William & Mary Bill of Rights Journal

Volume 21 (2012-2013)
Issue 2 Symposium: Noncitizen Participation in the American Polity

Article 8

December 2012

The Transformation of Immigration Federalism

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THE TRANSFORMATION OF IMMIGRATION FEDERALISM

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> CHIEF JUSTICE ROBERTS: Before you get into what the case is about, I'd like to clear up at the outset what it's not about. No part of your argument has to do with racial or ethnic profiling, does it? I saw none of that in your brief.
> GENERAL VERRILLI: Where—that's correct, Mr. Chief Justice.
> CHIEF JUSTICE ROBERTS: Okay. So this is not a case about ethnic profiling.
> GENERAL VERRILLI: We're not making any allegation about racial or ethnic profiling in the case.[1]

Thus began the Solicitor General's argument in the landmark case of *Arizona v. United States*.[2] This might strike the casual observer as odd. After all, concerns about discriminatory policing and unlawful harassment, detentions and arrest were the core of the criticisms lodged against Arizona's controversial Support Our Law Enforcement and Safe Neighborhoods Act[3] (generally referred to as "S.B. 1070") from the moment Governor Jan Brewer signed the bill into law on April 23, 2010.[4] The President of the United States criticized the law as "undermin[ing] basic notions of fairness that we cherish as Americans, as well as the trust between police and our communities that is so crucial to keeping us safe."[5] The Mexican American Legal Defense Fund decried

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[1] Transcript of Oral Argument at 33–34, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-182.pdf.

[2] 132 S. Ct. 2492 (2012).

[3] Ch. 113, 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, and 41).

[4] Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1.

[5] *Id.* (internal quotation marks omitted).

the law as "a recipe for racial and ethnic profiling."[6] Cardinal Mahoney of Los Angeles declared that the provisions requiring state and local officials to verify immigration documents were akin to Naziism.[7] Liberal commentator Rachel Maddow quickly dubbed S.B. 1070 the "papers, please" law and criticized it on similar grounds.[8] In their initial challenge to the Arizona law, many immigrants' rights and civil rights advocacy groups raised challenges to the law based on the Fourth Amendment's prohibition on unreasonable searches and seizures and the Fourteenth Amendment's guarantee of equal protection.[9] Indeed, these challenges have been renewed in the wake of the Supreme Court's decision in *Arizona v. United States*.[10]

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[6] *Id.* at A9.

[7] *Id.* Margaret Hu has noted that the cultural discomfort that denizens of the United States have with these types of documentation requirements is captured neatly in the classic film *Casablanca*. Margaret Hu, *'Show Me Your Papers' Laws and American Cultural Values*, JURIST—FORUM (Nov. 15, 2011), http://jurist.org/forum/2011/11/margaret-hu-immigration-papers.php. The first scene features a Nazi official asking a man to show his papers and ruthlessly shooting the man in the back when he produces expired documents. Hu writes:

> By the time we get to the end of the film, awash in a sea of fedoras and trench coats, the fog resplendent as a stylish film noir accessory, it is easy to forget that the plot revolves around immigrants and "papers." Putting the love triangle aside, the plot unfolds within the context of a political meta-narrative: the desperate plight of political refugees from a war-torn Europe who lack the good fortune, wealth or connections to possess their "papers." The film portrays the exiled and persecuted of all nationalities trapped in Vichy-occupied Morocco, devising escape schemes to the US, which symbolizes a dream of freedom. *Casablanca*, ultimately, is about immigrants seeking hope and redemption from discretionary abuses of power and the arbitrariness of having one's life and fortunes tied to the necessity of having the right "papers."

Id.

[8] *The Rachel Maddow Show* (MSNBC television broadcast Apr. 14, 2010), *transcript available at* http://www.msnbc.msn.com/id/36552869/ns/msnbc_tv-rachel_maddow_show/t/rachel-maddow-show/#.UBgiDjFSRis.

[9] The American Civil Liberties Union (ACLU), the Mexican American Legal Defense Fund (MALDEF), the National Immigration Law Center (NILC), the National Association for the Advancement of Colored People (NAACP), the ACLU Foundation of Arizona, the National Day Labor Organizing Network (NDLON), and the Asian Pacific American Legal Center (APALC) challenged the law on First, Fourth and Fourteenth Amendment grounds shortly after its enactment. Complaint for Declaratory and Injunctive Relief at 6, 56–58, Friendly House v. Whiting (D. Ariz. 2011) (No. CV-10-1061-PHX-SRB), 2011 WL 5367286 [hereinafter *Whiting* Complaint].

[10] *See* Valle del Sol v. Whiting, No. CV 10-1061-PHX-SRB (D. Ariz. Sept. 5, 2012); *see also* Plaintiffs' Proposed Motion for Preliminary Injunction and Memorandum of Points and Authorities in Support, Valle del Sol v. Whiting (D. Ariz. July 17, 2012) (No. 2:10-cv-01061-SRB) [hereinafter *Valle del Sol* Motion], *available at* http://www.aclu.org/files/assets/pi_brief_2b__5.pdf (reasserting their request for an injunction of S.B. 1070 Section 2(B) on Fourth and Fourteenth Amendment grounds as well as preemption grounds, and moving for an injunction of the state anti-harboring statute of Section 5 on preemption grounds).

The Solicitor General quickly clarified that those arguments were not before the Court in April of 2012. He framed his claim as a simple one: the state of Arizona had exceeded its authority in enacting S.B. 1070, and four sections of the legislation were preempted by federal immigration law.[11] Arguably, however, the Solicitor General immediately ceded too much ground in the first few seconds of his argument. On the one hand, the facial preemption challenge mounted by the federal government did not and could not rest on individualized showings of racial and ethnic profiling. On the other hand, it is because the Arizona law was inconsistent with, among other things, the antidiscrimination principles embedded in the structure of federal immigration law that it was preempted. The structural certainty of racial and ethnic profiling in the enforcement of S.B. 1070 is an important reason why the law was preempted, not a separate set of concerns that needed to wait for an as-applied challenge.

The courts and the litigants were aware of individual rights issues that lurked behind the dispute over federal power. Preemption became a means through which the feared individual rights consequences of S.B. 1070 might be averted without the need to litigate the effects of the law on particular individuals.[12] The preemption argument was therefore critically important for noncitizens present without authorization.[13] As Professor Hiroshi Motomura has illustrated, preemption claims are one of several kinds of claims raised in litigation as a means by which unauthorized migrants "assert rights obliquely and incompletely."[14] Identifying, detaining, and in some cases prosecuting unauthorized migrants are the express goals of S.B. 1070.[15] Those goals are not constitutionally prohibited provided they are achieved through constitutional means. After all, the federal government does all of these things every day.[16] Unauthorized migrants therefore could not challenge the law on the grounds of its intended results; they could only challenge the means by which those results would be achieved under the law. Their ability to mount a legal challenge depended on the claim that the state of Arizona was not the appropriate actor.[17]

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[11] The United States had initially contended that S.B. 1070 was preempted in its entirety, but Arizona District Court Judge Bolton rejected this argument, finding that only Sections 2(B), 3, 5(C) and 6 were preempted. United States v. Arizona, 703 F. Supp. 2d 980, 986, 1008 (D. Ariz. 2010).

[12] Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1736–38 (2010).

[13] *Id.* at 1730.

[14] *Id.* Motomura argues that preemption arguments are one of five general patterns of "transsubstantive arguments" that effectively serve to enable migrants to claim legal protections notwithstanding constitutional and statutory limitations on their substantive rights. *Id.* at 1723, 1728–29.

[15] S.B. 1070, 49th Leg., 2d Reg. Sess. § 1 (Ariz. 2010) (expressing the legislative intent of S.B. 1070).

[16] *Overview*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/about/overview/ (last visited Dec. 6, 2012).

[17] *See* Motomura, *supra* note 12, at 1736–46, for a discussion and critique of previous, similar deployments of preemption claims.

