.html> [<https://perma.cc/R3KS-HMQ5>]. Relatedly, Professor Peter Shane has suggested that the delegation of enforcement is “de jure” delegation in that several provisions of the INA delegate the implementation and enforcement of federal immigration law to the President and the executive branch. See Peter M. Shane, *Administrative Law to the Rescue?*, BALKINIZATION (Dec. 8, 2020, 9:30 AM), <https://balkin.blogspot.com/2020/12/administrative-law-to-rescue.html> [<https://perma.cc/KAR3-VJ8B>].

³⁴ Congress’s role as a co-principal with significant but not exclusive power is also consistent with the possibility that members of Congress were “perfectly happy” to have the President act without congressional ratification or even over what appeared to be congressional opposition (pp. 44–45).

³⁵ Cox and Rodríguez note that the Supreme Court has acknowledged the co-principal role of the President even in the same decision that seems to articulate the conventional wisdom of congressional primacy (pp. 195–96). The authors cite *Arizona v. United States*, 567 U.S. 387, 396 (2012).

³⁶ See generally T. Alexander Aleinikoff, *Aliens, Due Process and “Community Ties”: A Response to Martin*, 44 U. PITT. L. REV. 237, 237–39 (1983); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Hiroshi Motomura, *The*

the authority and willingness of courts to take such constitutional challenges seriously.³⁷ These scholars have tended to contrast the judiciary with the undifferentiated “political branches” without apparent concern for the separation of powers between the legislative and executive branches (p. ix).

And yet, this scholarly focus was likely a response to the most significant plenary power decisions, in which courts treated the political branches as a unitary and undifferentiated contrast to the judiciary.³⁸ It was only natural that scholars concerned about the rights of noncitizens would focus on courts as the branch of the federal government often called upon to give meaning to those rights. Even if scholars who analyzed the plenary power doctrine or the judicial role did not focus on the separation of powers between the legislative and executive branches, those scholars did not necessarily accept congressional primacy in making immigration law in the way that Cox and Rodríguez suggest by citing their scholarship for the conventional wisdom.³⁹

Moreover, Cox and Rodríguez largely disregard a major trend familiar to those who know immigration law. Scholarship since the 1980s and 1990s has moved well beyond the plenary power doctrine, a focus on the judiciary, and any apparent indifference to the relationship between the President and legislative branch in making immigration law. Far from conflating the political branches, immigration law scholarship over the past two decades reflects acute awareness of severe limits on Congress’s power to make immigration law and great skepticism of any analysis that assumes congressional primacy.

A hallmark of this scholarship has been close attention to the law in action, combined with skepticism that the law on the books enacted by legislatures actually creates immigration law statuses and defines

Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights, 92 COLUM. L. REV. 1625 (1992) [hereinafter Motomura, *Curious Evolution*]; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) [hereinafter Motomura, *Immigration Law After a Century of Plenary Power*]; David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

³⁷ See Legomsky, *supra* note 36, at 255; Motomura, *Curious Evolution*, *supra* note 36, at 1626; Motomura, *Immigration Law After a Century of Plenary Power*, *supra* note 36, at 547; Schuck, *supra* note 36, at 14–18.

³⁸ As Cox and Rodríguez note, Supreme Court decisions in plenary power’s formative era “were not primarily focused on the President’s immigration power in relation to Congress” (pp. 7, 45–46). See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). Scholars treated other decisions from the same historical period similarly. See, e.g., Legomsky, *supra* note 36, at 257 (so treating *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)); Motomura, *Curious Evolution*, *supra* note 36, at 1634–36 (so treating *Fong Yue Ting* and *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892)).

³⁹ This early focus on constitutional judicial review — in contrast to plenary power and without much attention to separation of powers — may also have reflected an effort to probe how immigration law fit into U.S. public law scholarship generally.

noncitizen rights and responsibilities. A central tenet has been the idea that statutory commands as to formal immigration status cannot be taken at face value. Instead, extrastatutory factors decide the law's practical consequences for noncitizens including lawful permanent residents and the undocumented. These factors reflect decisions made in the executive branch.

For example, some scholarly strands view immigration law as a matter of citizenship⁴⁰ or as a setting for racial exclusion.⁴¹ Other strands look beyond legislation enacted by Congress to analyze noncitizens' access to public benefits⁴² and noncitizens' rights in the workplace.⁴³ The scholarship on immigration federalism that also emerged in the 1990s similarly rejected any assumption of congressional primacy.⁴⁴ Other work has likewise explored irregular (or unauthorized or undocumented) migration⁴⁵ and the connection between immigration law and criminal law.⁴⁶ In short, examples abound of scholarship that urgently strives to understand how immigration law actually operates and implicitly rejects primary reliance on what Congress enacted — that is, on the “conventional wisdom.”

B. Discretion, Delegation, and the “Shadow System”

When *The President and Immigration Law* discusses the domestic facets of the President's immigration power as a counterweight to Congress's role, the book devotes considerable attention to immigration enforcement. Cox and Rodríguez explain that deportation is central to immigration policy, and that deportation operates as “post-entry . . . ‘social control’” (pp. 81–82, 89).⁴⁷ This is a concept for which they

⁴⁰ See Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994).

⁴¹ See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525.

⁴² See Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425 (1995).

⁴³ Interestingly, *The President and Immigration Law* covers this topic in some depth as illustrating the gap between the law on the books and the law in action (pp. 122–24).

⁴⁴ See Linda S. Bosniak, *Immigrants, Preemption and Equality*, 35 VA. J. INT'L L. 179 (1994); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201 (1994); Peter J. Spiro, *The States and Immigration in an Era of Demi-sovereignties*, 35 VA. J. INT'L L. 121 (1994).

⁴⁵ See Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955.

⁴⁶ See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

⁴⁷ The authors quote DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 4–6 (2007).

duly credit Professor Daniel Kanstroom's 2007 book, *Deportation Nation* (p. 89).⁴⁸

Kanstroom wrote that a core function of deportation is “extended border control” — deporting noncitizens who evade border and entry controls, or who violate a condition of admission.⁴⁹ In contrast, he explained, post-entry social control means that the government monitors noncitizens long after they enter the United States.⁵⁰ Even for longtime lawful permanent residents, unacceptable political activity or a criminal conviction can lead to deportation.⁵¹ This understanding of what it means to be a lawfully residing noncitizen — an “eternal probation” or “eternal guest” model according to Kanstroom⁵² — is a key part of Cox and Rodríguez's explanation that domestic presidential power over immigration derives largely from decisions to enforce immigration law against these “guests,” and that these decisions are discretionary (pp. 87–92).

Cox and Rodríguez also discuss the undocumented population. They echo other scholars who have explained how the growth of this population reflects a long history of legislative and executive branch decisions.⁵³ Underenforcement of immigration laws on the southern border in the early 1900s ensured a subservient temporary labor supply (pp. 95–98). The Bracero Program, which had supplied agricultural workers from Mexico for several decades, ended in the 1960s (pp. 107–08). At around the same time, Congress imposed the first numerical limits on Mexican immigrants. The result was a dramatic increase in undocumented immigration in the 1970s (pp. 107–10). Because enforcement capacity is limited, actual enforcement patterns reflect discretionary decisions about when, where, and against whom the government will act.⁵⁴

Cox and Rodríguez join other scholars who have explained that vast discretion to enforce — or not to enforce — immigration law against people who *could* be deported is an essential element of modern U.S. immigration law history. Discretion makes life precarious, both for lawful permanent residents subject to an eternal probation model and for undocumented noncitizens who by definition may be removable (pp.

