
IMMIGRATION PREEMPTION AND THE LIMITS OF STATE POWER: REFLECTIONS ON *ARIZONA V. UNITED STATES*

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INTRODUCTION

The closely-watched battle over Arizona's immigration enforcement law, S.B. 1070, resulted in the Supreme Court's most consequential immigration preemption decision in decades. The ruling in *Arizona v. United States*¹ struck

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1. 132 S. Ct. 2492 (2012).

down three parts of S.B. 1070 while allowing the most contested—the so-called ‘show me your papers’ requirement—to survive (for now). This outcome initially left many wondering whether the Court had upheld or rejected Arizona’s fundamental arguments for greater state autonomy over immigration enforcement.²

On balance, the *Arizona* decision is a stunning setback for claims advanced by supporters of S.B. 1070 and similar state laws. A decisive majority joined a single opinion that rejects the essence of the legal theories on which proponents staked the legitimacy of S.B. 1070 and the current spate of state immigration laws. The *Arizona* decision is a rebuke to sweeping state immigration power and refutes state claims that police possess “inherent authority” to enforce federal immigration violations or that sub-federal immigration regulation is permissible so long as it “mirrors” federal law.

Even the provision that the Court left standing was defanged in important respects. The law was limited in scope and enveloped in judicial admonitions that its implementation will be subject to Fourth Amendment and other constraints. This is not to diminish the continuing threat of racial profiling, discrimination, abuse and harassment that critics assert the surviving section presents; those claims and others remain alive and are emerging.³ And as I have suggested elsewhere, the basis for preemption of state immigration laws should be understood more broadly than is currently the case.⁴

In sum, roughly six years after the current wave of state and local immigration legislation began⁵ and as the dispute over state immigration

2. Some initial reports reflected confusion and both sides claimed victory. *See* Fernanda Santos, *In Arizona, Confusion on Ruling on Migrants*, N.Y. TIMES (June 25, 2012), http://www.nytimes.com/2012/06/26/us/in-arizona-confusion-on-immigration-law-ruling.html?_r=0; *see also infra* note 7.

3. *See infra* note 79.

4. I do not address normative questions about Supremacy Clause limits on sub-national immigration legislation here. My view is that federal anti-discrimination and anti-harassment principles are central to informing limits on state immigration authority and that those norms distinguish between, on the one hand, state measures like Arizona’s that target immigrants and, on the other hand, measures that instead further equality among all residents (regardless of immigration status) or seek to ameliorate vulnerabilities of non-citizens. For an initial discussion of the anti-discrimination component of preemption, see Lucas Guttentag, *Discrimination, Preemption, and Arizona’s Immigration Law: A Broader View*, 65 STAN. L. REV. ONLINE 1, 1-2 (2012).

5. As of 2007, thirty towns had enacted state immigration-related ordinances. Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES (Sept. 26, 2007), http://www.nytimes.com/2007/09/26/nyregion/26riverside.html?_r=2. The city of Hazleton, Pennsylvania, passed one of the first in 2006, and many other towns used its ordinance as a model. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 506-07 (2007) (describing passage of Hazleton ordinances in 2006 and noting that these “spawned a number of similar ordinances nationwide”).

regulation continues,⁶ the Court has sharply constrained permissible sub-federal authority, articulated a strong foundation for federal primacy in immigration enforcement, and rejected broad theories of state power.

This article (1) provides some relevant background on the recent history of Supreme Court immigration preemption decisions leading up to *Arizona*, (2) discusses how the *Arizona* litigation arose and explain the Court's decision, and (3) draws some initial conclusions about the implications of the *Arizona* ruling for theories of state immigration enforcement power. As is developed below, I argue that the Court has rejected the inherent authority and mirror image claims advanced by proponents of state immigration laws.⁷

I. BACKGROUND

A. The Long Drought.

Until 2011, the Supreme Court had not decided a case about state or local immigration regulation for more than twenty-five years. The last decision addressing a sub-federal immigration law was issued in 1984⁸ and the last immigration Supremacy Clause ruling was in 1982.⁹ During the almost three

6. See, e.g., *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010), *vacated and remanded*, 131 S. Ct. 2958 (2011); *Keller v. City of Fremont*, 853 F. Supp. 2d 959 (D. Neb. 2012), *on appeal* 12-1702, 12-1705, 12-1708 (8th Cir. 2012); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858 (N.D. Tex. 2008) *aff'd*, 675 F.3d 802, *reh'g en banc granted by* 688 F.3d 801.

7. For valuable insights, see David A. Martin, *Reading Arizona*, 98 VA. L. REV. IN BRIEF 41 (2012), http://www.virginialawreview.org/inbrief/2012/04/14/Martin_Web.pdf. For my initial observations that identify some of the points developed more fully here, see Lucas Guttentag, *Online Symposium: Strong on Theory While Profiling Ignored*, SCOTUSBLOG (June 25, 2012, 7:03 PM), <http://www.scotusblog.com/2012/06/online-symposium-strong-on-theory-while-profiling-ignored/>. For divergent commentary on the day of decision, compare Andrew Pincus, *Online Symposium: A Win for the Government and for the SG*, SCOTUSBLOG (June 26, 2012, 4:56 PM), <http://www.scotusblog.com/?p=147688>, with Richard Samp, *Online Symposium: A Defeat for the Obama Administration*, SCOTUSBLOG (June 25, 2012, 7:56 PM), <http://www.scotusblog.com/?p=147574>. In the interest of full disclosure, in my capacity at the ACLU I was involved in some of the cases and issues discussed in this article.

8. *Bernal v. Fainter*, 467 U.S. 216, 217-18 (1984) (holding that a Texas law requiring that notary publics be U.S. citizens violates Equal Protection Clause).

9. *Toll v. Moreno*, 458 U.S. 1 (1982) (holding that denial of in-state tuition rates to certain non-immigrant visa holders is preempted under Supremacy Clause). That same term the Court decided *Plyler v. Doe*, 457 U.S. 202, 215-16, 230 (1982) (holding that restricting K-12 public education to undocumented children violated the Equal Protection Clause); and *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (holding that state law requiring deputy probation officers to be United States citizens satisfied equal protection under the "political function" test). Two years later, the Court decided *Bernal v. Fainter*, which did not address preemption and broke no new ground. The Court held 8-1 that a state law imposing a citizenship requirement for notary publics violated equal protection and did not qualify under

decades that followed, the Court often addressed federalism and preemption outside the immigration context¹⁰ and decided many cases involving immigration law and the rights of non-citizens.¹¹ The Court did not, however, address immigration federalism. By comparison, in the period before 1984, the Court decided more than a dozen cases challenging state or local laws and regulations that singled out immigrants or imposed sub-federal immigration restrictions.¹² This generation of cases—with two notable exceptions¹³—

the “political function” exception. *Bernal*, 467 U.S. at 217-18, 227. Justice Rehnquist wrote a one-sentence dissent referencing an earlier dissenting opinion. *Id.* at 228.

10. See, e.g., Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion*, *Wal-Mart v. Dukes*, and *Turner v. Rogers*, 125 HARV. L. REV. 78, 112-13 (2011) (discussing the increasing preemptive power of the Federal Arbitration Act, particularly in the context of *AT&T v. Concepcion*, 131 S. Ct. 1740); Ernest A. Young, “*The Ordinary Diet of the Law*: The Presumption Against Preemption in the Roberts Court, 2011 SUP. CT. REV. 253, 267-83 (2011).

11. From 1983 to 2011, the Court continued to decide many immigration cases and claims by non-citizens. My tabulation identifies roughly six dozen such cases. The total number of immigration-related cases per term remained relatively steady even as the Court’s overall docket declined from almost 250 cases in 1982 to approximately seventy-five cases in 2012. Any enumeration like this is inherently suspect and subject to error and disagreement. My point is only that immigration cases in general did not decline during the lengthy period when immigration preemption cases disappeared from the Court’s docket. A list of cases used for these calculations is on file with the author. Excluded are cases relating to foreign nationals outside the United States asserting claims of extra-territorial application of the Constitution or U.S. law and claims by foreign corporations. See, e.g., *Rasul v. Bush*, 542 U.S. 466, 470 (2004); *Boumediene v. Bush*, 553 U.S. 723, 732 (2008); *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987).

Among the many immigration issues the Court addressed after 1983 were: scope of the 1980 Refugee Act, *INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); the extent of immigration detention authority, *Clark v. Martinez*, 543 U.S. 371 (2005); *Demore v. Kim*, 538 U.S. 510 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001); jurisdictional restrictions and habeas corpus rights of immigrants, *INS v. St. Cyr*, 533 U.S. 289 (2001); *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999); *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993); *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991); judicial deference to immigration agencies, *Negusie v. Holder*, 129 S. Ct. 1159 (2009); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); repeated disputes about the “aggravated felony” term under the immigration statute, *Kawashima v. Holder*, 132 S. Ct. 1166 (2012); *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007); the applicability of the exclusionary rule of criminal procedure to deportation proceedings, *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); whether federal labor remedies are available to unauthorized immigrant workers, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); and the constitutional and international law rights of non-citizens in the criminal justice system, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010); *Medellin v. Texas*, 552 U.S. 491 (2008).

12. From 1971-1984, I count the following: *Bernal v. Fainter*, 467 U.S. 216 (1984); *Toll v. Moreno*, 458 U.S. 1 (1982); *Plyler v. Doe*, 457 U.S. 202 (1982); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Ambach v. Norwick*, 441 U.S. 68 (1979); *Elkins v. Moreno*, 435 U.S. 647 (1978); *Foley v. Connelie*, 435 U.S. 291 (1978); *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Examining Bd. of Engineers v. Otero*, 426 U.S. 572 (1976); *De Canas v. Bica*, 424 U.S. 351 (1976); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634

concerned only the question of whether *legal* resident immigrants (permanent or temporary) could be subjected to state or local disabilities or restrictions.¹⁴

The two exceptions arose from state laws explicitly penalizing or denying equal treatment to aliens *not* lawfully in the United States. First, in *De Canas v. Bica*,¹⁵ the Court considered a California employment law that penalized certain employers who hired unauthorized immigrant workers. The Court recognized the force of the Supremacy Clause claim but upheld the law against a preemption challenge, ruling that the statute was not an impermissible regulation of immigration nor preempted by a comprehensive federal framework.¹⁶ The Court did not resolve whether the California statute posed a conflict with federal law and remanded on that issue.¹⁷

Second, the Court issued the landmark decision in *Plyler v. Doe*, holding

(1973); and *Graham v. Richardson*, 403 U.S. 365 (1971). Between 1961 and 1971, the only immigration federalism cases appear to be two challenges to an Oregon law denying non-resident aliens certain inheritance rights, which the Court invalidated as interfering with U.S. treaty obligations and with the federal foreign affairs powers. *See Zschernig v. Miller*, 389 U.S. 429, 430, 432 (1968) (holding that denial of intestate succession to a non-resident alien interfered with foreign affairs power); *Kolovrat v. Oregon*, 366 U.S. 187 (1961) (holding that denial of inheritance rights to a non-resident alien violated treaty obligations).

The number of cases addressing state alienage regulation and discrimination after 1971 and the decline of such rulings after 1984 may reflect an upsurge in legal challenges in the aftermath of the Court's ruling in *Graham v. Richardson* and the gradual resolution of claims thereafter. Congress also enacted major federal immigration and welfare legislation in 1986, 1990, and 1996 (as well as other significant amendments) that generated a legion of disputes in the lower courts and Supreme Court over the interpretation and constitutionality of many new federal provisions.

13. *See De Canas*, 424 U.S. 351; *Plyler*, 457 U.S. 202.

14. *See, e.g., Bernal*, 467 U.S. at 217-218 (legal resident alien challenge to state law requiring notary publics to be U.S. citizens); *Cabell*, 454 U.S. at 432 (legal resident alien challenge to state law requiring probation officers to be U.S. citizens); *Foley*, 435 U.S. at 291 (same regarding state law requiring state troopers to be citizens); *Toll*, 458 U.S. at 1 (non-immigrant visa holder challenge to state university tuition policy); *Elkins*, 435 U.S. at 647 (same); *Ambach*, 441 U.S. at 68 (legal resident alien challenge to law denying teacher certification to aliens who decline to pursue naturalization); *Nyquist*, 432 U.S. at 1 (legal resident aliens challenge to alienage restrictions on state financial education assistance); *Otero*, 426 U.S. at 572 (legal resident alien challenge to Puerto Rican law requiring civil engineers to be U.S. citizens); *Sugarman*, 413 U.S. at 634 (legal resident aliens challenge to state law limiting competitive state civil service employment to U.S. citizens); *Griffiths*, 413 U.S. at 717 (legal resident alien challenge to state law requiring attorneys to be U.S. citizens); *Graham*, 403 U.S. at 365 (legal resident aliens challenging state alien-based restrictions for welfare eligibility).

15. *De Canas*, 424 U.S. 351.

16. *Id.* at 356, 362. The *De Canas* Court relied on the fact that at that time the federal immigration statute “at best evidence[d] . . . a peripheral concern with employment of illegal entrants” *Id.* at 360-61.

17. *Id.* at 364-65 (California courts “to decide in the first instance whether and to what extent § 2805 as construed would conflict with the INA or other federal laws or regulations” in the manner it is seeking to “regulate the employment of illegal aliens”).

that a Texas state law and local school district policy denying equal access to primary and secondary education to undocumented school children violated the Equal Protection Clause.¹⁸ That decision expressly declined to address preemption,¹⁹ but it cited *De Canas* with approval.²⁰ A few weeks later in *Toll v. Moreno*²¹ —the last immigration federalism case of that era decided under the Supremacy Clause—the Court struck down a state restriction, but it also raised a disagreement about the proper reading of *De Canas*²² that was left lingering.

The *De Canas* holding and its characterization in *Plyler* that “the States do have some authority to act with respect to *illegal aliens*, at least where such action *mirrors federal objectives* and furthers a legitimate state goal,”²³ helped spawn the theories undergirding the measures at issue in *Arizona v. United States*. Proponents of state power seized on *Plyler*’s statement and argued that “mirroring” federal law justified state legislation.²⁴ Since the Court did not return to questions of immigration federalism in general—or as applicable to unauthorized aliens in particular—for many years, the permissible range of state regulation if aimed at “illegal aliens”²⁵ was uncertain. Advocates of state authority advanced theories of state autonomy, power to regulate unauthorized aliens, and authority to enact immigration penalties, all of which culminated with Arizona’s S.B. 1070.

Before the challenge to S.B. 1070 reached the Supreme Court, however, a narrower preemption question, based on a less ambitious claim of state power, emerged. Beginning in 2006, some cities and states enacted laws penalizing employers who hired unauthorized alien workers and mandating that businesses

18. *Plyler*, 457 U.S. 202.

19. *Id.* at 210 n.8. The preemption argument featured prominently in the court of appeals and district court and was the principal basis for invalidation of the education-restrictions. *See Doe v. Plyler*, 628 F.2d 448, 451-54 (5th Cir. 1981); *Doe v. Plyler*, 458 F. Supp. 569, 590-93 (E.D. Tex. 1978). The United States as amicus argued against preemption and did not address the merits of the equal protection claim. Brief for the United States at 14-47, *Doe v. Plyler*, 628 F.2d 448, (5th Cir. 1981) (No. 80-1538, 80-1934). A Justice Department memo criticizing the Solicitor General’s office for failing argue against the equal protection claim emerged during the confirmation hearings of Chief Justice Roberts. *See Memorandum to the Attorney General from Carolyn B. Kuhl & John Roberts, Plyler v. Doe: The Texas Illegal Aliens Case, June 15, 1982, available at* http://www.archives.gov/news/john-roberts/accession-60-88-0494/box8_folder013.pdf, at 2.

20. *Plyler*, 457 U.S. at 225.

21. *Toll v. Moreno*, 458 U.S. 1 (1982).