But the preemption claim was also very important for vindicating the rights of citizens and noncitizens lawfully present who feared that they would suffer the discriminatory effects of the Arizona law. For citizens and authorized migrants[18] who feared that they would be profiled and subjected to prolonged stops as a consequence of the law, the preemption challenge allowed them a means of challenging the law as a facial matter without waiting for the likely unconstitutional effects in implementation.[19]

Perhaps this explains why the reaction to the Court's decision in *Arizona v. United States* has been so mixed.[20] The ruling was actually a pretty clear victory for the federal government—at least as far as the preemption principles that were at stake.[21] As David Martin summarized the matter:

> [T]he majority warmly reaffirmed a constitutional doctrine, known as obstacle preemption, that will favor the federal government's interests in a wide swath of future cases. It also strongly endorsed the primacy of the federal government in immigration control, in the face of a stunningly vitriolic dissent from Justice Scalia asserting the sovereign exclusion powers of the states. And it rejected a "mirror-image" theory propounded by SB 1070's proponents that promised much future state legislative mischief.[22]

And yet, in upholding Section 2(B), the Court left in place a provision that was a source of deep concern for opponents of the law, and effectively green-lighted systematic state and local participation in immigration enforcement in a way that failed to account for the inevitable discriminatory effects of such participation.[23] It

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[18] I am using the term "migrants" here to account for "immigrants" and "nonimmigrants" as they are defined in the Immigration and Nationality Act. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15) (2006)

[19] *See* Motomura, *supra* note 12, at 1738 (explaining "[a] preemption-based institutional competence argument . . . is typically the challengers' only hope of prevailing and the statute's only risk of invalidation").

[20] David A. Martin, *Reading* Arizona, 98 VA. L. REV. IN BRIEF 41, 41–42 (2012), http://www.virginialawreview.org/inbrief/2012/04/14/Martin_Web.pdf.

[21] *Id.*

[22] *Id.*; *see also* Jennifer M. Chacón, *Arizona's S.B. 1070: Who Won, Why, and What Now?*, LEXISNEXIS EMERGING ISSUES ANALYSIS, 2012 EMERGING ISSUES 6515 (July 2012) (describing the ruling as a formal legal victory for the federal government, albeit one that will not mitigate most of the law's deleterious effects on individual rights on the ground); Lauren Gilbert, Patchwork Immigration Laws and Federal Enforcement Priorities (June 26, 2012) (unpublished manuscript), *available at* http://ssrn.com/abstract=2093486 (concluding that the decision was "largely a reaffirmation of federal supremacy with regard to the immigration power and a warning call to states to refrain from copycat laws," noting in particular the majority's robust application of the doctrine of obstacle preemption).

[23] Chacón, *supra* note 22, at 12.

is entirely possible that this provision will later be enjoined on preemption grounds if it is implemented in ways that are inconsistent with federal priorities, or on Fourth or Fourteenth Amendment grounds if it results in unreasonably lengthy stops or widespread racial profiling.[24] But the Court made it clear that a sub-federal jurisdiction can require its officers to make inquiries into the immigration status of individuals in otherwise lawful encounters with law enforcement.[25] As this Article will explain, the Court's decision invites inevitable discrimination and harassment of minority citizen groups and lawful migrants in contravention of the requirements of federal immigration law.

Part I of this Article outlines the Court's immigration federalism jurisprudence, focusing on its recent decisions, with particular attention to *Arizona v. United States*. In cases leading up to *Arizona v. United States*, the Court suggested that it might allow a much larger role for states in the creation and enforcement of immigration laws. But in the *Arizona* decision itself, the Court backed away from such suggestions, and hewed to a fairly traditional understanding of federal exclusivity, at least formally. This formal adherence to traditional federalism doctrine was hailed by some as a victory for the federal government and for federal primacy in immigration law. But the apparent triumph of federal primacy is illusory.

Part II explores the reasons that the Court's formal adherence to traditional notions of immigration federalism will fail to translate into federal primacy in practice. Succinctly put, traditional judicial articulations of immigration federalism do not account for the sub-federal immigration enforcement discretion that has accumulated over the past two decades. Following the last round of comprehensive immigration reform in 1986, scholarly, legal, and political consensus seemed to exist around the notion that states and localities would play a limited role in immigration enforcement; a role that was largely confined to making occasional arrests for immigration crimes and in some cases notifying federal enforcement agents of immigration violators in state or local custody.[26] By 2010, an entirely different vision of state and local participation in immigration enforcement had replaced the older, more limited one. This Part maps these changes, and also demonstrates how the existing case law on immigration policing relies on a delineation between federal and sub-federal policing that has become increasingly illusory.

Part III of this Article unpacks the Court's decision in *United States v. Arizona* to explain why the seemingly traditional approach to federalism espoused by the Court

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[24] *See id.* at 1–2 (discussing the likelihood of a proliferation of challenges alleging racial profiling).

[25] *Id.* at 8.

[26] *See* LISA M. SEGHETTI ET AL., CONG. RESEARCH SERV., RL 32270, ENFORCING IMMIGRATION LAW 5–6 (2006); *see also* Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 575–76 (2008); Rick Su, *Local Fragmentation as Immigration Regulation*, 47 HOUS. L. REV. 367, 369 (2010) (arguing that "immigration law has been traditionally understood to be an exclusive national issue—and thus distinct and separate from the local focus of local government law").

actually represents a substantial reformulation of immigration federalism principles. As previously noted, over the past two decades, sub-federal participation became a significant feature of the immigration enforcement landscape.[27] Much of this participation was not sanctioned by federal immigration law, and recently, the federal government's immigration enforcement policies have moved in a direction aimed at bringing sub-federal enforcement efforts more closely into alignment with the letter of federal immigration law.[28] The Court's decision in *Arizona v. United States* is insufficiently attentive both to the letter of federal immigration law and to the efforts of the federal government to move closer toward aligning practices with the letter of the law. Consequently, the Court's seemingly limited concessions to state authority in *Arizona v. United States* actually cede significant enforcement powers to sub-federal entities contrary to the requirements of federal immigration law. In the absence of federal legislation to normalize the status of some or all of the estimated 11.2 million unauthorized migrants in the United States,[29] state and local law enforcement will substantially shape immigration enforcement and the immigrant experience in the United States, notwithstanding the Court's formal endorsement of federal primacy.

I. ACADEMIC IMMIGRATION FEDERALISM: THE LAW ON THE BOOKS

S.B. 1070 is one of many state and local ordinances[30] that aim to do indirectly what a long line of constitutional case law indicates that they cannot do directly—regulate immigration.[31] As a legal matter, the bill's attempt to insert the state into immigration policy contravenes clearly accepted legal wisdom. By the time that the Supreme Court decided the *Chinese Exclusion Case*[32] in 1889, the Court had articulated the principle that Congress has plenary power to regulate immigration.[33] Other cases decided in the latter half of the nineteenth century affirmed the central role of the federal government—as opposed to the states—in setting immigration policy.[34]

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[27] *See, e.g.*, James Pinkerton, *Localized Immigration Enforcement on Rise*, HOUS. CHRON., Oct. 9, 2007, at A1.

[28] *See* discussion *infra* notes 347–48 and accompanying text.

[29] JEFFREY PASSEL & D'VERA COHN, PEW HISPANIC CTR., PEW RESEARCH CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, 1 (2011), *available at* http://www.pewhispanic.org/2011/02/01/unauthorized-immigrant-population-brnational-and-state-trends-2010/.

[30] Other state and local ordinances are discussed, see *infra* notes 83, 248–54 and accompanying text.

[31] *See Arizona, DREAM*, RURAL MIGRATION NEWS (July 2012), http://migration.ucdavis.edu/rmn/more.php?id=1702_0_4_0 (referring to SB 1070's sub-federal regulation of immigration).

[32] Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889).

[33] *Id.*

[34] *See, e.g.*, Henderson v. Mayor of New York, 92 U.S. 259 (1875) (holding state laws governing immigration unconstitutional).

Justice Scalia's dissent in *Arizona v. United States* hearkens to the early days of the Republic, when states and localities played the dominant role in immigration law and its enforcement.[35] But by the late nineteenth century, the case law clearly established an absolute[36] and largely unreviewable federal authority to enact through Congress, and enforce through the executive branch, the nation's immigration laws.[37] In the period that followed, even state statutory schemes that did not expressly conflict with congressional enactments were deemed preempted where they sought to regulate an area such as alien registration, for which Congress had already developed a comprehensive statutory framework.[38] Thus, the Court struck down Pennsylvania's alien registration scheme in spite of the fact that it did not expressly conflict with the operation of the later-adopted federal scheme.[39] The lesson was clear: the regulation of immigration was a matter for the federal government.

Over the past several decades, however, the Court has acknowledged some limited spaces for state and local involvement in immigration enforcement. Prior to the decisions of the Roberts Court, the most notable case in this regard was *DeCanas v. Bica*.[40] The question before the Court was whether a California law that imposed sanctions

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[35] Arizona v. United States, 132 S. Ct. 2492, 2511–13 (2012) (Scalia, J., dissenting). For scholarly discussions of this early history, see, for example, ARISTIDE R. ZOLBERG, A NATION BY DESIGN 99–118 (2006) (discussing various state immigration regulations); Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353 (2009) (discussing both exclusionary and inclusionary provisions enacted by states and territories to shape immigrant flows); Gerald Neuman, *The Lost Century of Immigration Law (1776–1785)*, 93 COLUM. L. REV. 1833 (1993) (documenting and describing various state immigration regulations in the early days of the Republic). Justice Scalia actually cites to Neuman's seminal piece in his dissent. *Arizona*, 132 S. Ct. at 2512 (Scalia, J., dissenting).