⁴⁸ *Id.* Kanstroom explained this concept earlier, in Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1897–98 (2000).

⁴⁹ Kanstroom, *supra* note 48, at 1906–07.

⁵⁰ *Id.* at 1907.

⁵¹ Cox and Rodríguez point out that probationary status is also built into the systems for labor immigration and immigration based on marriage (pp. 91–92).

⁵² KANSTROOM, *supra* note 47, at 6; Kanstroom, *supra* note 48, at 1907.

⁵³ See HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 34–55 (2014); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 58–61 (2004); Hiroshi Motomura, Essay, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2049–51 (2008).

⁵⁴ See MOTOMURA, *supra* note 53, at 46–52; Motomura, *supra* note 53, at 2050–54.

105–07, 240–42).⁵⁵ Discretion is the main source of domestic presidential power over immigration in what Cox and Rodríguez call the “shadow system” of immigration (pp. 103–14) based on “a profound mismatch between the law on the books and reality on the ground” (p. 111).

Immigration law scholars over the past several decades have devoted serious attention to this mismatch and its consequences for immigration law. I doubt that “[s]cholars have paid inadequate attention to this mismatch” between the law on the books and reality on the ground (p. 112).⁵⁶ In fact, many have considered how this outcome is tolerated and perhaps affirmatively desired by influential sectors of society (p. 128) and has “achieved a kind of (unsteady) equilibrium and acceptance” (p. 195).⁵⁷ This scholarship further undermines any suggestion that a conventional wisdom of congressional primacy prevails.

The key corollary of the vast discretion in immigration enforcement is also familiar to immigration law scholars. This is what Cox and Rodríguez call “de facto delegation” (p. 112) of enforcement discretion to an elaborate enforcement bureaucracy with many actors who exercise that discretion (pp. 92–105). This discretion has “often led to deliberate decisions to dramatically underenforce the immigration laws on the books” (p. 124).⁵⁸ The relevant actors include state and local government officers and employees, whose participation is essential for the enforcement bureaucracy to function (p. 135).

C. Familiar Answers, New Questions

Even if much in *The President and Immigration Law* will be familiar to readers who know immigration law, the book’s synthesis of this material is original and has much to teach even those who have been immersed for decades in immigration law and policy. Cox and Rodríguez offer less that is new in the specifics of what they say, but much more in *why* they say it and the big picture that emerges. Their book proves that scholarship can be pathbreaking by finding new meaning in what seems familiar or intuitive.

⁵⁵ A related ingredient is casting immigration law violations by the undocumented as crimes, sometimes making discretionary enforcement more severe (pp. 117–18).

⁵⁶ Relatedly, I doubt that this system “contrasts with the usual way scholars and lawyers think about delegation and executive authority in administrative law and separation of powers theory” (p. 105). For example, on ameliorating the mismatch, see generally Jason A. Cade, *Sanctuaries as Equitable Delegation in an Era of Mass Immigration Enforcement*, 113 NW. U. L. REV. 433 (2018).

⁵⁷ On tolerance, acquiescence, or approval, see MOTOMURA, *supra* note 53, at 52–55; Gerald P. López, *Don’t We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1718 (2012); and Motomura, *supra* note 53, at 2083–92.

⁵⁸ On the role of discretion in immigration enforcement, see generally SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* (2015).

What is novel in *The President and Immigration Law* is the question that Cox and Rodríguez answer with familiar material: How did the President come to exercise so much power over immigration? Though they rely on some understandings about undocumented noncitizens and lawful permanent residents in the United States that are widely shared, their book puts this knowledge into a new framework to understand this important facet of presidential power.

As I have explained in this Part II, much of the immigration law scholarship of the 1980s and 1990s closely analyzed plenary power, the role of courts, and constitutional judicial review.⁵⁹ After a flurry of attention to the connections between courts and an undifferentiated combination of the legislative and executive as the “political branches,” immigration law scholarship broadened its range of concerns while maintaining focus on the lives, rights, and voices of immigrants in the United States. But this scholarly evolution did not include intensive scrutiny of the presidency itself. For example, it did little to probe whether delegation by Congress is the reciprocal of presidential power.

The President and Immigration Law fills this big scholarly gap. This becomes especially clear in Chapter Seven, which analyzes in detail how interaction between the legislative and executive branches might harness the comparative advantages of both, while minimizing their vices (pp. 206–14). This perspective on separation of powers does not submerge or distract from the focus on immigrants that has been central to much immigration law scholarship. In fact, considering immigration law from the vantage point of an inquiry into presidential power deepens insights into the lives, rights, and voices of immigrants in three ways.

First, Cox and Rodríguez expand constitutional immigration law beyond an inquiry into individual rights by engaging more fully with structural and institutional issues. An example is their analysis of the 2012 U.S. Supreme Court decision in *Arizona v. United States*.⁶⁰ In that case, the federal government argued that federal law preempted Arizona Senate Bill 1070,⁶¹ which sought to involve state and local law enforcement agencies in federal immigration law enforcement.⁶² The Court found three provisions preempted on their face.⁶³ The Court let the fourth take effect, leaving for another day the question whether the provision might be preempted as applied.⁶⁴ Key to Justice Kennedy’s reasoning for the Court majority was what he considered “federal law” for

⁵⁹ See sources cited *supra* note 36.

⁶⁰ 567 U.S. 387 (2012).

⁶¹ S.B. 1070, 49th Leg., 2d Reg. Sess., 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, and 41).

⁶² *Id.* § 1; see *Arizona*, 567 U.S. at 393.

⁶³ See *Arizona*, 567 U.S. at 403, 407, 410.

⁶⁴ See *id.* at 415.

preemption purposes. He explained that federal law includes not just the letter of federal immigration statutes but also discretionary decisions by federal actors to enforce or refrain from enforcing immigration law.⁶⁵

Scholars before Cox and Rodríguez had made this point, but generally for a different purpose: to analyze how *Arizona* adds to doctrine on immigration federalism.⁶⁶ From this perspective, *Arizona* fits in a line of precedents that say when and how states and localities can adopt laws and policies affecting immigrants, and when and how states and localities intrude on federal prerogative and thus are preempted.⁶⁷ In this federalism scholarship, a main concern has been how states and localities affect immigrants and their communities, whether through enforcement or insulation from enforcement. For example, some scholars have voiced concern that delegating enforcement discretion to state and local actors risks opaque decisions that put discrimination beyond detection and remedy.⁶⁸

Cox and Rodríguez add uniquely to scholarly analysis of *Arizona* by explaining that the decision's significance is greater than what it says about federalism. If federal law includes discretionary enforcement decisions that govern the effects of statutes on the ground, then both Congress and the President make immigration law. On this understanding, *Arizona* is a landmark decision not just on federalism, but also on separation of powers (pp. 151–54).

Second, *The President and Immigration Law* links its broader analysis of the domestic aspects of the President's immigration power with the book's examination of its international aspects, which are less familiar than and rarely considered with the domestic. The result is a novel and more comprehensive understanding of presidential immigration power. Especially illuminating is how Cox and Rodríguez compare statutory parole and suspension authority with the nebulously anchored but pragmatically compelled discretion that is built into immigration enforcement (pp. 181–83).

