
SELF-HELP STRUCTURALISM

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Self-help enclaves in the law permit an actor to take otherwise unlawful action to redress another's wrongdoing. In Self-Help and the Separation of Powers, David Pozen suggests bringing self-help into the constitutional fold. Pozen dexterously navigates his thesis through a number of separation-of-powers thickets, but he does not factor in federalism. Filling that void, this Article constructs a two-dimensional model of "self-help structuralism"—one that accounts for federalism and separation of powers simultaneously. More

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specifically, this Article illustrates how states engage in self-help too, often in looping feedback with the federal branches. Appreciation for this cross-dimensional dynamic offers better purchase on the idea that constitutional self-help is happening. Yet it also instigates a fresh mix of anxieties over whether to legalize the practice. For example, should states also be licensed to invoke self-help against each other, or against the federal government? Can federal acts of self-help preempt state law? More generally, what meta-principles should guide the analysis when our dual commitments to federalism and separation of powers collide? This Article takes a first pass at these and related questions. But just asking them advances the idea of constitutional self-help to new ground. Whatever political, legal, and academic battles over constitutional self-help lie ahead, they will need to be fought on the field of “self-help structuralism.”

More broadly, this Article contributes to a larger project of cross-dimensional structuralism. Creative solutions to problems in public governance along one dimension (whether federalism or separation of powers) can have structural spillovers into the other. When separation of powers and federalism overlap and intersect—and, increasingly they do—a cross-dimensional approach of the type modeled here can be analytically necessary. Innovations that may look good in isolation can take on new hue when assayed in full structural context.

INTRODUCTION

Two wrongs generally do not make a right. But exceptions exist. Self-help enclaves in the law permit an actor to take otherwise unlawful action to redress another’s wrongdoing.¹ For example, a landowner can commit an otherwise unlawful battery to repel a trespass;² a sovereign nation can take otherwise unlawful measures to counter another sovereign’s unlawful transgression.³ Whether for reasons of fairness or efficiency, the law sometimes permits actors to take matters into their own hands.⁴

¹ *Self-Help*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “self-help” as an “attempt to redress a perceived wrong by one’s own action rather than through the normal legal process”). Throughout, I use the term self-help in its conditional sense: namely, the taking of action that would be otherwise unlawful but for its remedial purpose to prevent or cure another’s legal wrong. Cf. Catherine M. Sharkey, *Trespass Torts and Self-Help for an Electronic Age*, 44 TULSA L. REV. 677, 683 (2009) (describing the “conventional conception of self-help as a privilege to do something that would otherwise be legally actionable in order to prevent or cure a legal wrong”).

² See RESTATEMENT (SECOND) OF TORTS § 79 (1965).

³ See U.N. Charter art. 51 (recognizing an “inherent right of individual or collective self-defense” for states subject to actual or imminent armed conflict, until the Security Council takes measures to “maintain international peace and security”); Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT’L ORG. 185, 202 (highlighting “the right of self-help” in classical international law).

⁴ See Richard A. Epstein, *The Theory and Practice of Self-Help*, 1 J.L. ECON. & POL’Y 1,

This Article explores the possibility of constitutional self-help, whereby one arm of government takes otherwise impermissible action to redress another arm's constitutional wrong. As David Pozen provocatively suggests in *Self-Help and the Separation of Powers*, this system may already be upon us.⁵ President Obama, for instance, has pushed against constitutional and statutory limits in immigration, health care, education, environmental regulation, and more—proclaiming “We Can’t Wait!” for Congress to “do its job.”⁶ Meanwhile, Republican detractors in Congress often cite the President’s failure to “faithfully execute” the law as a reason for their intransigence, in the form of blocking legislation,⁷ blocking presidential nominees for cabinet-level positions,⁸ and otherwise. In these recursive showdowns, each branch lays blame with the other to explain or justify their own questionable action.⁹

26 (2005) (discussing the conventional justifications for self-help); Sharkey, *supra* note 1, at 683-84 (same).

⁵ David E. Pozen, *Self-Help and the Separation of Powers*, 124 *YALE L.J.* 2, 8 (2014) (“[M]any of the most pointed ways in which Congress and the President challenge one another can plausibly and profitably be modeled as self-help.”); *see also id.* at 8 (explaining that while doctrines have developed in many areas of law to allow for unilateral measures to cure or prevent misconduct, such self-help has not been formally recognized for constitutional separation of powers between the federal branches of government).

⁶ *See, e.g.*, President Barack Obama, Remarks by the President on the Economy and Housing (Oct. 24, 2011), <http://www.whitehouse.gov/the-press-office/2011/10/24/remarks-president-economy-and-housing> [<http://perma.cc/C9PD-LG7F>] (“So I’m here to say to all of you . . . we *can’t wait* for an increasingly dysfunctional Congress to do its job. Where they won’t act, I will.” (emphasis added)); Seung Min Kim & Jennifer Epstein, *Obama: GOP Failed to Pass a ‘Darn’ Immigration Bill*, *POLITICO* (July 1, 2014, 8:28 AM), <http://www.politico.com/story/2014/06/obama-immigration-reform-108447.html> [<http://perma.cc/RTV6-HEA3>] (“I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing . . .”).

⁷ *See* Esther Yu-Hsi Lee, *Boehner Won’t Advance Immigration Reform Until Republicans Can Trust Obama*, *THINK PROGRESS* (Feb. 6, 2014, 12:26 PM), <http://thinkprogress.org/immigration/2014/02/06/3258921/boehnerimmigration-distrust-obama/> [<http://perma.cc/SS7D-Z9WD>] (quoting House Speaker John Boehner as stating: “There’s widespread doubt about whether this administration can be trusted to enforce our laws and it’ll be difficult to move any immigration legislation until that changes.”).

⁸ *See* Seung Min Kim, *The GOP Plan for Lynch: It’s All About Immigration*, *POLITICO* (Nov. 11, 2014, 11:37 AM), <http://www.politico.com/story/2014/11/loretta-lynch-nomination-gop-112765.html> [<http://perma.cc/YQ4M-ZC2Z>] (“Senate Republicans plan to turn the battle over attorney general nominee Loretta Lynch into a larger debate over immigration, using the confirmation hearings as a proxy war over presidential power rather than a debate over Lynch’s qualifications.”).

⁹ The idea of separation of powers self-help contributes to a larger literature on interbranch conflict. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 *U. PA. L. REV.* 991, 1004 (2008) (modeling institutional conflict through the lens of “showdowns”); Mark Tushnet, *Constitutional Hardball*, 37 *J. MARSHALL L. REV.* 523, 523 (2004) (modeling interbranch conflict through a lens of “constitutional hardball”).

Prescriptively, and more ambitiously, Pozen suggests legalizing separation of powers self-help.¹⁰ This move would transform federal interbranch self-help from something that the President and Congress *do* to something they may *do lawfully* under certain circumstances.¹¹ For example, perhaps the President's constitutional duty to "faithfully execute" the law could be relaxed to redress a maximally obstructionist Congress.¹² Bringing self-help to the legal fore, Pozen argues, might help us better assess and regulate these and other types of federal interbranch conflict.¹³

This Article intervenes in three major respects. First, it highlights an overlooked complication in Pozen's account: namely, separation of powers self-help can have structural spillovers into federalism. Second, this Article identifies a parallel possibility for state self-help, and its spillovers into separation of powers. Third, and more generally, this Article appreciates that acts of government self-help can and often will impact private interests.¹⁴ That, in turn, presumably entails at least *some* judicial role policing self-help.¹⁵ Yet, what that role could or should be is anything but sure.

Unlike "constitutional showdowns" and "constitutional hardball," legitimate acts of constitutional self-help would require a triggering wrongful act by a rival federal branch, as well as other regulative features. *See infra* notes 31-42 and accompanying text (summarizing Pozen's suggested approach to interbranch self-help).

¹⁰ Pozen, *supra* note 5, at 61 (suggesting we bring separation of powers self-help within the "precincts of law"); *id.* at 70 (suggesting that self-help be submitted to "the language of the law"); *id.* at 10 (suggesting that we interpret the existing "interbranch conflict in more law-like terms"); *id.* at 89 (concluding that self-help "reprisals . . . do not necessarily entail lawlessness"); *see also* William P. Marshall, *Warning!: Self-Help and the Presidency*, 124 YALE L.J. FORUM 95, 100 (2014), <http://yalelawjournal.org/forum/self-help-and-the-presidency> [<http://perma.cc/8BE9-MLTW>] ("[Pozen's] *Self-Help* thesis then is not the recognized law of the land and, if accepted, would move the law of interbranch relations onto new ground.").

¹¹ Central to Pozen's legalization thesis is that self-help can be limited, as it is in other contexts, by requirements of proportionality, proper motive, advance notice, and other requirements. *See* Pozen, *supra* note 5, at 56-70; *see also infra* notes 31-42 and accompanying text (summarizing Pozen's suggested approach).

¹² *See* Pozen, *supra* note 5, at 7; *see also* U.S. CONST. art. II, § 3, cl. 5 (requiring the President to "take Care that the Laws [are] faithfully executed"); Pozen, *supra* note 5, at 76 (suggesting that a self-help lens may require us to "think much more carefully about possibilities for executive misbehavior above and beyond the written constitutional floor").

¹³ Pozen, *supra* note 5, at 10, 84-85.

¹⁴ I thank Aziz Huq for helping me consolidate these points, and for suggesting the term "structural spillovers."

¹⁵ Pozen's separation-of-powers account presumes no meaningful judicial role. *See* Pozen, *supra* note 5, at 22 (focusing on "the forms of interbranch self-help that . . . begin, and often end, outside the courts"). *But cf.* Marshall, *supra* note 10, at 112-15 (critiquing Pozen's prescriptive thesis on justiciability grounds). However, given that courts tend to treat state-state, federal-state, and federal-federal institutional conflict differently, it is not clear what the courts' approach would or should be in cases where states invoke legal self-

These interventions are not designed to solve the puzzle of whether separation of powers self-help would strike a better balance than either the one experienced today or prescribed by the Founders in the written Constitution.¹⁶ Rather, my objective is to finish emptying the puzzle box before we start. Pozen dexterously navigates his thesis through a number of separation-of-powers thickets, including the possibility of escalating cycles of recrimination between the federal political branches and the potential for self-help abuse by the President in particular.¹⁷ Critically, however, Pozen does not consider the implications—and escalating complications—of legalizing self-help in our federalist system.¹⁸ However one weighs the costs and benefits of legalizing self-help along the separation-of-powers dimension, the calculus may shake out quite differently when assayed in full structural context.

As will be shown, reframing constitutional self-help in cross-dimensional terms instigates a dizzying mix of new anxieties for the balance of powers and the rule of law.¹⁹ For instance, does it make sense to have a system in which the federal government can exercise self-help, but not states, or vice versa? Or do we need self-help symmetry, allowing self-help for both federal and state units, or neither, but not one or the other? Assuming structural self-help symmetry, what happens in the event of a clash between legitimate acts of federal self-help and legitimate acts of state self-help? More specifically, can federal acts of self-help preempt state law? More generally, what meta-

help against each other or against the federal government. Cf. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 129-30 (2001) (asserting that the Court engages in more “aggressive judicial enforcement” of separation of powers issues than federalism issues due to a “double standard” of judicial review); Steven G. Calabresi, *Separation of Powers and the Rehnquist Court: The Centrality of Clinton v. City of New York*, 99 NW. U. L. REV. 77, 83 (2004) (articulating the pro-separation of powers position of the Burger Court in contrast with the later pro-federalism years of the Rehnquist revolution). The discussion below explores and contextualizes this recurring theme.

¹⁶ See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1941 (2011) (describing the disconnect between the textual requirements of separation of powers and the way separation of powers is experienced and practiced today).

¹⁷ See Pozen, *supra* note 5, at 80-84 (articulating a number of potential pitfalls).

¹⁸ Pozen tees up the possibility of state self-help. See Pozen, *supra* note 5, at 87-88 (discussing historical examples of state self-help, including secession and immigration laws). But he does so only in passing, and more as a parallel rather than as an intersecting and interposing complication for his separation-of-powers thesis. More specifically, Pozen does not consider how the possibilities of state self-help might change the cost-benefit calculus of separation of powers self-help. Nor does he consider how separation of powers self-help might impact the federal-state balance of power, or our federalist system more generally.

¹⁹ Of course, separation of powers, federalism, and the rule of law are all complex and contestable concepts. To the extent relevant, and where possible, this Article notes the points of departure.

principles should guide the analysis when our dual commitments to federalism and separation of powers collide?

I could go on; these questions are merely representational. But just to ask them moves the idea of constitutional self-help to new ground: whatever political, legal, and academic battles over constitutional self-help lie ahead, they will need to be fought on the field of “self-help structuralism.” Emphatically, Pozen’s election to start with separation of powers is not wrong; it is just incomplete until we account for federalism too.

This Article proceeds in five parts. Part I does two things. First, it provides a summary of Pozen’s descriptive and prescriptive accounts of separation of powers self-help. Second, it introduces a self-help structuralism matrix, which, in broad strokes, conceives of four possible self-help systems to organize the discussion that follows.²⁰

Part II picks up where Pozen’s descriptive claim of separation of powers self-help leaves off. Here, I suggest a parallel phenomenon of state self-help. But, more importantly, I hope to demonstrate how acts of federal and state self-help interact and intersect in looping feedback. Appreciation for this cross-dimensional dynamic is critical: redesign along one structural dimension will necessarily affect and be affected by the other.

Part III offers a mostly skeptical view of Pozen’s idea to legalize separation of powers self-help. Although I agree that such self-help is *happening*, I worry—more than he—about what *legalizing* self-help portends for the balance of power, both horizontally among the federal branches and vertically between the federal and state governments.