22. *Compare id.* at 13 n.18 (explaining that *De Canas* upheld state law because federal law authorized it), *with id.* at 31 (Rehnquist, J., dissenting) (arguing that *De Canas* upheld state law because federal law did not prohibit it).

23. *Plyler*, 457 U.S. at 225 (emphasis added).

24. *See infra* note 161.

25. *De Canas v. Bica*, 424 U.S. 351, 365 (1976).

enroll in a federal employee verification program known as E-Verify.²⁶ The states and cities argued that the employer penalties (in the form of business license suspension or revocation) were authorized under federal law and that the E-Verify enrollment mandate was permissible because it generally furthered federal goals. Business and civil rights groups argued that both were preempted under express and conflict preemption principles.²⁷

In 2011, the Court rejected the preemption claims. *Chamber of Commerce v. Whiting*²⁸ upheld a law (also from Arizona) imposing both a state employer penalties regime and mandatory E-Verify enrollment. The Court found both were authorized by the immigration laws, under a specific proviso to an express preemption provision and by the purposes of the verification system, respectively.²⁹ That ruling fostered further uncertainty about the range of permissible state immigration laws. Did *Whiting* herald a broader view of state power to enact immigration legislation; did it authorize state penalties aimed at undocumented aliens; would a presumption *against* preemption apply to state and local immigration laws generally?

After *Arizona v. United States*, some initial answers can be discerned. The Court has imposed significant limits on state authority, has articulated a strong foundation for federal primacy, and has limited *Whiting* to its particular facts and claims.

B. S.B. 1070 and the Courts

In 2010, Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act, popularly known as S.B. 1070. It contained ten substantive sections as well as severability, implementation, and construction provisions. The bill's purpose was expressly set forth in Section 1:

The legislature declares that the intent of this act is to make attrition through

26. See, e.g., *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010); *Keller v. City of Fremont*, 853 F. Supp. 2d 959 (D. Neb. 2012); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858 (N.D. Tex. 2008). Some of these laws or ordinances included other prohibitions. See, e.g., *Hazleton*, 620 F.3d at 177 (describing local ordinances' rental and employment provisions); *Fremont*, 853 F. Supp. 2d at 964-65 (same).

27. See, e.g., *Fremont*, 853 F. Supp. 2d at 969-70.

28. 131 S. Ct. 1968 (2011).

29. In *Whiting*, the Court held 5-3 (with Justice Kagan recused) that the Legal Arizona Workers Act, which enacted a state employers sanctions law and mandated the use of E-Verify, was not preempted. 131 S. Ct. at 1973. The Court held that the law was neither expressly nor impliedly preempted. First, the opinion relied on a "savings clause" within the federal statute's express preemption provision to find that it was not expressly preempted. *Id.* at 1978-81. It then held that the law was not impliedly preempted because neither the sanctions provision nor the mandatory E-Verify enrollment conflicted with federal law or posed obstacles to the federal purpose. *Id.* at 1981-87. The United States was not a party but supported the plaintiffs' challenge. Brief for the United States as Amicus Curiae Supporting Petitioners, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (No. 09-115).

enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.³⁰

The key substantive provisions, as detailed below, included creating new state immigration crimes, authorizing state law enforcement officers to make certain immigration-based arrests, and requiring state officers to ask suspected unauthorized noncitizens to present immigration papers during police stops. The law was widely reported as “the nation’s toughest bill on illegal immigration.”³¹ Numerous other states soon considered or enacted laws modeled on S.B. 1070.³²

Immediate pre-enforcement legal challenges ensued. In some important respects, the proceedings in district court framed the issues in the Supreme Court. The principal private plaintiffs, a coalition of civil rights organizations, promptly sought a preliminary injunction.³³ The United States filed a separate lawsuit days after the court scheduled an injunction hearing in the civil rights case. Both actions sought to enjoin S.B. 1070 in its entirety as well as specific

30. S.B. 1070 § 1, 2010 Leg., 49th Sess. (Ariz. 2010).

31. Randal C. Archibald, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES (Apr. 24, 2010), http://www.nytimes.com/2010/04/24/us/politics/24immig.html?_r=0. The law was intended by its proponents to “make life for illegal immigrants so uncomfortable and uncertain that they w[ould] leave” the state. Nicholas Riccardi & Ashley Powers, *Arizona’s Immigration Strategy: Make Life Tough*, L.A. TIMES (Apr. 14, 2010), <http://articles.latimes.com/2010/apr/14/nation/la-na-arizona-immigration15-2010apr15>.

32. Alabama, Georgia, Indiana, South Carolina and Utah enacted similar laws, which are now subject to legal challenges by private litigants and in some cases by the United States. *See* Utah Coal. of La Raza v. Herbert, No. 2:11-CV-401-CW, 2011 WL 7143098, at *1 (D. Utah May 11, 2011); Buquer v. City of Indianapolis, 797 F. Supp. 2d 905, 909 (S.D. Ind. 2011); Ga. Latino Alliance for Human Rights v. Deal, 793 F. Supp. 2d 1317, 1321-22 (N.D. Ga. 2011); Hispanic Interest Coal. v. Bentley, No. 5:11-CV-2484-SLB, 2011 WL 5516953, at *1 (N.D. Ala. Sept. 28, 2011). The Eleventh Circuit recently issued decisions in the Georgia and Alabama cases. *See* Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250, 1269 (11th Cir. 2012); United States v. Alabama, 691 F.3d 1269, 1280-81 (11th Cir. 2012); Hispanic Interest Coal. v. Bentley, 691 F.3d 1236, 1249-50 (11th Cir. 2012).

33. *See* Complaint for Declaratory and Injunctive Relief, Friendly House v. Whiting, 846 F. Supp. 2d 1053 (D. Ariz. May 17, 2010) (No. CV 10-1061), a class action brought by a coalition of civil rights organizations, which was the most prominent challenge brought by non-governmental entities. Other non-governmental challenges include *Frisancho v. Brewer*, *National Coalition of Latino Clergy and Christian Leaders v. Arizona*, *Salgado v. Brewer*, *League of United Latin American Citizens v. Arizona*, and *Escobar v. Brewer*. *See* Complaint, *Frisancho v. Brewer*, No. CV 10-926 (D. Ariz. April 27, 2010); Order, Nat'l Coalition of Latino Clergy and Christian Leaders v. Arizona, No. CV 10-943 (D. Ariz. Dec. 10, 2012); Amended Complaint, *Salgado v. Brewer*, No. CV 10-00951 (D. Ariz. May 17, 2010); Opposition to Motion to Dismiss, *League of United Latin Am. Citizens v. Arizona*, No. 2:10-cv-01453 (D. Ariz. Oct. 11, 2010); First Amended Complaint, *Escobar v. Brewer*, No. CV 10-249 (D. Ariz. May 18, 2010).

provisions under the Supremacy Clause.³⁴ The civil rights suit also raised claims under the Fourth Amendment, Due Process, Equal Protection and right to travel guarantees.³⁵

The district court made clear at the preliminary injunction hearing that it would evaluate each section or subsection of S.B. 1070 separately.³⁶ The court acknowledged the legislative purpose announced in Section 1 but refused to consider a comprehensive challenge to the law as a whole.³⁷ The court therefore never directly grappled with the claim that the law constituted an integrated and impermissible state immigration policy or unconstitutional regulation of immigration. This granular analysis planted the seeds for the subsequent disaggregation of the law and the section-by-section rulings by the Ninth Circuit and Supreme Court.

The district court issued a decision only in the United States' lawsuit and enjoined four parts of S.B. 1070: two state immigration crimes, police warrantless immigration arrest authority, and the "show me your papers" verification requirement.³⁸ Arizona appealed and the United States did not cross-appeal.³⁹ The Ninth Circuit affirmed, unanimously enjoining the two state crimes and by a divided vote enjoining the warrantless arrest and verification requirements.⁴⁰

34. The United States argued that sections 1-6 were specifically preempted by the INA. *See* Complaint at 23-24, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413). The Friendly House plaintiffs argued sections 2 and 6 were separately preempted by the INA. *See* Complaint at 33-36, Friendly House v. Whiting, 846 F. Supp. 2d 1053 (D. Ariz. 2010) (No. CV10-1061).

35. Complaint at 55-60, *Friendly House*, 846 F. Supp. 2d 1053 (No. CV10-1061).

36. The United States signaled the importance of the case by taking the unusual step of having its senior career lawyer from the Office of Solicitor General argue the motion in district court. *See* Jerry Markon, *Edwin Kneedler a 'Savvy' Choice to Argue Suit Against Ariz. Immigration Law*, WASH. POST (July 31, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/30/AR2010073006222.html>.

37. The district court relied significantly on the severability clause to look at each section, subsection, provision and clause separately. In rebuffing *Friendly House* plaintiffs' emphasis on the overarching purpose of S.B. 1070, the district court remarked, "Their intent—you may not like their intent, the Arizona Legislature's Section 1, but I can't enjoin their intent. Their intent is their intent." Transcript of Oral Argument at 36, *Friendly House* v. Whiting, 846 F. Supp. 2d 1053 (D. Ariz. 2010) (No. CV10-1061).

38. The court did not rule in the *Friendly House* suit and issued the injunction only in the United States lawsuit. After the injunction in United States v. Arizona was on appeal, the district court ruled that the civil rights injunction motion was mooted by the United States injunction and largely denied Arizona's motion to dismiss. *See* Friendly House v. Whiting 846 F. Supp. 2d 1053, 1055 (D. Ariz. 2012). The district court later enjoined two other provisions in the *Friendly House* litigation, Sections 5A and 5B, which barred certain public solicitation of employment. *Friendly House* v. Whiting, 846 F. Supp. 2d 1053 (D. Ariz. 2012), *appeal docketed*, No. 12-15688 (9th Cir. Mar. 29, 2012).

39. As noted, the United States argued that other sections were preempted under the INA. *See supra* note 34.

40. *See* 641 F.3d 339. Judge Paez wrote the majority opinion with Judge Noonan

When Arizona sought *certiorari*, the case presented only the validity of the injunction against the four enumerated provisions based on the United States facial pre-enforcement challenge on Supremacy Clause grounds.⁴¹ The claim that the statute as a whole constituted an impermissible regulation of immigration had virtually disappeared.

C. *Arizona v. United States*

The specific provisions enjoined by the Ninth Circuit and at issue before the Supreme Court were Section 3, making it a state crime to violate the federal alien registration law;⁴² Section 5C, making it a state crime for an alien to seek or engage in unauthorized work;⁴³ Section 6, authorizing police officers in Arizona to make warrantless arrests of persons who are suspected of having committed a public offense that renders them removable;⁴⁴ and Section 2B, the so-called “show me your papers” verification provision requiring police to detain and verify a person’s immigration status who is otherwise stopped by the police if the officer has reasonable suspicion to believe the person is an alien “unlawfully present” in the United States.⁴⁵

The Supreme Court invalidated three of the four provisions. Justice Kennedy wrote for the five-Justice majority, composed of the Chief Justice and Justices Ginsburg, Breyer and Sotomayor. (Justice Kagan was recused.) The majority struck down the state registration crime (Section 3), the state unauthorized work crime (Section 5C), and the warrantless arrest authority (Section 6), but it rejected the United States’ facial challenge to the show-me-your-papers requirement (Section 2B). Justice Alito wrote separately and would

joining and also writing separately. Judge Bea dissented as to Section 2B (“show me your papers”) and Section 6 (warrantless arrests). *Id.* at 391. The four provisions are discussed in detail below.

41. See Petition for a Writ of Certiorari, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), 2011 WL 3562633.

42. Section 3 provides that “a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of [the federal alien registration requirements].” ARIZ. REV. STAT. ANN. § 13-1509 (2012).

43. Section 5 provides: “It is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state.” ARIZ. REV. STAT. ANN. § 13-2928 (2012).

44. Section 6 provides: “A peace officer, without a warrant, may arrest a person if the officer has probable cause to believe . . . The person to be arrested has committed any public offense that makes the person removable from the United States.” ARIZ. REV. STAT. ANN. § 13-3883 (2012).

45. Section 2B provides in relevant part that state officers must make a “reasonable attempt . . . to determine the immigration status” of any person they stop, detain, or arrest on some other legitimate basis if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.” ARIZ. REV. STAT. ANN. § 11-1051 (2012).

have struck down only the state registration crime (Section 3).⁴⁶ Justices Scalia and Thomas each dissented and would have upheld all of the challenged sections.⁴⁷ In sum, six Justices agreed that the failure-to-register crime was preempted and five held two additional provisions preempted: the unauthorized work crime and the warrantless arrest authority. None of the eight participating Justices found Section 2B (“show me your papers”) invalid on its face, though their reasoning diverged in various respects.

Section 3. The Court struck down Section 3’s state penalties for failing to register on the ground that the federal registration scheme addressed in *Hines v. Davidowitz*⁴⁸ was comprehensive and barred any state legislation because Congress has occupied the field.⁴⁹ Justice Alito agreed with the majority that Congress had enacted an “all-embracing system.”⁵⁰ Having found “field preemption,” the Court rejected Arizona’s arguments that it should be allowed to complement or supplement the federal scheme even if it had “the same aim” as federal law and adopted the same substantive standards.⁵¹

Section 5. The Court invalidated Section 5C’s criminal penalty for seeking or engaging in unauthorized employment on the ground that it conflicted with Congress’s decision to impose penalties on employers but not on employees.⁵² The Court recognized the extensive amendments regulating employment of unauthorized aliens enacted by the 1986 Immigration Reform and Control Act (IRCA)⁵³ and found that Arizona’s law would interfere with “the careful balance struck by Congress with respect to unauthorized employment of aliens.”⁵⁴

46. See *Arizona v. United States*, 132 S. Ct. 2492, 2531 (2012) (Alito, J., concurring in part and dissenting in part).

47. See *id.* at 2511 (Scalia, J., concurring in part and dissenting in part) and 2522 (Thomas, J., concurring in part and dissenting in part).

48. 312 U.S. 52 (1941).

49. The federal alien registration law creates misdemeanor penalties for non-citizens who fail to comply with registration requirements. See 8 U.S.C. § 1306(a) (2006) (noting that any alien who willfully fails to register “shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed \$1,000 or be imprisoned not more than six months, or both”); 8 U.S.C. § 1304(e) (2006) (noting that any alien who fails to carry evidence of registration “shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed \$100 or be imprisoned not more than thirty days, or both”).

50. 132 S. Ct. at 2529 (Alito, J., concurring in part and dissenting in part) (quoting *Hines*, 312 U.S. at 74).

51. *Id.* at 2502.

52. *Id.* at 2505.

53. See *id.* at 2503-05 (citing various sections of 8 U.S.C. as amended by IRCA, 99-603, 100 Stat. 2259 (1986)). IRCA § 101 enacted employer sanctions, including 8 U.S.C. § 1324(a) (2006), which prohibits employers from hiring noncitizens lacking federal employment authorization and requires employer verification of all new hires. This provision was not in place when the Court decided *De Canas* and hence was not part of the federal framework at that time.

54. 132 S. Ct. at 2505.

Section 6. The Court also found preempted Section 6's authorization of state police to engage in warrantless arrests of aliens for whom there is probable cause to believe they have committed a "removable" public offense.⁵⁵ The Court held that this authority conflicted with the INA's arrest provisions, gave more power to police than federal law gives to trained federal immigration officers and (impermissibly) authorized the police to act without any input from the federal government, thereby allowing the state to "achieve its own immigration policy" and risking harassment of immigrants.⁵⁶

Section 2B. The Court rejected the facial preemption challenge to Section 2B's mandate requiring police to detain and verify with the Department of Homeland Security (DHS) the immigration status of a person they otherwise stop or arrest if the police officer has "reasonable suspicion" the individual may be "unlawfully present in the United States."⁵⁷ Noting that Congress had specifically provided a mechanism for law enforcement to verify an individual's immigration status with federal immigration authorities,⁵⁸ the majority reasoned that Section 2B could be construed in a manner that would not run afoul of the INA.⁵⁹ The Court warned, however, that it did not mean to "foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect."⁶⁰

Unfortunately absent—and easy to overlook—is what the opinion did *not* do, namely judge the entirety of S.B. 1070 as an integrated whole. Lost in the provision-by-provision assessment is Arizona's unabashed purpose to enact a state policy of "attrition through enforcement" achieved by a series of measures that are "intended to work together" in order to "discourage and deter"—among other goals—the "unlawful *entry and presence* of aliens" in Arizona.⁶¹ S.B. 1070 legislated a state immigration policy to expel unlawful aliens through

55. *See id.*

56. *Id.* at 2506.