An example, one that emerged after the book's publication and in the transition to the Biden presidency in early 2021, shows the significance of the link between the parole power, which is usually outward-facing, and domestic enforcement discretion. The now-traditional view of the Deferred Action for Childhood Arrivals (DACA) program is that

⁶⁵ See *id.* at 396.

⁶⁶ See MOTOMURA, *supra* note 53, at 121–30.

⁶⁷ See *id.*

⁶⁸ See, e.g., Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 584–608 (2017); Christopher N. Lasch et al., *Understanding "Sanctuary Cities"*, 59 B.C. L. REV. 1703, 1764–68 (2018); Hiroshi Motomura, *Arguing About Sanctuary*, 52 U.C. DAVIS L. REV. 435, 467–68 (2018); Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1857–58 (2011).

it combines forbearance from domestic immigration enforcement with some benefits, most importantly work authorization.⁶⁹ This perspective is consistent with seeing DACA as a program of “deferred action.” This is a concept that has long been the basis for decisions by the federal government to refrain from immigration enforcement against individual noncitizens.⁷⁰

Parole provides a conceptual and legal tool to reach the same result as DACA. Though parole is traditionally an outward-facing power that allows entry into the United States, the federal government has granted parole to undocumented noncitizens who are already on U.S. territory. This allows “parole-in-place” to operate like deferred action to protect undocumented family members of U.S. military personnel from the threat of arrest and removal from the United States.⁷¹

Cox and Rodríguez discuss how the Obama Administration could have adopted parole in 2012 to protect some noncitizens from the threat of arrest and removal from the United States, but it chose to use deferred action instead (pp. 181–83). In my view, the Biden Administration could replace DACA with parole because parole can reach similar outcomes by drawing on a different set of historical and legal precedents that may better withstand legal pushback on the ground from field offices and rank-and-file officers in immigration enforcement agencies. *The President and Immigration Law* enriches understanding of this option.

Third, Cox and Rodríguez put scholars of immigration law in much closer conversation with scholars in other fields of law. This broader readership is a good reminder that novelty of scholarly contribution depends on audience, and *The President and Immigration Law* is a book with several audiences. Chapters Seven and Eight, on prescriptions going forward, make plain the book’s breadth of purpose. For example, Cox and Rodríguez provide a textured analysis of a “co-principals” model of immigration law. This model tries to blend the unique virtues of congressional and presidential power, with each branch able to offset the deficiencies of the other, and with the judiciary playing a secondary but important role.

Cox and Rodríguez seem not to write these discussions for an audience especially familiar with immigration law. Instead, they seem to

⁶⁹ Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2020).

⁷⁰ See Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42, 42–50, 63 (1976).

⁷¹ See U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-0091, PAROLE OF SPOUSES, CHILDREN AND PARENTS OF ACTIVE DUTY MEMBERS OF THE U.S. ARMED FORCES, THE SELECTED RESERVE OF THE READY RESERVE, AND FORMER MEMBERS OF THE U.S. ARMED FORCES OR SELECTED RESERVE OF THE READY RESERVE AND THE EFFECT OF PAROLE ON INADMISSIBILITY UNDER IMMIGRATION AND NATIONALITY ACT § 212(A)(6)(A)(i), at 3 (2013).

address a broader readership interested in the lessons of immigration law for separation of powers, federalism, administrative law, foreign affairs, and U.S. history generally. These scholars, policymakers, and sophisticated lay readers may be unfamiliar with immigration law and policy, or with immigration scholarship or policy debates. For example, Cox and Rodríguez apply their deep expertise in immigration law to enrich ongoing scholarly conversations about “presidential administration,”⁷² “internal separation of powers,”⁷³ and other transsubstantive debates about presidential power. In this way, *The President and Immigration Law* is a vital bridge connecting U.S. public law to immigration law. But this is a two-way bridge that also connects immigration law to public law generally. Those whose principal foci are immigration law and closely related areas of immigrants’ rights have much to gain from understanding how immigration law looks from the perspective of U.S. public law generally, with a broader set of concerns about institutions and authority.

III. LOOKING AHEAD

The final third of *The President and Immigration Law* assesses the current state of presidential power over immigration. Cox and Rodríguez discuss what changes would be durable, wise, and effective as responses to exercises of presidential immigration power that may be arbitrary, opaque, or lawless. They argue for new restraints on executive branch decisionmaking (pp. 219–23), and they explore what might produce such changes.

Cox and Rodríguez articulate their prescriptions in what amounts to two different voices. One is more pragmatic, assuming limits on the politically possible, but trying to hold Presidents more accountable for discretionary decisions. The second is more aspirational. Here Cox and Rodríguez’s proposals are less likely to be implemented, but they more fully reflect their own views and values, including the need for fundamental changes to the current statutory foundation for presidential immigration power.

⁷² See Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347 (2017); Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. DISCOURSE 418 (2021); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015); Shalev Roisman, *Presidential Law*, 105 MINN. L. REV. 1269 (2021).

⁷³ See Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Gillian E. Metzger, Essay, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017).

I offer two critiques of Cox and Rodríguez's look at the future. First, they do not fully address the President's domestic power over immigration because they focus more on the symptoms rather than the causes of this domestic power's most troubling features. Second, Cox and Rodríguez do little to analyze the international aspects of the presidential immigration power. This shortfall is unfortunate because what the President does internationally to address migration in the coming years is likely to become at least as important as what the President does domestically.

A. *Controlling Presidential Power*

In their first voice, Cox and Rodríguez express hope for more self-policing by the President. Some approaches that they discuss seem more likely to succeed than others. Presidents have tried to restrain decisionmaking within the executive branch. For example, the Obama Administration tried to ensure that federal immigration enforcement adhered to priorities that identified some removable noncitizens as high priorities for arrest and removal and other removable noncitizens as less worthy targets of enforcement. As I explain later in this Part III, this effort led to several pre-DACA efforts to systematize prosecutorial discretion, and then to DACA itself.⁷⁴

But reliance on executive self-restraint offers little assurance or comfort when it is most needed, as the Trump Administration showed time and time again. Outlining the conditions for effective and reliable self-restraint within the executive branch is an especially difficult task. This Part III discusses what this would involve, but first it is important to say more about the challenges posed by the future of presidential immigration power.

One significant set of challenges beyond executive self-restraint involves the judiciary. Cox and Rodríguez envision a more consistent role for federal courts in checking presidential excesses. They would have courts more readily strike down any immigration law decision by the President if it fails either of two tests. The first test would focus mainly on matters of process, but with some substantive scrutiny. Decisions must reflect genuine deliberation and a sound empirical foundation, and decisions must serve some notion of the public interest (p. 230). The second test would ask if immigration decisions are consistent with the U.S. Constitution as evaluated by serious constitutional judicial review (pp. 234–36).

Assessing this suggested approach requires exploring the current efficacy of judicial intervention, assessing possible changes, and asking whether such changes will matter. As for process, the Administrative

⁷⁴ See *infra* p. 2830.

Procedure Act⁷⁵ (APA) already obligates executive branch actors to follow statutory requirements intended to ensure deliberation and transparency.⁷⁶ Federal courts have primary institutional responsibility to enforce APA requirements, and court intervention based on the APA can make a difference.