Of course, judgments about what a proper balance entails and how to achieve it are familiar departure points in constitutional theory. Thus, it should not be surprising that Pozen and I (or anyone else) arrive at different conclusions in these respects. But some of our differences trace to competing outlooks on how the system would operate if self-help were legal. More specifically, Pozen anticipates that legalizing self-help might work to deter violations of first-order constitutional norms.²¹ Further, he argues that legalizing self-help would enable politicians to “confess violations of first-order norms,” which in turn can shield those norms from the distorting effects of short-run political gains.²² If accurate, these projections could promote the rule of law.²³ But I see matters playing out differently. For reasons discussed in

²⁰ See *infra* Section I.B.

²¹ See Pozen, *supra* note 5, at 61-62.

²² *Id.* at 61-62, 77.

²³ See Pozen, *supra* note 5, at 77. The rule of law defies easy definition. Throughout, I use the term to capture the principles that law should be relatively stable, predictable, transparent, and influential on society, including on government officials in particular. See, e.g., Erwin Chemerinsky, *Toward a Practical Definition of the Rule of Law*, JUDGES J., Fall 2007, at 4, 5; see also BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 93-94 (2004).

Part III, legalizing self-help would likely *entice*, not deter, violations of first-order constitutional norms. Moreover, politicians would likely invoke self-help as an *alternative* justification for otherwise constitutionally dubious action, not as a stand-in for more conventional legal defenses. If so, then many of the first-order concerns that Pozen seeks to avoid will both collapse into and be aggravated by second-order self-help contests.²⁴

Part IV imagines the structural inverse of Pozen's prescriptive claim, whereby states but not the federal branches might legally invoke self-help. Here, my concerns for the balance of power and the rule of law take on new hue. Expanding the potential cast of self-help actors to the states seems a dangerous proposition. Previously declared off-the-wall state tactics, like nullification, might suddenly be back in play.²⁵ Of course, this does not directly impugn Pozen's prescriptive suggestion to legalize federal branch self-help. But those who worry about legalizing *state* self-help should be prepared to explain why legalizing *federal* self-help is any less troubling or more satisfying.

Finally, Part V envisions a system where both federal and state institutions can lawfully engage in self-help—both intra-governmentally to redress acts of co-ordinate government units, and inter-governmentally to redress institutional acts across the federal-state divide. A quick peek into this Pandora's Box may suggest, to some, that we are better off keeping it closed (and double-bolted, just to be sure).

At retail, this Article both responds to and extends Pozen's thought experiment. His idea to bring self-help into the constitutional fold is endlessly intriguing, forcefully advanced, and perfectly timed. It is hard to view the political dysfunction raging today without believing that something should be done.²⁶ Whether constitutional self-help is part of the answer will ultimately depend on a large and indeterminate set of considerations, which this Article helps bring to the fore.

At wholesale, however, this Article also contributes to a broader project of "cross-dimensional structuralism."²⁷ The connections between separation of

²⁴ See *infra* notes 120-141 (explaining these points in more detail).

²⁵ See *Cooper v. Aaron*, 358 U.S. 1, 17-18 (1958) (holding that state nullification of Supreme Court precedent is constitutionally illegitimate). For a revisionist treatment of state nullification, see generally THOMAS E. WOODS, JR., *NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY IN THE 21ST CENTURY* (2010) (making the case in favor of state nullification). See also Jack M. Balkin, "*Wrong the Day It Was Decided*": *Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 679 (2005) (explaining that constitutional historicism holds that what are "off-the-wall" legal claims "change over time in response to changing social, political, and historical conditions").

²⁶ See Marshall, *supra* note 10, at 95 (offering this observation).

²⁷ See David S. Rubenstein, *Administrative Federalism as Separation of Powers*, 72 WASH. & LEE L. REV. 171, 171-78 (2015) (coining the term, and arguing that proposals for administrative federalism can and should be made with an eye toward separation of powers).

powers and federalism are far less obvious today than at the founding,²⁸ and some might think less important. But so long as separation of powers and federalism continue to exert gravitational pull on our constitutional order, we must attend to how they might work together: either toward their intended “double security” for liberty;²⁹ or, conversely, toward tyranny. The point here is not to connect federalism and separation of powers to their original forms. Rather, it is to appreciate how these structural sub-strands might reconnect to *each other*—in their emerged, and still emerging, permutations.

Too often, we identify a problem in public governance and propose a creative solution along one structural dimension (whether separation of powers or federalism). Yet we miss how that innovation will impact, and be impacted by, the other structural dimension. That is, we overlook important cross-dimensional dynamics when federal and state domains overlap and interact.³⁰ A cross-dimensional evaluation of the type modeled here may be analytically rewarding in any number of structural contexts. And, toward that end, this Article hopes to stir more than a few pots.

²⁸ See THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961) (“In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.”).

²⁹ *Id.*

³⁰ An emerging thread of scholarship seeks to overcome this quiescence. For some of my own work on “cross-dimensional structuralism,” see Rubenstein, *supra* note 27, at 171-78 (arguing that proposals for administrative federalism can and should be made with an eye toward separation of powers); David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1167-69 (discussing interplay between the separation of powers nondelegation maxim and federalism’s preemption doctrine); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL’Y 815 (2013). For other important work on the contemporary relationships between federalism and separation of powers, see, for example, Jessica Bulman-Pozen, *Federalism as a Safeguard of Separation of Powers*, 112 COLUM. L. REV. 459 (2012) (describing how cooperative-federalism arrangements can promote separation of powers); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001) (describing how formal lawmaking procedures promote federalism); Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 829-30 (2004) (discussing relationship between federalism and separation of powers in the foreign affairs context); Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL’Y 181 (1998) (describing how cooperative-federalism arrangements can promote separation of powers); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 707-08 (2001) (same); Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J.L. ECON. & POL’Y 17 (2013) (tracing important connection between federalism and separation of powers in *Erie*).

I. CONSTITUTIONAL SELF-HELP: DEFINITIONS AND FRAMING

This Part provides additional texture to Pozen's descriptive and prescriptive treatments of separation of powers self-help. Pozen's account is analytically rich and nuanced in ways beyond what this summary can hope to capture. In what follows, I offer only the highlights necessary to bring his account and my extensions into view. More refined points will be saved for later parts of the Article.

A. *Pozen's View*

Separation of powers self-help, as Pozen describes it, is "the unilateral attempt by a government actor to resolve a perceived wrong by another branch . . . through means that are generally impermissible but that are assertedly permitted in context."³¹ This form of self-help is "conditional," insofar as it depends upon another's wrongful act.³² Under Pozen's articulation, both "big-C" and "small-c" constitutional violations by one branch can potentially trigger self-help by another.³³ Here, the "big-C" Constitution refers to the canonical document, as interpreted by the Supreme Court.³⁴ The "small-c" constitution, by contrast, refers to "a broader set of emergent, quasi-legal norms that organize the working of government," but which are not tied to the written Constitution.³⁵ Just to name a few, "small-c" constitutional norms include the President's acquiescence to Supreme Court decisions with which he disagrees, the Senate's deference to presidential nominees for cabinet-level executive officials, and Congress's maintenance of lower federal courts.³⁶

Of course, whether a particular government action qualifies as a constitutional violation can often be fairly disputed. For example, congressional obstructionism is almost certainly not a "big-C" problem, though reasonable minds might disagree on whether it is a "small-c" constitutional

³¹ Pozen, *supra* note 5, at 12 (emphasis omitted).

³² *Id.* at 11-12 (distinguishing "conditional" self-help from "general" self-help, the latter of which refers to helping oneself in ways that are perfectly legal and that do not depend on the wrongfulness of another's action). When referring to self-help herein, I mean "conditional" self-help.

³³ *Id.* at 27 ("Interbranch self-help attaches not only to legal rules grounded in the Constitution's text but also to a broader set of emergent, quasi-legal norms that organize the workings of government.").

³⁴ *Id.* at 10 n.23, 66-67.

³⁵ For useful discussions of "small-c" constitutional norms, which are sometimes referred to in the literature as "constitutional conventions," see generally AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* ch. 9 (2012); GEOFFREY MARSHALL, *CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY* 12-13 (1984).

³⁶ See James G. Wilson, *American Constitutional Conventions*, 40 *BUFF. L. REV.* 671-738 (1992) (discussing these and many other examples).

violation or none at all.³⁷ But, provided that the President “perceives” that Congress committed a constitutional violation (via obstructionism or otherwise), that is enough under Pozen’s conception to trigger—although not necessarily justify—an act of presidential self-help.³⁸

Pozen’s prescriptive claim would bring constitutional self-help to the legal fore, at least with respect to separation of powers. This move, according to Pozen, could provide legal structure and a better foundation for understanding and regulating the uses and abuses of constitutional self-help.³⁹ The federal branches would not have free license to self-help, he argues, because *self-help itself is a norm* that constrains—even as it justifies—remedial acts.⁴⁰ On this conception, self-help can be cabined by principles of proportionality, categorical prohibitions on certain uses, temporal limitations, procedural requisites of advance notice and demand, and other regulative features.⁴¹ In short, Pozen’s legalization thesis would not condone all attempted uses of interbranch self-help. Rather, it would legitimate some uses of self-help, as circumstances warrant.⁴²

B. *Two-Dimensional Reframing*

Like Pozen’s approach, mine maintains a distinction between self-help that may be happening (descriptive) and whether self-help should be legalized under certain circumstances (prescriptive). Building on his work, however, this Article widens the constitutional self-help frame to account for separation of powers and federalism, simultaneously. Considered together, these variables yield four broad possibilities depicted below:

³⁷ Compare Pozen, *supra* note 5, at 78 (allowing for the possibility that congressional obstructionism can qualify as a “small-c” constitutional violation), with Marshall, *supra* note 10, at 101-05 (arguing that congressional obstructionism is not a constitutional violation—“big-C,” “small-c,” or otherwise). The imprecision of determining whether a constitutional violation has occurred is, in fact, a reason to worry about legalizing constitutional self-help. This Article develops this theme throughout, *infra*.

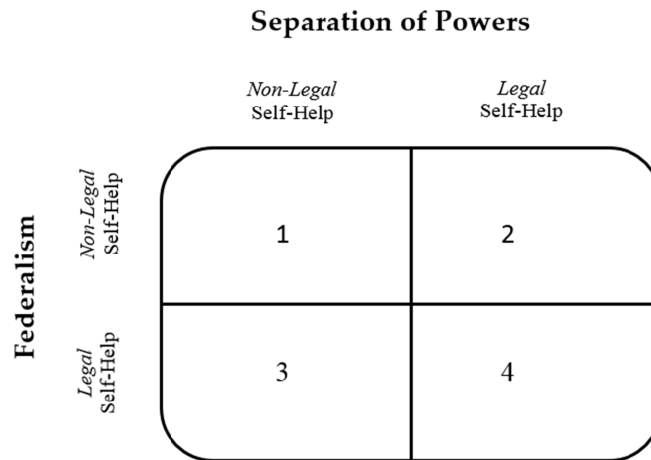
³⁸ Whether a federal branch’s act of self-help is legitimate and/or lawful, for Pozen, will depend on other considerations. See Pozen, *supra* note 5, at 58-61 (suggesting limits on separation of powers self-help); see also *supra* notes 31-37 and accompanying text (discussing some of these limitations); *infra* notes 39-42 and accompanying text (same).

³⁹ See, e.g., Pozen, *supra* note 5, at 74-75 (arguing that a “self-help framework” can offer a “richer set of resources with which to investigate” the “legal and normative character” of federal interbranch conflict).

⁴⁰ *Id.* at 70-76 (“[N]umerous conventions regulate constitutional self-help.”).

⁴¹ *Id.* at 62-70.

⁴² *Id.* at 76, 89.



Quadrant 1: This quadrant roughly approximates our extant system. Self-help is arguably happening—both at the federal and state levels—but in legally inchoate ways.⁴³ Moreover, acts of federal and state self-help interact and intersect in looping feedback, as demonstrated below through cutting-edge examples in immigration, health care, education, and more.

Quadrant 2: This quadrant best approximates Pozen’s prescriptive claim. In this imagined system, self-help by the federal political branches (but not the states) would be a legitimate tool of constitutional redress when circumstances warrant. As envisioned here, the federal branches could self-help to redress each other’s constitutional wrongs, in ways that might—though not necessarily—affect state interests. This quadrant differs from Quadrant 1 in

⁴³ See Pozen, *supra* note 5, at 78-79 (acknowledging that, in litigation settings, the President’s lawyers do not seek to defend their action in self-help terms). Indeed, when the Solicitor General suggested during oral argument in *Noel Canning* that “the recess power may now act as a safety valve given [congressional] intransigence,” members of the Court were hostile to the suggestion, Transcript of Oral Argument at 21, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (No. 12-1281), and implicitly rejected it in 9-0 ruling against the administration, *Noel Canning*, 134 S. Ct. at 2550 (overruling President Obama’s recess appointments to the National Labor Relations Board). For more on the Senate engaging in self-help in reaction to Presidential recess appointments, compare Seth Barrett Tillman, *Senate Termination of Presidential Recess Appointments*, 101 NW. U. L. REV. COLLOQUY 82 (2007), with Brian C. Kalt, Response, *Keeping Recess Appointments in Their Place*, 101 NW. U. L. REV. COLLOQUY 88 (2007).

two respects: first, self-help would be legal; second, it would be legal for the federal political branches only.

Quadrant 3: This quadrant imagines the inverse of Quadrant 2, where states (but not the federal political branches) could lawfully invoke self-help against each other and/or against the federal branches under certain circumstances. At the extreme, previously discredited tactics like state nullification of federal law may dangerously re-emerge.⁴⁴ Short of that, less extreme acts of state resistance, which I call “neo-nullification,” might fall within legal bounds.⁴⁵ This could include, for example, state action that does not declare federal law null, but which is purposefully in tension with federal law. Further, states conceivably could exercise self-help against each other, conjuring the ghosts of our pre-Constitutional past under the Articles of Confederation.⁴⁶ If this seems wildly outlandish, or dangerous, keep reading. That is part of the point.