[36] *See, e.g.*, Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.").

[37] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) ("The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.").

[38] *See* Hines v. Davidowitz, 312 U.S. 52, 66–67 (1941) ("[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.").

[39] *Id.* at 67–68.

[40] 424 U.S. 351 (1976).

on employers who hired noncitizens unauthorized to work in the United States impermissibly infringed on federal immigration powers.[41] The Court rejected the legal challenge to the California law, concluding that, in the absence of a comprehensive federal scheme to regulate the employment of unauthorized workers, California's law was not preempted by federal immigration law.[42] *DeCanas* acknowledged the power of states to regulate immigration-related matters that fall under the states' traditional police powers (in this case, employment), provided the states' laws do not conflict with federal immigration law.[43] The Court was able to distinguish *Hines* because of the absence of a comprehensive federal statutory scheme governing the employment of unauthorized workers.[44] In the years that followed the case, Congress did enact comprehensive legislation to address this issue. Specifically, the Immigration Reform and Control Act of 1986 (IRCA)[45] developed a statutory scheme requiring employers to maintain records of employees' work eligibility, penalizing employers who hire unauthorized workers, and protecting authorized workers from discriminatory hiring practices.[46] Thus, the Roberts Court had a chance to revisit the Court's ruling in *DeCanas* in the face of further sub-federal efforts to regulate the employment of unauthorized workers.[47]

Interestingly, another case to suggest a space for sub-federal immigration regulation was *Plyler v. Doe*,[48] a case that is generally considered the high water mark of constitutional protection of the rights of unauthorized noncitizens.[49] In that case, which involved a challenge to a Texas law that would have required undocumented students to pay to attend public primary and secondary school, the Supreme Court struck down the state law on equal protection grounds.[50] But in so doing, the Court suggested that a state "might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population."[51] While "the State has no direct

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[41] *Id.* at 352–53.

[42] *Id.* at 356–58.

[43] *Id.* at 356–57.

[44] *Id.* at 362–63. At the time *DeCanas* was decided, the immigration statute's harboring provision expressly excluded employment from the harboring definition, which made it clear that Congress had expressly declined to criminalize the employment of unauthorized workers. *See* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1154 (2009). The harboring exclusion was known as the "Texas Proviso" in honor of the state that most wanted the exception to exist. *Id.*

[45] Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

[46] 8 U.S.C. §§ 1324a–1324b (2006).

[47] *See* Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011). Further discussion of *Whiting* follows *infra* Part I.A.

[48] 457 U.S. 202 (1982).

[49] *See* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN 65–66 (2006) (describing *Plyler* as the "ultimate aliens' rights decision").

[50] *Plyler*, 457 U.S. at 210–16.

[51] *Id.* at 228.

interest in controlling entry into this country . . . unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service."[52] The Court went on to write "we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns."[53] This language in *Plyler* is obviously dicta.[54] Nevertheless, like *DeCanas*, it signaled that there may be spaces and occasions when sub-federal regulation of immigration matters might be permissible.[55] Both cases left unanswered the question of precisely how much leeway states have to regulate immigration.

Until recently, the Court did not have the opportunity to explore the scope of state authority to regulate immigration.[56] In the intervening years, the most high-profile attempt by a state to regulate certain aspects of immigration—California's Proposition 187—was enjoined by a district court[57] and the State subsequently abandoned its defense of the law.[58] But in the past two years, the Court has issued two major decisions on the topic: *Chamber of Commerce v. Whiting*[59] and *Arizona v. United States*. Although these decisions modestly expand the potential sphere of state immigration policymaking and enforcement, the cases have generally hewed surprisingly close to traditional lines. As will be explained further in Part II, shifts in immigration enforcement practices, not in the jurisprudence, have fundamentally transformed the role of sub-federal actors in immigration enforcement.

A. Chamber of Commerce v. Whiting*: Feints Toward a More Permissive Immigration Federalism*

The *Whiting* case[60] involved a facial challenge to an Arizona state law—the Legal Arizona Workers Act (LAWA)—that allows the superior courts of Arizona to

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[52] *Id.* at 228 n.23 (citing DeCanas v. Bica, 424 U.S. 351, 354–56 (1976)).

[53] *Id.* (citing *DeCanas*, 424 U.S. at 354–56); Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration through Criminal Law*, 61 DUKE L.J. 251, 269–71 (2011) (discussing *DeCanas* and *Plyler* as creating possible space for future state enforcement of immigration law).

[54] *See* Huyen Pham & Pham Hoang Van, *The Economic Impact of Local Immigration Regulation: An Empirical Analysis*, 32 CARDOZO L. REV. 485, 489–91 (2010) (describing the prevalence of sub-federal immigration regulation).

[55] *See id.*

[56] *See id.* at 492–93 (noting recent challenges to state immigration laws).

[57] League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995) (enjoining Proposition 187 on preemption grounds).

[58] *See* Patrick J. McDonnell, *Davis Won't Appeal Prop. 187 Ruling, Ending Court Battles*, L.A. TIMES, July 29, 1999, http://articles.latimes.com/print/1999/jul/29/news/mn-60700. One of Proposition 187's main legal problems was that it ran directly afoul of *Plyler*. *See League of United Latin Am. Citizens*, 980 F. Supp. at 774.

[59] 131 S. Ct. 1968 (2011).

[60] For my earlier analysis of *Whiting* see Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY (forthcoming 2012). I draw on that analysis here.

suspend or revoke the business licenses of employers who knowingly and intentionally hire unauthorized noncitizen workers.[61] The law creates a procedure by which anyone can submit a complaint about a business's hiring practices to the state's Attorney General or a county attorney.[62] The submission of such a complaint requires the official to investigate the claim and, if it is found to be neither false nor frivolous, to bring action against the employer.[63] A first violation requires the employer to terminate unauthorized workers and to comply with reporting requirements.[64] A second violation results in permanent revocation of the employer's business license.[65]

The Act also requires all employers to participate in E-Verify—the federal automated program that allows employers to verify the work eligibility of employees.[66] Under federal law, participation in the E-Verify program is voluntary.[67] The Arizona law imposes no penalties for the failure to use E-Verify, but it does provide that participation in E-Verify creates a presumption of good faith compliance.[68]

The Chamber of Commerce of the United States and various business and civil rights organizations sued to enjoin the law on the grounds that it was expressly and impliedly preempted by federal immigration regulation—and specifically by the provisions of IRCA.[69] The federal district court rejected the challenge, finding that the law complemented IRCA,[70] which expressly precludes only state regulation "other than through licensing and similar laws."[71] Although the plaintiffs argued that LAWA was not a "licensing" or "similar" law, the court disagreed.[72] Classifying LAWA as a licensing scheme, the court found that LAWA fell within IRCA's savings clause and was not preempted.[73] The Ninth Circuit agreed.[74]

The plaintiffs also argued that even if federal law did not expressly preempt Arizona's employer sanctions law, LAWA was impliedly preempted because it was inconsistent with federal law providing for the voluntary use of E-Verify.[75] The district court rejected that argument, and the Ninth Circuit, in affirming the district court on this point, also found that the E-Verify program was one that Congress had "implicitly strongly encouraged by expanding its duration and its availability (to all

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[61] ARIZ. REV. STAT. ANN. § 23-212 (2012).

[62] *Id.* § 23-212(B).

[63] *Id.* § 23-212(B)–(D).

[64] *Id.* § 23-212(F)(1).

[65] *Id.* § 23-212(F)(2).

[66] *Id.* § 23-214(A).

[67] Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1975 (2011).

[68] *Id.* at 1975–77.

[69] Chicanos por la Causa, Inc. v. Napolitano, 558 F.3d 856, 860 (9th Cir. 2009), *cert. granted sub nom*. Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011).

[70] *Id.* at 860, 863.

[71] 8 U.S.C. § 1324a(h)(2) (2006).

[72] *Chicanos por la Causa*, 558 F.3d at 860, 863.

[73] *Id.*

[74] *Id.* at 864–66.