The most prominent recent example of meaningful judicial intervention based on the APA is *Department of Homeland Security v. Regents of the University of California*,⁷⁷ decided by the U.S. Supreme Court in 2020 after *The President and Immigration Law* went to press. *Regents* invalidated the Trump Administration's rescission of the DACA program for failure to fully consider several substantial factors bearing on whether DACA should be rescinded or continued.⁷⁸ One factor was the option to continue DACA as a program of forbearance from enforcement without continuing to grant work authorization and other benefits.⁷⁹ The Court also found that the Trump Administration failed to consider the extent of reliance on DACA by DACA recipients and others since the adoption of the program in 2012.⁸⁰

Greater transparency and deliberation to comply with APA-like standards can expose Presidents to greater public scrutiny and accountability for immigration decisionmaking. *Regents* reflected the high value that the U.S. Supreme Court places on these effects.⁸¹ The rationale is that executive branch decisions must have a degree of transparency, both to assure that government decisions reflect thorough public deliberation and to impose political accountability for those decisions. If a decision is reached publicly for reasons that are made public, the political process can hold the executive branch to account. The Court adopted a similar rationale — in insisting on transparency and some candor in disclosing the reasoning behind government decisions — to block the Trump Administration's attempt to add a question about U.S. citizenship to the 2020 Census.⁸²

But the efficacy of the APA and similar constraints is limited. The APA applies to agency action but not to decisions by the President.⁸³ The APA can make a difference where it applies, as it did to the

⁷⁵ 5 U.S.C. §§ 551, 553–559, 701–706.

⁷⁶ See *id.* § 706(2)(A) (providing that a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

⁷⁷ 140 S. Ct. 1891 (2020).

⁷⁸ *Id.* at 1901.

⁷⁹ *Id.* at 1910–13.

⁸⁰ *Id.* at 1913–15.

⁸¹ See *id.* at 1909.

⁸² See *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019).

⁸³ See Roisman, *supra* note 72, at 1271–73 (distinguishing between agency action governed by the APA and “presidential law,” *id.* at 1271 (emphasis omitted), to which the APA does not apply).

Department of Homeland Security's attempt to rescind DACA. In *Regents*, the Supreme Court applied the APA to invalidate that attempt. That rescission effort reflected a reluctance to accept political exposure and accountability, combined with failure to anticipate the application of basic administrative law by the courts. As an example of the latter, the Trump Administration did not heed the well-established legal rule that the validity of an executive branch decision is judged by the reasons articulated when the decision was made.⁸⁴ The Administration announced the rescission in September 2017.⁸⁵ For almost a year, it delayed publicly stating the reasons on which it would later rely in court.⁸⁶

But the real lesson of *Regents* and similar decisions may be that future Presidents and their subordinates need only gesture with more timeliness and some facial plausibility toward APA requirements. The judicial precedents tell a President how to comply with process-focused requirements in ways that may render those requirements toothless as long as the President shows some willingness to answer for a decision in the political arena. All of this suggests that Cox and Rodríguez may be too sanguine to characterize the APA as even a “modest” corrective to “the opacity and accountability defects of policymaking through enforcement” (p. 231).

Constitutional judicial review is another type of role for courts. To scrutinize the President's immigration decisions for adherence to constitutional norms, some judicial inquiry can reflect process values, especially procedural due process. Other potentially applicable constitutional norms are more substantive, such as a norm against racial or religious discrimination in immigration law decisions.⁸⁷ But the plenary power doctrine is a major obstacle to a meaningful constitutional role for courts in immigration law cases.⁸⁸ Courts and commentators typically apply this “immigration law” label to controversies involving a noncitizen's admission to the United States or continued presence on U.S. soil.⁸⁹ In such cases, constitutional judicial review is muted.

Cox and Rodríguez believe that plenary power does not dampen constitutional judicial review as severely as most immigration law scholarship has suggested (pp. 31–33, 235). This general argument appeared in immigration law scholarship no later than twenty years ago.⁹⁰ The idea is that constitutional challenges to immigration law decisions failed not because of the plenary power doctrine, but rather because they were

⁸⁴ *Regents*, 140 S. Ct. at 1907.

⁸⁵ *Id.*

⁸⁶ *See id.* at 1907–10.

⁸⁷ *See generally* Motomura, *Curious Evolution*, *supra* note 36.

⁸⁸ *Id.* at 1626.

⁸⁹ *Id.*

⁹⁰ *See* Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 *GEO. IMMIGR. L.J.* 257, 257–58 (2000).

inconsistent with the mainstream, non-immigration-related constitutional law of that same historical period.

To be sure, a few U.S. Supreme Court immigration law decisions can be explained by the general constitutional principles and culture of the relevant era without viewing constitutional judicial review in immigration law cases as truncated. This interpretation may be most accurate for the early plenary power cases of the 1880s and 1890s, which rejected constitutional claims in a historical period before the emergence of much of today's bedrock constitutional doctrine. *The President and Immigration Law* discusses *Chae Chan Ping v. United States*,⁹¹ the seminal 1889 Supreme Court decision, from this perspective (p. 32). Cox and Rodríguez's version of this argument also derives support from the exceptions to the plenary power doctrine that have developed over the decades. For example, courts are generally more receptive to constitutional challenges to the government's immigration law decisions when those challenges allege failure to meet constitutional standards for procedural due process.⁹²

However, many precedents in more recent decades show that constitutional judicial review continues to be much weaker in immigration law cases than in cases outside of immigration law. A telling example is *Department of Homeland Security v. Thuraissigiam*,⁹³ issued by the U.S. Supreme Court in 2020 after *The President and Immigration Law* went to press. In *Thuraissigiam*, a noncitizen asylum seeker had newly arrived on U.S. soil and had been apprehended twenty-five yards inside the southern border.⁹⁴ The central issue was whether he could invoke the writ of habeas corpus to challenge the lawfulness of detaining him pending his removal proceeding.⁹⁵

If Vijayakumar Thuraissigiam could invoke habeas jurisdiction, would he then prevail in arguing on the merits that the government's rejection of his asylum claim denied him procedural due process as required by the Constitution? The leading precedent most directly applicable to the facts in *Thuraissigiam* seemed to be *Yamataya v. Fisher*,⁹⁶ decided by the U.S. Supreme Court in 1903. In *Yamataya*, a Japanese immigrant had been admitted to the United States four days before an immigration inspector found that her admission had violated federal immigration law and twelve days before the federal government issued a

⁹¹ 130 U.S. 581 (1889). Even if the Supreme Court's central concern in the Chinese exclusion cases was "to articulate an affirmative conception of federal power to regulate immigration" (p. 33), this concern is consistent with creating a scheme that made it very hard to challenge the government's immigration law decisions on constitutional grounds.

⁹² See Motomura, *Curious Evolution*, *supra* note 36, at 1631.

⁹³ 140 S. Ct. 1959 (2020).

⁹⁴ *Id.* at 1964, 1967.

⁹⁵ *Id.* at 1963.

⁹⁶ 189 U.S. 86 (1903). This case is often referred to as *The Japanese Immigrant Case*.

warrant for her arrest.⁹⁷ The Court held that she could invoke procedural due process under the U.S. Constitution.⁹⁸ For decades, *Yamataya* has been understood to apply to noncitizens on U.S. soil regardless of their immigration status.⁹⁹ But the *Thuraissigiam* majority questioned whether the *Yamataya* principle applies when a noncitizen has not been inspected and admitted to the United States at a port of entry.¹⁰⁰

The significance of *Thuraissigiam* remains unclear. It may end up being limited to noncitizen apprehensions that occur a very short distance inside the border and a very short time after crossing into the United States. But the Supreme Court gestured toward some narrowing of the reach of constitutional judicial review in a case arising on U.S. territory. *Thuraissigiam* may suggest not only that the plenary power doctrine is alive and well, but also that the Court may expand the doctrine's reach and further limit constitutional judicial review in the coming years.