Quadrant 4: This quadrant approximates an imagined system where both state and federal arms of government could lawfully exercise self-help under certain circumstances. This quadrant treats self-help symmetrically, as does Quadrant 1. The critical difference, however, is that in Quadrant 1 self-help is happening in legally inert ways, whereas in Quadrant 4 self-help would enjoy some yet-to-be-determined legal cover.

Although highly stylized, these quadrants provide useful starting points for understanding the self-help system we have (Quadrant 1), in relation to Pozen’s prescriptive separation of powers thesis (Quadrant 2).⁴⁷ Further, this two-dimensional matrix contextualizes the system we could have if Pozen’s prescriptive thesis were inverted to apply only to the states (Quadrant 3), or extended to encompass both federal and state institutions (Quadrant 4). The discussion below is organized around these four possibilities, beginning with Quadrant 1 and ending in Quadrant 4.

II. CONSTITUTIONAL SELF-HELP: IN ACTION

This Part develops a cross-dimensional account of Pozen’s descriptive claim that constitutional self-help is happening. As he suggests, our era of political dysfunction may simply reflect an episode of recursive self-help: the President

⁴⁴ See *infra* notes 161-164 (collecting sources on nullification).

⁴⁵ See *infra* notes 165-179 and accompanying text.

⁴⁶ Cf. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring) (“If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.”).

⁴⁷ My sense is that either Pozen did not consider his proposal in these asymmetrical terms, or if he did, that Quadrant 3 was a theoretical nonstarter. But those who care to defend the separation of powers self-help asymmetry of Quadrant 2 will need to show why it is preferable to the federalism self-help asymmetry in Quadrant 3 (and, for that matter, preferable to the symmetrical self-help structures in Quadrants 1 and 4). Pozen makes the case for preferring Quadrant 2 over Quadrant 1, but his analysis ends there.

makes law to correct for Congress's wrongs; Congress fails to make law because it cannot trust the President to faithfully execute it; and so on. If two wrongs do not make a right, then maybe three, four, or more will. And, if you are struggling to figure out who "started it," just consult MSNBC or Fox News.

This is an important story to tell; but it is only half of it. States are engaging in self-help too—simultaneously, and often iteratively, with the federal branches.⁴⁸ Indeed, some of the very examples Pozen employs to frame separation of powers self-help⁴⁹ can be reframed in cross-structural terms.⁵⁰ Consider the following examples:

- Some claim that the President is not "tak[ing] care" to "faithfully execute" Congress's immigration laws.⁵¹ So Arizona and other states took it upon themselves to pick up the enforcement slack,⁵² despite the constitutional norm that immigration regulation is vested solely in the federal government.⁵³ Moreover, in reaction to Congress's failure to pass comprehensive immigration reform, the President has attempted to unilaterally confer legal permission to millions of undocumented immigrants to reside and work in the United States.⁵⁴ But Arizona,

⁴⁸ One should also assume that self-help is happening *within* states—for example, between a state's political branches. Although surely interesting, and likely relevant to the mechanics of self-help in action, I bracket this complication for future consideration. As will be seen, matters are complicated enough without it.

⁴⁹ See Pozen, *supra* note 5, at 5 (immigration and education); *id.* at 42-43 (health care).

⁵⁰ See *infra* notes 52-66 and accompanying text.

⁵¹ U.S. CONST. art. II, § 3, cl. 5.

⁵² See Beason-Hammon Alabama Taxpayer and Citizen Protection Act, No. 2011-535, 2011 Ala. Laws 677 (codified as ALA. CODE, §§ 31-13-1 to 31-13-30 (2011)); Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. §§ 11, 13, & 41). *But see* Arizona v. United States, 132 S. Ct. 2492, 2497 (2012) (enjoining some, but not all, of Arizona's immigration-related laws).

⁵³ See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1886-93 (1993) (discussing the emergence of federal exclusivity in the field of immigration, but also explaining that it was not so for the first hundred years of our nation); see also *Truax v. Raich*, 239 U.S. 33, 42 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government."). As Cristina Rodriguez and others have explained, the distinction between "immigration regulation," within the federal government's exclusive province, and permissible state regulation that affects immigrants, can be hard to maintain and arguably should be discarded. See, e.g., Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571 (2008) ("[T]he federal government, the states, and localities form part of an integrated regulatory structure that helps the country as a whole to absorb immigration flows and manage the social and cultural change that immigration inevitably engenders.").

⁵⁴ See Jennifer Epstein, 'Come Out of the Shadows': Obama, At Last, Unveils Sweeping Action on Immigration, POLITICO (Nov. 21, 2014, 12:55 PM), <http://www.politico.com/story/2014/11/obama-immigration-action-113072.html>

which perceives the President's action to be unconstitutional, has sought to deny driver's licenses and other local benefits to this class of undocumented immigrants.⁵⁵

- Some say that Congress passed the Affordable Care Act without bipartisan support and in excess of its enumerated powers.⁵⁶ Thus, states responded with their own "Health-Care Freedom" laws, which declared that their residents did not have to purchase health plans.⁵⁷ The states passed these statutes in anticipation or in response to the Affordable Care Act's plain terms to the contrary,⁵⁸ and in derogation of the constitutional norm that federal law is supreme.⁵⁹ Moreover, in a show of force that threatened the Act's viability,⁶⁰ a large number of states elected not to set up their own health insurance exchanges, despite having fought successfully in Congress for the statutory right

[<http://perma.cc/E592-27QW>] (announcing Obama's plan to shield up to five million undocumented immigrants from deportation); *see also infra* notes 102-105 and accompanying text (discussing these initiatives). *But cf.* *Texas v. United States*, Civ. No. B-14-254, 2015 WL 648579 (S.D. Texas Feb. 16, 2015) (holding that states would be injured, for purposes of establishing standing, if the Obama administration's program of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) went into effect), *aff'd*, *Texas v. United States*, No. 15-40238, 787 F.3d 733 (5th Cir. 2015) (denying the administration's request to stay the district court's preliminary injunction).

⁵⁵ *See, e.g.*, *Ariz. Exec. Order No. 2012-06*, 18 *Ariz. Admin. Reg.* 2237 (Sept. 7, 2012), http://apps.azsos.gov/public_services/register/2012/36/governor.pdf [<http://perma.cc/B6T6-JSUD>] (directing state agencies to take necessary steps to "prevent [Deferred Action for Childhood Arrivals] recipients from obtaining eligibility . . . for any . . . state identification, including a driver's license"). *But see* *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (enjoining Arizona's policy of denying drivers' licenses to such beneficiaries on equal-protection grounds).

⁵⁶ *See* Brief for Center for Constitutional Jurisprudence et al. as Amici Curiae Supporting Respondents at 6, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (arguing that the "presumption of constitutionality" that [the] Court has traditionally bestowed upon Congressional action is substantially weakened" for the Affordable Care Act because it was enacted without bipartisan support).

⁵⁷ Richard Cauchi, *State Laws and Actions Challenging Certain Health Reforms*, NAT'L CONFERENCE OF STATE LEGISLATURES (last updated Apr. 9, 2015), <http://www.ncsl.org/research/health/state-laws-and-actions-challenging-ppaca.aspx> [<http://perma.cc/LK8B-NYRU>] (providing a survey of these laws).

⁵⁸ *Compare* 26 U.S.C. § 5000A (2012) (requiring as part of the Affordable Care Act, Pub. L. No. 111-148, "minimum essential healthcare coverage"), *with* MONT. CODE ANN. § 2-1-501 (2014) ("[A]n agency of [Montana], may not implement or enforce in any way the provisions of Public Law 111-148 . . . that relates to the requirement for individuals to purchase health insurance and maintain minimum essential health insurance coverage.").

⁵⁹ *See* U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

⁶⁰ This effort to undermine the Affordable Care Act failed. *See* *King v. Burwell*, 135 S. Ct. 2480 (2015).

to set up and control their own exchanges.⁶¹ In response, the Obama administration promulgated an IRS regulation⁶² that arguably re-wrote key provisions of the Act⁶³ in ways that undermined this state resistance, but that never could have survived the legislative process.

- Some claim that Congress imposed unreasonable burdens and penalties on non-complying states under the No Child Left Behind Act.⁶⁴ When efforts fell short to amend that law in Congress, the Obama administration accomplished many of its redesign objectives unilaterally through conditional waivers, which allow states to avoid the Act's penalties provided that consenting states comply with newly imposed administrative standards.⁶⁵ Some states are now resisting the very conditions that they agreed to in the waivers, arguing that the Executive's conditions were unlawful or ill-advised to begin with.⁶⁶

⁶¹ See Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 *FORDHAM L. REV.* 1749, 1760-65 (2013) (discussing some of the federalism bargains that led to, and were probably necessary for, passage of the Affordable Care Act).

⁶² 26 C.F.R. § 1.36B-2(a)(1) (2014) (allowing a taxpayer to receive an insurance subsidy regardless of whether her insurance is purchased on a state or federal exchange).

⁶³ See Jonathan H. Adler & Michael Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 *HEALTH MATRIX* 119, 119 (2013) (arguing that the IRS rule violates the Affordable Care Act). *But cf.* Abbe Gluck, *Symposium: The Grant in King – Obamacare Subsidies as Textualism's Big Test*, *SCOTUSBLOG* (Nov. 7, 2014, 12:48 PM), <http://www.scotusblog.com/2014/11/symposium-the-grant-in-king-obamacare-subsidies-as-textualisms-big-test/> [<http://perma.cc/F6VU-V3RZ>] (defending the IRS regulation on textualist grounds).

⁶⁴ No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 9401, 115 Stat. 1425, 1972-75 (2002) (codified at 20 U.S.C. § 7861 (2012)).

⁶⁵ See *ESEA Flexibility*, U.S. DEP'T OF EDUC. <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> [<http://perma.cc/E473-SZST>] (last modified Feb. 25, 2015) (explaining the federal government invited the states to request flexibility regarding specific requirements of No Child Left Behind Act in exchange for rigorous and comprehensive State-developed plans); see also Joy Resmovits, *No Child Left Behind Debate Centers on Federalism*, *HUFFINGTON POST* (Aug. 16, 2011, 1:02 PM), http://www.huffingtonpost.com/2011/08/16/no-child-left-behind-reauthorization-federalism_n_927718.html [<http://perma.cc/N8PQ-8Y7J>] (describing the Obama administration's "unprecedented use of executive power to work around" the No Child Left Behind Act); Joy Resmovits, *Obama Administration Issues No Child Left Behind Waiver Renewal Guidance*, *HUFFINGTON POST* (Nov. 13, 2014, 7:59 PM), http://www.huffingtonpost.com/2014/11/13/obama-no-child-left-behind_n_6153176.html [<http://perma.cc/62HZ-3NHH>] (reporting that states adopted Common Core to satisfy the waiver conditions).

⁶⁶ See, e.g., Complaint at 2, *Jindal v. U.S. Dep't of Educ.*, No. 14-CV-534, 2015 WL 854132 (M.D. La. Feb. 26, 2015), available at <http://apps.washingtonpost.com/g/documents/local/jindal-lawsuit-against-obama->

Of course, the descriptive account offered here is both definitionally and analytically contingent: whether self-help is happening depends on (1) how self-help is defined and (2) whether a particular act meets that definition.⁶⁷ But these checkpoints are more essential to Pozen's descriptive account than to mine, which is mostly derivative. *If* self-help is happening among the federal political branches, then it is fair to understand certain state acts as self-help too.⁶⁸ So construed, constitutional self-help is not just happening—it is happening in iterative and often seamless ways across structural boundaries.

III. LEGALIZING SEPARATION OF POWERS SELF-HELP?

This Part offers a mostly skeptical view of Pozen's prescriptive thesis to legalize separation of powers self-help, captured in Quadrant 2. Here, it will be useful to recall that Pozen's legalization thesis would not condone all attempted uses of federal interbranch self-help. Rather, legal self-help would be rimmed with qualifications, such as proportionality, categorical prohibitions on certain uses, temporal limitations, procedural requisites of advance notice and demand, and others. In short, on Pozen's view, whether an act of federal self-help should qualify as legal, or legitimate, would depend on a range of considerations and surrounding circumstances.⁶⁹

While I tend to agree that separation of powers self-help is happening, I worry more than he does about what legalizing self-help portends for the horizontal and vertical balances of power, as well as more generally for the rule of law. I consider each below.

administration/1208/ [http://perma.cc/2PC6-9BHL] (bringing suit by the Louisiana governor challenging legality of the President's education initiatives); Derek W. Black, *Federalizing Education by Waiver?*, 68 VAND. L. REV. 607, 659 (2015) (“[T]he waiver process's front-end efficiency was largely a product of the states having little choice but to side-step difficult local problems of politics and law, which resurfaced later when important constituents caught up to the change.”); Martha Derthick & Andy Rotherham, *Obama's NCLB Waivers: Are They Necessary or Illegal?* EDUC. NEXT (Spring 2012), <http://educationnext.org/obamas-nclb-waivers-are-they-necessary-or-illegal/> [http://perma.cc/9LZN-BJSL] (“Given the uncertain legal ground on which its new regime of not-quite-regulation rests, the department could face some unusual dilemmas if it attempts to bring federal power to bear against dissenters.”). Black offers an extensive account challenging the legality of the executive's conditional waiver program under NCLB. *See generally* Black, *supra*. For a general defense of the waivers, see David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013).

⁶⁷ *See supra* Section I.A (providing definitions and limitations).

⁶⁸ For some additional examples of what may qualify as state self-help, see *infra* notes 165-175 and accompanying text.

⁶⁹ *See supra* notes 31-42 and accompanying text (summarizing Pozen's prescriptive account).