[75] *Id.* at 866–67.

fifty states)."[76] The Ninth Circuit also upheld the district court's rejection of the claim that IRCA's antidiscrimination provision impliedly preempted the Arizona scheme because "Congress requires employers to use either E-Verify or I-9, and appellants have not shown that E-Verify results in any greater discrimination than I-9."[77]

The Supreme Court heard oral arguments in the *Whiting* case on December 8, 2010.[78] On May 26, 2011, it issued its decision.[79] The decision, authored by Chief Justice Roberts, did not significantly expand states' abilities to regulate immigration law.[80] It did contain dicta that hinted that the Court was planning to apply a more limited version of obstacle preemption in future cases,[81] but the Court's later decision in *Arizona v. United States* declined to seize or expand upon this dicta in the *Whiting* case.[82]

Like the lower courts, the Supreme Court in *Whiting* found that LAWA's business license suspension provision[83] was a licensing scheme that fell within IRCA's savings clause in 8 U.S.C. § 1324a(h)(2), which allows for state regulation of the employment of unauthorized workers through "licensing and similar laws."[84] The Court thus rejected the express preemption argument raised by the Chamber of Commerce.[85] That portion of the opinion was discrete, for it was limited by its facts to the carve-out language of IRCA, and is unlikely to be particularly instructive in other contexts.

But the Chamber of Commerce had also argued that LAWA was preempted on an implied preemption theory of obstacle preemption because it upset the carefully balanced immigration enforcement and antidiscrimination goals of the federal immigration scheme.[86] Like the lower courts before it, the Supreme Court rejected this claim as well.[87] The Court noted that the state law tracked the federal scheme both

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[76] *Id.* at 867.

[77] *Id.* Separately, the Ninth Circuit rejected the plaintiffs' argument that LAWA's sanction provisions violated due process. *Id.* at 867–68.

[78] Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011).

[79] *Id.*

[80] *Id.*

[81] Lauren Gilbert, *Immigration Laws, Obstacle Preemption and the Lost Legacy of* McCulloch, 33 BERKELEY J. EMP. & LAB. L. 153, 181–82 (2012).

[82] *See infra* Part I.B.

[83] The Supreme Court noted that Arizona was not alone in enacting such a provision and cited comparable provisions that have been enacted in Colorado, Mississippi, Missouri, Pennsylvania, Tennessee, Virginia, and West Virginia. *Whiting*, 131 S. Ct. at 1975 & n.2. The Court did not note in the decision, but was certainly aware of the fact that some localities have also enacted similar provisions. *See, e.g.*, Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (considering the constitutionality of one such ordinance), *vacated sub nom.* City of Hazleton, Pa. v. Lozano, 131 S. Ct. 2958 (2011).

[84] *Whiting*, 131 S. Ct. at 1977–81.

[85] *Id.*

[86] *Id.* at 1981, 1983.

[87] *Id.* at 1981–85.

in how it defined authorized workers and how it defined offenses, arguably suggesting that state laws that mirror the federal scheme are less likely to be deemed to conflict with or pose an obstacle to federal law.[88] The Court then noted that Congress expressly welcomed state licensing laws in this area.[89] "The balancing process that culminated in IRCA resulted in a ban on hiring unauthorized aliens, and the state law here simply seeks to enforce that ban. Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'. . . ."[90] To some commentators, this language suggested that the Court was likely to take a skeptical and narrow view of obstacle preemption in future immigration cases, including *Arizona v. United States*.[91]

In short, reading *Whiting*, one could potentially discern far more tolerance for state immigration regulation than that which is found in prior case law.[92] But the question remained how far the Court would extend that reasoning in cases outside of the IRCA carve-out. The answer—not very far—came with the Court's next decision.

B. Arizona v. United States*: Limiting* Whiting*; Reaffirming Federal Dominance*

The Court's most recent foray into immigration federalism came with the case of *Arizona v. United States*. The case arose out of litigation over Arizona's S.B. 1070.[93] Section 1 of S.B. 1070 states in no uncertain terms that:

> the intent of [S.B. 1070] is to make attrition through enforcement the public policy of all state and local government agencies in Arizona [and that] [t]he 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.[94]

To achieve this goal, S.B. 1070 amends or creates four sections of the Arizona Revised Statutes that impose criminal liability on the basis of unauthorized presence in the

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[88] *Id.* at 1982–84.

[89] *Id.* at 1984–85.

[90] *Id.* at 1985.

[91] *See, e.g.*, Gilbert, *supra* note 81, at 182–83 (describing the Court's narrow application of obstacle preemption and predicting that the Court's evolving approach, if applied in future cases, could give states broader latitude to enact bills like S.B. 1070).

[92] *See id.* at 205–07 (discussing the likelihood of *Whiting* providing lawmakers direction in crafting state and local immigration law).

[93] Arizona v. United States, 132 S. Ct. 2492, 2497 (2012).

[94] Ch. 113, 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. §§ 11, 13, 23, 28, and 41).

United States.[95] Although proponents of the law argued that it merely "mirrors" federal immigration law, this is clearly not the case,[96] as the law creates criminal liability for some conduct that is not criminal under federal law[97] and imposes more stringent penalties on other federally sanctioned conduct.[98]

S.B. 1070 also "imposes new duties and creates new powers designed to increase" state and local law enforcement's "investigation of immigration status, arrests of removable noncitizens, reporting of undocumented status to federal authorities, and assistance in removal by delivering removable noncitizens to federal authorities."[99] The overall point is to have state and local law enforcement more involved in all phases of immigration enforcement.[100] These provisions would allow peace officers to make an arrest without a warrant based on probable cause if "[t]he person to be arrested has committed any public offense that makes the person removable from the United States,"[101] and would require verification of the immigration status of a person lawfully stopped on the basis of "reasonable suspicion . . . that a person is an alien and is unlawfully present in the United States."[102]

The legal filings for injunctive relief certainly reflect the concern that the law would result in unreasonable searches and seizures and discriminatory law enforcement, and raise these claims under the Fourth and Fourteenth Amendments.[103] But the leading arguments against S.B. 1070—and indeed, the arguments that Federal District Court Judge Bolton relied upon in enjoining the law—were arguments over federal preemption.[104] The briefs filed by the United States Department of Justice argued that the Arizona law was preempted by federal immigration law.[105] The government's

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[95] *See* Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47, 50 (2010); *see also* Chacón, *supra* note 22, at 2.

[96] For a complete dissection and rejection of the "mirror image" defense for sub-federal immigration regulation in general and S.B. 1070 in particular, see generally Chin & Miller, *supra* note 53.

[97] *See* ARIZ. REV. STAT. ANN. § 13-2928(C) (West 2012) (criminalizing the act of working without authorization).

[98] *See id.* § 13-1509 (criminalizing an individual's failure to carry alien registration papers when that individual's presence in the country is not legally authorized).

[99] Chin et al., *supra* note 95, at 62; *see* ARIZ. REV. STAT. ANN. §§ 11-1051, 13-3883 (discussing enforcement of immigration laws and arrest by an officer without a warrant).

[100] *See* § 1 (discussing how the goal of the act "is to make attrition through enforcement the public policy" of Arizona state and local government agencies).

[101] *Id.* § 13-3883.

[102] *Id.* § 11-1051(B).

[103] *Whiting* Complaint, *supra* note 9, at 6, 56–58.

[104] United States v. Arizona, 703 F. Supp. 2d 980, 992–1006 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011).

[105] Plaintiff's Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof at 12–13, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-cv-1413-NVM).

preemption argument relied on theories of both express and implied preemption, with the government taking the position that the entire law was preempted.[106]

Judge Bolton ultimately declined to enjoin the entire statute, but she did enjoin four provisions on preemption grounds.[107] She first enjoined S.B. 1070 Section 2(B).[108] That Section required Arizona officials to "make a reasonable attempt, when practicable, to determine an individual's immigration status during any lawful stop, detention, or arrest where reasonable suspicion exists that the person is unlawfully present in the United States."[109] It also required that "all persons who are arrested have their immigration status verified prior to release."[110] Judge Bolton found that the provision would impermissibly burden the federal government, which would effectively be required to check on the status of any person arrested and detained by Arizona officials under their expanded stop and arrest authority.[111] She also noted that these provisions impermissibly burden lawful permanent residents by subjecting them to harassment in contravention of existing federal immigration law.[112] For these reasons, she found that the U.S. government was likely to succeed on the merits on its claim that this particular provision of S.B. 1070 was unconstitutional on a theory of implied conflict or obstacle preemption.[113] She used similar reasoning to strike down Section 6 of the law, which would have allowed Arizona officials to conduct warrantless arrests when there is probable cause to believe that "the person to be arrested has committed any public offense that makes the person removable from the United States."[114]

Section 3 would have made it a state crime for anyone to fail to comply with the alien registration provisions of federal law if that person was not lawfully present in the United States.[115] Citing *Hines v. Davidowitz*,[116] Judge Bolton held that the current federal alien registration requirements already create an integrated and comprehensive system of registration, and the Arizona provisions that created penalties for failure to comply impermissibly altered the federal penalty scheme for noncompliance.[117] She therefore enjoined the provisions on the ground that the federal

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[106] *Arizona*, 703 F. Supp. 2d at 991–92.