57. *Id.* at 2507 (quoting ARIZ. REV. STAT. ANN. § 11–1051(B) (2012)).

58. *Id.* at 2508.

59. *See id.* at 2509–10 ("At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume § 2(B) will be construed in a way that creates a conflict with federal law.").

60. *Id.*

61. 2010 Ariz. Sess. Laws 450, 450 (emphasis added). As was pointed out by states supporting the federal government's legal challenge, the "attrition" policy that S.B. 1070 implements is the one espoused by those who expressly seek to change federal enforcement practices to make life sufficiently intolerable for undocumented immigrants and their "networks of relatives, friends, and countrymen" so that immigrants will self-deport. Brief for the States of New York, et al. as Amici Curiae Supporting Respondent at 18, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182) 2012 WL 1054493 (quoting Mark Krikorian, *Downsizing Illegal Immigration: A Strategy of Attrition Through Enforcement*, CENTER FOR IMMIGRATION STUDIES 4 (May 2005), <http://www.cis.org/articles/2005/back605.pdf> (internal quotation marks omitted)).

a series of mutually reinforcing measures.⁶²

Justice Kennedy's opinion reiterated the law's purpose but did not invoke it in the Court's analysis. The Court's piecemeal approach is a legacy of the district court's ruling that each part should be considered separately, and the United States' decision not to appeal the denial of a comprehensive injunction.⁶³

Nonetheless, the *Arizona* decision erects an analytical framework that endorses two principles. First, state (or local) police may enforce federal immigration law only with federal permission or authorization.⁶⁴ Second, states may not enact their own state crimes to punish immigration violations. While not directly adopting a presumption *in favor of* (in contrast to the general presumption against) preemption, *Arizona* rejects a claim of a freewheeling state immigration enforcement or sanctioning power. The ruling portends a strong weighting of the scales *against* state immigration laws and enforcement policies that establishes, at a minimum, a *preference* for preemption in the realm of immigration enforcement.

1. Police Inquiries: Limiting Section 2B.

Even in upholding the Section 2B "show me your papers" law, the Court placed important limits on state police, reinforced federal control, and sent some significant cautionary signals. The Court noted that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns."⁶⁵ This is significant because the Court cited several Fourth Amendment cases holding that a stop may not be prolonged beyond the time reasonably necessary for the initial law enforcement justification in support of this admonition.⁶⁶ The Court further warned that "it would disrupt the federal framework to put state officers in the position of holding aliens in custody for

62. Justice Scalia's dissent confirms—and defends—the obvious purpose of S.B. 1070 to adopt a state *immigration* policy and hence apparently recognizes that the law's legitimacy should be judged on that basis. In recognition of the self-evident goal of Arizona's legislation, Justice Scalia defended that purpose directly in a remarkable claim of state sovereignty to set state immigration policies. *See Arizona*, 132 S. Ct. at 2522 (Scalia, J. concurring in part and dissenting in part) ("If securing its territory in this fashion is not within the power of Arizona, we should cease referring to it as a sovereign State.")

63. As noted above, the United States' legal challenge (as well as that of the civil rights organizations filed first) sought to invalidate *all* the provisions of S.B. 1070, not just the four addressed by the Supreme Court. But the district court rejected that approach and it never reemerged as the case proceeded to the Supreme Court. *See supra* notes 40-45 and accompanying text.

64. By "enforce," I refer here to unilateral state arrest and detention authority for investigation of immigration violations.

65. *Arizona*, 132 S. Ct. at 2509.

66. *Id.* (citing *Arizona v. Johnson*, 555 U.S. 323, 333 (2009); *Illinois v. Caballes*, 543 U.S. 405, 407 (2005))

possible unlawful presence without federal direction and supervision.”⁶⁷ This emphasizes that even “holding” a person for possible federal action is impermissible without federal government control.

The Court found that Section 2B “could be read” to avoid these problems, depending on how state courts interpret the provision and how the law operates.⁶⁸ In that context the Court warned that Section 2B “likely would survive preemption”⁶⁹ assuming it “only requires” police to conduct status checks during an authorized lawful detention or after release.⁷⁰ The Court also explained that S.B. 1070 provided for an Arizona driver’s license to allay any reasonable suspicion, that it contained an express non-discrimination provision prohibiting officers from considering race, color, or national origin, and that S.B. 1070 requires law enforcement to implement the law in a manner consistent with federal immigration law and the Privileges and Immunities Clause.⁷¹ The Court relied on the “basic uncertainty about what the law means and how it will be enforced,” left open the possibility of a showing that it has “other consequences that are adverse to federal law and its objectives,” and, as noted, concluded that it was not foreclosing “other preemption and constitutional challenges” that might be asserted later.⁷²

The limitations imposed by the Court’s Section 2B analysis are not only internal, i.e., restricting the scope of Section 2B itself. The limitations are also external. *Arizona* diminished Section 2B’s effect by invalidating the two state immigration crimes (for failure to register and unauthorized employment) with which Section 2B is intended to interact.⁷³ By striking down Arizona’s criminalization grounds, the Court negated the basis for police finding reasonable suspicion or probable cause for a *state* crime based solely on a federal immigration status violation. Were that permitted, the police arrest itself could be triggered solely by suspicion of a state immigration-based violation, thereby entirely eliminating the need for *non-immigration* criminal suspicion before the police could act.

Understanding this interplay of the state crime provisions of S.B. 1070 with the police verification in Section 2B is essential to appreciating the consequence of the Court’s holding. If the two state crimes had not been

67. *Id.*

68. *Id.*

69. *Id.*

70. *See also id.* at 2529 (Alito, J., dissenting) (“If properly implemented, § 2(B) should not lead to federal constitutional violations, but there is no denying that enforcement of § 2(B) will multiply the occasions on which sensitive Fourth Amendment issues will crop up.”).

71. *Id.* at 2508.

72. *Id.* at 2509-10.

73. The limits do not, of course, address pretextual stops for non-immigration violations or discriminatory stops that single out persons based on race, ethnicity, appearance or other improper grounds.

barred, the limitations imposed on Section 2B would have meant much less or little at all. Police suspicion of state immigration crimes would have constituted a basis for an initial, purportedly legitimate, law enforcement stop or arrest leading to the follow-up Section 2B status and verification requirement. Suspicion solely of an immigration violation would thus serve as the basis both for an initial stop—because it would be a stand-alone state crime—and for the “reasonable suspicion” requiring further inquiry and verification. Leaving aside on what articulable objective grounds a person could be suspected of such an immigration offense, the requirement of independent criminal conduct would be largely eviscerated. No separate (non-immigration) crime would have been necessary and any semblance of limiting the “show me your papers” demand to instances where an individual is first subject to a legitimate law enforcement stop based on reasonable suspicion or probable cause *unrelated to* immigration status suspicion would be illusory. The important result of the Court’s decision is that Arizona cannot boot-strap suspected immigration violations into status and verification checks. At least as a formalistic matter, the police must demonstrate a non-immigration criminal law basis for the stop, and the detention may not exceed that purpose.⁷⁴

2. Federal Control: Foreign Policy and Executive Enforcement Discretion

The *Arizona* ruling also made express the critical link between immigration enforcement and foreign policy as well as endorsing the role of Executive discretion in setting enforcement priorities.

The Court explained that the threat of harassment of foreign nationals—the “mistreatment of aliens in the United States”—resulting from state laws or police initiatives is an important element in the nexus of foreign relations and immigration policy.⁷⁵ This was recognized by the Court decades ago in *Hines v. Davidowitz*⁷⁶ but is often forgotten as an essential reason for federal preemption.⁷⁷ It rests on the understanding that in the eyes of other countries (and under the obligations of international law) the national government is responsible for the legal status and treatment of foreign nationals in the United States.⁷⁸ Any such failure is attributable to the federal government.

74. This interaction between section 2 and sections 3 and 5C is among the reasons why the provisions of S.B. 1070 should be understood as working together and preempted under a broader regulation-of-immigration approach that the district court rejected. See *supra* notes 40-45 and accompanying text.

75. *Arizona*, 132 S. Ct. at 2498.

76. 312 U.S. 52, 73-74 (1941).

77. Notably, Judge Noonan wrote separately in the Ninth Circuit “to emphasize . . . the statute[s] . . . incompatibility with federal foreign policy.” *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011) (Noonan, J., concurring); *see also id.* at 366-69.

78. *See Hines*, 312 U.S. at 65 (“[T]here has grown up in the field of international relations a body of customs defining with more or less certainty the duties owing by all

Mistreatment of foreign nationals here may also cause reciprocal mistreatment of Americans abroad, whom our federal government has the desire and responsibility to protect.⁷⁹

That local rules or restrictions may trigger bilateral problems or disputes with national consequences far transcending the locality involved is foundational to such cases as *Henderson v. Mayor of City of New York*⁸⁰ and *Chy Lung v. Freeman*.⁸¹ Well over a century ago, in *Chy Lung*, the Court noted

nations to alien residents—duties which our State Department has often successfully insisted foreign nations must recognize as to our nationals abroad. In general, both treaties and international practices have been aimed at preventing injurious discriminations against aliens.” (footnote omitted)).

79. The separate Fourteenth Amendment equal protection limitations on local legislation discriminating on the basis of alienage reflects a concern that states or localities may engage in immigration legislation motivated by local prejudices or parochial interests, including veiled (or not) hostility based on race, nationality, or nativism. Among the grounds underlying heightened equal protection scrutiny of most state alienage classifications while giving greater leeway to federal alienage discrimination, *see Mathews v. Diaz*, 426 U.S. 67, 84-85 (1976), is a recognition that local legislation targeting noncitizens singles out politically vulnerable and disenfranchised aliens without serving a transcendent national interest, *see Graham v. Richardson*, 403 U.S. 365, 366 (1971) (holding state law denying equal welfare eligibility to legal resident aliens subject to strict scrutiny); JOHN HART ELY, DEMOCRACY AND DISTRUST 161-62 (1980); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1436-37 (1995). *But see Sugarman v. Dougall*, 413 U.S. 634, 642-43 (1973) (establishing that states can restrict positions which involve essential political activities to citizens as members of the political community); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 59-64. The relationship between preemption, which protects the federal government’s interest, and equal protection, which protects the individual noncitizen’s equality interest, is a separate topic. *See generally* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1211-16 (6th ed. 2008); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT’L L. 201 (1994); Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51 (1985). Acknowledging diminished Equal Protection scrutiny for federal alienage laws should not be (mis)understood as endorsing or accepting that doctrine. *See, e.g.*, Linda Bosniak, *The Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1102, 1104-05 (1994); Tamra M. Boyd, Note, *Keeping the Constitution’s Promise: An Argument for Greater Judicial Scrutiny of Federal Alienage Classifications*, 54 STAN. L. REV. 319, 334 (2001) (criticizing the “overbroad” use of the plenary power doctrine with respect to federal laws that involve domestic discrimination against resident aliens).

80. 92 U.S. 259, 273-74 (1875) (emphasizing “the protection which the foreigner has a right to expect from the Federal government when he lands here a stranger, owing allegiance to another government, and looking to it for such protection as grows out of his relation to that government”); *see Arizona*, 132 S. Ct. at 2498 (“It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.”).

81. 92 U.S. 275, 280 (1875) (“[H]as the Constitution . . . done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer . . . ?”). *See Arizona*, 132 S. Ct. at 2498 (citing *Chy Lung*).

that a locality's abuse of non-citizens has the potential to "embroil us in disastrous quarrels with other nations."⁸²

One significance of *Arizona* is that the Court enlists *Hines* and the anti-harassment principle in the context of S.B. 1070, a law that is aimed expressly at *unauthorized* immigrants. *Arizona* underscores that this preemptive norm applies forcefully even though the state law targets foreign nationals who are not legal residents and are present in violation of federal law. The effect on them, the Court recognizes, equally implicates foreign policy concerns and national interests. In *Hines* itself, the individuals subject to the Pennsylvania law were foreign nationals legally residing in compliance with federal immigration law but at risk of violating the Pennsylvania state registration scheme.⁸³ *Arizona*, by contrast, seeks to target those who are in violation of federal law. Nonetheless, *Arizona* affirmed the danger of state schemes that threaten harassment of foreign nationals and thereby interfere with federal authority—regardless of whether the foreigners have lawful or unlawful federal immigration status.

A distinct but related aspect of the foreign affairs basis for federal immigration power is the federal government's interest in using immigration policy as an affirmative tool of foreign relations—as opposed to the solely reactive interest in avoiding unwanted tensions with other countries or protecting United States citizens abroad. The affirmative aspect may include admitting aliens of particular countries as a statement about another country's government or human rights policies,⁸⁴ providing temporary protection in times of disaster,⁸⁵ expelling foreigners in times of tension,⁸⁶ or imposing special

82. *Chy Lung*, 92 U.S. at 280. In his Ninth Circuit dissent, Judge Bea viewed the majority's consideration of a protest lodged by Mexico about Arizona's law as a kind of "heckler's veto" by a foreign nation that should not be allowed to preempt a state statute by complaining about it. *United States v. Arizona*, 641 F.3d 339, 383 (9th Cir. 2011) (Bea, J., dissenting). That misconceives the import of a foreign government's complaint and fails to recognize that its significance depends on whether the United States chooses to credit, ignore or dispute the complaint. To be sure, a foreign government complaint may constitute evidence of foreign interest and give good reason to believe that the state law in question is not "merely an internal affair." *Id.* at 354; *see also id.* at 353 n.14. But the federal government's judgment—as reflected for example in formal statements, State Department declarations submitted in legal challenges or actual litigation brought by the United States—remains firmly in control.

83. 312 U.S. 52, 66 (1941) (referring to consequences for "perfectly law-abiding" foreign nationals).

84. *See, e.g.*, Wesley L. Hsu, *The Tragedy of the Golden Venture: Politics Trump the Administrative Procedures Act and the Rule of Law*, 10 GEO. IMMIGR. L.J. 317, 335 (1996) (describing political backlash against Tiananmen Square massacre leading to an amendment of the INA to establish asylum eligibility for victims of "coercive population control policies" like China's).

85. *See* 8 U.S.C. § 1254(a) (2006) (authorizing Temporary Protected Status).

86. One early example is the Enemy Aliens Act of 1798, which remains in effect. *See* 50 U.S.C. §§ 21-24 (2012); *see also* Gregory Fehlings, *Storm on the Constitution: The First*

requirements on some foreign nationals as a retaliatory or security measure.⁸⁷ In these cases, the federal government is affirmatively wielding the federal immigration power as a tool of diplomacy or international relations.⁸⁸

Finally, *Arizona* emphatically endorsed paramount federal control and included Executive priorities over initiating immigration proceedings within that sphere. The Court ruled that the federal government's discretion not to prosecute for federal immigration violations is an important element of control.⁸⁹ This discretion, the Court noted, "embraces immediate human concerns" and implicates equitable claims by immigrants based on their U.S. citizen children, longtime residence, military service and broad federal policy

Deportation Law, 10 TULSA J. COMP. & INT'L L. 63, 74 (2002) (describing the undeclared war with France as the backdrop to passage of the Alien Enemies Act). Later examples of deportation as a tool of foreign policy interlaced with national security overtones include the Cold War expulsion of known or suspected current or former Communist Party members. *See, e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 581 (1952); *Kessler v. Strecker*, 307 U.S. 22, 23 (1939).