A. *Balance of Power*

1. Horizontal Balance of Federal Power

a. *Political Branches*

Legalizing separation of powers self-help could dangerously distort the balance of power among the federal branches in favor of the President.⁷⁰ The Executive is arguably the most dangerous federal branch already.⁷¹ As William Marshall has explained, in some detail, legalizing self-help threatens to tip the horizontal balance of power even further in the Executive's direction.⁷² This likely result stems, in part, from Congress's collective action problems, the distorting force of motivational bias, and partisan politics.⁷³

Relative to Congress, the President will have many more opportunities and temptations to invoke self-help. Increasingly, the public expects the President to get the job done, and the President's legacy may depend on him doing so.⁷⁴ Consider, in this regard, President Obama's remark that "*regardless of what Congress does, ultimately I'm the President of the United States and [the people] expect me to do something about it.*"⁷⁵ By contrast, Congress is a "they" not an "it."⁷⁶ That makes congressional self-help more difficult, if for

⁷⁰ See Marshall, *supra* note 10, at 98 ("Allocating to the presidency the additional tool of self-help along with its already formidable arsenal would only exacerbate the considerable imbalance among the branches that already exists."). Like Pozen, Marshall does not factor in federalism in his treatment of separation of powers self-help.

⁷¹ See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1727 (1996) (discussing how the executive branch eclipsed the legislative branch as the most powerful); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 507 (2008) (explaining the causes of expanding presidential power).

⁷² See generally Marshall, *supra* note 10.

⁷³ See *id.* at 105-08 (advancing this claim); see also NLRB v. Noel Canning, 134 S. Ct. 2550, 2606 (2014) (Scalia, J., concurring) ("[W]hen the President wants to assert a power and establish a precedent, he faces neither the collective-action problems nor the procedural inertia inherent in the legislative process."); Curtis A. Bradley & Trevor Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 443 (2012) (discussing the "fundamental imbalance" that accrues because of the President's will and capacity to promote the power of that office); Jamelle C. Sharpe, *Judging Congressional Oversight*, 65 ADMIN. L. REV. 183, 203-14 (2013) (discussing these and other dynamics, which give the President an edge over Congress in the operation of modern government).

⁷⁴ See Bradley & Morrison, *supra* note 73, at 442-43 (discussing public expectations and the incentives that provide for presidential action); Marshall, *supra* note 10, at 107-08 ("The siren song enticing the President to make her historical mark is not easily ignored.").

⁷⁵ President Barack Obama, Statement by the President on the Affordable Care Act (Nov. 14, 2013) (emphasis added), <http://www.whitehouse.gov/the-press-office/2013/11/14/statement-president-affordable-care-act> [<http://perma.cc/QDD5-2CU4>].

⁷⁶ See generally Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

no other reason than it requires a wider base of political support and coordination.

Political partisanship only exacerbates the President's self-help advantage over Congress. For instance, the President's political allies in Congress can slow or quash congressional resistance to executive-branch self-help.⁷⁷ The cynic might even imagine *wink-and-nod* self-help, whereby the President's political allies in Congress stall or stop a bill *so that* the President can act unilaterally under self-help's legal cover. Surely, I do not suggest that this would be a legitimate exercise of self-help, much less a common one. I do worry, however, that legalizing self-help may tempt this pathology, which would hardly be detectable much less provable. Congressional members of the President's political party, for example, could stall or stop passage of a mostly partisan-friendly bill, publically justify their 'no-vote' on the ground that the bill contained too many party-unfavorable terms, and then have their partisan position vindicated by unilateral presidential action.

More generally, I worry that legalizing some forms of self-help may open the door to more venal forms. Perhaps self-help will have equilibrium-restoring qualities, consistent with some normatively satisfying separation-of-powers ideal.⁷⁸ But just as likely, legalizing self-help will have broken-glass qualities: with each new agitation, small cracks will deepen, lengthen, and scatter in new directions.⁷⁹

b. *The Judiciary*

Pozen mostly trains his attention on federal interbranch conflict between the President and Congress. But the judiciary might factor into separation of powers self-help in at least three ways. First, the Court might self-help against one or both political branches. Pozen mostly brackets this possibility from his lexicon, on the theory that judicial review should not be considered self-help, except perhaps at the very extremes.⁸⁰ Because this move is mostly

⁷⁷ Cf. Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 671 (2011) ("[A]ll indications are that political 'ambition counteracting ambition' has failed to serve as a self-enforcing safeguard for the constitutional structures of federalism and separation of powers in the way that Madison seems to have envisioned."); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2324 (2006) ("[T]he political interests of elected officials generally correlate more strongly with party than with branch . . .").

⁷⁸ See Pozen, *supra* note 5, at 46-47 (explaining that "self-help may be a conservative practice inasmuch as it seeks to reestablish some prior equilibrium," or "be an engine of legal and political creativity" to arrive at new ones).

⁷⁹ I am grateful to Jon Michaels for suggesting the broken-glass analogy.

⁸⁰ See Pozen, *supra* note 5, at 22 ("[W]hile there may be an intriguing debate to be had about the contours of judicial self-help, it is likely to remain a rarefied debate so long as we limit ourselves to irregular or judge-initiated practices and exclude the bulk of judicial review. This Article will focus on the forms of interbranch self-help that are most readily identifiable as such: those that begin, and often end, outside the courts.").

definitional, I am content to follow his lead (though, to be sure, more might reasonably be said).

Second, the political branches could take self-help action against the Court, perhaps for example, through defunding or jurisdiction-stripping legislation. Again, Pozen mostly brackets these scenarios from consideration. But recent events may suggest the need for closer inspection. In April 2015, Texas Senator and presidential candidate Ted Cruz introduced the “Protect Marriage from the Courts Act of 2015” in Congress.⁸¹ The bill threatens to strip the federal courts (including the Supreme Court) of jurisdiction over “claims pertaining to the constitutionality of State marriage laws.”⁸² The bill was introduced while the constitutionality of state bans on same-sex marriage was pending before the Supreme Court in *Obergefell v. Hodges*.⁸³ In anticipation of the Court’s ruling, the bill provides that non-parties will not “have any obligation to comply with the [Court’s] decision.”⁸⁴

Presumably, Congress will not pass this bill (especially under a Democratic President). And, were the bill to pass, the Court presumably would strike it down.⁸⁵ Should this scenario arise, the Court would be both player and umpire of its own game. These types of conflicts, while foreseeable, are likely to be rare. But they do raise the specter of the Court as a self-help target. And, while it may make sense to bracket more conventional types of judicial review from the self-help lexicon, judicial review of self-help acts against the Court may warrant different treatment.

A third judicial component of separation of powers self-help involves the Court more as umpire, and less as direct player. Unlike the former scenarios, this one is too immediate and inevitable to bracket. It includes a cluster of hard-hitting questions, such as whether, how, and to what extent federal courts will police or intervene in self-help showdowns between the federal political branches. Although Pozen’s position on this set of questions is not entirely clear, he seems content with the soft assumption that federal courts would play either no role, or a very limited one, unless individual rights are implicated.⁸⁶

⁸¹ S. 1080, 114th Cong. (2015).

⁸² *Id.*

⁸³ 135 S. Ct. 2584 (2015).

⁸⁴ S. 1080, 114th Cong. § 3 (2015).

⁸⁵ For an early take on this issue, see Alex Glashauser, *The Danger of Disrobing the Judiciary*, HUFFINGTON POST (June 16, 2015, 10:59 AM), http://www.huffingtonpost.com/alex-glashauser/the-danger-of-disrobing-the-judiciary_b_7591338.html [<http://perma.cc/7WLR-YNQW>] (“[Senator Cruz’s] “legislative attempt to restrain the judicial branch violates the separation-of-powers doctrine, and the invitation to state judges to ignore a Supreme Court decision makes a hash of the constitutional enshrinement of federal law as ‘the supreme Law of the Land.’”).

⁸⁶ See Pozen, *supra* note 5, at 51 (“In the separation-of-powers context, by contrast, the shadow of adjudication is fainter. Legal disputes are less apt to be justiciable. Courts play a comparatively minor role in supervising self-help, whereas mechanisms like elections and public opinion play a much larger role.”); *id.* at 29 (remarking, in the context of small-c

In practice, however, that exception will swallow the rule because many acts of self-help will implicate private interests. Moreover, private parties harmed by first-order constitutional violations will generally be able to sue in court,⁸⁷ and resolving these claims might also require the Court to address any second-order self-help defenses. How the Court would, or should, resolve these claims is anything but sure.

What is more, these scenarios raise the questions of whether, and to what extent, the Court's rulings on first-order constitutional norms in the self-help context would have precedential value in non-self-help contexts. For example, suppose that Congress is sued for some allegedly unconstitutional action. Further suppose that, as part of a self-help defense, Congress alleges that the President's non-enforcement of a particular law was the triggering unlawful action. If the Court rules on the triggering question—i.e., whether the President's non-enforcement violated the Take Care Clause—would that decision have precedential effect in future non-self-help contexts? For those of the view that questions of constitutional conflict are better left undecided by the Court,⁸⁸ legalizing self-help could force matters in the opposite direction. Meanwhile, for those who think the Court should be deciding more questions of constitutional structure than it currently does,⁸⁹ legalizing self-help might

constitutional violations, that “[i]ntragovernmental self-help and elections, not judicial review, are the institutional mechanisms to curb violations.”); *see also id.* at 70 (recognizing that second-order self-help norms “may be susceptible to manipulation and violation, given that judicial enforcement does not back them up”).

⁸⁷ At least for big-C violations, if not small-c violations. *See supra* notes 31-38 (describing the difference). *See Bond v. United States*, 131 S. Ct. 2355, 2363-64, 2366-67 (2011) (“An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable.”). *But cf. Aziz Z. Huq, Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1440 (2013) (“When an individual litigant seeks to enforce a structural constitutional principle that immediately redounds to the benefit of an official institution, and there is no reason the latter could not enforce that interest itself, a federal court should not permit the individual litigant to allege and obtain relief on the basis of the separation of powers or federalism.”).

⁸⁸ *See, e.g.,* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (1962) (arguing in favor of the “passive virtues” of judicial restraint); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 378-79 (1980) (arguing that when individual rights are not implicated, courts should abstain from deciding constitutional questions concerning the separation of powers and federalism); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 7 (1996) (espousing judicial minimalism).

⁸⁹ *See* Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1711 (1998) (arguing that active judicial dialogic participation can support democratic decision-making and popular accountability); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1459 (2001) (arguing for greater judicial role in enforcing limits on the federal government); *see also* Martin H. Redish & Elizabeth J. Cisar, *“If Angels Were to Govern”: The Need for*

provide those additional opportunities. I will return to these matters later, after some additional groundwork is laid.⁹⁰

2. Vertical Balance of Federal-State Power

Beyond my concerns for the horizontal balance of power among the federal branches, legalizing separation of powers self-help may also dangerously distort the federal-state balance of power in favor of the federal government. When the President and Congress engage in self-help against each other, those acts might directly or indirectly affect the states. In a self-help world, for example, Congress might commandeer state officials to enforce federal marijuana laws because the federal executive is not “tak[ing] care” to do so.⁹¹ The President, for example, might grant amnesty to millions of undocumented immigrants in response to congressional intransigence on comprehensive immigration reform,⁹² but at unwanted costs to certain states.⁹³ To be clear, I am not suggesting that the President or Congress can take these measures under existing law.⁹⁴ But that is precisely the point. Legalizing self-help would change the rules of the game, in yet-to-be-determined ways, and potentially without the benefit of a judicial umpire.

Certainly, we should not rule out the possibility that separation of powers self-help might advantage the states—or, at least some states—in some

Pragmatic Formalism in Separation of Powers Theory, 41 DUKE L.J. 449, 492-94 (1991) (arguing that separation of powers controversies cannot be left to the free play of politics).

⁹⁰ See *infra* notes 178-182 (revisiting questions about judicial review as it relates to acts of state self-help).

⁹¹ Cf. Memorandum from James M. Cole, Deputy Att’y Gen., to All United States Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<http://perma.cc/AM8C-JHZE>] (outlining the Department of Justice’s policy of general non-enforcement of federal marijuana laws in jurisdictions where marijuana use is not criminalized under state law).

⁹² I am not suggesting that President Obama’s recent immigration policies amount to amnesty—they clearly do not, despite the rhetoric from some Republican opponents. See, e.g., Stephan Dinan, *Amnesty to Impose Billions in Costs on States, Lawsuit Alleges*, FOX NEWS (Jan. 12, 2015), <http://nation.foxnews.com/2015/01/12/amnesty-impose-billions-costs-states-lawsuit-alleges> [<http://perma.cc/XKX6-56RG>]. Immigration amnesty—conventionally understood—would require some permanent permission or path to citizenship, which DAPA and DACA do not offer. See *supra* notes 102-106 and accompanying text.

⁹³ Cf. *supra* note 54 (outlining the litigation regarding the DAPA executive actions).

⁹⁴ See *Printz v. United States*, 521 U.S. 898, 933 (1997) (striking down federal statute which sought to commandeer state law enforcement officials); Dep’t of Homeland Sec.’s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. & Defer Removal of Others, 38 Op. O.L.C. 1, 1 (2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<http://perma.cc/49KK-MU2Y>] (prescribing limits on the President’s use of prosecutorial discretion in immigration).

circumstances.⁹⁵ After all, presidents will have incentives to curry favor with states to win their Electoral College votes. Meanwhile, individual members of Congress may have incentives to favor their home-state constituents. In politically contingent ways, acts of federal self-help may advance states' rights, or state autonomy, or geographically concentrated private interests, with respect to any given issue.⁹⁶

This sort of political opportunism,⁹⁷ however, is not a stand-in for constitutionally imposed limits on federal power.⁹⁸ Invariably, some set of states will oppose acts of federal self-help, given the diversity of ideological

⁹⁵ An example may be the Executive's practice of waiving or easing statutory requirements for states, as the Obama administration has done for the No Child Left Behind Act. Even with respect to such executive waivers, however, reasonable minds disagree on whether states are better or worse off, individually or collectively, from such waivers. See Lindsey Burke, *Alaska, Texas Reject Common Core Standards*, HEARTLAND, (Mar. 25, 2010), <http://news.heartland.org/newspaper-article/2010/03/25/alaska-texas-reject-common-core-standards> [<http://perma.cc/XZ8X-BGVF>] (discussing Alaska's and Texas's rejection of Common Core Standards, and quoting Governor Rick Perry saying "I will not commit Texas taxpayers to unfunded federal obligations or to the adoption of unproven, cost-prohibitive national standards and tests"); Sally Holland, *Education Secretary Defends No Child Left Behind Waivers*, CNN.COM (Feb. 7, 2013, 5:18 PM), <http://www.cnn.com/2013/02/07/us/congress-school-waivers/> [<http://perma.cc/Q48H-D85A>] (detailing attempts to pass legislation before resorting to the ESEA Waiver program, and quoting Secretary Arne Duncan saying that issuing waivers was "always, always our Plan B").