[107] *Id.* at 1008.

[108] *Id.* at 987.

[109] *Id.* at 989.

[110] *Id.*

[111] *Id.* at 995–96.

[112] *Id.* at 995.

[113] *Id.* at 996.

[114] *Id.* at 1004–06 (quoting ARIZ. REV. STAT. ANN. § 13-3883(A)(5)). Bolton reasoned that the task of figuring out what would constitute a removable offense was far too complex to provide a workable basis upon which an officer could make a probable cause determination. *Id.* at 1006.

[115] Ch. 113, 2010 Ariz. Sess. Laws 450 (codified as amended in ARIZ. REV. STAT. ANN. § 13-1509).

[116] 312 U.S. 52 (1941).

[117] *Arizona*, 703 F. Supp. 2d at 998–99 (citing *Hines*, 312 U.S. at 66–74).

government was likely to succeed on the merits of their claim that these provisions were preempted as in conflict with federal law.[118]

Finally, Judge Bolton held that Section 5(C), which made it a crime for someone unlawfully in the country to solicit work, was field preempted by IRCA.[119] She reasoned that Congress had enacted a comprehensive statutory scheme governing the employment of noncitizens.[120] This federal provision made it a crime to hire an unauthorized worker, but did not criminalize the worker.[121] Judge Bolton found that Arizona's attempt to make conduct criminal, that was not criminalized under federal law, was inconsistent with the federal statutory scheme.[122]

Three notable provisions of the law were not enjoined in 2010. The first was a provision that made it a criminal offense to:

> (1) [t]ransport or move or attempt to transport or move an alien in [Arizona], in furtherance of the illegal presence of the alien in the United States . . . (2) [c]onceal, harbor, or shield or attempt to conceal, harbor or shield an alien from detection in [Arizona] . . . [and] (3) [e]ncourage or induce an alien to come to or reside in [Arizona] . . . .[123]

Judge Bolton concluded that the provision did not impermissibly regulate immigration or violate the Dormant Commerce Clause.[124] Judge Bolton found that the provision was "directed at legitimate local concerns related to public safety"[125] and that "any incidental burden on interstate commerce is minimal in comparison with the putative local benefits."[126] She therefore allowed this provision to stand in 2010.[127]

However, on September 5, 2012, in response to a lawsuit filed by various civil rights organizations, Judge Bolton ultimately did issue a preliminary injunction of

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[118] *Id.* at 999.
[119] *Id.* at 1002.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] ARIZ. REV. STAT. ANN. § 13-2929(A)(1)–(3) (West 2012).
[124] *Arizona*, 703 F. Supp. 2d at 1003–04.
[125] *Id.* at 1004.
[126] *Id.*
[127] *Id.* at 1004, 1008. Judge Bolton ruled separately on a motion filed by other plaintiff organizations that raised a number of constitutional challenges to S.B. 1070, including Fourth Amendment claims. Judge Bolton dismissed a few of the claims and denied others as moot, citing the July 28, 2010, injunction issued on preemption grounds. However, the order indicated that if the court had not found the motion moot, it would have found "compelling" the plaintiffs' Fourth Amendment argument that S.B. 1070 "transforms investigatory stops into de facto arrests without probable cause." *See* Court Order at 2, 33–34, 36–38, Friendly House v. Whiting (D. Ariz. 2010) (No. CV-10-1061-PHX-SRB) (dismissing some of the plaintiffs' claims and denying others as moot).

these portions of Section 5 of S.B. 1070 on field and conflict preemption grounds.[128] Relying on reasoning employed by the Eleventh Circuit in a challenge to similar Georgia and Alabama laws, she found that federal law already comprehensively regulated the crime of alien smuggling; that states could not separately criminalize and prosecute smuggling offense; and that enforcement of the Arizona law could not be achieved consistently with federal law.[129] Most media accounts of Judge Bolton's September 5, 2012, order paid little attention to her injunction of S.B. 1070's anti-smuggling provision, focusing primarily instead on Judge Bolton's decision to deny a preliminary injunction as to Section 2(B) in the wake of the Supreme Court's June 2012 decision.[130] But the injunction of the anti-smuggling provision is actually quite significant because some Arizona law enforcement agencies have successfully targeted numerous noncitizens for prosecution under its anti-smuggling provision and have effectively used this provision as a backdoor means of regulating immigration.[131]

The second notable provision exempt from the injunction was a provision that made minor changes to Arizona's existing anti-smuggling law.[132] As Judge Bolton noted, in 2010, the United States did not expressly challenge the anti-smuggling law, and she did not enjoin it.[133] Arizona's entire anti-smuggling provision continues to be the subject of litigation, however, because various civil rights organizations have successfully claimed that Sheriff Joe Arpaio of the Maricopa County Sheriff's Office (MCSO) has abused this and other provisions of law to make illegitimate arrests solely on the basis of immigration status.[134] As a result of these claims, the MCSO is currently enjoined from making arrests solely on the basis of immigration status.[135] Finally, Judge Bolton left intact a provision that would allow Arizona citizens to sue Arizona officials for failing to enforce federal immigration law to the full extent permitted by federal law.[136]

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[128] Valle del Sol v. Whiting, No. CV 10-1061-PHX-SRB (D. Ariz. Sept. 5, 2012).

[129] *Id.* at 7–9, 11.

[130] *See* Fernanda Santos, *Arizona Immigration Law Survives Ruling*, N.Y. TIMES, Sept. 7, 2012, at A20.

[131] *See generally* Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749 (2011) (discussing how Arizona has implemented its own system for punishing immigration crimes).

[132] *Arizona*, 703 F. Supp. 2d at 1000.

[133] *Id.*

[134] *See* Ortega Melendres v. Arpaio, No. 12-15098, slip. op. 18–19 (9th Cir. Sept. 25, 2012).

[135] *Id.* at 18–19. The federal government is separately suing the MCSO for civil rights violations. United States v. Maricopa Cnty., No. CV12-0981-PHX-ROS (D. Ariz. filed May 10, 2012); *see also* Fernanda Santos & Charlie Savage, *U.S. Suit Says Sheriff Discriminated Against Latinos*, N.Y. TIMES, May 11, 2012, at A18.

[136] *See Arizona*, 703 F. Supp. 2d at 986, 1008.

On November 1, 2010, the Ninth Circuit heard oral arguments in the case.[137] On April 11, 2011, the Ninth Circuit affirmed the district court's order in its entirety.[138] Arizona appealed the case to the Supreme Court.[139] On June 25, 2012, the Supreme Court issued its decision in the case.[140]

The Court first analyzed S.B. 1070 Section 3, the provision that created the new state misdemeanor forbidding the "willful failure to complete or carry an alien registration document" in violation of federal law.[141] The Court found Arizona's alien registration provision to be field preempted, declaring that "the Federal Government has occupied the field of alien registration" with its comprehensive registration scheme,[142] thereby impliedly preempting Arizona's efforts to create auxiliary—and slightly more severe[143]—penalties for failure to comply with the federal scheme.[144] Like the lower courts, the Supreme Court relied heavily on its 1941 ruling in *Hines v. Davidowitz* the Court's earlier field preemption decision concerning an alien registration scheme.[145] "Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards."[146] Of course, unlike the Pennsylvania scheme at issue in *Hines v. Davidowitz*,[147] the Arizona law closely mapped onto the federal registration scheme.[148] But this made no difference to the Court, which found that there was no room for additional state action, even complementary state action, given the existence of a comprehensive federal scheme.[149]

The Court next evaluated Section 5(C), which made it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place

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[137] *See* United States v. Arizona, 641 F.3d 399 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (2011).

[138] *Id.* at 366. The judges were unanimous in their conclusions as to two of the four enjoined provisions: Sections 3 and 5(C). *See Arizona*, 641 F.3d 399. Judge Bea dissented with regard to two provisions—Sections 2(B) and 6—which he believed were not preempted by federal law. *Id.* at 391 (Bea, J., concurring in part and dissenting in part).

[139] Arizona v. United States, 132 S. Ct. 2492 (2012).

[140] *Id.* I wrote an expert commentary on the decision for the Lexis Emerging Issues Series. Chacón, *supra* note 22. The description of the case that forms the remainder of this section borrows from my analysis in that short commentary.

[141] *Arizona*, 132 S. Ct. at 2501 (citing ARIZ. REV. STAT. ANN. § 13-1509(A) (West Supp. 2011)).