87. There have been a number of initiatives to single out groups of individuals for increased scrutiny, some of which have been subject to constitutional challenge. *See, e.g.*, *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) (upholding 1979 regulation imposing extra requirements on Iranian student visa holders against discrimination challenge on ground that it was within the authority of Attorney General and constituted permissible nationality-based discrimination), *cert. denied* 100 S. Ct. 2928; Deepa Iyer & Jayesh M. Rathod, *9/11 and the Transformation of U.S. Immigration Law and Policy*, HUM. RTS., Winter 2011, at 10, 11 (describing the establishment after the September 11, 2001, attacks of the controversial National Security Entry-Exit Registration System, "NSEERS," which applied special tracking and registration requirements almost exclusively to nationals of Muslim-majority countries).

88. The point that federal immigration authority is intimately connected to foreign policy should not be confused with the much-criticized plenary power doctrine. The latter invokes foreign affairs as one source of federal power over immigration, but then takes the additional and contested step of insisting on extreme judicial deference to many of the political branches' immigration policy decisions. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); *Harisiades v. Shaughnessy*, 342 U.S. 580, 587-91 (1952); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950); *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) ("The Chinese Exclusion Case"). This doctrine of judicial deference has long been subject to intense scholarly criticism as grounded in a prerights jurisprudence, racist nineteenth century origins and 1950s Cold War fears. *See, e.g.*, Sarah Cleveland, *Powers Inherent in Sovereignty*, 81 TEX. L. REV. 1, 282-83 (2002); Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts*, 66 HARV. L. REV. 1362, 1392 (1953) (describing the idea that the plenary power obviates the need for meaningful due process review as "a patently preposterous position"); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 862 (1987) (describing plenary power as "a constitutional fossil, a remnant of a prerights jurisprudence that we have proudly rejected in other respects"); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Power*, 1984 SUP. CT. REV. 255 (1984). *See generally* ALENIKOFF, *supra* note 79, at 1211-16 (collecting sources).

89. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

choices.⁹⁰

II. IMPLICATIONS: RESTRICTING STATE IMMIGRATION ENFORCEMENT POWER

The restrictions on state immigration power erected by *Arizona* derive from multiple aspects of the Court's decision. As this section explains, the Court's ruling necessarily rejects the two central justifications for the Arizona statute and similar state laws: (1) that state and local police agencies and offices possess "inherent authority" to engage in immigration enforcement as part of the state's traditional police powers, and (2) that states may enact their own sanctions or punishment for federal immigration violations so long as state laws "mirror" federal prohibitions and immigration categories.⁹¹

A. Rejecting Inherent Authority

One key claim of Arizona and proponents of state immigration enforcement power is that state and local police possess "inherent authority"—that is, authority sourced generally in principles of state sovereignty and specifically within the state's historic police power—to arrest those suspected of being in violation of federal immigration law.⁹² That theory was dealt a severe—indeed fatal—setback. Even if not entirely neutered, it has been left without any vitality to justify claims of state power.

90. *Id.* The majority's recognition that the policies of favorable prosecutorial discretion are inherent in the federal scheme precipitated the much commented-upon dissent and oral statement from the bench by Justice Scalia acerbically chastising the post-argument policy of 'deferred action' for so-called 'DREAMers.' *See id.* at 2521 (Scalia, J., concurring in part and dissenting in part); *see also* Bench Statement, Scalia, J., available at <http://www.nytimes.com/interactive/2012/06/25/us/politics/25scalia-statement.html>. For one of many responses, see Richard Posner, *Justice Scalia is Upset About Illegal Immigration. But Where is His Evidence?* SLATE (June 27, 2012), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/supreme_court_year_in_review/supreme_court_year_in_review_justice_scalia_offers_no_evidence_to_back_up_his_claims_about_illegal_immigration_.html.

91. A number of commentators had offered trenchant—and prescient—critiques of both. *See, e.g.*, Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 258 (2011); Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before S.B. 1070*, 58 UCLA L. REV. 1749 (2011); Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 978 (2004); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).

92. *See, e.g.*, Kris Kobach, *The Quintessential Force Multiplier*, 69 ALBANY L. REV. 179, 199-201 (2005); *see also infra* note 119.

Before *Arizona*, courts and commentators disagreed over whether police had inherent authority to arrest for violations of the *civil* provisions of federal immigration law.⁹³ That dispute, however, appeared to accept or assume that state police did possess inherent authority to arrest for suspected *criminal* immigration transgressions.⁹⁴ The Court's ruling has now left little doubt that state authority to arrest for civil immigration violations without federal invitation or authorization is barred. More broadly, the implications of *Arizona* suggest that even unwelcomed state enforcement of federal *criminal* immigration violations interferes with federal preeminence and is not permitted.

1. The Claim of Inherent Authority

The principal proponents of inherent authority trace its constitutional roots to the Tenth Amendment police power, which reserves for the states powers not enumerated in the Constitution.⁹⁵ The claim is that states may conduct arrests for federal immigration violations—just as they purportedly may conduct arrests for other federal offenses—as an exercise of the “basic power of one sovereign to assist another sovereign” in enforcing its laws.⁹⁶ The argument draws on Supreme Court precedent concerning the lawfulness of state arrests

93. Compare *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983) (drawing a distinction between state enforcement of criminal provisions, but not civil provisions, of the Immigration and Naturalization Act based on the “pervasive regulatory scheme” created by the Act’s civil provisions versus the “narrow and distinct element” of the Act’s criminal provisions), with *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999) (“[Federal law] does not limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws.”). See also Memorandum from Douglas W. Kmiec, Ass’t Atty. Gen., Office of Legal Counsel, to Joseph R. Davis, Ass’t Dir., Fed. Bureau of Investigation, *Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File* (Apr. 11, 1989) at 4 n.11 (“Even if state authorization existed with respect to federal non-criminal law, it would necessarily have to be consistent with federal authority [U]nlike the authorization for state and local involvement in federal criminal law enforcement, we know of no similar authorization in the non-criminal context.” (citation omitted)).

94. See, e.g., *Gonzales*, 722 F.2d at 475 (holding that because of the piecemeal, minimal nature of the criminal provisions of the Immigration and Nationality Act, police had authority to arrest suspected violators); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 991 F. Supp. 895, 903 (N.D. Ohio 1997) (“Any officer . . . ‘whose duty it is to enforce criminal laws’ may, consistent with the doctrine of preemption, enforce the criminal prohibitions of the INA.”). Some scholars—with divergent views on state power—criticized this distinction. See *infra* note 133.

95. See Kobach, *supra* note 92, at 199; Memorandum from Jay S. Bybee, Ass’t Atty. Gen., Office of Legal Counsel, *Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations* (Apr. 3, 2002), <http://www.aclu.org/files/FilesPDFs/ACF27DA.pdf>; see generally Kobach, *supra* note 92 (detailing the inherent authority argument).

96. Kobach, *supra* note 92, at 200.

for federal crimes.⁹⁷ None of these Supreme Court cases, however, concerns *immigration* violations—civil or criminal.

The courts of appeals assumed or held that state enforcement of criminal provisions was permissible but were divided on state enforcement of civil immigration violations. Most prominently, in *Gonzales v. City of Peoria*,⁹⁸ the Ninth Circuit had rejected an argument that Congress had preempted local police from arresting persons for the crime of illegal entry, 8 U.S.C. § 1325. The court did not find a “pervasive regulatory scheme” from which preemption should be inferred.⁹⁹ The court presumed, however, that the *civil* immigration provisions constituted a pervasive scheme that was “consistent with *exclusive* federal power over immigration.”¹⁰⁰ It thus expressed strong reservations about

97. See *Ker v. California*, 374 U.S. 23 (1963); *Miller v. United States*, 357 U.S. 301 (1958); *Johnson v. United States*, 333 U.S. 10 (1948); *United States v. Di Re*, 332 U.S. 581 (1948). In these cases, the Court held that the standard for assessing the legality of a state arrest warrant was governed by the relevant state law, even though the offense itself was federal. Although “[n]o act of Congress lays down a general federal rule for arrest without warrant for federal offenses,” states were assumed to be allowed to conduct arrests for federal laws and the warrants authorizing those arrests were analyzed under state law. *Di Re*, 332 U.S. at 591.

98. 722 F.2d 468 (9th Cir. 1983).

99. It noted instead that “regulation[s] of criminal immigration activity” are “few in number and relatively simple in their terms” and “are not and could not be supported by a complex administrative structure.” *Id.* at 475. Armed with the “general rule . . . that local police are not precluded from enforcing federal statutes” unless “enforcement activities . . . impair federal regulatory interests,” the court allowed local police arrests for suspected criminal immigration violations. *Id.* at 474.

The decision rejected an argument that § 8 U.S.C. 1324(c) (2006), which specifically provided arrest authority for alien smuggling and harboring, constituted evidence that arrests for illegal entry and re-entry were not similarly authorized and hence preempted. *Gonzales*, 722 F.2d at 475. The court looked to the legislative history of the three provisions and concluded that the codification of section 1324(c) “implicitly made the enforcement authority as to all three statutes identical.” *Id.*

The court also based its division of civil and criminal enforcement on what it perceived as the relatively few criminal immigration provisions: 8 U.S.C. §§ 1324, 1325, and 1326. See *Gonzales*, 722 F.2d at 476. This analysis has been criticized as under-inclusive. See, e.g., Linda Reyna Yañez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 HISP. L.J. 9, 27-28 (1994) (counting twenty-five criminal immigration provisions within the INA); Kobach, *supra* note 92, at 219-21 (counting forty-seven criminal immigration provisions between Title 8 and Title 18 of the United States Code and noting that although “immigration law has expanded considerably since the Ninth Circuit made this assertion in 1983 . . . most of the forty-seven criminal provisions were already in place” when *Peoria* was decided); see also *infra* note 139. The Ninth Circuit’s analysis may have also been due in part to the relatively low number of *prosecutions* for illegal reentry at that time. That has changed dramatically. See *infra* note 146.

100. *Gonzales*, 722 F.2d at 474-75 (“We assume that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the *exclusive federal power* over immigration. However, this case does not concern that broad scheme, but only a narrow and distinct element of it – the regulation of criminal immigration activity by aliens.”) (emphasis

police arresting for civil violations¹⁰¹ but allowed police to arrest for immigration crimes.¹⁰² By contrast, more than fifteen years later, the Tenth Circuit offered a robust endorsement of state enforcement of immigration laws—civil as well as criminal—on the assumption that such authority exists and that federal law had not curtailed it.¹⁰³

Divergent views on inherent authority are similarly reflected in a series of Office of Legal Counsel (OLC) opinions. In 1989 the OLC opined on state authority to arrest aliens with outstanding federal deportation warrants. Adopting the reasoning of *Peoria*, the opinion noted that “the mere existence of a warrant of deportation does not enable all state and local law enforcement officers to arrest the violator of those *civil provisions*.¹⁰⁴ In 1996, a more extensive OLC memo concluded that state agents were authorized to enforce criminal immigration law but they “lacked recognized legal authority to stop and detain an alien solely on suspicion of civil deportability.”¹⁰⁵

added)).

101. *Id.*

102. *Id.* at 476 (“We therefore conclude that state law authorizes Peoria police to enforce the criminal provisions of the Immigration and Naturalization Act. We firmly emphasize, however, that this authorization is limited to criminal violations.”). The Ninth Circuit stressed that illegal entry was not a continuing offense, that even criminal arrests are permissible only if the police are authorized under state law to arrest for misdemeanors *not* committed in the officer’s presence (as was the case under Arizona law at that time), and that the arrest procedures must comply with the federal Constitution (which were violated in part by the city’s detention and transportation policy). *Id.* at 476-77.

103. Federal law “does not limit or displace the *preexisting general authority* of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws.” *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999) (emphasis added); *see also United States v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001) (holding that an individual’s assertion that he was not “legal” provided state trooper probable cause to arrest the individual for a violation of immigration law).

104. Memorandum from Douglas W. Kmiec, Ass’t Atty. Gen., Office of Legal Counsel, to Joseph R. Davis, Ass’t Dir., Fed. Bureau of Investigation, *Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File* (Apr. 11, 1989), at 9.

105. Memorandum from Teresa Wynn Roseborough, Deputy Ass’t Atty. Gen., Office of Legal Counsel, for Alan Bersin, United States Attorney, Southern District of California, *Re: Assistance by State and Local Police in Apprehending Illegal Aliens* (Feb. 5, 1996), <http://www.justice.gov/olc/immstop1a.htm> (noting that state and local police “lack[ed] recognized legal authority to stop and detain an alien *solely on suspicion of civil deportability*, as opposed to a criminal violation of the immigration laws or other laws.”) *Gonzales* also refers to the earlier views of the Justice Department as expressed by Attorney General Griffin Bell in a 1978 press release. *See Gonzales*, 722 F.2d at 473. That pronouncement states that the Attorney General “reaffirmed [DOJ] policy that the responsibility for enforcement of the immigration laws rests with the Immigration and Naturalization Service (INS), and not with state and local police.” Press Release, Attorney General Griffin Bell, Guidelines Issued for State and Local Police in Immigration Cases (June 23, 1978) (reprinted in 55 INTERPR. REL. No. 31, at 306 (Aug. 9, 1978)). The Attorney General further stated that the Department “would continue to urge” state and local police to observe guidelines that they “not stop and question, detain, arrest, or place an

In 2002, the OLC reversed course. In an undisclosed opinion, portions of which remain redacted from the public view,¹⁰⁶ it articulated a far-reaching view of police authority to arrest for violations of federal law “inher[ing] in the States’ status as sovereign entities.”¹⁰⁷ The memo stated that federal law did not bar and in fact affirmatively authorized state police arrests for federal immigration violations—both criminal *and* civil.¹⁰⁸ These conflicting judicial and Justice Department views set the stage for S.B. 1070.¹⁰⁹

2. Civil Immigration Enforcement

The *Arizona* Court’s rejection of S.B. 1070’s Section 6 warrantless arrest authority constitutes the most telling refutation of the state’s inherent authority claim. Section 6 authorized any Arizona police officer to conduct a warrantless arrest based on probable cause to believe that a person is removable under the

‘immigration hold’ on any persons not suspected of crime, solely on the ground that they may be deportable aliens.” *Id.*

106. The publicly available portion of the 2002 OLC opinion was disclosed through Freedom of Information Act (FOIA) litigation conducted by the ACLU. Nat’l Council of La Raza v. Dept. of Justice, 411 F.3d 350 (2d Cir. 2005). The OLC website posts the 1996 memo but the 2002 opinion remains unavailable. *See Opinions by Date and Title*, U.S. DEP’T OF JUSTICE (Oct. 21, 2012), <http://www.justice.gov/olc/memoranda-opinions.html>.

107. Memorandum from Jay S. Bybee, Ass’t Atty. Gen., Office of Legal Counsel, to John Ashcroft, Atty. Gen., *Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations*, Apr. 3, 2002, 3 [hereinafter 2002 OLC memo].

108. The 2002 OLC memo asserted that field preemption analysis was “entirely misplaced” in the immigration context and instead that federal law should be read against a background assumption that “it would be unreasonable to suppose that [the United States’] purpose was to deny to itself any help that the states may allow.” *Id.* at 8 (quoting *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928) (Hand, J.)). It further noted that 8 U.S.C. § 1252(c) had been enacted in 1996 not as necessary to establish state authority to arrest for designated immigration violations but as *additional* authority above and beyond states’ inherent authority to arrest. 2002 OLC memo, *supra* note 107, at 8-12; *see also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Title IV, § 439, 110 Stat. 1276 (1996).