⁹⁶ See Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 278-87 (2000) (discussing the political incentives federal officials have to advance state interests).

⁹⁷ I do not use "political opportunism" in a pejorative sense. As Ernest Young explains, the Framers depended on political opportunism to maintain our constitutional structure. Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1279 (2004) ("[T]he Framers designed our system of horizontal and vertical separation of powers around the expectation that individuals and groups would support one institution or the other at any given time for politically opportunistic reasons."). Politics offers some connective tissue between the federal and state levels of government, and thus is generally considered an important safeguard of federalism today. See Kramer, *supra* note 96. But that is not to say that politics is a constitutionally sufficient or effective safeguard of federalism. See Prakash & Yoo, *supra* note 89, at 1463 ("While the Founders undoubtedly believed that the political process would serve as a significant safeguard of state interests, they did not understand the political safeguards to be exclusive.").

⁹⁸ See Kramer, *supra* note 96, at 223-27 (rejecting the conventional view that the states' representation in Congress protects the institutional interests of the states); William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J. L. & PUB. POL'Y 139, 147-52 (1998) (suggesting that changing political realities have undermined what few political safeguards existed); Prakash & Yoo, *supra* note 89, at 1460 (likening reliance on politics to safeguard federalism to "reinforcing the walls of a sand castle as the tide returns").

and political interests within states, as well as the influence that national parties wield over state-level policy.⁹⁹ States wishing to resist acts of federal branch self-help would have to demonstrate not only that the federal actor violated first-order constitutional norms, but also that it violated second-order self-help norms. This additional roadblock could squeeze states from their historic checking function¹⁰⁰ precisely when it may be needed most: namely, when Congress's ability to temper presidential action is stifled by legislative gridlock.¹⁰¹

Consider a recent and still developing example. In November 2014, President Obama announced a program of Deferred Action for Parental Accountability (DAPA), which if implemented would grant temporary permission for some four million otherwise undocumented immigrants to remain and lawfully work in the United States.¹⁰² This program comes atop the Obama administration's still-ongoing program of Deferred Action for Childhood Arrivals (DACA), which grants the same permissions to an

⁹⁹ See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014) (explaining how states have become staging grounds for national party agendas, policy entrepreneurs, and moneyed interests); James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1, 17 (2013) (arguing that national political parties have served as conduits through which national politics "colonize[s]" state politics).

¹⁰⁰ See THE FEDERALIST NO. 28, at 180 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (explaining that states will check the federal government, and vice versa); THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961) ("The different governments will controul each other, at the same time that each will be controuled by itself."); see also Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1111 (2011) (reviewing ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010)) ("Ultimately, the debate over the Kentucky and Virginia Resolutions was a debate over the ability and authority of the states to serve as loci of protest against unconstitutional and oppressive federal laws."); Gardner, *supra* note 99, at 7 ("Like the separation of powers horizontally into distinct legislative, executive, and judicial branches, federalism answers to this difficulty by giving each level of government, state and national, substantial powers sufficient to allow each to monitor and check the abuses of the other.").

¹⁰¹ Cf. Gerard N. Magliocca, *Don't Be So Impatient*, 88 NOTRE DAME L. REV. 2157, 2161 (2013) ("Congress cannot get many things done because the voters that they represent do not agree on what should be done."); Franita Tonson, *The Union as a Safeguard against Faction: Congressional Gridlock as State Empowerment*, 88 NOTRE DAME L. REV. 2267, 2269 (2013) ("[T]he bicameralism and presentment requirements of Article I that make federal legislation difficult to pass allow states to experiment with different policies and procedures to address some of these problems on a local scale.").

¹⁰² See Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs. et al. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [<http://perma.cc/KK4P-VXXQ>] (giving details on new categories of persons that should receive deferred deportation actions). See also Epstein, *supra* note 54 (explaining the executive action and its political ramifications).

estimated 1.5 million undocumented immigrants.¹⁰³ The Obama administration insists that these immigration initiatives are perfectly legal under governing constitutional and statutory law.¹⁰⁴ Any statutory override by Congress will face a presidential veto: President Obama has already said so.¹⁰⁵

Meanwhile, however, more than half the states have sued to enjoin DAPA on the theory that it violates the President's Article II duty to faithfully execute Congress's law.¹⁰⁶ If separation of powers self-help becomes a legal defense, a judicial ruling that the President violated first-order norms under the Article II Take Care Clause would be necessary, but not sufficient, to vindicate the states' interests.¹⁰⁷ Aggrieved states would also have to demonstrate that the President exceeded second-order self-help norms, whatever those may prove to

¹⁰³ Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot. et al. (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/YXP7-NJWJ>] (detailing the Department of Homeland Security's plan to exercise prosecutorial discretion with regard to undocumented immigrants who came to the United States as children).

¹⁰⁴ See, e.g., President Barack Obama, Remarks by the President in Immigration Town Hall – Nashville, TN (Dec. 9, 2014), <http://www.whitehouse.gov/the-press-office/2014/12/09/remarks-president-immigration-town-hall-nashville-tennessee> [<http://perma.cc/9GE7-6FRT>] (asserting legal authority for DAPA); President Barack Obama, Remarks by the President on Immigration – Chicago, IL (Nov. 25, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/25/remarks-president-immigration-chicago-il> [<http://perma.cc/ZVG8-49CJ>] (same). For the possibility that DACA is legal, but DAPA is not, compare Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 107 (2014) (arguing that DACA is legally justified under the circumstances), with Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1185-86 (2015) (arguing that DAPA is not).

¹⁰⁵ See President Barack Obama, Remarks by the President in the State of the Union Address (Jan. 20, 2015), <http://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015> [<http://perma.cc/6SW8-Q5H2>]; Elise Foley, *House GOP Vows to Block Protections for Undocumented Immigrants*, HUFFINGTON POST, (Jan. 15, 2015, 12:29 AM), http://www.huffingtonpost.com/2015/01/14/house-republicans-dhs-immigration_n_6470288.html [<http://perma.cc/6F8R-X6M2>] (reporting that the White House “issued a formal veto threat [against] . . . anything that goes against [its] executive actions on immigration”).

¹⁰⁶ Complaint for Declaratory and Injunctive Relief at 2, *Texas v. United States*, No. 1:14-cv-00254 (S.D. Tex. Dec. 3, 2014), 2014 WL 6806231 (“[Plaintiffs] seek declaratory and injunctive relief against the United States and the above-named federal officials . . . for their violations of the Take Care Clause . . . and the Administrative Procedure Act . . .”). See also *supra* note 54 (listing the injunctions preventing the Obama administration from undertaking these actions).

¹⁰⁷ States already face an uphill battle getting their claims heard in court because of justiciability roadblocks. See *Arpaio v. Obama*, 27 F. Supp. 3d 185, 192 (D.D.C. 2014) (dismissing plaintiff's challenge to Obama's DAPA program for lack of standing).

be when states (as opposed to a co-ordinate branch of federal government) bear some of the brunt.

Further, if separation of powers self-help is not itself justiciable under the political question doctrine, standing doctrine, or otherwise, then objecting states would have no judicial recourse. Instead, states would be pawns at the mercy of the warring federal political branches. This renders a frightening new dimension to the so-called “political safeguards” theory of federalism, endorsed by the Supreme Court in *Garcia v. San Antonio Metro Transit Authority*.¹⁰⁸ According to the *Garcia* Court, federalism is mostly entrusted to the political—not the judicial—process.¹⁰⁹ Critically, however, the Court’s abstention from zealously policing the federalism boundary presupposes a *properly* functioning structural system.¹¹⁰ Whether separation of powers self-help meets that ideal is highly questionable.

Conceivably, some of these tensions might ease if federal self-help that affected state interests was categorically barred. But, at various degrees of remove, self-help by one or both of the federal political branches will almost always affect state—or, some states’—interests. Would the question, in such cases, be whether a sufficient nexus exists between state interests and the federal act of self-help? Although this type of line drawing is not unthinkable, it is fraught with complication and unlikely to appeal to a Court that has generally eschewed this sort of intervention in other federalism contexts.¹¹¹

The complications continue. If federal acts of self-help can legally interface with state interests, what should the result be in the event of a conflict between the two? There is no inherent reason why the Supremacy Clause should apply in this context.¹¹² Why, for example, should the Supremacy Clause apply in pristine form if the Article II Take Care Clause or the Article I limits on Congress’s powers do not? This reflects a recurring tension in Quadrant 2: it requires choices about which first-order constitutional norms to insist upon or relax in a system where separation of powers self-help is a tool of legal redress.

Further, even if the Supremacy Clause could apply, questions abound over how it would or should apply. As written, the Supremacy Clause provides that the “Constitution” and “Laws . . . made in Pursuance [of the Constitution]”

¹⁰⁸ 469 U.S. 528, 556 (1985) (citing Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544-45 (1954)).

¹⁰⁹ *Garcia*, 469 U.S. at 550. See generally Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341 (discussing *Garcia*’s shift from a sovereignty-based to a process-based approach to federalism).

¹¹⁰ In *Garcia*, the Court rejected the state’s constitutional challenge only after finding that “the internal safeguards of the political process have performed as intended.” 469 U.S. at 556; see also *id.* at 554 (declaring that the Court would maintain a policing role to “compensate for possible failings in the national political process”).

¹¹¹ *Cf. id.* (eschewing a similar line drawing exercise in favor of letting the political process work out) (overruling *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976)).

¹¹² U.S. CONST. art. VI, cl. 2.

shall be the supreme law of the land.¹¹³ But acts of self-help are not the “Constitution.” Nor, in any conventional sense, are self-help acts “Laws . . . made in Pursuance [of the Constitution].”¹¹⁴ Quite to the contrary, self-help connotes action taken *despite* first-order substantive or procedural constitutional norms that would otherwise apply. Would all lawful acts of federal branch self-help, or just some of them, be supreme over conflicting state law? And, what should the result be when state law clashes with a lawful act of congressional self-help but is consistent with a lawful act of presidential self-help, or vice versa? More generally, if courts will not be deciding which acts of federal branch self-help are lawful to begin with, how can states know whether to follow Congress’s or the President’s lead in a self-help showdown between those co-ordinate branches?

We may get answers to these questions. But we do not have them yet. That leads to my next concern, for the rule of law.

B. *Rule of Law*

Of course, the rule of law is a complex and contestable concept.¹¹⁵ But my use of the term here fits comfortably within convention, capturing the principles that law should be relatively stable, predictable, transparent, and influential on society, including on government officials in particular.¹¹⁶

Pozen’s idea to legalize separation of powers self-help might promote the rule of law by deterring violations of first-order constitutional norms without judicial intervention, and by bringing greater transparency to the self-help motivations behind otherwise questionable government action.¹¹⁷ But my outlook is less rosy, for three general reasons.

¹¹³ *Id.*

¹¹⁴ The “in Pursuance” requirement in the Supremacy Clause has generally been understood to include a procedural component, requiring that qualifying Laws be made in the “manner prescribed by this Constitution,” Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 5 n.13 (2011) (quoting William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 20-21), a substantive component, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (asserting that the “made in pursuance” language excludes from supremacy acts of Congress that the Supreme Court deems unconstitutional), or both, see David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J.L. & PUB. POL’Y 267, 269 (2015) (discussing the import of the phrase “Laws . . . made in pursuance [of the Constitution]” as it relates to preemption of state law by administrative agencies).

¹¹⁵ See Chemerinsky, *supra* note 23, at 4 (“Few concepts in law are more basic than the rule of law, few are more frequently invoked, and yet few are more imprecisely defined.”). For some comprehensive treatments, see TAMANAHA, *supra* note 23; Joseph Raz, *The Rule of Law and Its Virtue*, in LIBERTY AND THE RULE OF LAW 3-21 (Robert L. Cunningham ed., 1979).

¹¹⁶ See, e.g., Chemerinsky, *supra* note 23.

¹¹⁷ Pozen, *supra* note 5, at 61-62, 77 (“Attending to these *conventions of self-help* . . . has the potential to yield a range of analytical and practical payoffs.”).

First, Pozen's prescriptive thesis *moves* the lines separating constitutional from unconstitutional action in contingent and unpredictable ways: otherwise unlawful action becomes lawful if certain case-specific conditions are met. Second—and more my focus here—legalizing self-help creates *more* lines demarking constitutional from unconstitutional action. The threat is that constitutional law will lose its coordinating and constraining qualities on politicians as more legal lines are drawn. As sketched further below, more legal questions means more focal points for public debate. More focal points, in turn, create more legal indeterminacy, more opportunity for legal misdirection, less transparency, less voter coordination, and thus less political accountability.¹¹⁸ That may be great for politicians, who might prefer not to be ruled by law.¹¹⁹ But it may be bad for the rest of us. Third, the Court's oversight function—if there is to be one—might improve these dynamics, yet it could just as likely make matters worse.

1. Law and Politics, Through a Self-Help Lens

The relationship between law and politics is notoriously unstable and messy. At one extreme, law may not constrain our elected federal officials at all.¹²⁰ For those of that view, legal lines—if they exist—are inconsequential to how the federal branches interact or should interact.¹²¹ A more conventional view, however, is that lines separating lawful from unlawful political action do and should matter, especially when judicial review is not forthcoming.¹²² The law serves a coordinating function not only for politicians, but also for the public

¹¹⁸ On law as a focal point for collective judgments about presidential conduct, see Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1410-12 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010)).