[142] *Id.* at 2502.

[143] *Id.* at 2503 (explaining that the Arizona law does not allow for probation as a penalty for failure to carry registration papers; the federal law does).

[144] *Id.* at 2503.

[145] Hines v. Davidowitz, 312 U.S. 52 (1941).

[146] *Arizona*, 132 S. Ct. at 2502.

[147] *See Hines*, 312 U.S. at 59–61.

[148] *See Arizona*, 132 S. Ct. at 2501–02.

[149] *Id.* at 2502.

or perform work as an employee or independent contractor."[150] Citing its 2011 decision in *Whiting*, the Court concluded that, unlike the federal alien registration scheme, the IRCA provisions do not fully occupy the field with regard to the employment of unauthorized workers.[151] Indeed, the carve-out provision at issue in *Whiting* expressly allows for certain sub-federal regulation in the field.[152] Thus, there is room for states to legislate in this area. But the Court rejected the notion that Arizona's legislation was compatible with the federal scheme.[153] The Court concluded that "[a]lthough § 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."[154] The Court reasoned that the legislative history of IRCA reflects Congress's consideration of and rejection of criminal sanctions for workers.[155] Thus, the Court concluded that the Section was unconstitutional on a theory of obstacle or conflict preemption.[156]

This was the first signal that the Court was not planning to follow the logic of *Whiting* toward more restrained obstacle preemption analyses on questions of immigration federalism. The Court could have concluded that Arizona's goals were consonant with the federal goals, and that the State was using the federal classifications for permissible employment and therefore, that the legislation could coexist comfortably with the federal scheme.[157] Such a conclusion arguably would have been supported by Justice Robert's warning in *Whiting* against "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives."[158] But the Court declined to go down this road, instead employing a fairly robust approach to the obstacle preemption inquiry.[159]

The next provision scrutinized by the Court was Section 6, which provided that a state officer "without a warrant, may arrest a person if the officer has probable cause to believe [that the person] has committed any public offense that makes [him] removable from the United States."[160] The Court observed that even immigration officers do not necessarily have the authority to arrest someone upon having probable cause of removability.[161] In the absence of a federal warrant, arrest based upon

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[150] *Id.* at 2503 (citing ARIZ. REV. STAT. ANN. § 13-2928(C) (West Supp. 2011)).

[151] *Id.* at 2504–05.

[152] *See* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1970–71 (2011).

[153] *Arizona*, 132 S. Ct. at 2505.

[154] *Id.*

[155] *Id.* at 2504.

[156] *Id.* at 2505.

[157] *See id.* at 2516, 2519 (Scalia, J., concurring in part and dissenting in part); *id.* at 2523, 2533–34 (Thomas, J., concurring in part and dissenting in part).

[158] Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1985 (2011) (internal quotation marks omitted).

[159] *See Arizona*, 132 S. Ct. 2492.

[160] *Id.* at 2505 (citing ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (West Supp. 2012)).

[161] *Id.* at 2506.

probable cause of removability is permitted only in a limited, statutorily prescribed set of circumstances.[162] The Court therefore concluded that Section 6 provided Arizona's officials with "greater authority to arrest aliens on the basis of possible removability than Congress has given to trained immigration officers."[163] The Court also concluded that the result would be "unnecessary harassment of some aliens . . . whom federal officials determine should not be removed."[164] Finally, the Court noted that the federal statute specifies the circumstances under which state officers are entitled to perform the functions of immigration officers, such as by operation of a formal agreement with the federal government pursuant to 8 U.S.C. § 1357(g)(1).[165] Arizona's arrest authority is far more capacious.[166]

Here again, the Court arguably could have concluded that Arizona's law was reasonably consonant with federal law.[167] Indeed, as Justice Alito wrote in his dissent, "[s]tate and local officers do not frustrate the removal process by arresting criminal aliens."[168] It is possible to view the statutory scheme as one that fosters Arizona's cooperation with federal enforcement.[169] But the majority rejected the notion that this was "cooperation."[170] "There may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government."[171] Because the arrest authority was broader than federal authority and unauthorized by federal law, the Court found that the provision created "an obstacle to the full purposes and objectives of Congress."[172] Once again, the Court was engaged in a fairly robust application of obstacle preemption principals, notwithstanding the suggestion in *Whiting* of the desirability of another possible approach.[173]

The final provision addressed by the Court was Section 2(B), which requires officers to request proof of status during otherwise lawful seizures upon "reasonable suspicion" that a person was unlawfully present.[174] Section 2(B) also requires the determination of an individual's immigration status before the person is released after

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[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.* at 2506–07.
[167] *See id.* at 2524–25 (Alito, J., concurring in part and dissenting in part).
[168] *Id.* at 2533.
[169] *Id.*
[170] *Id.* at 2507 (majority opinion).
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*

a lawful arrest.[175] This Section was the most controversial of the law's provisions,[176] and the only one that the Supreme Court upheld.[177]

The Court's legal reasoning is understandable. Section 2(B) does not come into play unless there is a legitimate state law enforcement justification for the initial detention or arrest.[178] Even without Section 2(B), Arizona officials are authorized to confer with federal officials about an individual's immigration status, and federal law requires that the federal government respond to such communications from state actors.[179] The federal government purportedly encourages such communications.[180] Therefore, the Court did not see a problem with the state authorizing or requiring immigration status checks during otherwise lawful stops or arrests.[181]

Moreover, the Court read the powers that Section 2(B) bestows on state officials quite narrowly.[182] The Court assumed for purposes of its conclusion that any stop or arrest would not be prolonged by an immigration status inquiry, and it suggested that if a stop was prolonged for purposes of the immigration inquiry alone, it might well run afoul of the Fourth Amendment prohibition on unreasonable seizures.[183] The Court declined to reach the issue of whether an otherwise lawful detention could be prolonged lawfully on the basis of reasonable suspicion of illegal entry or another immigration crime,[184] and it did not even suggest that prolonging an otherwise lawful detention could be justified on the ground of suspected civil immigration violations (such as overstaying a student visa).[185]

The Court therefore upheld the provision by reading Section 2(B) as not creating any additional arrest or detention powers over and above those that state officials already exercised in their ordinary law enforcement duties.[186] Because the Court read Section 2(B) as merely making a set of constitutional enforcement practices into state policy, it found no reason to strike down the provision.[187] The Court also left the door wide open for "other preemption and constitutional challenges,"[188] thus

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[175] *Id.*

[176] *See ACLU Officials Respond to Supreme Court Ruling on Arizona Anti-Immigrant Law*, AM. CIVIL LIBERTIES UNION (June 25, 2012) [hereinafter *ACLU Officials Respond*], http://www.aclu.org/immigrants-rights/aclu-officials-respond-supreme-court-ruling-arizona-anti-immigrant-law (quoting American Civil Liberties Union directors).

[177] *Arizona*, 132 S. Ct. at 2510.

[178] *Id.* at 2509.

[179] *See* 8 U.S.C. § 1357(g)(10)(A) (2006).

[180] *Arizona*, 132 S. Ct. at 2508.

[181] *Id.* at 2507–10. For a critique of this rationale, however, see *infra* Part III.

[182] *See Arizona*, 132 S. Ct. at 2507–09.

[183] *Id.* at 2509.

[184] *Id.*

[185] *See id.*

[186] *See id.* at 2510.

[187] *See id.*

[188] *Id.*

issuing a clear warning that if the law is implemented in ways that conflict with federal immigration law, resulting in unreasonable seizures under the Fourth Amendment, or in racial profiling in violation of the Fourteenth Amendment, the law will still be subject to constitutional challenges.[189] Indeed, such challenges are already underway.[190]

As a legal matter, *Arizona v. United States* makes no clear break from prior law. It reiterates a strong federal role in immigration policy and applies a fairly robust version of obstacle preemption in striking down Sections 5(C) and 6.[191] As David Martin noted early on, the *Arizona* decision also rejects the "mirror image" theory of sub-federal immigration regulation.[192] And yet the decision was greeted with significant concern by the President of the United States and by immigrants' rights advocates throughout the country.[193] The concern was based on a notion that Section 2(B), which seems so innocuous in the Supreme Court's decision in the *Arizona* case,[194] would actually allow for the exercise of tremendous state power to regulate the lives of immigrants in ways that fueled discriminatory policing practices.[195] It is almost certainly the case that it will. But this is not because of any recent, radical transformation in Supreme Court jurisprudence. Instead, it is because of a gradual and substantial transformation in the socio-legal context of immigration policing—one that has taken place over the past two decades. The next section describes those changes.