109. Advocates of state immigration enforcement initiatives like S.B. 1070 relied on the reasoning undergirding the 2002 memo. *See, e.g.*, Brief of Petitioners at 15, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182) (“S.B. 1070 is . . . simply an attempt by the State, pursuant to its inherent authority under Our Federalism, to add its own resources to federal ones . . .”). Justice Alito referred to the Justice Department view at oral argument. Transcript of Oral Argument at 20, *United States v. Arizona*, 132 S. Ct. 2492 (2012) (No. 11-182) (Justice Alito referencing OLC memo for assumption that the “officer can arrest . . . simply on the ground that the person is removable”); *see also* Jerry Markon, *Memo from 2002 Could Complicate Challenge of Arizona Immigration Law*, WASH. POST, May 18, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/17/AR2010051702175.html> (noting the apparent contradiction between the Obama administration’s position in *Arizona v. United States* and the still-on-the-books 2002 memo).

immigration laws based on certain grounds (*i.e.*, that they have committed a “public offense” rendering them removable).¹¹⁰ Under preexisting Arizona law, state officers were already empowered to conduct many warrantless arrests for crimes committed within the state.¹¹¹ Section 6 was therefore understood as adding to existing arrest authority by allowing arrest of (1) individuals believed to have committed a crime in *another* state that rendered them removable from the country; (2) individuals convicted and sentenced for a removable offense within the state who were not deported; and (3) individuals who had been ordered deported who nevertheless remained or illegally reentered.¹¹² The provision thus was a kind of amalgam of civil and criminal arrest authority in that it authorized arrest for civil immigration violations where the person is “removable” based on an underlying “public offense.” It is difficult to imagine a clearer case for police arrest power if inherent authority exists. In defending the statute, Arizona expressly relied on the “inherent authority” of its police to arrest individuals for immigration violations.¹¹³

The Court’s invalidation of Section 6 necessarily rejects that police possess such inherent authority. The Court held that the provision stands as an obstacle “to the full purposes and objectives of Congress” on multiple grounds.¹¹⁴ Notably, the Court did so based on a relatively benign construction of Section 6—that is, reading it as only permitting, rather than *mandating*, arrests.¹¹⁵ Thus, even a statute vesting purely discretionary arrest authority for state officers to make warrantless arrests for suspected immigration violations based on underlying criminal conduct was held preempted.

Several aspects of the reasoning leading to that holding are especially important. First, and significantly, the Court found and identified only “limited circumstances” in which state officers “may perform the functions of an immigration officer.”¹¹⁶ The opinion enumerates four such circumstances and

110. Section 6 provides that an Arizona police officer, “without a warrant, may arrest a person if the officer has probable cause to believe . . . the person has committed any public offense that makes [him or her] removable from the United States.” ARIZ. REV. STAT. ANN. § 13-3883(A)(5).

111. *See id.* at § 13-3883.

112. *See* Brief for Petitioners at 41-42, *Arizona v. United States*, 132 S. Ct. 2493 (2012) (No. 11-182).

113. *Id.*

114. *Arizona*, 132 S. Ct. at 2501 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

115. *See, e.g., Arizona*, 132 S. Ct. at 2506 (noting that under Section 6, states “would have the power to conduct an arrest” based on potential removability). Nor did the Court place any weight on the fact that a separate section of S.B. 1070 authorizes civil damages actions against any agency whose officers fail to maximally enforce every provision of S.B. 1070. *See* S.B. 1070 § 2, art. 8(G), p. 2 (allowing for civil actions to be brought against any state official for enforcing immigration law to “less than the full extent permitted by federal law”), available at <http://www.azleg.gov/legtext/49leg/2r/bills/S.B. 1070s.pdf>.

116. *Arizona*, 132 S. Ct. at 2506. The Court went on to note the INA enumerates several specific circumstances in which the Attorney General can permit “state officers [to]

explains that under each the officers are subject to the Attorney General's "direction and supervision."¹¹⁷ The Court's cataloguing and characterization of the *permitted* areas of state officer activity is crucial because it rejects the claim that these provisions are simply manifestations (or extensions) of a broader and unspecified "inherent" power of state officers to act without any federal imprimatur. Rather, the Court determined that "federal law specifies" the permissible role of state police to engage in immigration enforcement. The Court finds these authorizations necessary to permit state police action—and thereby also reads the limitations contained in those federal laws as restricting state authority.¹¹⁸ This approach implicitly rejects the position of some states that they possess inherent authority without the need for an affirmative grant of federal authorization¹¹⁹—and that this authority is not constrained by the limits of any federal grant. These states argued that federal law operates to supplement—not to confer—a preexisting state power. The Supreme Court rejected that reading of federal law and instead held the federal statute to be the source—and also the restriction—on state authority.¹²⁰

The force of the Court's holding is underscored by an additional and distinct rationale barring state officers from unilateral involvement in immigration enforcement, namely the interference with federal discretion that such arrests constitute. The Court emphasized that "authorizing state officers to

perform the functions of an immigration officer," such as in a so-called 287(g) program. *Id.*; *see also* §§ 1357(g)(1), §1103(a)(10) (authority may be extended in the event of an "imminent mass influx of aliens off the coast of the United States"); §1252c (authority to arrest in specific circumstance after consultation with the Federal Government); §1324(c) (document fraud).

117. *Arizona*, 132 S. Ct. at 2506. ("Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer. A principal example is when the Attorney General has granted that authority to specific officers in a formal agreement with a state or local government.")

118. "Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer." *Id.* at 2506.

119. *See, e.g.*, Brief of Amici Curiae of Michigan and Fifteen Other States in Support of Petitioners at 56, *Arizona v. United States*, 132 S. Ct. 2492 (No. 11-182) (noting that states "have inherent authority to arrest for violations of Federal law").

120. The Court also refuses to credit the reading of 8 U.S.C. § 1252(c) advanced by the 2002 OLC memo. *Arizona*, 132 S. Ct. at 2506. That memo viewed § 1252(c) not as constituting the basis for authorizing state arrests under the particular circumstances it enumerates (illegally present aliens who were previously convicted of a felony and left or were removed from the United States) but rather as enacting an "additional vehicle"—largely unnecessary—that is in addition to the *pre-existing* inherent state authority. *See* 2002 OLC memo, *supra* note 107, at 10. The OLC position cannot survive *Arizona*, which makes clear that states must find their authority to arrest in federal law and therefore the power is limited to what federal law has conferred. The Supreme Court read § 1252(c) as one among a series of statutory examples where Congress has conferred "limited authority" and police act "subject to the Attorney General's direction and supervision." *Arizona*, 132 S. Ct. at 2506.

decide whether an alien should be detained for being removable . . . violates the principle that the removal process is entrusted to the discretion of the Federal Government.”¹²¹

The significance of that pronouncement may not be fully appreciated without stressing that Section 6 authorized arrests simply and solely for the purpose of handing over the suspected alien to the federal government. Thus, Arizona could rightly argue that the removal process remained entirely subject to federal control. Section 6 did not penalize the alien directly or purport to make the ultimate determination of removability. It was, plain and simple, a statute authorizing arrest (and temporary detention) of an alien based on probable cause that the individual had committed a public offense that also rendered her removable from the United States. In other words, the actual removal process and decision remained indisputably and effectively a federal decision. Nonetheless, even this limited state role, the Court held, was preempted by the federal scheme. *Arizona* shows that state enforcement actions alone—far short of removal or prolonged detention and wholly apart from imposing a formal state sanction—undermine the principle of federal discretion and are impermissible.

Also central to the Court’s analysis is the complexity of the federal scheme. In holding the arrest authority preempted, the Court grounded its reasoning not simply on the importance of formal federal control of immigration enforcement but on a central theme in the Court’s recent jurisprudence: the “significant complexities involved in enforcing immigration law, including the determination whether a person is removable.”¹²² While never simple—and famously subject to the observation that immigration law bears a “striking resemblance” to “King Minos’s labyrinth in ancient Crete” and stands as an example “of Congress’s ingenuity in passing statutes certain to accelerate the aging process of judges”¹²³—that complexity has grown exponentially in recent decades.¹²⁴ The *Arizona* Court recognized this

121. *Arizona*, 132 S. Ct. at 2506.

122. *Id.* at 2492 (citing *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (Alito, J., concurring in the judgment)).

123. *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) (Kaufman, J.).

124. Over the past twenty-five years, Congress has repeatedly amended the Immigration and Nationality Act, vastly expanding the categories of crimes and deportable offenses. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208, 110 Stat. 3009 (1996); Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990); Immigration Reform & Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986); *see also* Nancy Morawetz, *Understanding the Impact of the 1996 Immigration Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV 1936, 1939-40 (2000) (criticizing the “Alice-in-Wonderland-like definition of the term ‘aggravated felony’”). Simultaneously, the Court has held that courts should defer to changing agency interpretations of ambiguous statutes. *See* *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 980-83 (2005). Justice Alito, concurring in the judgment in *Padilla v. Kentucky*, observed: “[P]roviding advice on whether a conviction for a particular offense will make an

complexity and concluded that federal training is an essential predicate for any state officer to engage in immigration enforcement.

Another ground on which the Court relied is the federal statutory scheme governing the conduct of its own federal agents. *Arizona* finds these limitations as necessarily reflecting normative federal policy judgments that apply with preemptive force to sub-federal law officers. The immigration laws contemplate the actual arrest of a suspected removable alien by federal agents *only* under specifically enumerated circumstances, and specify when a warrantless arrest is permissible. The required default process for federal removal, the Court explained, is the issuance of an administrative immigration “Notice to Appear,” which does not result in arrest by federal officers.¹²⁵ Arrests *without* warrants, even by federal officers trained in the intricacies of the immigration laws, are permitted only in limited circumstances.¹²⁶ The Court concluded that those limits set the parameters for state officers as well, and it rejected Arizona’s claim of state warrantless arrest authority in part because the state statute would give state officers “even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers.”¹²⁷

A key principle emerging from this analysis is that the procedural and structural limits embedded in the immigration statute constitute not just self-imposed limits on federal agents but broader federal policy judgments that apply to all immigration enforcement and thereby impose preemptive parameters on state authority. A warrantless *state* arrest is impermissible and contrary to the federal scheme because it would permit an immigration arrest without any input from the federal government, without any consideration of enforcement priorities (and exercise of prosecutorial discretion *not* to pursue some categories of aliens or individuals), and without any consideration of the requirements that federal law imposes for a warrantless federal arrest.¹²⁸ This

alien removable is often quite complex. As has been widely acknowledged, determining whether a particular crime is an ‘aggravated felony’ or a ‘crime involving moral turpitude’ is not an easy task.” 130 S. Ct. 1473, 1488 (2010).

125. The Court explained that the Notice to Appear initiates removal proceedings, informs the recipient about the proceedings, instructs the suspected alien when to appear, and imposes consequences for failure to do so. *Arizona*, 132 S. Ct. at 2505; *see also* 8 U.S.C. § 1229(a) (2006). Normally, such a notice—not warrantless arrest and detention—commences the removal process. There are specific circumstances when the Attorney General may or must issue a warrant for an alien’s arrest and detention *Compare* 8 U.S.C. § 1226(a) (2006) (noting discretionary bases for arrest and detention) *with* § 1226(c)(1) (noting mandatory bases for detention). The Court stressed that in the federal arrest context “warrants are executed by federal officers who have received training in the enforcement of immigration law.” *Arizona*, 132 S. Ct. at 2506.

126. *See* 8 C.F.R. § 287.8(c)(2) (2003).

127. *Arizona*, 132 S. Ct. at 2506.

128. The Court’s invocation of the federal warrant requirement as a limit on state practice contradicts reliance on Judge Learned Hand’s analysis in *Marsh v. United States*, 29

establishes an essential point: federal limits on federal immigration enforcement authority foreclose state claims of greater power.

The Court's understanding that limitations on federal arrest authority impose equal or greater limits on parallel state actions stands in notable contrast to the analysis in *Chamber of Commerce v. Whiting*.¹²⁹ There the Court allowed Arizona to impose a state mandate of E-Verify enrollment despite federal law making participation voluntary.¹³⁰ The *Whiting* Court did not view a limitation on federal authorization as also limiting state authority or prohibiting the state from going further. Instead, the Court read the federal text literally as applying only to the Secretary of Homeland Security and not to state actors. After *Arizona*, that mode of reasoning is confined to the particular—and peculiar—context of the E-Verify statute at issue in *Whiting*. In *Arizona* the Court understands that limits on federal immigration enforcement by federal agents are a *a fortiori* applicable to state agents. It treats the textual restriction as reflecting a broader federal norm of balancing enforcement with concern over government intrusiveness, unchecked authority and individual rights that cannot be transgressed by state officers.¹³¹ And *Arizona* applies that principle forcefully, even though state officers under the Supreme Court's construction of Section 6 are exercising only discretionary, not mandatory, arrest authority. The Court's approach is uniquely important as a limit on state immigration enforcement when important competing individual rights and protections are at stake.

In addition to the invalidation of Section 6, the Court's limitation of Section 2B further supports the rejection of inherent authority. As explained above, the Court rejected the state's claim of expansive detention and verification authority for immigration status inquiries. *Arizona* reinforces strict limitations requiring that any detention must be based on independent law enforcement purposes and cannot be extended for immigration inquiries.¹³² If the police possessed the inherent authority that its supporters assert, no such limitation would be appropriate. The narrow reading of Section 2B negates such a claim of power.

F.2d 172, 174 (2d Cir. 1928), which the 2002 OLC memo also cited as authority, and means that case lacks authority in the immigration context. *See* 2002 OLC memo, *supra* note 107, at 3.

129. 131 S. Ct. 1968 (2011).

130. *Id.* at 1985 (“The provision of IIRIRA setting up the program that includes E-Verify contains no language circumscribing state action. It does, however, constrain federal action. . . . That provision limits what the Secretary of Homeland Security may do—nothing more.”).

131. This is reminiscent of *Hines*, where Justice Black, writing for the Court, recognized the importance of “protect[ing] the personal liberties” of the aliens subject to registration and “leav[ing] them free from the possibility of inquisitorial practices and police surveillance....” *Hines*, 312 U.S. at 74.

132. *See* text at note 74 *supra*.

3. Criminal Immigration Enforcement

The Court's Section 6 analysis not only rejects Arizona's assertion of free-wheeling civil enforcement authority, but also puts pressure on the long-standing distinction articulated by lower courts and commentators between state enforcement of *civil* and *criminal* immigration violations. Until now, the debate over inherent authority has turned largely on whether state officers may arrest for civil immigration offenses, while assuming that arrests for criminal violations are allowed.¹³³ The basis for this distinction has been contested by some critics on both sides of the debate,¹³⁴ but it has endured as a critical fault line.¹³⁵ Although the *Arizona* decision does not directly engage this question, the Court's reasoning at a minimum casts doubt on the sustainability of this demarcation, and the Court's opinion conspicuously avoids endorsing a distinction.¹³⁶ Faithfully applied, the Court's ruling barring S.B. 1070's civil enforcement measures should also preclude police from arresting based on criminal immigration violations (absent express federal authorization).¹³⁷

133. See text at notes 97-108 *supra*. See *supra* note 99 (detailing the civil versus criminal debate); Kobach, *supra* note 92, 199-201 (arguing that state police have inherent authority to arrest for both civil and criminal violations). Importantly, some commentators have long disputed this distinction and argued that states may not enforce either civil or criminal immigration statutes. See Wishnie, *supra* note 91, at 1085; Pham, *supra* note 91 at 978.

134. See, e.g., Wishnie, *supra* note 91, at 1089 ("[O]n the whole, enforcement of the immigration statutes has traditionally been the province of federal immigration officials. Congress's extensive regulation of immigration has preempted . . . state and local arrest authority. This is true for both the civil provisions . . . and the numerous criminal provisions . . ."); Pham, *supra* note 91, at 978 ("[T]he position that local law officers may enforce criminal but not civil immigration laws presents serious problems, both in terms of judicial interpretation and practical enforcement."); Kobach, *supra* note 92, at 223 ("The overlap between civil and criminal provisions of immigration law is also demonstrated by the many actions in the immigration arena that trigger both civil and criminal penalties.").