This reading of *Thuraissigiam* is consistent with prior Court decisions reinforcing the plenary power doctrine, including *Trump v. Hawaii*¹⁰¹ in 2018. In theory, expanding constitutional judicial review in immigration law cases would allow courts to rein in the President more effectively than they do today. But any such expansion would be inconsistent with current law and, in particular, with the plenary power doctrine, which seriously limits the ability of courts to take constitutional challenges seriously.¹⁰² This limitation, combined with the narrow scope of APA-type review, suggests that only the most resolute optimists will rely on courts to check presidential immigration power as it exists today.

B. Reducing Presidential Power

In their more aspirational voice, Cox and Rodríguez suggest changes beyond controlling presidential power as it exists today. Here they explore ways to alter the conditions that have allowed presidential power to expand (pp. 229–30). The approach would reduce the number of

⁹⁷ See *id.* at 87.

⁹⁸ See *id.* at 99–100.

⁹⁹ See Motomura, *Curious Evolution*, *supra* note 36, at 1638–39.

¹⁰⁰ See *Thuraissigiam*, 140 S. Ct. at 1981–83.

¹⁰¹ 138 S. Ct. 2392 (2018).

¹⁰² For cogent critiques of this narrow reading of the plenary power doctrine as reprised in *The President and Immigration Law*, see Lucas Guttentag, *The President and Immigration Law: The Danger and Promise of Presidential Power*, JUST SEC. (Oct. 19, 2020), <https://www.justsecurity.org/72863/the-president-and-immigration-law-the-danger-and-promise-of-presidential-power> [<https://perma.cc/28ZX-YYHW>]; and Aziz Huq, *Three Missing Pieces in The President and Immigration Law*, BALKINIZATION (Dec. 3, 2020, 9:30 AM), <https://balkin.blogspot.com/2020/12/three-missing-pieces-in-president-and.html> [<https://perma.cc/9QM8-4ZB7>].

noncitizens who are subject to discretionary enforcement. This reduction would close the gap between the law on the books and the law in action, in turn reducing the zone of discretion and limiting presidential power over immigration. As Cox and Rodríguez argue, reforms of this kind are essential to move away from the current reality that “enforcement judgments establish the ‘real’ primary rules for the regulatory regime” (p. 195).¹⁰³ The urgency of reducing the zone of discretionary enforcement (pp. 210–14) reflects recognition of not only the human costs for affected individuals and communities but also the resulting loss to the nation as a whole (pp. 240–41).

To limit executive discretion, Cox and Rodríguez offer two proposals that directly address the President’s discretion in enforcing immigration law domestically. One proposal would offer lawful immigration status to most of the current unauthorized population.¹⁰⁴ This should happen, they explain, both now and in the future as a periodic feature of U.S. immigration law (pp. 244–45). The second proposal would limit the removal of noncitizens from the United States. To this end, legislation could narrow the grounds of removability. Other legislation could introduce a blanket shield against the removal of longtime residents, even those unlawfully present (p. 245).

The starting premise for these changes is the historical account in *The President and Immigration Law* and previous scholarship showing how the current system of selective admissions and selective enforcement relies heavily on vast enforcement discretion. This history suggests strongly that presidential immigration power will remain robust until legislation shrinks the potentially removable population by conferring lawful immigration status on most or all undocumented noncitizens. Cox and Rodríguez’s second proposal — to narrow removability grounds and no longer remove noncitizens with longtime residence in the United States — relies on the same historically grounded discretion-limiting approach to presidential immigration power.¹⁰⁵

My response to these two proposals is to ask what would happen if they were implemented. If fewer noncitizens were potentially removable, the zone of enforcement discretion would shrink, and with it the President’s power over immigration. But this analytical arc in *The President and Immigration Law* seems too incomplete to be persuasive.

¹⁰³ Cox and Rodríguez are right that “congressional priorities” are not discernable in a way that guides, channels, or restricts the President’s enforcement discretion (pp. 198–202), and that Congress’s practical ability to direct or supervise the exercise of enforcement discretion is likewise limited (pp. 203–06).

¹⁰⁴ See generally MOTOMURA, *supra* note 53, at 41–55.

¹⁰⁵ See U.S. Citizenship Act, H.R. 1177, 117th Cong. (2021), <https://lindasanchez.house.gov/sites/lindasanchez.house.gov/files/2021.02.18%20US%20Citizenship%20Act%20Bill%20Text%20-%20SIGNED.pdf> [<https://perma.cc/UQ2N-5G5F>] (relying throughout on judicial and administrative discretion).

First, one-time or infrequent legalization, even if it is a meaningful temporary fix, is unlikely to be a durable solution. Even if the number of undocumented noncitizens in the United States declines, a lasting narrowing of enforcement discretion requires more than addressing that discretion directly. It also requires a basic realignment of the admissions system that has produced — and will likely re-produce — the discretionary enforcement zone that plagues immigration law today. To be sustainable, the admissions system must more closely match the demands in the U.S. economy for noncitizen labor.¹⁰⁶

Policy options include expanded temporary or permanent admissions. But these changes pose challenges. Temporary admissions are open to objections that diminish their political viability or hamper their effectiveness.¹⁰⁷ Similar obstacles complicate the expansion of permanent admissions, whether through revised admissions categories or periodic legalization of noncitizens who are unlawfully present.¹⁰⁸ Increases in temporary or permanent admissions are also politically vulnerable to narratives — whether well grounded or not — that cast new noncitizen workers as threats to the economic well-being of citizens and as causes of cultural anxiety.¹⁰⁹ Politically effective responses to economic or cultural concerns may require a government role for which the required support in society is lacking.¹¹⁰

I see a path out of this thicket, but responses to migration must be broader than legalization of the current undocumented population. Responses must also be broader than reworking the admissions system, even assuming that these two options are politically possible. The most promising and sustainable responses to migration require careful attention to the conditions in sending countries that influence decisions by individuals and families to emigrate.¹¹¹ Equally important are conditions in transit countries, which may sometimes become viable ultimate destinations for migrants.¹¹² These categories of origin and transit are fluid; some countries of transit are also countries of origin.

¹⁰⁶ This need to reform the admissions system limits the efficacy of reforms that focus principally on enforcement, such as the recommendations in Peter L. Markowitz, *The Constraints on Presidential Immigration Policy*, BALKINIZATION (Dec. 7, 2020, 9:30 AM), <https://balkin.blogspot.com/2020/12/the-constraints-on-presidential.html> [<https://perma.cc/6MEA-KH73>].

¹⁰⁷ See Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 499–502 (2020).

¹⁰⁸ Periodic legalization of undocumented noncitizens who have been in the United States for a period of time can have significant advantages over choosing immigrants through ex ante admissions (pp. 87–88). See also Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 847–52 (2007); Hiroshi Motomura, *Choosing Immigrants, Making Citizens*, 59 STAN. L. REV. 857, 858 (2007).

¹⁰⁹ See Motomura, *supra* note 107, at 528–37.

¹¹⁰ See *id.* at 541.

¹¹¹ See *id.* at 502–03.

¹¹² See *id.* at 521–23.

In turn, if the best responses to migration require serious bilateral and regional engagement with other countries,¹¹³ what are the implications for presidential power over immigration? Narrowing the zone of domestic enforcement discretion may not matter as much as the expansion of presidential immigration power over the past half-century suggests. Instead, the international dimension of the President's immigration power will likely be at least as important, and probably more important.