¹¹⁹ Cf. Paul R. Verkuil, *Separation of Powers, the Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 305 (1989) (“[T]he notion that no man can be a judge in his own cause was among the earliest expressions of the rule of law in Anglo-American jurisprudence.”).

¹²⁰ See Curtis A. Bradley & Trevor W. Morrison, *Essay, Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1110-12 (2013) (“The general posture of judicial abstention . . . raises questions about whether presidential power is truly subject to legal constraints.”). For a classic defense of judicial abstention in structural controversies, see CHOPER, *supra* note 88, at 175, 275, 379 (arguing that federal courts should abstain from structural controversies that do not implicate individual rights).

¹²¹ POSNER & VERMEULE, *supra* note 118, at 4, 15, 72 (arguing that “law does little to constrain the modern executive,” that Presidents are constrained instead by “politics and public opinion,” and that any observationally stable arrangements are simply coordinating focal points with no legal status). See also BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010) (lamenting this feature of modern presidential power).

¹²² See, e.g., Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 979 (2009) (“[T]he thought that officials holding constitutionally constituted offices might be wholly unconstrained by the Constitution proves incoherent.”).

that stands in judgment of political action.¹²³ Politicians speak in the language of law, in part because the public increasingly demands that politicians do so.¹²⁴ Thus, regardless of whether our politicians follow the law because it is law, politicians can be influenced by the threat of political sanctions for breaking the law as *publicly* understood.¹²⁵ This can help to explain why, for example, the President does not simply disregard unfavorable Supreme Court decisions or other well-established constitutional norms that might interfere with his political preferences.¹²⁶

Pozen is sensitive to law's celebrity status in our political culture.¹²⁷ Indeed, partly for that reason, he worries that first-order constitutional norms might, in the long run, lose their constraining quality if eroded through disingenuous, self-serving, and politically opportunistic legal interpretations by the President and members of Congress. If self-help were legal, Pozen argues, politicians would not have to pretend that their actions comply with first-order norms or bend those norms to make their actions fit.¹²⁸ Instead, politicians could transparently invoke self-help as a legal justification, thereby insulating first-order norms from precedent-setting short-run political gains.¹²⁹

Possibly, but I doubt it. If self-help were legal, politicians would most often invoke it as a fallback argument, not as a stand-in. The President, for example, will continue to argue that his "We Can't Wait!" initiatives are perfectly legal under the best interpretation of the relevant constitutional norms *and* claim self-help as an alternative justification.¹³⁰ This type of alternative argumentation—familiar in judicial settings—is a recipe for legal obfuscation

¹²³ For in-depth treatments of this claim, see Bradley & Morrison, *supra* note 120, at 1140 (discussing how legal dialogue—or "law talk"—is one way that law constrains politicians); Pildes, *supra* note 118, at 1411.

¹²⁴ See Bradley & Morrison, *supra* note 120, at 1140 ("[The] executive branch almost always endeavors to argue that its actions are lawful—and to rebut criticisms to the contrary.").

¹²⁵ See Pildes, *supra* note 118, at 1416 (observing the "powerful intertwining of judgments of legality and politics within American political culture in political and public assessments of presidential conduct").

¹²⁶ Bradley & Morrison, *supra* note 120, at 1138. *But cf.* Frederick Schauer, *Is Legality Political?*, 53 WM. & MARY L. REV. 481, 505 (2011) (suggesting the possibility that "the practice of following the law just because it is the law . . . is far less rewarded by the electorate and in public political life than is commonly supposed").

¹²⁷ Pozen, *supra* note 5, at 80 ("The language of self-help would both enrich the terms and clarify the stakes of the debate between President Obama and his congressional critics.").

¹²⁸ *Id.* at 61-62, 77.

¹²⁹ *Id.* at 70-75.

¹³⁰ *Cf.* Bradley & Morrison, *supra* note 120, at 1097, 1140 (2013) (stating that, because of the pervasiveness of public "law talk" in American politics, the "executive branch almost always endeavors to argue that its actions are lawful—and to rebut criticisms to the contrary").

and lawlessness in the political arena, especially in non-justiciable contexts.¹³¹ Presidents rarely “acknowledge that they are acting inconsistently with the law. Instead, they typically argue that the law does not require what critics are contending.”¹³² If that pattern holds, then legalizing self-help cannot do the work that Pozen sets for it. We would get all the same legal questions *and more*.¹³³

Take, for example, President Lincoln’s “all the laws, but one” quip,¹³⁴ which is arguably the most famous claim to constitutional self-help ever made. Lincoln maintained that his decision to unilaterally suspend the writ of habeas corpus during the Civil War was necessary to save the Union.¹³⁵ But that was an alternative argument; he less famously claimed that suspending the writ fully complied with the Constitution’s Suspension Clause.¹³⁶

For a current example, consider again the brouhaha surrounding President Obama’s recent immigration initiatives.¹³⁷ The President has sharply defended DACA and DAPA in legal terms.¹³⁸ Moreover, both of these executive initiatives are backed (and/or paved) by a publicly released Office of Legal Counsel Memorandum (OLC Memo).¹³⁹ It is not entirely clear why the

¹³¹ See *infra* Section III.B.2 (developing this claim).

¹³² Bradley & Morrison, *supra* note 120, at 1114; accord Pildes, *supra* note 118, at 1424 (“Presidents rarely proclaim in public their outright defiance of law, but they (and their legal advisors) at times push the boundaries of legal compliance by embracing tendentious legal positions not widely shared among legally knowledgeable interpreters but that nonetheless enable presidents to pursue their policy aims.”).

¹³³ Indeed, Presidents may have an incentive to argue alternatively because there is something to gain from each argument. More specifically, a President may argue that his or her action is perfectly legal under first-order constitutional norms (to allay any legal concerns) and argue that the action was justified as self-help (to sling mud at political opponents and/or to signal the President’s ability to govern even in the face of political opposition). I thank Jamelle Sharpe for help with this point.

¹³⁴ Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953).

¹³⁵ See *id.* (“[W]ould not the [President’s] official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve [the government]?”).

¹³⁶ See *id.* at 429-31 (arguing to Congress that the privilege of writ of habeas corpus may be legally suspended “when, in cases of rebellion, or invasion, the public safety *does* require it”); see also U.S. CONST. art. I, § 9, cl. 2.

¹³⁷ It is the debates themselves—not the winning positions—that matter for my purposes.

¹³⁸ See, e.g., President Barack Obama, Remarks by the President on Immigration (Nov. 21, 2014), <http://www.whitehouse.gov/the-press-office/2014/11/21/remarks-president-immigration> [<http://perma.cc/9PTX-GJXT>] (“We’re going to keep on working with members of Congress to make permanent reform a reality. But until that day comes, there are actions that I have the legal authority to take that will help make our immigration system more fair and more just. And this morning, I began to take some of those actions.”).

¹³⁹ Dep’t of Homeland Sec.’s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. & Defer Removal of Others, 38 Op. O.L.C. 1, 1 (2014),

President chose to publically release the OLC Memo, but one reasonable guess is that the President felt some need to justify his immigration policies in *legal* terms to the *public*. In that respect, however, the OLC Memo is also notable for what it does not argue: it does not raise self-help as a legal defense.

Now, imagine for a moment that separation of powers self-help were legal. Would President Obama—or the OLC—really forgo their mainline constitutional defense under the Take Care Clause? If not, then add at least three more questions of law for the public to chew on. First, does Congress even have a constitutional duty to legislate?¹⁴⁰ If so, did Congress violate that duty, in this case, by failing to pass comprehensive immigration reform? And, if so, did the President's responsive tactic comport with second-order norms of self-help—such as proportionality, advance notice and demand, redressive motive, and any other yet-to-be-determined limits on separation of powers self-help? None of these are easy questions. But, more to the point, as the number of legal questions increases, public coordination around the law decreases, and, with it, some of law's constraining effect on the President.

It gets worse. If and when Congress reacts to the President's unilateral action in unconventional ways, Congress too will want to invoke self-help as an alternative legal defense. In that case, add another legal question for public consumption: do Congress's retaliatory actions comport with second-order self-help norms?¹⁴¹ And now the kicker: the first-order question that Pozen's approach hopes to preserve—in this example, whether the President violated the Take Care Clause—(re)surfaces in Congress's own self-help defense. Thus, even if the President were to forego a first-order constitutional defense on the front end, that same question would be raised by Congress, on the back-end, as the necessary trigger for Congress's self-help defense. Anticipating this, the President will be even more likely, *ex ante*, to justify his action in first-order terms—if only to take the wind out of Congress's anticipated self-help sail.

<http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<http://perma.cc/6C4B-QYYR>].

¹⁴⁰ If Congress has such a duty, it is only in the sense of an unwritten convention, not commanded by the written Constitution. *Compare* Marshall, *supra* note 10, at 107 (arguing that Congress has no constitutionally prescribed duty to pass laws, much less laws that comport with the President's preferred policies), *with* Pozen, *supra* note 5, at 9 (“Against the backdrop of a constitutional text that assigns Congress hardly any affirmative responsibilities, constitutional conventions arguably impose on [the legislature] a much larger set of duties to the executive and to the polity more broadly.”).

¹⁴¹ Consider, for example, that members of the Senate threatened to block President Obama's replacement of Attorney General Eric Holder in protest to Obama's immigration programs carried out by the Department of Homeland Security. *See supra* note 9 and accompanying text. If Republican members of the Senate had made good on this threat, they would arguably be violating the “small-c” constitutional norm of confirming cabinet-level officials. But, if self-help were available as a legal defense, they might not be doing anything improper.

In a tit-for-tat system, legalizing self-help may thus have the opposite effect that Pozen forecasts. Rather than clarify and preserve first-order constitutional norms, legalizing self-help may exponentially confound them in collapsed, second-order form. For those who worry that the law does not constrain politicians very well, legalizing self-help will more likely exacerbate—not ameliorate—this concern.

2. The Court as Umpire?

Here, I return to some questions posed above concerning the Court's role in self-help contests between the political branches. Outside the constitutional context (*e.g.*, the law of trespass), the availability of judicial review is what helps keep self-help norms within rule-of-law norms. But, when the Court acts as self-help umpire over the co-ordinate branches of government, the dynamics are far more complicated, and the Court potentially upsets the rule of law more than commands it.¹⁴²

As noted, the Court will likely need to get involved in self-help contests, insofar as those contests might harm private interests.¹⁴³ Suppose, however, that the Court elects *not* to intervene in self-help showdowns between the political branches, either as a general rule or categorically, when private interests are not implicated. Still, how absolute would that judicial abjuration be?

We can imagine the Court leaving the political branches well enough alone during a first self-help strike, for example by the President against Congress (*T1*), or a retaliatory one, by Congress against the President (*T2*), and so on, at *T3* et cetera. We might further assume, in this scenario, that each act taken in isolation (*T1*, *T2*, *T3* . . .) meets the criteria for legitimate self-help.¹⁴⁴ Yet, when framed as a recursive episode, it will hardly feel legitimate at all, regardless of whether private interests are affected, and certainly if they are. If self-help has broken-glass qualities, would we not expect (even demand) judicial intervention at *some point*? If so, *when* is that point?

Unfortunately, by the time that point arises, the Court will likely find itself in a legitimacy bind. On the one hand, if the Court remains idle, it may smack of illegitimate abdication of judicial power. On the other hand, however, it might smack of judicial favoritism if the Court suddenly intervened to discipline one branch (say, Congress, at *T4*) when it did not intervene sooner but could have (say, against the President at *T3*), and might have waited to intervene until later. The Court's legitimacy suffers either way. Moreover, a sudden, potentially opportunistic judicial intervention might instigate another self-help act, this time by the "losing" political branch against the Court.

In this high-stakes game of musical chairs, the President or Congress may start the music, hoping the other will be left standing when the Court hits the

¹⁴² I thank Peter Strauss for suggesting this connection.

¹⁴³ See *supra* notes 86-87 and accompanying text.

¹⁴⁴ See *supra* notes 39-42.

stop button. Faithful observers might assume fair judicial play; but skeptics will wonder if the Court was peeking all along. Because this can all be anticipated, we might put the choice to the Court now: (1) shut down the game before it starts; (2) play it by ear (so to speak); or (3) never end it. Pozen's prescriptive thesis leaves little if any room for the first possibility. And the latter two are unsettling.

My concerns for the balance of power and rule of law closely correlate. In its most favorable light, legalizing separation of powers self-help can promote the rule of law by deterring violations of first-order constitutional norms without judicial intervention.¹⁴⁵ But, in today's hyperpolarized political culture, legalizing self-help is far more likely to escalate and cycle institutional conflict.¹⁴⁶ These institutional showdowns will tend to favor the President over Congress, and the federal government over the states. Without a judicial umpire, politicians may be constrained by public perceptions of what the law requires.¹⁴⁷ Yet, if the polity cannot grasp what the law generally requires, or which branch "started" the conflict, which officials will the polity hold accountable to stop it? Meanwhile, the Court as self-help umpire might skew more than correct self-help abuses by the political branches.

One last point before proceeding: even if legalizing self-help could deter or cure more unlawful behavior than it encourages, and in reasonably balanced ways, is this the rule-of-law modeling we want from our *nation's leaders*? If not, then we might object to separation of powers self-help not just for what it does, but also for what it stands for.

IV. LEGALIZING STATE SELF-HELP?

This Part teases out Quadrant 3, which captures the structural inverse of Pozen's prescriptive idea. Specifically, what if states—but not the federal branches—could legally invoke self-help? It would take many articles to give this idea full expression. The discussion below merely begins the conversation, and mostly bespeaks caution.