135. See text at note 99 *supra*. The civil-criminal distinction is based at least in part on the notion that criminal immigration provisions are limited in scope and nature. In fact, immigration law contains scores of criminal provisions, and several immigration provisions carry *both* civil and criminal penalties, blurring the dividing line between them. Commentators have challenged the distinction on this ground. See Pham, *supra* note 91, at 978 ("As a matter of judicial interpretation, the accuracy of the *Gonzales* court's characterization that criminal provisions in the INA are 'few in number and relatively simple in their terms' is questionable . . . Nor are these criminal provisions a 'narrow and distinct element' of the INA as the Ninth Circuit concluded."); see also text at note 99 *supra*.

136. See 132 S. Ct. at 2509 ("There is no need in this case to address whether reasonable suspicion of illegal entry or another [federal] immigration crime will be a legitimate basis for prolonging detention or whether this too would be preempted by federal law. ").

137. As noted, supporters of the inherent authority theory also argue that there is no coherent distinction between enforcement of civil and criminal immigration violations because both are complex, highly regulated and otherwise similar. See Kobach, *supra* note 92, at 199-201. That further supports my contention that insofar as *Arizona* rejects the power

In rejecting state authority to arrest for *civil* violations, *Arizona* considered federal interests and concerns that are equally at stake if state police are permitted to enforce *criminal* immigration violations. These considerations include the complexity of immigration provisions, the government's important interest in federal control, the necessity of maintaining federal enforcement discretion, the limits imposed by federal law on federal authority, the limited grounds granting affirmative authority to state police for civil immigration arrests, and the potential interference with foreign relations arising from harassment of foreign nationals (regardless of their immigration status).

The “significant complexities” involved in enforcing immigration law are plainly implicated by criminal immigration violations. These include the substantial and much-contested expansion of “aggravated felony” grounds of removal¹³⁸ as well as an array of immigration-specific crimes, many of which also have civil counterparts,¹³⁹ and some that may be predicated in part on the validity of an underlying removal order, thus incorporating the complexity of civil immigration law even more directly into the criminal process.¹⁴⁰

Further, federal control and governmental discretion are no less implicated in enforcing criminal immigration violations. If unbridled state authority to conduct civil immigration enforcement upsets the carefully calibrated federal scheme, inherent authority to conduct *criminal* enforcement has equally—if not

of inherent authority for civil enforcement the argument for inherent authority for criminal enforcement falls as well, and both are prohibited unless affirmatively authorized by federal law.

138. The complexity is evidenced by the multiple Supreme Court decisions in recent years deciding what constitutes an aggravated felony. *See, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010); *Kawashima v. Holder*, 132 S.Ct. 1166 (2012); *Nijhawan v. Holder*, 557 U.S. 29 (2009); *Moncrieffe v. Holder*, 662 F. 3d 387 (2011), *argued*, No. 11-702 (U.S. Oct. 10, 2012).

139. *See, e.g.*, 8 U.S.C. § 1324(a)(3) (2006) (criminalizing “knowingly hir[ing] for employment at least 10 individuals with actual knowledge that the individuals are aliens”); § 1324(a)(4) (increasing maximum criminal sentence to 10-years in certain instances); criminal immigration document fraud); 18 U.S.C. § 1423 (misuse of evidence of citizenship or naturalization); § 1424 (impersonation or misuse of papers in naturalization proceedings); § 1427 (sale of citizenship or naturalization papers); § 1541 (issuance of passport or other instrument without authority); § 1542 (false statement in application for and use of passport); § 1543 (forgery or false use of passport); § 1544 (misuse of passport); § 1546(a) (forgery or alteration of visa, permit, or other immigration document); § 1546(a) (impersonation or false statements in application for immigration document); § 1546(b) (use of false immigration document); 8 U.S.C. § 1326 (illegal reentry after lawful prior removal); *see generally*, Pham, *supra* note 91, at 978 (“The criminal provisions are closely interrelated with the civil provisions, and together, they provide the total immigration regulation scheme. For example, the immigration crime of illegal reentry is punishable by deportation, a civil measure, or imprisonment, a criminal punishment.”).

140. *See, e.g.*, *United States v. Mendoza-Lopez*, 481 U.S. 828, 837-38 (1987) (concluding that in some cases defects in immigration proceeding may be asserted in criminal prosecution for illegal reentry).

more—disruptive consequences. Federal officials in areas with high numbers of illegal reentrants and other criminal immigration violators have expressly adhered to a policy of only prosecuting those who are serious, high-priority offenders.¹⁴¹ For local police to arrest alleged violators who are not charged by federal authorities would contradict those choices and thrust the putative defendants onto federal prosecutors¹⁴² and would contravene federal priorities adopted for important resource-based, humanitarian, and policy reasons.¹⁴³

In addition, as with civil enforcement, the INA enumerates circumstances under which local police may aid criminal immigration enforcement.¹⁴⁴ This supports the same conclusion that Congress has preempted a broader, more general free-standing state enforcement authority. An assertion of “inherent authority” by states to enforce immigration crimes would result in much broader, sweeping authority than the “limited circumstances” in which states are affirmatively authorized to assist.

Furthermore, state arrests for immigration crimes create the same or greater risk of harassment of foreign nationals and interference with foreign relations. Arrests for criminal immigration violations may well cause even longer detention and are more intrusive than their civil counterparts. In both cases, arrests implicate the same “immediate human concerns” and foreign relations consequences.

Finally, the factual assumption underlying the civil/criminal distinction is eroding (even assuming it was accurate before). When *Peoria* (and the earlier OLC memos) drew a distinction between civil and criminal immigration violations, the courts found or assumed that criminal immigration violations

141. See, e.g., Sandra Dibble, *Questions Raised about Deportees’ Reentries*, U-T SAN DIEGO (Aug. 20, 2011), <http://www.utsandiego.com/news/2011/aug/20/questions-raised-about-deportees-repeated-re/> (quoting United States Attorney Laura Duffy noting that her office only prosecutes reentrants with the “most serious criminal records,” as the “practical reality is that [the office] operates with finite resources.”).

142. This would impermissibly intrude on federal authority and is distinct from the inquiry that the Court permitted under Section 2B. In that context, the Court found the inquiry specifically authorized by federal law, the DHS obliged to respond, and the burden one that Congress intended. *See Arizona*, 132 S. Ct. at 2522-23 (citing 1373(c) and duty of Law Enforcement Support Center to respond).

143. The decision not to prosecute for simple unlawful entry could reflect a policy choice to focus on criminal activity such as drugs, human trafficking or cartels, or not to impose criminal penalties on aliens who pose no threat and may be eligible for humanitarian relief now or in the future if they avoid multiple misdemeanor (or felony) convictions. Cf. John Morton, IMMIGRATION AND CUSTOMS ENFORCEMENT, MEMORANDUM ON EXERCISING PROSECUTORIAL DISCRETION CONSISTENT WITH THE CIVIL IMMIGRATION ENFORCEMENT PRIORITIES OF THE AGENCY FOR THE APPREHENSION, DETENTION, AND REMOVAL OF ALIENS 2, 5 (2011). If states pursue arrests on their own, prosecutorial and judicial resources would be further strained if not overwhelmed. *See* National Immigration Forum, OPERATION STREAMLINE: UNPROVEN BENEFITS OUTWEIGHED BY COST TO TAXPAYERS (September 2012), http://www.immigrationforum.org/images/uploads/2012/Operation_Streamline_Costs.pdf.

144. See, e.g., 8 U.S.C. § 1324(c) (2006).

were limited in scope and criminal prosecutions limited in number.¹⁴⁵ Since then, both have grown exponentially and mass criminal prosecutions are now the norm.¹⁴⁶ In short, it is difficult to formulate a coherent distinction between civil and criminal enforcement that would permit police to enforce criminal provisions in light of the factors that the *Arizona* Court found foreclosed civil arrest authority.

Justice Alito in dissent takes pains to try to negate the obvious inference that the Court has cast doubt on state enforcement of *criminal* immigration provisions. Both in his concurrence addressing Section 2B and his dissent on Section 6, Alito seeks to reaffirm the general proposition that state police may arrest for federal crimes, noting that “state and local officers generally have authority to make stops and arrests for violations of federal *criminal* laws.”¹⁴⁷ He is notably silent with regard to any defense of state police power over civil immigration enforcement. But even as to criminal violations, he couches his claim of state authority in tentative terms,¹⁴⁸ acknowledging that only the lower

145. *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983) (drawing a distinction between state enforcement of criminal provisions, but not civil provisions, of the Immigration and Nationality Act based on the “pervasive regulatory scheme” created by the Act’s civil provisions versus the “narrow and distinct element” of the Act’s criminal provisions).

146. The number of criminal prosecutions has grown exponentially since *Peoria*. Criminal prosecutions are now an integral part of federal immigration enforcement and removal. In 1986, three years after *Peoria* was decided, Justice Department statistics show 391 illegal reentry prosecutions and 6,635 illegal entry prosecutions. *See Lead Charges for Criminal Immigration Prosecutions*, TRACIMMIGRATION, http://trac.syr.edu/immigration/reports/251/include/imm_charges.html (last visited Nov. 13, 2012). By contrast, in 2011, the number of reentry prosecutions had increased an estimated hundred-fold, with a total of 37,104 projected prosecutions and the total prosecutions for illegal entry and reentry at more than 70,000—a number that constitutes nearly half the total federal criminal docket. *Id.*; *Illegal Reentry Becomes Top Criminal Charge*, TRACIMMIGRATION, <http://trac.syr.edu/immigration/reports/251/> (last visited Nov. 13, 2012). The mushrooming of the criminal immigration docket is attributable to fast-track dispositions and programs like Operation Streamline in border jurisdictions. *See, e.g.*, *United States v. Roblero-Solis*, 588 F.3d 629 (9th Cir. 2009) (addressing constitutionality of Operation Streamline program and finding that en masse pleas violate voluntariness requirement of Fed. R. Crim. P. 11); *JOANNA LYDGATE, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, UNIV. OF CAL., BERKELEY LAW SCH., ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 15* (2010), available at <http://www.law.berkeley.edu/files/OperationStreamlinePolicyBrief.pdf> (discussing problems with Operation Streamline); *Ingrid V. Eagly, Prosecuting Immigration*, 104 N.W. U. L. REV. 1281, 1328-30 (2010) (discussing entrenchment and constitutionality of Operation Streamline); *Jennifer M. Chacón, Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 143 (2009) (describing fast-track pleas for illegal reentry).

147. *Arizona v. United States*, 132 S. Ct. 2492, 2528 (Alito, J., concurring in part and dissenting in part) (citing *Di Re* and *Miller*) (emphasis added).

148. *Id.* (noting that “state and local officers generally have authority to make stops and arrests for violations of federal criminal laws,” that “[l]ower courts have so held,” and citing OLC memoranda from 2002 and 1996 in support) (emphasis added).

courts have so held, and then citing to the OLC memos that in turn rely on those lower court rulings.¹⁴⁹

In sum, while *Arizona* did not directly address Arizona's argument that police have inherent authority to arrest for immigration violations, the Court's analysis rejects the salience of that view as a meaningful rationale for state authority. *Arizona* has established a framework that limits the immigration arrest authority to that which is conferred or invited by federal law.¹⁵⁰

Defenders of the inherent authority view may argue that *Arizona* does not implicate inherent authority at all, but rather that it resolved only a second-tier question, namely whether federal law has affirmatively preempted the inherent power that police do in fact possess. In other words, they would read the Court's opinion as affirming or not addressing the existence of sweeping inherent state power with regard to immigration enforcement but finding it preempted by the federal statutory scheme—not as rejecting the existence of such authority outright.¹⁵¹

The flaw with this argument is that it depends on finding very muscular federal preemption in the INA based on very thin federal statutory language. If the police possess the inherent power that state law proponents claim, the ouster of or limitation on that authority must be unmistakable. Where the

149. *Id.* Justice Alito disagrees that federal authority is necessary for police to engage in immigration enforcement. He rejects the majority's finding that the INA affirmatively provides the "limited authority" that permits state police to act. *Id.* at 2496. He insists that federal authorization is not necessary for state officers to act, and he rejects the view that the "grant of federal authority" expresses "a clear congressional intent to displace" states' police powers in any circumstance not specifically authorized. *Id.* at 2528. But that is precisely how the Court read those provisions. Alito implicitly recognizes the dilemma that the Court's reading of the INA poses for his view of state power because he retreats to the presumption against preemption to make his case. *Id.* Yet, that presumption was either cast off by the Court or overcome by the Court's finding that unilateral police enforcement of federal immigration laws cannot live in harmony with the federal scheme. Either way, the Court has concluded that, at least in the immigration realm, Congress's extensive regulation combined with its vesting of enforcement discretion in the Executive establishes a de facto presumption in favor of preemption of state police authority.

150. Requiring federal approval is not remarkable and will hardly impede enforcement (if otherwise permissible) that is consistent with federal goals. The mechanisms by which the federal government seeks to invite states to act under federal auspices are actually quite broad. Federal agreements with state and local agencies under 287(g), federal policies that affirmatively communicate information to local agencies under initiatives like "Secure Communities" and federal ICE detainers all presumably constitute manifestations of federal priorities. Those efforts—and their often-flawed or constitutionally-dubious implementation by police agencies—are subject to non-preemption constraints and may be vulnerable to legal challenges. *See, e.g.*, Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority*, 35 WILL. MITCHELL L. REV. 164, 186, 186-91 (2008) (describing how DHS "grossly exceeds the limits of its statutory authority to issue detainers").

151. *See, e.g.*, 2002 OLC memo, *supra* note 107, at 2-3 (noting that states have inherent power above and beyond explicit authorization to engage in immigration enforcement, "subject only to federal preemption").

states' historic police power is implicated, it is presumptively preserved unless "the clear and manifest purpose of Congress"¹⁵² was to overcome it. In other words, under inherent authority theory (and traditional preemption doctrine), if the police are acting within a traditional realm of state power, then that authority can be overcome only by especially strong and clear congressional intent to preempt state authority.¹⁵³

Finding such a level of clarity and force in the federal framework that the Court held preempted Section 6 is difficult, if not impossible. There is no decisive or manifest prohibition on state police arrests. To the contrary, affirmative invitation for state assistance and involvement exists in the federal law,¹⁵⁴ and the judicial opinions were sharply divided on whether federal statutes barred, permitted or were agnostic on state enforcement.¹⁵⁵ In the face of such uncertainty, preemption would normally be absent.

If, as is now the case under *Arizona*, a state's purported inherent authority can be overcome by such an equivocal federal scheme, the inherent authority theory effectively does not work. It either exists in name but not in practice, or the federal interest *in immigration* is sufficiently strong to overcome the state's authority even when the expression of the federal immigration interest is grounded in less-than-explicit statutory provisions that would not normally constitute an ouster of state law. Under either approach, there is no force to the claim that the state's "inherent authority" to engage in immigration enforcement gives state police the power to arrest for immigration violations without specific federal authorization. In fact, *Arizona* may reasonably be read as manifesting a presumption *in favor* of preemption of subfederal immigration enforcement.¹⁵⁶

152. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) cited with approval in *Arizona* at 2495; see generally Ernest A. Young, "The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court, 2011 SUP. CT. REV. 253, 265-69 (2011) (describing development of *Rice* doctrine).

153. See, e.g., *Rice*, 331 U.S. at 230 ("Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress."). Judge Paez, writing for the Ninth Circuit, framed the realm of power being exercised as civil immigration enforcement power, not the vaguer police power. Because such immigration enforcement is not a field traditionally occupied by the states, the Ninth Circuit declined to exercise a presumption against preemption for Section 6. See *United States v. Arizona*, 641 F.3d 339, 361 (9th Cir. 2011).

154. See, e.g., 8 U.S.C. § 1252(a) (2006) ("[T]o the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who—(1) is an alien illegally present in the United States; and (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction").