C. *Beyond the Domestic to the International*

In the international sphere, *The President and Immigration Law* suggests several ways to reshape the President's immigration power, but even if combined they do not go far enough. One reform would expand what is now parole authority under INA section 212(d)(5). The President would be empowered not only to grant parole but also to admit noncitizens in durable statuses leading to lawful permanent residence and a path to citizenship (pp. 245–46). Another reform would give the President a meaningful role in deciding the number of lawful immigrants admitted to the United States. This authority would resemble the presidential power under current law to set the level of refugee admissions (pp. 246–47).¹¹⁴ Cox and Rodríguez would also require more transparency when the President exercises authority under INA section 212(f) to suspend the entry of noncitizens (p. 246).¹¹⁵

Cox and Rodríguez do not explore these outward-facing proposals as fully as they analyze the domestic sphere, which is the main focus of their forward-looking discussion (p. 192). They address the future of the international aspects of presidential immigration power principally in two endnotes that readers will easily miss. One reads:

The President does possess other forms of power to address root causes of migration, to the extent those are found in country conditions abroad. His foreign affairs authorities theoretically enable him to address such root causes, but in reality these factors are largely out of the control of the United States and far more complex than the laws and policies of the United States that regulate immigration trends, whatever their source. (pp. 313–14 n.70)

In another endnote, Cox and Rodríguez write:

¹¹³ See *id.* at 510.

¹¹⁴ See Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 103 (adding INA § 207(a)(2)–(3), codified at 8 U.S.C. § 1157(a)(2)–(3)).

¹¹⁵ Cf. Tom Jawetz, *The President and Immigration Law: Restoring Faith in Our Immigration System Through Enforcement Discretion and Reform*, JUST SEC. (Oct. 14, 2020), <https://www.just-security.org/72815/the-president-and-immigration-law-restoring-faith-in-our-immigration-system-through-enforcement-discretion-and-reform> [<https://perma.cc/H8RJ-M5Z9>] (viewing “enforcement” to include enforcement of laws “that offer opportunities to gain freedom from coercion by obtaining relief from removal and legal status”).

Political theorists also grapple with the extent to which outright exclusion — the initial refusal of entry to the country — amounts to impermissible coercion. We focus here on deportation, because it is more central to our story of presidential immigration law, and because the debate over whether exclusion amounts to a form of direct and troubling coercion strikes as a difficult case. (p. 315 n.2)

These intriguing comments acknowledge the international aspects of presidential immigration power but seem intended mainly to explain why Cox and Rodríguez chose to keep their discussion of the international cursory. This choice may be unsurprising, given their focus on enforcement discretion. From this perspective, shrinking the discretionary zone is pivotal, and the parole and suspension powers operating internationally matter much less. But it is natural to ask what a fuller version of this quadrant on the international aspects of the future of presidential immigration power might have said.

I start my answer with what Cox and Rodríguez do say. Early in *The President and Immigration Law*, they lay the historical foundation for seeing presidential immigration power as a combination of domestic enforcement discretion and the outward-facing power to grant parole and suspend entry (p. 45). This history makes clear that the domestic and international aspects of the President's immigration power did not evolve separately. In fact, they have been intertwined. Cox and Rodríguez's historical account supports the view that the international aspects of the President's immigration power created conditions that allowed the President's domestic immigration power to expand.

For example, the international immigration power to negotiate the Bracero Program with the Mexican government contributed to the U.S. economy's dependence on cheap labor from Mexico during a formative historical period.¹¹⁶ This dependence led in the 1960s and 1970s to the dramatic increase in undocumented migration from Mexico, and in turn to the rise of the deportation state and to the normalization of vast presidential discretion over enforcement (pp. 41–45). The use of parole to let large numbers of forced migrants into the United States coincided over time with the growth of the undocumented population. A fair inference from Cox and Rodríguez's analysis of these concurrent mid-twentieth-century trends is that the repeated use of the parole power shifted the culture of immigration law to one in which vast discretion within a system of selective admissions and selective enforcement seemed unremarkable.

The link between the international and the domestic also runs in the opposite direction. Another fair inference from Cox and Rodríguez's analysis is that domestic enforcement discretion as to the undocumented

¹¹⁶ See MOTOMURA, *supra* note 53, at 39–42; Motomura, *supra* note 53, at 2049–51.

population may have laid the foundation for the broad use of the suspension power that the U.S. Supreme Court endorsed in *Trump v. Hawaii*.¹¹⁷ Recall that supporters of DACA have defended the program as an exercise of broad presidential discretion to refrain in a systematized way from enforcement against a large group of undocumented young people. This broad view of the President's domestic immigration power is consistent, at least in general terms, with the U.S. Supreme Court's willingness to allow the President's suspension power to authorize exclusion orders against majority-Muslim countries and to sustain those orders against constitutional challenges. Cox and Rodríguez at least imply these connections between the domestic and the international aspects of presidential immigration power.

The next question — but one that Cox and Rodríguez do not pose or answer — is what the international dimension of the President's immigration power needs to address.¹¹⁸ U.S. responses to migrants coming to the United States from Central America offer a complex but instructive example. Both the Obama and Trump Administrations looked beyond domestic enforcement — and also beyond border enforcement — to address migration from Central America since 2014.

The Obama Administration put some stock in the Alliance for Prosperity, an initiative to foster economic development in Central America.¹¹⁹ The Trump Administration took a quite different approach, effectively withdrawing from the Alliance.¹²⁰ Like the Obama Administration, however, the Trump Administration came to rely heavily on diplomacy. These efforts led, as Cox and Rodríguez note, to agreements with Honduras, El Salvador, and Guatemala that try to shunt asylum seekers to those countries (p. 35).¹²¹

During the Trump Administration, arrangements with Mexico — both a country of origin and a country of transit for immigration to the United States — were an essential facet of immigration policy. Similar developments are occurring elsewhere in the world. Turkey and Jordan are countries of both origin and transit for migration to the European Union. There is great potential — but also much peril to avoid — in arrangements with, and investments in, countries of origin and transit. These relationships may be able to give people a real option to stay at

¹¹⁷ See 138 S. Ct. 2392, 2410–15 (2018).

¹¹⁸ I generally endorse the emphasis on the outward facing in Alan Bersin, *The President and Immigration Law Series: Presidential Power, Migration Management, and Foreign Affairs*, JUST SEC. (Oct. 16, 2020), <https://www.justsecurity.org/72872/the-president-and-immigration-law-series-presidential-power-migration-management-and-foreign-affairs> [<https://perma.cc/58D8-8CHW>].

¹¹⁹ Motomura, *supra* note 107, at 510.

¹²⁰ See *id.* at 510 & n.220.

¹²¹ See, e.g., Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims, Guat.-U.S., July 26, 2019, T.I.A.S. No. 19-1115.

home and not migrate at all, or to return to their countries of origin after temporary migration to a country like the United States.¹²²

Other ad hoc arrangements will become at least as important as traditional immigration legislation of universal application. The probable trend is that immigration law will become more closely tied to the conduct of foreign affairs.¹²³ An example from the historical account in *The President and Immigration Law* is the mixture of grants of parole and suspension-based interdiction in multiple administrations' responses to Cuban and Haitian migrants trying to reach the United States (pp. 59–65). In the future, parole and suspension may be just two types of foreign affairs initiatives that try to respond to migration in international terms as part of efforts to keep domestic challenges more manageable.