¹⁴⁵ Pozen, *supra* note 5, at 9 (arguing that interbranch self-help is a "significant feature of our constitutional design" and a "plausible component of a regime committed to the rule of law"); see also Bradley & Morrison, *supra* note 120, at 1098 ("A variety of justiciability limitations—including the general disallowance of legislative standing, ripeness considerations, and the political question doctrine—are regularly invoked by courts as a basis for declining to resolve issues of presidential power, especially when individual rights are not directly implicated.").

¹⁴⁶ Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159, 1165-66 (2014) (describing some causes for today's political dysfunction); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 276-81 (2011) (tracing today's hyperpolarization to the civil rights era).

¹⁴⁷ See *supra* notes 118-126 and accompanying text.

That said, I do not mean to rule out some productive possibilities of state self-help. First, affording states a limited right of self-help may advance any number of federalism values—including, but not limited to, states' ability to check and compete with the federal government.¹⁴⁸ Armed with self-help as legal cover, states might deter the federal branches from violating first-order norms and otherwise counter the President in ways that Congress and courts cannot.¹⁴⁹ Moreover, if the federal-state balance is skewed too far in favor of the federal government, perhaps state self-help can turn the tide.¹⁵⁰ Lastly, perhaps legalizing self-help will better equip the states to keep each other in check.¹⁵¹ Again, I cannot do these claims justice here, and it is not my purpose to do so. I only flag them as considerations to weigh against a number of potential hazards attending state self-help.

Like for separation of powers self-help, I worry that legalizing state self-help would come at great cost to the balance of power and rule of law. Here, consideration must be had for our two federal sub-systems: (1) the relationship among the states (horizontal federalism); and (2) the relationship between the states and the federal government (vertical federalism). This dichotomy blurs in theory and practice. But, for present purposes, the distinction between state-state and state-federal dynamics captures some important thematic variances.

A. *State Self-Help and Horizontal Federalism*

Our horizontal federalism is more than two hundred years in the making. States may be engaging in acts of self-help against each other, but, in our extant system, many of those acts are judicially policed and voidable under an array of constitutional doctrines: for example, under the Dormant Commerce

¹⁴⁸ See Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (“Perhaps the principal benefit of the federalist system is a check on abuses of government power.”); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1369 (2001) (“[I]n order to attract and retain the loyalty of the People, state governments have to maintain the ability to provide beneficial regulation and services in areas that really matter.”).

¹⁴⁹ Cf. Bulman-Pozen, *supra* note 30, at 478 (explaining how states charged with implementing federal programs may “diverge from federal executive policy, curb the federal executive’s own implementation of the law, or goad the federal executive to take particular actions”); Rubenstein, *supra* note 27, at 175-77 (explaining how administrative preemption doctrine and administrative processes might be shaped to promote the states’ checking function).

¹⁵⁰ Cf. Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1765-66 (2005) (explaining that the balance of power has shifted in the federal government’s direction and arguing for compensating adjustments).

¹⁵¹ Cf. Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 65 (2014) (explaining how politics and interstate dynamics might keep states in check without judicial review); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1475 (2007) (discussing judicial and congressional role in policing horizontal federalism).

Clause, Full Faith and Credit Clause, Compact Clause, Privileges and Immunities Clause, and Supremacy Clause.¹⁵² Moreover, the federal political branches sometimes play an active role policing horizontal federalism.¹⁵³

Legalizing self-help among the states, however, threatens to substitute the rule of law with political vigilantism.¹⁵⁴ This is not hard to imagine. One state takes action that other states perceive to traverse constitutional limits on state power. Negatively affected states take redressive action that, in turn, negatively impacts other states, and so on. Left unregulated, this self-help picture is reminiscent of our failed experiment under the Articles of Confederation.¹⁵⁵ The Framers designed the Constitution, in large part, to alleviate interstate conflict.¹⁵⁶ But *legalizing* self-help for the states could mean easing or eliminating some of the existing constitutional limits on state actions. Given the porousness of state borders, and different political centers of gravity among red and blue states, economic and social spillovers across state boundaries might become the new norm.¹⁵⁷

As Pozen suggests for separation of powers self-help, principles of proportionality, categorical bars, and other limiting features could help regulate state self-help. For example, certain acts of state self-help might simply be taken off the table. The nagging questions, however, are what to take off the table, who will decide that, and on what basis? Could Oklahoma, for example, impose economic burdens on Coloradans to redress or deter the spillover effects of Colorado's marijuana laws?¹⁵⁸ Could Nevada surround itself with a border fence, to keep undocumented immigrants fleeing Arizona from entering

¹⁵² Cf. Gerken & Holtzblatt, *supra* note 151, at 114-16 (describing judicial role in horizontal federalism disputes).

¹⁵³ See, e.g., Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1370 (2006) ("Congress frequently regulates activities because state regulation, or lack of regulation, of those activities imposes external costs on neighboring states.").

¹⁵⁴ Cf. Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 966-72 (2001) (urging a stronger judicial role in policing horizontal federalism); Scott Fruehwald, *The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 DENV. U. L. REV. 289, 327-28, 331 (2003) (same).

¹⁵⁵ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 9 (4th ed. 2011) (discussing interstate friction under the Article of Confederation).

¹⁵⁶ See Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891, 897 (1990).

¹⁵⁷ Cf. Gerken & Holtzblatt, *supra* note 151, at 69-99 (discussing economic and social spillovers among states, and challenging the conventional distaste for such spillovers).

¹⁵⁸ Cf. Motion for Leave to File Complaint, Complaint, and Brief in Support, *Nebraska & Oklahoma v. Colorado*, No. 220144 ORG (U.S. Dec. 18, 2014), <http://www.ok.gov/oag/documents/NE%20%20OK%20v%20%20CO%20-%20Original%20Action.pdf> [<http://perma.cc/RG6W-SEXP>] (alleging, inter alia, that Colorado's laws legalizing marijuana violate the Supremacy Clause).

Nevada?¹⁵⁹ We do not know yet. Presumably, however, discovering the answers to these sorts of questions will be protracted and messy.

In a provocative new article, Heather Gerken and Ari Holtzblatt advance a “political safeguards” account of horizontal federalism, in which they argue that much interstate conflict already is, and in more cases should be, left to the free play of politics.¹⁶⁰ Like Pozen’s self-help thesis, theirs requires a difficult balancing of costs and benefits, as well as speculation about what the system would look like “if.” Legalizing state self-help would surely affect their political-safeguards calculus, yet in which direction is not clear. State self-help might better enable states to keep each other in check; or it might have precisely the opposite effect.

B. *State Self-Help and Vertical Federalism*

The relationship between the states and the federal government presents a different dynamic, is regulated by different constitutional norms, and has its own historical and contemporary precedents. But, at root, the nature of the questions remains the same: If state self-help were legal as against the federal government, which acts would remain out of bounds, who would decide, and on what basis?

Presumably, a state could not secede from the nation to protect itself from an allegedly tyrannical federal act. Still, what about state “nullification” of federal law, whereby states declare and treat federal law as null?¹⁶¹ This highly discredited practice is clearly out of bounds under existing legal doctrine.¹⁶² The answer, however, may become less certain if state self-help was legal. Just as legalizing separation-of-powers self-help might relax the President’s duty to faithfully execute federal law, legalizing federalism self-help might relax a state’s duty to comply with federal law.

¹⁵⁹ *Cf.* *Arizona v. United States*, 132 S. Ct. 2492, 2517 (2012) (Scalia, J., concurring in part and dissenting in part) (“The State has the sovereign power to protect its borders more rigorously if it wishes, absent any valid federal prohibition. The Executive’s policy choice of lax federal enforcement does not constitute such a prohibition.”).

¹⁶⁰ Gerken & Holtzblatt, *supra* note 151, at 83 (“[I]nterstate friction is a symptom of a healthy democracy rather than a disease unto itself.”).

¹⁶¹ See Adrienne Koch & Harry Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson’s and Madison’s Defense of Civil Liberties*, 5 WM. & MARY Q. 145, 173-76 (1948) (discussing nullification’s historical lineage).

¹⁶² See *Cooper v. Aaron*, 358 U.S. 1, 17 (1958); JOHN DINAN, HOW STATES TALK BACK TO WASHINGTON AND STRENGTHEN AMERICAN FEDERALISM 2 (Cato Inst., Policy Analysis No. 744, 2013) (“Many Americans and almost all scholars see nullification as a discredited doctrine inconsistent with the constitutional principles underlying the American federal system.”); Paul Finkelman, *Turning Losers Into Winners: What Can We Learn, if Anything, from the Antifederalists*, 79 TEX. L. REV. 849, 892 (2001) (reviewing SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING AMERICAN TRADITION IN AMERICA, 1788-1828* (1999)) (discussing the historical failures of nullification). *But cf.* WOODS, *supra* note 25, at 197-249 (making the case in favor of state nullification).

This is not a chimerical prospect. State nullification may be behind us, but it is not out of view. Nullification might even be a campaign platform in the upcoming presidential race. Consider again, for example, Senator and presidential candidate Ted Cruz's proposed bill, which would allow non-party states to disregard the Court's constitutional ruling in the same-sex marriage case.¹⁶³ Cruz was actually second to the punch: former Arkansas Governor and presidential candidate Mike Huckabee was first to contend, during a radio interview, that states could continue to deny same-sex marriages even if the Supreme Court ruled otherwise.¹⁶⁴ To be sure, these views may be extreme. Yet it would be naïve to assume away public support for them. Even if legalizing state self-help would not legitimate state nullification, it surely could encourage it.

For argument's sake, however, let us assume that state nullification of federal law would not qualify as a legitimate act of state self-help. What about lesser acts of state resistance—or, what I call “neo-nullification”—where states do not declare federal law null, but take action that is purposefully in tension with federal law to tee up the issue for political debate or legal challenge?¹⁶⁵ Consider the following real-world examples:

- In 2004 and 2005, several states passed statutes and resolutions opposing the No Child Left Behind Act,¹⁶⁶ on the stated or assumed argument that NCLB violated federalism principles. Among these laws was a Utah statute that directed state officials to prioritize state education objectives over federal objectives if the two conflicted.¹⁶⁷
- In 2010, Nebraska passed a “fetal-pain” statute that bars most abortions performed after twenty weeks from conception.¹⁶⁸ In 2013, Arkansas and North Dakota went further, passing laws barring most abortions once a fetal heartbeat is detected—which can occur as early as twelve weeks after conception.¹⁶⁹ These laws are in significant tension, if not wholly incompatible, with *Roe v. Wade*¹⁷⁰ and its progeny.¹⁷¹ But, according to Governor Dalrymple of North Dakota,

¹⁶³ See *supra* notes 81-85 and accompanying text.

¹⁶⁴ See Igor Bobic, *Mike Huckabee: States Can Ignore Supreme Court on Gay Marriage*, HUFFINGTON POST (Jan. 21, 2015, 11:59 PM), http://www.huffingtonpost.com/2015/01/21/mike-huckabee-gay-marriage-supreme-court_n_6512042.html [<http://perma.cc/Y2NL-9UB4>].

¹⁶⁵ See DINAN, *supra* note 162, at 2 (discussing, distinguishing, and generally defending this new breed of state resistance).

¹⁶⁶ See *id.* at 7 (discussing state resistance to NCLB).

¹⁶⁷ UTAH CODE ANN. § 53A-1-903(2) (LexisNexis 2011).

¹⁶⁸ NEB. REV. STAT. § 28-3,106 (2014).

¹⁶⁹ ARK. CODE ANN. § 20-16-1304 (2013); N.D. CENT. CODE § 14-02.1-05.1 (2013).

¹⁷⁰ 410 U.S. 113 (1973).

¹⁷¹ See *id.* at 163; Lindsay J. Calhoun, Comment, *The Painless Truth: Challenging Fetal Pain-Based Abortion Bans*, 87 TUL. L. REV. 141, 155 (2012) (arguing that these laws are

his state's anti-abortion law is "a legitimate attempt by a state legislature to discover the boundaries of [*Roe*] . . . ' [Because] the Supreme Court . . . 'has never considered this precise restriction'" of a fetal heartbeat, and therefore the constitutionality of this measure is an open question.¹⁷²

- As of 2015, eighteen states had enacted so-called "Health Care Freedom" laws inconsistent with the Affordable Care Act's individual mandate provision.¹⁷³
- Between 2009 and 2013, eight states enacted so-called "Firearms Freedom" laws, purporting to exempt firearms manufactured and remaining solely within the state from provisions of the National Firearms Act of 1934 and the Gun Control Act of 1968.¹⁷⁴ Wyoming and Kansas take the additional step of authorizing state prosecution of federal officials that try to enforce federal firearms statutes in violation of the states' firearm laws.¹⁷⁵

These examples further underscore my descriptive claim in Part II: states are actively engaging in self-help against the federal government. Currently, these acts are being policed under the Supremacy Clause, other doctrines of vertical federalism, and to some extent by the federal political branches.¹⁷⁶ Legalizing self-help, however, would move the lines of constitutionality. Formerly highly questionable tactics might become questionable; formerly questionable tactics might become lawful. Again, where the new lines will be drawn, who will draw them, how they will be enforced, and so on, would all need to be worked out if state self-help were legalized.

We might eventually get there. But even if the end holds promise, the transition harbors untold costs for the balance of power and the rule of law. Political forces and motivational bias may cause state actors to excessively

"clearly unconstitutional" under *Roe* and its progeny). *But cf.* Note, *The Science, Law, and Politics of Fetal Pain Legislation*, 115 HARV. L. REV. 2010, 2023-31 (2002) (suggesting how a properly configured fetal-pain statute might comply with *Roe* and its progeny).

¹⁷² See John Eligon & Erik Eckholm, *New Laws Ban Most Abortions in North Dakota*, N.Y. TIMES, Mar. 27, 2013, at A1.

¹⁷³ See Cauchi, *supra* note 57 (canvassing state law).