155. See *supra* text accompanying note 93, (discussing split among courts).

156. Cf. *Arizona*, 132 S. Ct. at 2530 ("The Court gives short shrift to our presumption against preemption.") (Alito, J., dissenting).

B. Mirror Image Refuted

Arizona also contradicts the broad claims by state law adherents that states may enact their own immigration penalties or rules that “mirror” federal law, the so-called mirror image claim of state power and one of the pillars of S.B. 1070.¹⁵⁷ The “mirror image” theory, also described as “concurrent enforcement,” asserts that states are permitted to attach independent state penalties to violations of federal immigration law, so long as the definition of what constitutes a violation parrots federal statutory categories or conduct.¹⁵⁸ This goes significantly beyond claiming a state power to arrest based on a suspicion of federal violations (civil or criminal) to assert more broadly that states may enact their own state punishments for federal immigration transgressions.¹⁵⁹

As indicated earlier, the claim of mirror image proponents had found a source in ambiguous language in *Plyler v. Doe* where the Court noted that *De Canas v. Bica* recognized that states have “some authority to act” with respect to undocumented immigrants, at least where such action “mirrors federal objectives” and furthers a legitimate state goal.¹⁶⁰ On that shaky foundation and in conjunction with claims of dual sovereignty, proponents of state immigration laws constructed a theory that states may penalize immigration violations under

157. See Brief for Petitioner at 49-57, United States v. Arizona, 641 F.3d 339, 383 (9th Cir. 2011) (No. 11-182); Amicus Curiae Brief of the Secure States Initiative at 36-39, United States v. Arizona, 641 F.3d 339, 383 (9th Cir. 2011) (No. 11-182).

158. Kris W. Kobach, *Reinforcing the Rule of Law*, 22 GEO. IMMIGR. L.J. 459, 475-77 (2008) (praising state laws mirroring federal anti-trafficking, anti-smuggling, and anti-harboring crimes); see generally Peter H. Schuck, *Taking Immigration Federalism Seriously*, U. CHI. LEGAL F. 57, 86-89 (2007) (developing test for consistency with federal policy). In a different context, a similar theme appeared in a non-controlling section of Chief Justice Roberts’s opinion in *Whiting*, (joined by three others) where he found that Arizona’s state employer sanctions law did not conflict with federal law because it “closely tracks IRCA’s provisions in all material respects.” *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1981 (2011). As explained below, *Arizona* limits *Whiting* to the particular provision at issue there.

159. Proponents presumably accept express preemption and would not make a “mirror” claim in defense against an express federal preemption provision. Cf. Brief for Petitioner at 54, United States v. Arizona, 641 F.3d 339, 383 (9th Cir. 2011) (No. 11-182) (“IRCA’s express and limited preemption provision, 8 U.S.C. §1324a(h)(2), preempts only state laws imposing ‘sanctions (other than through licensing and similar laws) upon those who employ, or recruit, or refer for a fee for employment, unauthorized aliens,’ and thus does not reach Section 5(C).”).

160. *Plyler v. Doe*, 457 U.S. 202, 226 (1982) (“As we recognized in *De Canas v. Bica*, 424 U.S. 351, 96 S. Ct. 933, 47 L.Ed.2d 43 (1976), the States do have some authority to act with respect to illegal aliens, at least where such action *mirrors federal objectives* and furthers a legitimate state goal.”) (emphasis added). In *Plyler* itself, of course, the Court expressly declined to address preemption, *id.* at 210 n.8, and held, on Equal Protection grounds, that state or local laws discriminating against undocumented school children in primary and secondary (K-12) education were unconstitutional. *Id.* at 230.

state laws so long as a critical criterion is satisfied, namely that the state incorporates federal immigration categories or classifications and penalizes conduct or status that the federal government also sanctions.¹⁶¹ The mirror image proponents relied principally on authorities concerning matters over which the states exercised traditional police powers¹⁶² for the further power of state legislatures to enact their own state immigration crimes.¹⁶³ As proponents of the “mirror image” theory developed their arguments in support of S.B. 1070, they began to draw on a wider range of case law in which the Supreme Court had allowed states to establish their own penalties for violations of federal civil and criminal law unrelated to immigration.¹⁶⁴

161. *See, e.g.*, Kobach, *supra* note 158, at 476 (“As long as state statutes mirror federal statutory language and defer to the federal government’s determination of the legal status of any alien question, they will be on secure constitutional footing.”) (citing to examples posted at on the website of IRLI, where Kobach serves as counsel). *But see* Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 258 (“A plain reading of a long line of Supreme Court cases suggests that states have no intrinsic sovereign authority to impose criminal sanctions for what they regard as misconduct involving immigration, nor do they have the authority to induce the self-deportation of noncitizens they deem undesirable.”).

162. *See, e.g.*, Reply Brief for Petitioners, *Arizona v. United States*, 132 S. Ct 2492 (2012), No. 11-182, 2012 WL 416748, at *50 (citing *Pennsylvania v. Nelson*, 350 U.S. 497 (1956)). One case presumably outside that realm, which appeared in Arizona’s Supreme Court brief. In *Gilbert v. Minnesota*, 254 U.S. 325, 329 (1920), a World War I-era case, the Court upheld a state law creating a crime of “interfer[ing] with or discourage[ing] the enlistment of men in the military.” *See also Arizona*, 132 S. Ct. at 2517-18 (Scalia, J., dissenting) (citing *Gilbert* to support a concurrent enforcement argument). Notably, Justice Brandeis’s dissent would have invalidated the law on grounds that closely track contemporary preemption analysis. *Gilbert*, 254 U.S. at 340 (Brandeis, J., dissenting) (“The Minnesota statute was, when enacted, inconsistent with the law of the United States, because at that time Congress still permitted free discussion of these governmental functions.”). Although the case is more commonly discussed for its implications for free speech doctrine, it has recently been rediscovered for its preemption holding. *See* Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 310 n.110 (2012). But because *Gilbert* precedes the development of the modern preemption framework, its contemporary persuasiveness as a preemption case is questionable. In any event, its lack of persuasiveness in *Arizona* indicates that it carries no weight in the immigration context.

163. *See* Kobach, *Reinforcing the Rule of Law*, *supra* note 158, at 475 (citing *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983)). For a compelling critique of the use of *Gonzales* and related cases by “mirror image” proponents, *see* Chin & Miller, *supra* note 161, at 279 (“Gonzales and Marsh allowed state assistance to federal authorities through arrests, not through legislation or prosecution. The power to assist through arrest does not imply the power to legislate or to prosecute, because arrests leave crucial decision-making power in the hands of the federal government, which is free to choose among the criminal, civil, and administrative sanctions and remedies authorized by the INA”).

164. *See, e.g.*, *California v. Zook*, 336 U.S. 725, 735 (1949) (upholding state crime of selling transportation without permit from the federal Interstate Commerce Commission); *Asbell v. Kansas*, 209 U.S. 251, 258 (1908) (upholding state misdemeanor of transporting cows which were not inspected by state or federal officials); *Fox v. Ohio*, 46 U.S. 410, 435 (1847) (upholding state crime for passing counterfeit money); *see also* *Bates v. Dow*

In its particulars, *Arizona* addresses enactment of state crimes only with regard to the areas of employment by unauthorized immigrant workers (Section 5C), and alien registration (Section 3). To be sure, the Court's analysis turned on the specifics of the two provisions and their relation to federal law and congressional purposes. But *Arizona*'s analysis invalidating them manifests a general rejection of the "mirror image" formula as a defense to immigration preemption.

For both provisions, the Court treated the state law as effectively mirroring federal categories. It proceeded on the understanding that the S.B. 1070 provisions penalized activities (i.e., unauthorized employment) or violations (lack of registration) that were themselves impermissible under federal law. Both state provisions relied on federal definitions or categories to determine who was subject to state penalties.¹⁶⁵ For importantly different but related reasons, both sections of S.B. 1070 were struck down. In doing so the Court adopted an approach that rejects reliance on the mirror image theory as a sufficient rationale for parallel state immigration enforcement laws. Critically, the Court also recognized throughout its opinion that the *means* of enforcing immigration law are a central part of the immigration policy set by Congress. State penalties—even if congruent with federal sanctions or categories – may nonetheless be preempted because they conflict with federal enforcement policies and priorities. *Arizona* thus affirms that just because a state provision "has the same aim" and "adopts substantive standards" does not insulate it from preemption.¹⁶⁶

In Section 5C the state sought to impose criminal penalties on aliens engaging in—or seeking—employment that subjects employers to penalties under federal law. IRCA provides that employers who knowingly hire unauthorized alien workers or fail to verify all new hires are subject to civil and criminal sanctions.¹⁶⁷ S.B. 1070 sought to criminalize those same

Agrosciences LLC, 544 U.S. 431, 447-48 (2005) (finding that federal regulation does not preempt parallel state tort liability); Medtronic, Inc. v. Lohr, 518 U.S. 470, 496-97 (1996) (same).

165. ARIZ. REV. STAT. ANN. § 13-1509(A) (2010) (Section 3(A) of S.B. 1070) ("In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code § 1304(e) or 1306(a)."); ARIZ. REV. STAT. ANN. § 13-2928(C) (2010) (Section 5(C) of S.B. 1070) ("It is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state.")

166. *Arizona*, 132 S. Ct. at 2503. *Compare id.* at 2505 ("Although § 5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement."), *with Schuck, supra* note 158, at 59 ("I maintain that such laws should be upheld by the courts so long as they reflect a legitimate state interest and do not interfere with the goals of federal immigration policy, properly and conventionally understood.").

167. 8 U.S.C. § 1324(a) (2006).

“unauthorized aliens” whom an employer may not hire under federal law.

Significant to an appreciation of the Court’s ruling is recognizing that the Court did not rely on (or consider) the possibility that Section 5C penalized an employment relationship not actually barred by federal law. Had it done so, the Court could have focused on whether Arizona’s law exceeded the boundaries of federal prohibitions.¹⁶⁸ Rather, the Court accepted Arizona’s assertion that it had defined the categories of aliens vulnerable to state prosecution by incorporating federal law and federal definitions. Those aliens whose employment would subject employers to penalties (civil and potentially criminal) were in turn criminalized under state law if they engaged in (or sought) the work that was prohibited and for which the employers could be sanctioned. The state penalties were thus presented as punishing a relationship rendered illegal under federal law.

Nevertheless, this mirroring of federal goals and categories did not resolve the preemption question. The Court rejected the argument that sharing “one of the same goals as federal law” was sufficient. Instead, it engaged in a more far-reaching inquiry into potential conflicts with the enforcement structure established by Congress. It found that because “a ‘[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy,’” Arizona was interfering with the “careful balance struck by Congress” as to how to enforce employment restrictions.¹⁶⁹

In reaching this result, the Court found that the legislative history of federal immigration employment regulation showed that Congress had considered and declined to enact measures criminalizing immigrant workers themselves. One could argue that this diminishes the consequence of the Court’s reasoning. But under the “mirror image” rationale such a decision by Congress *not* to act—without an express prohibition on state regulation—would not be sufficient to foreclose state penalties.¹⁷⁰ So long as the category of aliens singled out for state punishment are penalized for conduct that federal law also outlaws, the state law would be deemed a permissible “mirror” of the federal interest and

168. It could be argued that neither Section 3 nor Section 5C mirrored federal law as precisely as Arizona asserted. Section 5 arguably criminalized independent contractors—and clearly applied to those only “seeking” but not actually finding work—neither of which would actually make the employer counterpart liable under federal law. Section 3 arguably criminalized failure to comply with the federal registration statute without importing the requisite mens rea into the state statute. Critically, the Court did not consider either possibility, and nothing turned on these nuances under the Court’s analysis. Rather the Court proceeded on the assumption that the category of aliens subject to state penalty in both provisions was entirely congruent with the federal category under the relevant federal provision. Yet both provisions were preempted. *See Arizona*, 132 S. Ct. at 2503-05.

169. *Arizona*, 132 S. Ct. at 2505 (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1981)).

170. Brief for Petitioner at 53, *United States v. Arizona*, 641 F.3d 339, 383 (9th Cir. 2011) (No. 11-182).

not preempted by the federal scheme.

The Court's resistance to a "mirror image" rationale with regard to Section 5C is particularly significant because the provision regulates the realm of employment—an area in which the states hold traditional police power.¹⁷¹ In both *De Canas* and *Whiting* (decisions handed down generations apart and under different statutory frameworks) the Court gave wide berth to state laws governing immigrant employment and regulation of unauthorized immigrant workers. *De Canas* affirmed the historic power of states to regulate employment generally and held that—pre-IRCA—Congress had not evidenced sufficient intent to preempt state laws penalizing employers for hiring unauthorized immigrant workers. It suggested that federal preemptive intent must be especially clear to displace state authority to regulate employment of aliens.

In *Whiting*, the Court remained tolerant of state regulation of immigrant employment even after the enactment of IRCA and major changes regulating and sanctioning employers that hire undocumented immigrant workers.¹⁷² It upheld state penalties and procedures against employers that exceeded federal law and were imposed outside the federal process.¹⁷³ While the holding turned on a contested reading of the particular express preemption clause, *Whiting* rejected consideration of the larger purpose and structure of the federal regime.¹⁷⁴ The dissenters, particularly Justice Breyer, unsuccessfully argued that the state law must be tested against Congress' overall scheme and intent, and that the key preemption clause must be read in light of Congress's entire legislative purpose and balancing of competing interests and concerns.¹⁷⁵

In *Arizona* the Court adopted the reasoning that Justice Breyer had advanced in his *Whiting* dissent, namely that S.B. 1070's penalties would "interfere with the *careful balance* struck by Congress with respect to unauthorized employment of aliens."¹⁷⁶ *Arizona* looked at the "the text, structure and history" of IRCA to conclude that Congress had decided to

171. And that is how Arizona defended the provision. Brief for Petitioner at 53, *United States v. Arizona*, 641 F.3d 339, 383 (9th Cir. 2011) (No. 11-182) ("Section 5(C) is a presumptively valid exercise of the traditional state authority to regulate the employment relationship.")

172. *See Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1970 (2011).

173. *Id* at 1968.

174. The broad express preemption provision contained a parenthetical exception for "licensing and similar laws." *Id.* at 1973 (The Court reviewed the express preemption provision, the exception to preemption, and a residual claim of conflict preemption. *Whiting* held that Congress had intended to allow the challenged state sanctions law. In reaching that conclusion, the Court relied on the text of the savings clause within the express preemption provision.)

175. *Id.* at 1992-96 (Breyer, J. dissenting) ("Why would Congress, after *carefully balancing* sanctions to avoid encouraging discrimination, want to allow States to destroy that balance?"') (emphasis added). *See also id.* at 2005 (Sotomayor, J. dissenting).

176. *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012) (emphasis added).

sanction employers and that “it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized work.”¹⁷⁷ In *Arizona*, the employment regulation is read not only for penalties assigned to unlawful behavior but also for penalties that were *not* assigned. The *absence* of a federal penalty had preemptive force.¹⁷⁸

The Court’s decision on Section 5C also sheds light on a dispute about *De Canas* that had arisen soon after it was decided. In *Toll v. Moreno*, six years after *De Canas*, the Court struck down a Maryland tuition statute that denied favorable in-state treatment for children of certain international civil servants. The Court invalidated the state law on the ground that it conflicted with the favorable federal immigration treatment (and reciprocal treaty and other benefits) conferred on this category of non-immigrants. In doing so, the majority addressed the traditional leeway afforded states as confirmed by *De Canas*. But *Toll* cabined the reach of *De Canas* in a footnote that has received remarkably little attention.¹⁷⁹ In footnote 18, Justice Brennan explained *De Canas* as permitting the California law *not* because Congress had failed to prohibit it, but instead because the federal statutory scheme had intended to allow it.¹⁸⁰ Justice Rehnquist in dissent argued that *De Canas* held not that Congress had authorized the state law but that California was free to legislate because there was “no strong evidence” that Congress had intended to preempt it.¹⁸¹

Arizona implicitly reaffirms Brennan’s reading that affirmative federal permission—not merely statutory silence—was required even in the *De Canas* context: a law targeting “illegal alien” employment within an arena of traditional state power under a federal scheme that exhibited only “peripheral concern” with employment of immigrants. *Arizona* reinforces the view that

177. In one respect, of course, Section 5C is not a perfect “mirror” of federal law since engaging in unauthorized work is not a federal crime. But under the “mirror image” concept that should not matter because the state law furthers the federal goal by applying a state sanction against conduct impermissible under federal law.