This look to the future leads me to doubt the accuracy of saying, as Cox and Rodríguez do, that in the nineteenth century, “immigration bore even more directly on foreign policy than it does today” (p. 23). I also doubt that Cox and Rodríguez are right that the “new crisis” of increased migration northward from Central America is “much smaller in scale” than the crisis posed by unauthorized migration over the last four decades, even if this migration “is much different in character” (p. 244). Civil war, societal dysfunction, the breakdown of security, dire economic conditions, and climate change are likely to dictate the new reality of migration on a broad scale, not just for the United States but throughout the world.¹²⁴

Given the range of world events that influence migration, some versions of the parole and suspension powers also seem unavoidable. Even if immigration systems minimize the role of enforcement discretion, it is hard to imagine doing completely without ad hoc vehicles for allowing noncitizens into the country, at least temporarily. Likewise, it is hard to imagine the complete elimination of ad hoc authority to suspend entry. These powers are part of a larger framework for irreducible international aspects of the President's immigration power as an aspect of foreign affairs.¹²⁵ Cox and Rodríguez note at one point that these sorts of “national-security- and diplomacy-based foundations for presidential authority to act on immigration were never entirely abandoned” (p. 45), and this remains true today.

¹²² See Motomura, *supra* note 107, at 502–17.

¹²³ We may have moved beyond what Cox and Rodríguez call the “utterly ordinary times” in which enforcement discretion is “the more significant, persistent source of presidential control over immigration policy” (p. 105).

¹²⁴ See generally Motomura, *supra* note 107 (arguing that the current asylum law regime fails to account for migration shaped by unsettled political conditions, civil wars, environmental degradation, and other causes of large-scale forced migration).

¹²⁵ See David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 39–50 (2015).

The next question is whether these ad hoc powers should be powers of Congress rather than of the President. But Congress is what Cox and Rodríguez aptly call “sluggish” (p. 192) — ill-suited to crafting, debating, and enacting legislation that responds nimbly enough to developments outside the United States that call for responses to migration.¹²⁶ This critique of Congress, often directed toward its inability to design lawful admission categories that are sensitive to trends in labor markets or the economy in general, applies with even greater force to congressional inability to craft U.S. government responses to world events that influence decisions by people to migrate across international borders.

Still a further essential question is how to limit the improper exercise of the international aspects of the President’s immigration power. For presidential immigration power that operates outwardly and is tied closely to foreign affairs, this is a daunting challenge. It is even more daunting than the challenge that Cox and Rodríguez anticipate for those who would limit the domestic presidential immigration power based on discretionary enforcement.

D. Reimagining Limits on Presidential Power

Limiting excesses in the use of presidential immigration power is more difficult in the international sphere because some of the conceptual and doctrinal tools that might rein in improper exercises of domestic presidential power based on enforcement discretion may be less available internationally. In the United States, arguments for statutory and constitutional protections for both lawful permanent residents and undocumented noncitizens have been based on a civil rights framework for the past several generations. The conceptual foundation of this framework was that noncitizens inside the United States, whether lawfully or unlawfully present, should be treated as members of the U.S. national community who have legitimate claims to constitutional and other rights. This argument has not always prevailed, but it has been the dominant mode for statutory and constitutional arguments on behalf of noncitizens.¹²⁷

But consider what happens when legal and political debate shifts away from the undocumented population that was the focus of attention in the last few decades of the twentieth century and the first decade of the twenty-first. Immigration debates changed in the mid-2010s, when renewed upheavals in Central America led large numbers of forced migrants to travel northward, overland to the southern border of the

¹²⁶ Cox and Rodríguez observe that, as compared to the legislative process, “[e]xecutive branch deliberation, especially when lawyers are involved, is more likely to be grounded in reasons and operational realities” (p. 210). Other comparative advantages of executive branch decisionmaking include greater knowledge based on both expertise and awareness of the consequences of legislation (pp. 207–10).

¹²⁷ See Motomura, *supra* note 107, at 463–79.

United States. Few had direct personal connections with the United States or other claims to U.S. national belonging to support the sort of civil rights arguments that longtime residents have made. Instead, these migrants' claims were based on a body of law that protects refugees by granting asylum.

The refugee protection scheme in current law emerged after World War II.¹²⁸ It established a standard for protection based on whether migrants would have a well-founded fear of persecution if forced to return to their home countries.¹²⁹ Adopting this standard, the 1951 Geneva Convention Relating to the Status of Refugees obligated its parties to *nonrefoulement* — the duty not to return migrants to face persecution at home.¹³⁰ This obligation had a generous veneer, but the Convention was drafted in ways that limited the reach of its protections and left intact bedrock concepts of border control and national sovereignty.¹³¹ This post-World War II system of refugee and asylum law is ill suited for responding to large groups of migrants whose protection claims may prompt sympathy, but whose individual claims often fail to thread the doctrinal needle as successful asylum claims must do.

In this setting, neither the civil rights framework that has tried to protect noncitizens in the United States nor the asylum system for forced migrants — nor the combination of them — is likely to be an effective response. Singly or together, these twin threads no longer seem viable as legal, political, or conceptual approaches to migration management. Similar shifts away from twentieth-century assumptions are evident in much of the world.¹³² What matters are ways to influence the complex migration-related relationships that the United States has with other countries. The next step is to understand and respond to excesses in the exercise of the outward-facing power on which Presidents will increasingly rely to address and influence migration patterns. These exercises of power will occur when Presidents grant parole, suspend entry, and, most importantly, make a wide variety of arrangements with sending and transit countries to influence migration choices.

Adapting to new realities of the international exercise of the President's immigration power must start by acknowledging that exercising this power is not necessarily improper just because it helps some people more than others. Every facet of immigration law makes some noncitizens “winners” and some “losers,” and leaves others in between.

¹²⁸ See *id.* at 480.

¹²⁹ See *id.* at 482 (quoting INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)).

¹³⁰ *Id.* at 480.

¹³¹ See *id.* at 480–83.

¹³² See *id.* at 484–85. Cox and Rodríguez note that the Refugee Act of 1980 gives the President authority to set the annual number of refugees to be admitted to the United States (p. 69); this contrasts with the system of deciding asylum applications filed at the U.S. border or inside the United States, see Motomura, *supra* note 107, at 481.

Because immigration law is the legal manifestation of a border separating insiders from outsiders, some line-drawing is unavoidable.

When is line-drawing improper? A baseline expectation is some degree of transparency, so that the President's exercise of immigration power cannot escape legal and political scrutiny. This approach leads Cox and Rodríguez to emphasize transparency (pp. 231–34), an emphasis that I endorse. But, in addition, I recognize that achieving transparency — to lay the foundation for accountability — can be especially daunting in the context of international agreements and arrangements.¹³³ In the general area of international law, even basic transparency vehicles such as Federal Register publication are notably absent.¹³⁴

As difficult as it is to achieve transparency, it is also important to impose substantive constraints on the international exercise of presidential immigration power.¹³⁵ To explore what these substantive constraints might be, I start with an “easy” case, even if there is nothing easy about it under current doctrine. A test for the efficacy of limits on presidential decisionmaking asks if a decision would be invalidated if substantial evidence shows that it discriminates on the basis of race or religion. It is hard to have faith in limits on the improper exercise of presidential immigration power if racial or religious discrimination would escape judicial scrutiny.¹³⁶

Current doctrine, especially the U.S. Supreme Court decision in *Trump v. Hawaii*, does little to justify such faith. But how might current doctrine be modified to reverse what is most troubling about *Trump v. Hawaii*? Not every presidential exercise of the suspension power will be improper or unconstitutional. That said, the fatal flaw in *Trump v. Hawaii* was the Court's failure to take seriously the entry ban's effects on U.S. citizens. The result was not just to draw a line between citizens and noncitizens, but also to discriminate on the basis of national origin or religion against citizens with close connections to directly affected

¹³³ See generally Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1287–92 (2018) (arguing that the presidential creation of international agreements suffers from a lack of transparency, and proposing reforms); Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629 (2020) (using empirical data to argue that the system of transparency for U.S. international executive agreements is one of “dysfunction and nonaccountability,” *id.* at 632).