¹⁷⁴ Barak Y. Orbach et. al., *Arming States' Rights: Federalism, Private Lawmakers, and the Battering Ram Strategy*, 52 ARIZ. L. REV. 1161, 1180 (2010) (stating eight such bills were enacted into law by 2010); *The Firearms Freedom Act (FFA) is Sweeping the Nation*, FIREARMS FREEDOM ACT (June 3, 2010), <http://firearmsfreedomact.com/> [<http://perma.cc/9TV5-42C7>] (maintaining a list of states that have passed firearm freedom measures).

¹⁷⁵ KAN. STAT. ANN. § 50-1207 (2014); WYO. STAT. ANN. § 6-8-405 (2010); *see, e.g.*, *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 982 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 955 (2014), and *cert. denied sub nom. Montana v. Holder*, 134 S. Ct. 1335 (2014) (striking down Montana's Firearms Freedom Act).

¹⁷⁶ See Issacharoff & Sharkey, *supra* note 153, at 1370 (discussing Congress's role in policing horizontal federalism); Metzger, *supra* note 151, at 1480-1512 (same).

invoke self-help, even when circumstances do not justify them doing so. At least for the President, the centralizing pull of a national constituency might temper executive-branch uses (and abuses) of self-help. By contrast, the elected representatives in states with concentrated political views may be more apt to use (and abuse) the right of self-help. Responding to local interests, state officials may be pressured to take self-help action whenever it is politically expedient to do so, or politically suicidal not to. Certainly, when the same political party controls both federal political branches, then states controlled by the opposing party may have little or nothing to lose by invoking self-help.

Political forces or moneyed interests originating outside of the state might even pressure state officials to take self-help action. States have become staging grounds for national party agendas, especially for the party out of power in the nation's capital.¹⁷⁷ Thus, for example, Republican national party elites may encourage red states to self-help against decisions by Democratic federal officials. Again, the cynic might envision *wink-and-nod* state self-help. This time, however, the party out of power in federal government stalls or stops federal action so that states can go it alone (under the tutelage of national party elites or policy entrepreneurs). These and other acts of state self-help may or may not be legitimate—again, depending on whatever limitations might attach to state self-help. But, once we allow for some acts of state self-help, can we really expect to keep the camel out of the tent?

Perhaps with the courts' help. Again, however, that assumes that courts would, or should, have a role in policing acts of state self-help taken to redress a perceived constitutional violation by a federal branch. Granted, some acts of state self-help might be categorically prohibited or beyond the pale of what any state would attempt. But the hypothesis tested here (in Quadrant 3) assumes that there will be some set of potentially legal acts of state self-help taken against one or more federal branch. In those cases, on what basis would courts decide the threshold, self-help triggering question of whether the federal government acted unlawfully?¹⁷⁸ Many of those first-order questions are currently non-justiciable or effectively so—either because there is no law to apply (in the case of “small-c” constitutional norms) or because the Court has not felt comfortable second-guessing the political branches.¹⁷⁹ Suppose, for example, that the alleged triggering act involves a “political question,”¹⁸⁰ or

¹⁷⁷ See Bulman-Pozen, *supra* note 99, at 1080 (“Republican-led states challenge the federal government when it is controlled by Democrats, while Democratic-led states challenge the federal government when it is controlled by Republicans.”).

¹⁷⁸ See *supra* notes 32-39 and accompanying text (discussing the need for a trigger as a threshold justification for conditional self-help).

¹⁷⁹ Cf. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1183 (2013) (“[C]ourts may not directly *enforce* conventions against other political actors, in the sense that courts may not invoke freestanding conventions to override written legal rules. However, courts may indirectly *recognize* and *incorporate* conventions in the course of performing their . . . duty of interpreting written laws or rules of common law.”).

¹⁸⁰ Cf. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (outlining factors that can render

concerns a nondelegation challenge,¹⁸¹ or tests the scope of the President's prosecutorial discretion.¹⁸² In these contexts, would courts simply defer to the federal branch's claim that it did not violate a constitutional norm? If so, then vertical state self-help effectively becomes a null set because a federal court will almost never deem the conditional self-help trigger satisfied.

On the other hand, if courts were to decide this conditional trigger, then the courts would be resolving some of the very constitutional questions, in round-a-bout self-help contexts, that courts have felt ill equipped to address in more direct contexts.¹⁸³ And, here again, the question arises: assuming that courts do decide these first-order constitutional questions in self-help contexts, would those decisions, in turn, extend to non-self-help contexts?

V. LEGALIZING BOTH FEDERAL AND STATE SELF-HELP?

Building on the foregoing, this last Part offers a peek into Quadrant 4. In this imagined system, federal and state institutions can lawfully engage in self-help, both intra-governmentally to redress the acts of co-ordinate government units, and inter-governmentally to redress institutional acts across the federal-state divide.

This quadrant treats self-help symmetrically, in the sense that self-help would be a legal option for both state and federal units under certain circumstances. As envisioned here, the scope of the self-help privilege would not necessarily be, or need to be, equal across the structural divide. States, for instance, may be more restricted than the federal branches in how self-help is used. Moreover, courts might play a more active role in policing state self-help than it would policing federal self-help, either for historic reasons, or because the existence of conflicting laws may require conciliation in ways that federal interbranch disputes may not.¹⁸⁴ Despite these variables, however, the system envisioned here is one where both federal branch self-help and state self-help would interact and intersect in contingently legal ways.

separation of powers questions non-justiciable under the "political question" doctrine).

¹⁸¹ Cf. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474-75 (2001) (stipulating that the Court is not well positioned to "second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law") (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989)); see also Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 324-28 (1987) (explaining that the nondelegation maxim is essentially non-justiciable in practice).

¹⁸² Cf. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (holding that the separation of powers doctrine demands broad prosecutorial discretion); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (stating that "the decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch," and explaining that the Court generally will not second-guess such executive decisions).

¹⁸³ See *supra* notes 180-182 and accompanying text.

¹⁸⁴ I thank Jon Michaels for suggesting this point.

Whatever else may be said about this system, it will not be orderly. Consider the following hypothetical:

President Obama declares that DAPA is legally justified as a self-help measure to redress Congress's failure to fix our broken immigration system.¹⁸⁵ Arizona, however, does not believe that Congress's failure to pass law is a constitutional wrong.¹⁸⁶ Rather, Arizona believes that the President violated his constitutional duty to faithfully execute Congress's immigration laws.¹⁸⁷ Invoking legal self-help, Arizona denies drivers' licenses and public education to all undocumented immigrants.¹⁸⁸ Arizona's harsh immigration laws cause large numbers of undocumented immigrants to "self-deport" to neighboring New Mexico.¹⁸⁹ New Mexico voters are not sure who to blame—Congress, the President, or Arizona. Regardless, New Mexico does not wish to host Arizona's undocumented population. So, invoking self-help as a defense, New Mexico passes anti-immigration laws that are even harsher on undocumented immigrants. Meanwhile, other states, including Illinois, pass "sanctuary" laws that by design aim to shield undocumented immigrants from federal detection, and that in effect encourage undocumented immigrants to reside in their state.¹⁹⁰ In 2017, a Republican controlled Congress passes a bill, signed

¹⁸⁵ See *supra* note 102 and accompanying text (describing DAPA).

¹⁸⁶ Cf. Marshall, *supra* note 10, at 101-04 (arguing that Congress has no constitutional duty to pass laws).

¹⁸⁷ Cf. Complaint for Declaratory and Injunctive Relief, *supra* note 106, at 2-5, (listing the states suing to enjoin the Obama administration's DAPA program).

¹⁸⁸ *But cf.* Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding that, under the facts presented, Texas could not meet its burden of demonstrating a sufficient state interest in denying public education to undocumented immigrants); *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1058 (9th Cir. 2014) (enjoining Arizona's policy of denying drivers' licenses to DACA beneficiaries on equal-protection grounds).

¹⁸⁹ Cf. Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, § 1, 2010 *Ariz. Sess. Laws* 450, 450 ("The legislature declares the intent of this act is . . . to discourage and deter the unlawful entry and presence of aliens. . ."); Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 *TULSA J. COMP. & INT'L L.* 155, 156-57 (2008) (hypothesizing that as the "risks of detention or involuntary removal go up," so too does the probability that unlawfully present immigrants will "self-deport").

¹⁹⁰ For examples of sanctuary laws, see City of N.Y. Exec. Order No. 41 (Sept. 17, 2003), http://www.nyc.gov/html/records/pdf/executive_orders/2003EO041.pdf [<http://perma.cc/3MJ5-PQFQ>] (setting out a general city privacy policy and limiting the extent to which city officials can gather and report information regarding immigration status); see also Brief for The Center on the Administration of Criminal Law, as amicus curiae supporting Appellee-Plaintiff at 16, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645), 2010 WL 5162530 (C.A.9), at *16 (stating that at least seventy-three cities, counties, and states have at various times had "non-cooperation" provisions, also sometimes referred to as "sanctuary" laws), *aff'd in part and rev'd in part*, 132 S. Ct. 2492

into law by President Ted Cruz, compelling state police forces to report all known undocumented immigrants to the federal government.¹⁹¹ After Illinois refuses to do so, Congress cuts Illinois's federal funding for law enforcement.¹⁹²

Now, the question: In a world where self-help is legal for both the federal branches and states, which government institution(s) violated the law in the hypothetical above? One possible response is that none of them did. Another possible response is that all of them did. And, of course, there are any number of possible answers in between.

Choosing the best answer to the question above proves difficult, in part, for three related reasons. The first reason should be familiar: in a system where self-help is legal, we do not yet know which constitutional doctrines and norms to insist on, which to relax, who should decide, and on what basis. For example, the Supremacy Clause is not a silver bullet for resolving self-help conflicts in the federal government's favor. As explained above, there is no inherent reason why the Supremacy Clause should apply in a self-help showdown between federal and state institutions; and, even if it did, still undecided is how it would or should apply.¹⁹³ Similarly, in a world where self-help is illegal, federal commandeering of state policy and officials is clearly out of bounds.¹⁹⁴ But, in a self-help world, perhaps Congress could commandeer states to redress some perceived unconstitutional wrong by the states or the President. And so on. These questions may be answerable; the point, however, is that we do not have those answers yet.

This leads to the second reason why answering the hypothetical proves difficult: acts of structural self-help may be informed, to some extent, by current arrangements, doctrines, and historical antecedents. Pozen's idea to import self-help principles of proportionality, proper motive, categorical bars, etc., into the constitutional mix provides a framework for assessing acts of constitutional self-help. But his framework, alone, cannot do the work of determining which acts of self-help would be legal or not. It depends on the circumstances. And many of those circumstances (including but not limited to

(2012).

¹⁹¹ *But cf.* *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress cannot commandeer state officials to enforce federal gun-control laws).

¹⁹² *Cf.* H.R. 3073, 114th Cong. (2015) (seeking to "[t]o prohibit the receipt of Federal financial assistance by sanctuary cities, and for other purposes"); S. 1764, 114th Cong. (2015) (to similar effect). *But cf.* *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) ("Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer."); *South Carolina v. Dole*, 483 U.S. 203, 207-09 (1987) (requiring that Congress clearly put states on notice of any conditions attaching to federal funding).

¹⁹³ *See supra* notes 112-114 and accompanying text (arguing that the Supremacy Clause does not have inherent applicability within the self-help doctrine).

¹⁹⁴ *See Printz*, 521 U.S. at 935.

what counts as a qualifying trigger, the availability of judicial review, categorical bars on certain forms of self-help, and so on) are still up for grabs.

This leads to the third reason why answering the hypothetical proves difficult: distinguishing illegitimate from legitimate forms of self-help is a normatively charged exercise. If we cannot agree on how to optimize separation of powers or federalism when treating each separately, then how can we expect agreement when our dual commitments to separation of powers and federalism (whatever they may be) collide?

The pathway forward is anything but sure. That itself, poses challenges for the rule of law. Over time, constitutional self-help may mature into a doctrine or practice that is somewhat predictable, stabilizing, and self-sustaining. As yet, however, we are a long way off. Reframing constitutional self-help in cross-dimensional terms shows just how far.

CONCLUSION

Pozen's *Self-Help and the Separation of Powers* makes tremendous inroads toward understanding federal interbranch conflict. It also paves the way toward understanding governmental self-help more generally. But, before casting judgment on the merits of separation of powers self-help, we need to account for federalism too. This Article is a first pass.

We might surface from this exercise with any number of reactions. One reaction might be to shut down constitutional self-help altogether. Another may be to leave self-help as a shadow practice (Quadrant 1), which is arguably how it operates today. Alternatively, we might leave open the possibility of legalizing only federal branch self-help (Quadrant 2), only state self-help (Quadrant 3), or only cross-dimensional self-help (Quadrant 4). To choose any arrangement over the others requires a normatively satisfying reason for doing so.

I expect that some people might favor the idea of federal branch self-help but abhor state self-help. But even if we could have the former without the latter, this would not eliminate federalism's relevance to constitutional self-help. Acts of legal self-help between the President and Congress will still affect state interests and state law, not to mention private interests within states. Thus, federalism questions such as whether federal branch self-help can preempt state law, and if so, under what circumstances, will still be relevant. Moreover, even if state self-help is not a legal option, state action will still affect national interests. This raises other federalism questions, such as whether a federal branch can exercise self-help to redress unlawful state action—for example, by commandeering state officials, or cutting state funding without clear advance notice.¹⁹⁵ As these lingering questions highlight, we cannot develop a theory of separation of powers self-help without attending to federalism even if we wanted to. Nor, for the same reasons, can we develop a theory of federalism self-help without attending to separation of powers.

¹⁹⁵ See *supra* notes 191-194 and accompanying text.

Constitutional self-help is an exciting, and endlessly intriguing concept in its own right. But this Article's organizing principle of cross-dimensionalism can, and should, have wide-ranging appeal beyond self-help. Increasingly, some of our most vexing puzzles of constitutional structure implicate separation of powers and federalism simultaneously. In these recurring contexts, a cross-dimensional lens may be more than analytically rewarding—it may be analytically necessary.