II. THE EVOLUTION OF IMMIGRATION FEDERALISM—THE SOCIO-LEGAL STORY

Reading *Arizona v. United States*, one might assume that not much has changed in the world of immigration federalism.[196] The fact, however, is that the situation has changed substantially, but this change has come as a result of shifting enforcement policies, and not as an edict of the Supreme Court. Following the last round of comprehensive immigration reform in 1986, scholarly, legal and political consensus seemed to exist around the notion that states and localities would play a limited role

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[189] *See id.* at 2508–10; *see also* Gerald P. López, *Don't We Like Them Illegal*?, 45 U.C. DAVIS L. REV. 1711, 1813 (2012).

[190] *See, e.g.*, *Valle del Sol* Motion, *supra* note 10; *see also supra* notes 128–30 and accompanying text (discussing this litigation).

[191] *See Arizona*, 132 S. Ct. at 2503–07.

[192] Martin, *supra* note 20, at 42.

[193] *See* Statement on the Supreme Court Ruling on Arizona's Illegal Immigrant Enforcement Legislation, 2012 DAILY COMP. PRES. DOC. 201200509 (June 25, 2012), *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201200509/pdf/DCPD-201200509.pdf; *see also ACLU Officials Respond*, *supra* note 176 (discussing the views of American Civil Liberties Union directors); *Supreme Court Issues Ruling on Arizona Anti-Immigrant Law*, NAT. IMMIGR. L. CENTER (June 25, 2012), http://www.nilc.org/nr062512.html.

[194] *See Arizona*, 132 S. Ct. at 2507–10.

[195] *See ACLU Officials Respond*, *supra* note 176.

[196] *See* Gilbert, *supra* note 22 (concluding that *Arizona* confirmed federal power in the area of immigration).

in immigration enforcement;[197] this role was largely confined to making occasional arrests for immigration crimes and in some cases notifying federal enforcement agents of immigration violators in state or local custody.[198] By 2010, an entirely different vision of state and local participation in immigration enforcement had replaced the older, more limited one.[199] State and local law enforcement had become the primary point of contact for many noncitizens coming into contact with the removal system and the federal executive branch has been the main architect of this new order.[200] This section maps the changing socio-legal landscape of immigration enforcement. Subsection A discusses changes in immigration enforcement at the federal and sub-federal level. Subsection B discusses the static legal regime governing enforcement, which does not account for the new enforcement realities.

A. The Changing Nature of Immigration Enforcement

Over the past twenty years, states and localities have become increasingly involved in defining immigration policy and in enforcing immigration laws.[201] The forces that have brought states and localities to this larger role have come from above and below. On the one hand, greater sub-federal involvement in immigration enforcement has been authorized by Congress and, more importantly, instrumentalized by federal executive branch policies and pronouncements.[202] On the other hand, some of this involvement has been generated by entrepreneurial efforts at the state and local level that have moved the baselines of acceptable state and local involvement in immigration policy.[203]

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[197] *See* Cecilia Renn, *State and Local Enforcement of the Criminal Immigration Statutes and the Preemption Doctrine*, 41 U. MIAMI L. REV. 999 (1987); Linda R. Yanez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 TEX. HISP. J.L. & POL'Y 9 (1994); *see also supra* note 26.

[198] *See* Renn, *supra* note 197, at 1003–04.

[199] *See* Anita Sinha & Richael Faithful, *State Battles Over Immigration: The Forecast for 2012*, ADVANCEMENT PROJECT (2012), *available at* http://b.3cdn.net/advancement/cb04adc6a402a87838_s2m6i2sx0.pdf.

[200] *See* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1579–81 (2010).

[201] I previously analyzed a number of these trends, which also have the effect of increasing the criminalization of migration. *See* Chacón, *supra* note 60, at 116–30.

[202] *See* discussion *infra* notes 222–25.

[203] *See, e.g.*, Pratheepan Gulasekaram & Karthick Ramakrishnan, *The Anti-Immigrant Game*, L.A. TIMES, April 24, 2012, http://articles.latimes.com/2012/apr/24/opinion/la-oe-gula-immigration-law-politics-20120424 (discussing the authors' findings concerning the role of issue entrepreneurs in "choos[ing] venues for immigration enforcement schemes that are politically receptive to immigration restrictions" and promoting laws that reformulate the legal baseline of sub-federal immigration enforcement).

Given the widespread acceptance of the principle—rearticulated in *Arizona v. United States*—that the federal government controls immigration policy,[204] one would assume that any delegation of that power would come from Congress. But congressional inertia in the area of immigration reform has meant that Congress's role in the transforming landscape of immigration federalism has been slight.[205] This is not to say, however, that Congress has been irrelevant. In 1996, Congress made four important changes to the immigration code with the goal of increasing state and local cooperation in immigration enforcement.[206] First, with the passage of the Anti-Terrorism and Effective Death Penalty Act of 1998 (AEDPA),[207] Congress authorized state officers to arrest and detain noncitizens who had "previously been convicted of a felony in the United States."[208] Second, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[209] added a provision to the immigration law allowing the Attorney General to empower local officials to enforce civil immigration laws in instances involving "an actual or imminent mass influx of aliens . . . [that] presents urgent circumstances requiring an immediate Federal response."[210] Third, IIRIRA added Section 287(g) to the Immigration and Nationality Act[211] (INA), which allowed the Attorney General to delegate immigration enforcement authority to state and local police pursuant to a formal agreement between the state or local agency and the Department of Justice.[212] Fourth, Congress prohibited states and localities from barring their employees from reporting immigration status information to the federal government and required the federal government to respond to sub-federal agency inquiries concerning citizenship or immigration status "for any purpose authorized by law."[213] All of these changes were made against a

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[204] *See* Arizona v. United States, 132 S. Ct. 2492, 2498–99 (2012).

[205] Sinha & Faithful, *supra* note 199, at 1, 4.

[206] *See Immigration Law Enforcement by State and Local Police,* BACKGROUNDER (Nat'l Immigration Forum, Wash. D.C.), Aug. 2007, at 3–4, *available at* http://www.immigrationforum.org/images/uploads/Backgrounder-StateLocalEnforcement.pdf; *see also* Chacón, *supra* note 200, at 1580.

[207] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 8 U.S.C. § 1252(c) (2006)).

[208] *Id.* § 439(a), 110 Stat. 1214, 1276.

[209] Pub. L. No. 104-208, § 303(a), 110 Stat. 3009-546, 3009-646 (codified as amended at 8 U.S.C. § 1103(a) (2006)).

[210] *Id.*

[211] *See* 8 U.S.C. § 1357(g) (2006).

[212] *Id.*

[213] Pub. L. 104-208, § 642(c), 110 Stat. No. 3009, 3009-707 (1996) (codified as amended at 8 U.S.C. § 1373 (2006)). The Act read:

> (a) IN GENERAL.—Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and

backdrop of legislation that gave states increased authority to deny certain services and benefits to noncitizens, particularly those present without authorization.[214]

Members of Congress were reacting (in a limited way) to pressure from constituencies seeking a greater role for states and localities in immigration policy and enforcement[215]—such as the advocates of California Proposition 187.[216] These changes to the law allowed for limited and controlled state and local participation in immigration enforcement.[217] These provisions refute any notion that states have inherent authority to enforce immigration laws. These specific, limited grants of enforcement power are the only immigration enforcement powers that Congress has formally authorized for states and localities.[218] The changes to the law signal noteworthy changes in the role that states and localities play in immigration enforcement, but the limited nature of these changes suggests that Congress continued to envision a limited role for sub-federal actors in immigration enforcement. Even the events of September 11, 2001, did not prompt any fundamental legislative changes in this regard.[219] The only immigration "policy" that Congress has consistently and enthusiastically supported over the past decade is the increased funding of the immigration

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> Naturalization Service information regarding the citizenship or immigration status, lawful, or unlawful, of any individual.
> (b) ADDITIONAL AUTHORITY OF GOVERNMENT ENTITIES.—Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
> (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
> (2) Maintaining such information.
> (3) Exchanging such information with any other Federal, State, or local government entity.
> (c) OBLIGATION TO RESPOND TO INQUIRIES.—The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

Id. § 642, 110 Stat. No. at 3009-707.

[214] *See* Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1840–43 (2007).

[215] *See* Chacón, *supra* note 200, at 1579–80.

[216] *See* Chacón, *supra* note 214, at 1840–41.

[217] *See* Chacón, *supra* note 200, at 1579.

[218] *See id.* at 1579–80 (discussing the extent to which states can enforce immigration laws).