178. Notably, the Court did not rely on “field preemption” despite the breadth of employment regulation under the INA. Instead, the Court held that Section 5C conflicted with federal law. *Arizona*, 132 S. Ct. at 2505 (“Although § 5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement.”). That conflict was not overcome by the claim that Section 5C mimicked conduct prohibited by federal law and targeted workers barred by federal law from employment.

179. *Toll v. Moreno*, 458 U.S. 1, 12 n.18 (1982).

180. *Id.* (“We rejected the pre-emption claim not because of an absence of congressional intent to pre-empt, but because Congress *intended* that the States be allowed, ‘to the extent consistent with federal law, [to] regulate the employment of illegal aliens.’”) (quoting *De Canas v. Bica*, 424 U.S. 351, 361 (1976)).

181. *Id.* at 31 (Rehnquist, J., dissenting) (“The statute in *De Canas* discriminated against aliens, yet the Court found no strong evidence that Congress intended to pre-empt it.”).

federal authorization is necessary and that an inference from federal silence cannot constitute federal permission even (or particularly) in the area of employment of undocumented immigrants.¹⁸² Broadly speaking, state penalties are prohibited unless the federal scheme confers on the states the authority to single out unauthorized non-citizens for state sanction.¹⁸³

The Court's rejection of the "mirror image" theory is further—although perhaps less obviously so—reflected in its ruling on Section 3. That portion relies principally on the comprehensive scheme for alien registration enacted by federal law. The Court held that state penalties for violations of the federal alien registration law were impermissible, even though Arizona claimed—and the Court accepted as given—that the state had done nothing more than enact its own misdemeanor penalty for violation of the federal statute that punished the identical conduct.¹⁸⁴ The Court rejected Arizona's law on the ground that the federal framework was comprehensive and occupied the field thereby precluding any state penalty or regulation, citing *Hines v. Davidowitz*. That in itself was important because, as Arizona argued and Justice Alito noted, *Hines* had not directly addressed a state law that sought solely to enforce the federal regime.¹⁸⁵ Plainly, "mirror image" is no exception to field preemption.¹⁸⁶

In addition, *Arizona* specifically rejected as "unpersuasive on its own terms" the state's claim that it is sufficient to have "the same aim" as federal

182. The Court had not had a reason or opportunity to return to this dispute and *Whiting* did not acknowledge *Toll*'s gloss on *De Canas*. While *Whiting*'s analysis is consistent with *Toll*'s reading because the Court found (or assumed) affirmative federal authorization for both parts of Arizona's law at issue in that case (through its reading of the licensing proviso and E-verify authorization), the issue of affirmative authorization or silence was not squarely presented.

183. *Whiting* allowed the state business license penalty and the E-verify enrollment mandate based on finding such federal intent to allow. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1981 (2011) ("Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted."). *Arizona*'s treatment of Section 2B is also consistent with this understanding. The Court found affirmative authorization in federal law for the police inquiries and verifications it permitted. *See Arizona*, 132 S. Ct. at 2508. This further supports understanding *Arizona* as teaching that any state role in immigration enforcement must be firmly rooted in a grant of federal permission.

184. *See* Petitioner's Opening Brief at 52, *Arizona v. United States*, 132 S. Ct. 2492 (No. 11-182) ("So too here. Section 3 simply seeks to enforce the federal registration requirements and tracks federal law in all material respects.").

185. In *Hines* itself the Court had struck down a Pennsylvania statute that predated the federal law and that therefore did not perfectly match the federal framework. *See Hines v. Davidowitz*, 312 U.S. 52, 59-60 (1941).

186. *Arizona*, 132 S. Ct. at 2502-03. Insofar as some mirror image proponents claim that it is permissible even in the face of a comprehensive scheme. The Court rejected any such proposition. *See generally* Brief of Secure States Initiative at 37-38, *Arizona v. United States*, 132 S. Ct. 2492 (No. 11-182).

law and to “adopt[] its substantive standards.”¹⁸⁷ That is to say, even outside the framework of the particular comprehensive scheme that the Court held governs alien registration, the Court’s reasoning rejects the foundational principle that “mirroring” federal goals and standards is sufficient, an approach it condemns as failing “on its own terms” and thus dismissing it as a basis for determining immigration preemption.

Finally, the Court rejected the “mirror image” argument by examining the conflicts between Arizona’s statute and the federal enforcement structure, reiterating that states cannot grant their enforcement officers broader leeway in enforcing immigration law than the federal authorities,¹⁸⁸ and recognizing that a difference in possible state *sentences* as compared to federal law established a conflict between the state and federal statutes.¹⁸⁹

C. *Lopez-Mendoza* Revisited

The Court’s ruling in S.B. 1070 is separately significant for one additional reason. In striking down Section 6, the Court affirms at the outset that “[a]s a general rule, it is not a crime for a removable alien to remain present in the United States,” citing *INS v. Lopez-Mendoza*.¹⁹⁰ While self-evident to immigration practitioners who correctly stress that violation of immigration status is not itself a crime, the emphasis by the Court and its citation to *Lopez-Mendoza* is noteworthy and may lead to further reconsideration of the contested holding of that case.

Lopez-Mendoza concerned the applicability of the Fourth Amendment exclusionary rule to civil immigration deportation proceedings. The Court determined that the balancing test in *Janis v. United States*,¹⁹¹ which requires “weigh[ing] the likely social benefits of excluding unlawfully seized evidence against the likely costs,”¹⁹² was the proper framework for deciding whether the exclusionary rule should apply.¹⁹³ In that context, the Court stated in dicta that

187. *Arizona*, 132 S. Ct. at 2502.

188. *Id.* at 2503 (“Were § 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.”).

189. Specifically, probation, a possible sentence under federal law, was not available under the Arizona law. *Arizona*, 132 S. Ct. at 2503.

190. *Id.* at 2505 (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)).

191. 428 U.S. 433 (1976).

192. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (applying *United States v. Janis*, 428 U.S. 433, 454 (1976)). *Janis* “set[s] forth a framework for deciding in what types of proceeding application of the exclusionary rule is appropriate.” *Id.*

193. *Id.*

“entering or remaining unlawfully in this country is itself a crime,”¹⁹⁴ a characterization that Justice White, writing for four dissenters, disputed. The majority’s language and similar statements¹⁹⁵ caused the Court to conclude that the exclusion of unlawful evidence would impose costs that “are both unusual and significant,” because of the “unique” societal costs that occur when suppression of evidence permits “continuing violations of the law.”¹⁹⁶ There and elsewhere, the majority cited to the federal alien registration law and the illegal entry statute as the basis for finding ongoing criminal violations.¹⁹⁷ The Court held that balancing these social costs with the absence of a sufficient deterrent benefit¹⁹⁸ rendered it inappropriate to import the Fourth Amendment exclusionary rule from criminal proceedings to the immigration process.¹⁹⁹

194. *Id.* at 1038 (citing 8 U.S.C. §§ 1302, 1306, 1325). The statutes cited by Justice O’Connor’s majority opinion are failure to register under the alien registration law, 8 U.S.C. §§ 1302, 1306 (the same federal registration law implicated by Section 3 of S.B. 1070), and the misdemeanor illegal entry statute, 8 U.S.C. 1325 (discussed by the Ninth Circuit in *Gonzales v. City of Peoria*). The opinion emphasized the failure-to-register ground and did not squarely decide whether illegal entry is “a continuing or a completed crime.” *Id.* at 1047 n.3.

195. *See id.* at 1047 (respondent “is a person whose unregistered presence in this country, without more constitutes a crime.”); *id.* at 1047 (“release [of unregistered alien with duty to register] within our borders would immediately subject him to criminal penalties.”); *id.* at n.3 (failure to register when under duty to do so “plainly constituted a continuing crime” and Court need not decide whether “remaining in this country following an illegal entry is a continuing or completed crime.”); *id.* at 1050 (application of exclusionary rule would “compel release from custody persons who would then immediately resume their commission of a crime through their continuing, unlawful presence in the country.”).

196. *Id.* at 1046. This particular reference is ambiguous as to whether the Court is referring to civil immigration violations or criminal violations (or both). Earlier, Justice O’Connor analogizes the “ongoing violations” to a leaking hazardous waste dump or the return of contraband drugs or explosives. *Id.* The opinion then states that the plaintiffs’ “unregistered presence in this country, without more, constitutes a crime” and that his release “would immediately subject him to criminal penalties.” *Id.* at 1047.

197. *Id.* at 1038.

198. The majority cited a variety of grounds, disputed by the dissenters, why exclusion of evidence would not achieve sufficient deterrence of unconstitutional police conduct. *Lopez-Mendoza*, 468 U.S. at 1033.

199. *Lopez-Mendoza* has been widely criticized by commentators as wrongly decided at the time and as unrealistic in light of subsequent events. *See, e.g.*, Stella Burch Elias, “*Good Reason to Believe*”: *Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 WIS. L. REV. 1109, 1157 (2008); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1114 (2004); Matthew S. Mulqueen, *Rethinking the Role of the Exclusionary Rule in Removal Proceedings*, 82 ST. JOHN’S L. REV. 1157, 1183 (2008); 1 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (4th ed.) 245 (“An extreme and fundamentally unsound cost-benefit analysis was utilized by the majority in *I.N.S. v. Lopez-Mendoza*.”); Jonathan L. Hafetz, *The Rule of Egredousness: INS v. Lopez-Mendoza Reconsidered*, 19 WHITTIER L. REV. 843, 873 (1998); Judy C. Wong, Note, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in*

Lopez-Mendoza left open the availability of suppression of evidence under more limited circumstances.²⁰⁰

Justice White's dissent argued that the exclusionary rule should apply²⁰¹ and objected specifically to the majority's characterizations of ongoing criminal violations.²⁰² In particular, White stressed that "it is not the case that . . . 'unregistered presence . . . without more constitutes a crime.'"²⁰³ He emphasized that illegal entry "does not describe a continuing offense,"²⁰⁴ and that "it is simply not the case" that the result of suppressing evidence would "allow the criminal to continue in the commission of an ongoing crime."²⁰⁵

Arizona's solid majority now adopts implicitly the understandings that Justice White's dissent in *Lopez-Mendoza* asserted. The foundational premise of *Arizona* is a refutation of *Lopez-Mendoza*'s dictum, namely that "it is not a crime for a removable alien to remain in the United States."²⁰⁶ *Arizona* thus cabins any broad misconception about *Lopez-Mendoza*'s language and, importantly, contradicts a key assumption underlying the *Lopez-Mendoza* balancing that rejected imposition of the exclusionary rule. If "as a general rule" unlawful presence does not constitute a crime, then unregistered presence is not presumptively a "continuing crime" as *Lopez-Mendoza* posits.²⁰⁷ *Arizona* may thus provide further impetus for courts to expand the grounds for exclusion explicitly left open in *Lopez-Mendoza*²⁰⁸—and to encourage a

Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants, 28 COLUM. HUM. RTS. L. REV. 431, 444-46 (1997).

200. The Court limited its ruling to "exclusion of credible evidence gathered in connection with peaceful arrests by [federal immigration] officers." 468 U.S. at 1051. It left open the question of suppression in the case of "egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." *Id.* at 1050-51 (noting that BIA provided for exclusion under some circumstances).

201. *Id.* at 1060 ("the costs and benefits of applying the exclusionary rule in civil deportation proceedings do not differ in any significant way from the cost and benefits of applying the rule in ordinary criminal proceedings") (White, J., dissenting).

202. *Id.* at 1057. White explained that the Court had ignored important limitations on the duty to register, including most significantly that the failure must be "willful." He also pointed out that unlawful (initial) entry was generally viewed by courts—including the Supreme Court in *dictum*—as completed at the time of entry and not continuing, and that only illegal *re-entry* (following deportation) had been construed by some courts as a continuing violation. *Id.* (citing *United States v. Cores*, 356 U.S. 405, 408, n.6 (1958); *Gonzales v. City of Peoria*, 722 F.2d 468, 473-474 (9th Cir. 1983); *United States v. Rincon-Jimenez*, 595 F.2d 1192, 1194 (9th Cir. 1979).

203. *Id.* at 1056.

204. *Id.* at 1057 (emphasis added).

205. *Id.*

206. *Arizona*, 132 S. Ct. at 2505 (emphasis added).

207. *Id.*

208. See, e.g., *Olvia-Ramos v. Att'y Gen.*, 694 F.3d 259 (3d Cir. 2012); *Puc-Ruiz v. Holder*, 629 F.3d 771 (8th Cir. 2010); *Singh v. Mukasey*, 553 F.3d 207 (2d Cir. 2009);

reexamination of the assumptions and reasoning underlying the *Lopez-Mendoza* Court's narrowly-divided result.

CONCLUSION

Arizona v. United States establishes important limits on state authority to adopt immigration enforcement measures. In the process of striking down three provisions and allowing one to survive, the Court reaffirmed key principles and values underlying restrictions on sub-federal autonomy to deploy state police and criminal law for immigration enforcement. Among the reasons articulated in *Arizona*'s decision are the national interest in preventing harassment of foreign nationals, the complexities of immigration law, the legitimacy of federal enforcement discretion and the limits imposed on federal enforcement powers by Congress. All reflect national norms that restrict unilateral state enforcement measures without federal authorization.

The Court addressed only some sections of Arizona's immigration enforcement law—and did not consider the law as a whole or its unvarnished goal of expelling unwanted immigrants from the state. Nonetheless, the decision establishes a framework for scrutinizing state enforcement laws that extends beyond the particular measures in S.B. 1070. *Arizona* clearly articulates that federal authorization for state immigration enforcement is a paramount requirement; that stand-alone state immigration crimes interfere with federal law; that executive discretion must be respected; that congressional omissions as well as enactments have preemptive force; and that state laws authorizing inquiry, arrest, detention or transportation based on suspicion of immigration violations are presumptively impermissible and—the Court importantly reminded—subject to Fourth Amendment and other constitutional limitations.

For those who touted inherent police powers or argued for broad state immigration enforcement authority, *Arizona* demonstrates that state action is severely circumscribed. The claims of “inherent authority” or “mirroring” federal law have proven to lack analytical force—or persuasive effect. Neither theory survived as a meaningful conceptual ground for legitimizing state immigration power. Even the claim that police are entitled to conduct arrests for federal immigration *crimes* is vulnerable in light of *Arizona*'s rejection of unauthorized *civil* immigration enforcement.

Of course, the courts have yet to address every new state immigration law. Nor did the Court have before it *federal* immigration and enforcement policies or cooperative state-federal programs that may be deeply problematic or contested for other reasons.

Lopez-Rodriguez v. Mukasey, 536 F.3d 1012 (9th Cir. 2008); Almeida-Amaral v. Gonzales, 461 F.3d 231 (2d Cir. 2006).

Immigration is a contentious issue. At the conclusion of the *Arizona* opinion, Justice Kennedy encourages a “searching, thoughtful and rational” national discourse.²⁰⁹ If that conversation occurs, it must address an array of state measures as well as federal policies. But even if that discourse is deferred, the Court has set boundaries to prohibit states from single-mindedly adopting punitive enforcement policies that threaten harassment of foreign nationals, contravene the country’s broader national interest and ignore the “immediate human concerns” of immigrants in our society.

209. *Arizona*, 132 S. Ct. at 2510.