¹³⁴ See Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 140, 242–53 (2009) (arguing for an Administrative Procedure Act for international law to create “greater openness, public participation, and transparency,” *id.* at 140).

¹³⁵ One such constraint could be stronger arbitrariness review under the APA. See Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790791 [<https://perma.cc/4SKA-QYYM>] (explaining how APA arbitrariness review can facilitate political accountability).

¹³⁶ Cox and Rodríguez note the “specter of racial profiling looms particularly large in a discretionary system” (p. 217).

noncitizens. The entry ban treated those citizens substantially worse than citizens without such connections. This effect transformed outward-facing discrimination into discrimination that operates inside the United States against some U.S. citizens.

The best path forward is to curtail the inhibiting effects of the plenary power doctrine on constitutional judicial review by considering the effects of immigration law decisions on U.S. citizens.¹³⁷ The dissents in *Trump v. Hawaii* show how constitutional judicial review can operate in the presidential immigration power's international dimension.¹³⁸ In that dimension, decisions similar to parole and suspension and arrangements with other countries are the focus of political and judicial attention. Of course, there will be hard cases that require agonizing line-drawing, but at least courts should weigh the factors that should matter.

Trump v. Hawaii was an especially egregious case of religious discrimination, even if the Supreme Court rejected that constitutional challenge. And much discrimination will not lend itself to the forms of proof that may allow challengers to prevail in court. This is especially likely as presidential power over immigration moves outside of decisions like parole and suspension and into areas of diplomatic negotiations and ad hoc arrangements with other countries. As this happens, the most promising approaches may rely on institutional design, especially patterns of delegation.

Here I return to the idea of self-restraint that I mentioned but did not discuss fully at the start of this Part III. As I mentioned, bare faith in self-restraint inspires little confidence that it will be effective when effectiveness is most needed. Transparency and other process requirements can matter, but they are often inadequate to counter presidential overreach. But it may be more promising to consider patterns of delegation that reflect careful allocation of power among executive branch actors.¹³⁹ This promise may be especially justified if constitutional judicial review is enhanced beyond what current doctrine allows, and institutional design and delegation can operate to give indirect effect to more robust constitutional norms.

So far, I have spoken of "the President" as a single actor, deferring until now the issue of decisionmaking within the executive branch. But the President's power over immigration can be in the hands of the President, political appointees, or career civil servants of many possible

¹³⁷ See generally Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1942–52 (1996) (book review); Hiroshi Motomura, *Whose Immigration Law?: Citizens, Aliens, and the Constitution*, 97 COLUM. L. REV. 1567, 1582–87 (1997) (book review).

¹³⁸ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2429–33 (2018) (Breyer, J., dissenting); *id.* at 2433–48 (Sotomayor, J., dissenting).

¹³⁹ See Katyal, *supra* note 73, at 2318; Metzger, *supra* note 73, at 444–45.

levels and locations.¹⁴⁰ Delegation matters because it can erode transparency and the likelihood that decisions are consistent with substantive values such as nondiscrimination. *The President and Immigration Law* makes this general point by examining the Obama Administration's DACA program (pp. 163–80, 220–21).

Here Cox and Rodríguez parallel several scholars who likewise recognized that DACA was meant principally to neutralize resistance in U.S. Immigration and Customs Enforcement (ICE) field offices to efforts to set enforcement priorities at the highest levels of the Department of Homeland Security.¹⁴¹ DACA effectively transferred discretionary authority to grant deferred action from ICE field personnel to central office personnel within U.S. Citizenship and Immigration Services,¹⁴² the federal agency that adjudicates petitions for immigration benefits.

DACA allowed high-level decisionmakers at the Department of Homeland Security to assert political control to achieve a bureaucratic centralization of enforcement discretion (p. 164). One effect was to limit the zone in which discretion could be exercised without scrutiny. This is a transparency concern, but it is informed by substantive values. In contrast, delegation can bury decisions deep in the bureaucracy, so that the result is opacity and a significant risk of discrimination that escapes detection and remedy. This use of centralization versus delegation offers some limits on the President's exercise of immigration power, even in its international dimension, as a middle option between bare transparency and strong forms of constitutional judicial review.¹⁴³

Overall, Cox and Rodríguez provide a historical foundation for discussing the future of the international aspects of presidential immigration power. And they suggest outward-facing expansions of presidential power that will include a direct role in lawful admissions. But these are relatively modest ways to address the international future, given the

¹⁴⁰ I share the concern that Cox and Rodríguez's "binary juxtaposition between presidential centralization and unfettered dispersion to street-level discretion is uncomplete." Huq, *supra* note 102.

¹⁴¹ See Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama's Immigration Actions*, 50 U. RICH. L. REV. 665, 684–88 (2016); Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58, 89–90 (2015); Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 22–24 (2015); Ahilan Arulanantham, *The President's Relief Program as a Response to Insurrection*, BALKINIZATION (Nov. 25, 2014, 5:00 PM), <https://balkin.blogspot.com/2014/11/the-presidents-relief-program-as.html> [<https://perma.cc/QF9G-G9CN>]. Cox and Rodríguez made this point around the same time. See Cox & Rodríguez, *The President and Immigration Law Redux*, *supra* note 32, at 135–42.

¹⁴² Motomura, *supra* note 141, at 24–25.

¹⁴³ Prophylactic centralization to control misuse or excess of presidential immigration power that may result from delegation resembles the use of preemption to prevent states and localities from exercising power that may discriminate and also may escape detection and remedy. See MOTOMURA, *supra* note 53, at 132–38. I agree with Cox and Rodríguez that "arguments from federalism made by each side primarily serve their respective visions of immigration enforcement rather than a principled conception of the proper structure of constitutional government" (p. 157).

vastness of the international challenges that will emerge as migration patterns evolve, and as a broader array of international agreements becomes the dimension in which governments can most effectively address migration. Only a well-designed combination of transparency, substantive constraints, and institutional design will allow sound presidential responses while limiting presidential excesses.

CONCLUSION: BACK TO THE BEGINNING

My call for attention to international arrangements brings this Review full circle, back to the book's discussion of the historical period when the President's interventions in matters of migration were rooted in the President's power over treaties. In the coming decades, the outward-facing exercise of presidential immigration power is likely to become more important than it seems today. Presidents will act not just through parole and suspension but, perhaps more importantly, by entering into arrangements with other countries to address migration. The President's immigration power may be returning to the international sphere where it first emerged. This shift may make limiting the excesses of presidential immigration power an even more daunting challenge than it is today. Meeting this challenge starts by recognizing its complexity. *The President and Immigration Law* takes the first essential step on this path.