[219] *See id.* at 1581 (describing the United States Department of Justice's policy on local and state immigration enforcement).

enforcement bureaucracy, which is charged with enforcing the nation's outmoded immigration laws.[220]

But if Congress was largely inert, the executive branch moved much more aggressively in developing immigration policy, first expanding and then seeking to limit state and local law enforcement efforts into immigration enforcement. In the years immediately after September 11, 2001, the executive branch engaged in unprecedented expansions of state and local power in enforcement—an expansion that has ebbed in more recent years. First, in the post–9/11 era, the executive branch used the immigration enforcement and detention system as a primary site of domestic anti-terrorism policy, notwithstanding the lack of nexus between much of the immigration enforcement and any actual terrorist threat.[221] One important element of this increased enforcement was the federal government's increasing reliance on state and local law enforcement as a primary site of immigration enforcement.[222]

Michael Wishnie describes the three distinct initiatives that generated this increased involvement. The first was a shift in the Department of Justice away from its traditional position that state and local officials lacked the power to enforce civil immigration laws in favor of the unprecedented position that they had the "inherent authority" to enforce these laws.[223] The second was the decision to have the Immigration and Naturalization Service (INS) enter several categories of civil immigration information into the National Crime Information Center (NCIC) database that all law enforcement agents can access during routine policing.[224] Third, the Attorney General and his senior staff used informal methods to encourage state and local police departments to prioritize immigration enforcement and to make immigration arrests.[225]

These developments in executive policy led to a fundamental change in the culture of some state and local law enforcement agencies. Whereas once these agencies had assumed that their role in immigration enforcement was marginal at best, some now came to view immigration enforcement as a core function.[226] Interest in immigration

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[220] For a discussion of recent trends in funding, see Chacón, *supra* note 60, at 118.

[221] *See* Chacón, *supra* note 214, at 1854–61.

[222] Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1085 (2004).

[223] *Id.* at 1085–86. For further discussion of this major policy shift see Chacón, *supra* note 200, at 1581 (summarizing the change); Chacón, *supra* note 60, at 127–28 (describing the change in policy); Wishnie, *supra* note 222, at 1088–95.

[224] Wishnie, *supra* note 222, at 1086–87; *see also* Chacón, *supra* note 200, at 1587–88.

[225] Wishnie, *supra* note 222, at 1087. Wishnie contends that this exercise of state and local power is unconstitutional. *See id.* at 1088–1101; *see also* 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 (2004).

[226] Perhaps the most notorious example of such a shift is that of Sheriff Joe Arpaio of Maricopa County, Arizona, who went from believing that immigration enforcement was outside of his jurisdiction to making it his trademark policy. *See* Terry Carter, *The Maricopa*

enforcement spurred a number of states and localities to seek to enter into 287(g) agreements that would allow them to enforce immigration laws, at least in a limited way.[227] Although the legislation providing for such agreements had been on the books since 1996, it was not until after September 11, 2001, that the executive branch actually began to implement such enforcement agreements with sub-federal entities.[228] The number of agreements proliferated in the years that followed; the bulk of existing agreements were signed after 2006.[229] Currently, there are sixty-three participating agencies in twenty-four states.[230] Unfortunately, federal training of sub-federal officials was inadequate,[231] and the program was criticized for being poorly targeted[232] and for contributing to racial profiling in law enforcement.[233] Despite the criticisms that these agreements generated, the Obama Administration chose to continue the program.[234] Under President Obama, existing 287(g) agreements were revised and federal training and oversight was purportedly strengthened.[235] However, criticisms of the program have persisted.[236] The Department of Homeland Security (DHS) recently has terminated 287(g) agreements upon findings that sub-federal agents abused their immigration enforcement authority by engaging in patterns of racial profiling.[237] This suggests that DHS is more closely monitoring implementation

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Courthouse War, ABA J. Apr. 2010 at 43, 44–46 (2010); *see also* Eagly, *supra* note 131, at 1753–67 (describing immigration enforcement in Maricopa County).

[227] The oldest 287(g) agreement was signed in 2002. *See Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/287g.htm (last visited Dec. 6, 2012) [hereinafter *Fact Sheet*].

[228] *Id.*

[229] RANDY CAPPS ET AL., MIGRATION POL'Y INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 9 (Jan. 2011), *available at* http://www.migrationpolicy.org/pubs/287g-divergence.pdf (indicating that sixty-five of the seventy-two 287(g) agreements in existence at the time of the report were signed after 2006).

[230] *Fact Sheet*, *supra* note 227.

[231] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, No. GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROL NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (2009).

[232] CAPPS ET AL., *supra* note 229, at 50 (recommending refocusing 287(g) programs on serious offenders).

[233] *See* Chacón, *supra* note 254, at 1616–19.

[234] *See Fact Sheet*, *supra* note 227 (stating the number of 287(g) agreements still in enforcement under the Obama administration and listing a number of agreements signed in 2009).

[235] *See* CAPPS ET AL., *supra* note 229, at 11.

[236] *Id.* at 12.

[237] Michael Biesecker, *Feds Block NC Sheriff's Access to ICE Database*, VA. PILOT, Sept. 19, 2012, http://hamptonroads.com/2012/09/feds-block-nc-sheriffs-access-ice-database (reporting the termination of Alamance County's 287(g) agreement in the wake of Justice Department determinations that the Alamance County sheriff discriminatorily targeted Latinos for policing); Statement by Secretary Napolitano on DOJ's Findings of Discriminatory Policing in Maricopa County, Dep't of Homeland Sec. (Dec. 15, 2011), *available at* http://www.dhs

of the agreements, or at least that DHS is unwilling to continue agreements in jurisdictions where DOJ has made findings of egregious acts of discrimination. The program remains operational in sixty-three jurisdictions.[238]

The Secure Communities program dwarfs all other prior efforts to involve states and localities in immigration enforcement,[239] but it also signals an important shift away from reliance on sub-federal discretion in enforcement, in favor of consolidating discretion at the federal level. From a federal perspective, the advantage of Secure Communities is that it expands federal enforcement capacity by processing information about local arrest without bestowing the increased enforcement powers on sub-federal agents required by the 287(g) program. At least in theory, if not in practice,[240] discriminatory power concerning enforcement is shifted back to the federal government. The first appropriations for the program were authorized in December 2007.[241] Currently, the program is operating in more than 3,000 jurisdictions across the country, including all jurisdictions along the United States–Mexico border.[242] As Immigration and Customs Enforcement (ICE) describes the program, the fingerprints of individuals arrested or booked by state or local officials, which have long been submitted to the Federal Bureau of Investigation (FBI), now go through a second database as well.[243]

> Under Secure Communities, the FBI automatically sends the fingerprints to DHS to check against its immigration databases. If these checks reveal that an individual is unlawfully present in the United States or otherwise removable due to a criminal conviction, ICE takes enforcement action—prioritizing the removal of individuals who present the most significant threats to public safety as determined by the severity of their crime, their criminal history, and other factors—as well as those who have repeatedly violated immigration laws.[244]

.gov/news/2011/12/15/secretary-napolitano-dojs-findings-discriminatory-policing-maricopa-county (terminating Maricopa County's 287(g) agreements, citing DOJ "findings of discriminatory policing practices within the Maricopa County Sheriff's Office (MCSO)").

238 *See Fact Sheet*, *supra* note 227.

239 *See* Chacón, *supra* note 200, at 1595–97.

240 In fact, at least some states and localities have modified their policing tactics in the wake of the Secure Communities program, and the result has been an increase in discriminatory policing. *See* discussion *infra* text accompanying notes 258–61.

241 *See* Chacón, *supra* note 200, at 1595.

242 *See Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Dec. 6, 2012) [hereinafter *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT].

243 *Id.*

244 *Id.*; *see also* Carrie L. Rosenbaum, *Introduction to 287(g) Agreements, Secure Communities, and Immigration Detainers*, LEXISNEXIS EMERGING ISSUES ANALYSIS, 2010 EMERGING ISSUES 5400 (2010).

Defenders of the program argue that this is an ideal way to allow states and localities to multiply the forces of immigration enforcement agencies in a way that merely piggybacks on existing law enforcement efforts and therefore, generates no negative racial profiling effects.[245] Critics argue that the program's existence encourages racial profiling.[246] The charges have been viable enough that ICE recently has taken systematic steps to address some of these concerns.[247]

Recent executive branch efforts to reconsolidate immigration enforcement discretion in the hands of the federal government have run up against a rising tide of state and local laws designed to insert sub-federal actors in immigration enforcement. In recent years, there has been a rash of sub-federal ordinances aimed at immigrants,[248] many of which include criminal provisions designed to trigger the involvement of local law enforcement.[249] Arizona's S.B. 1070 and the copycat legislation it inspired[250] have received the bulk of the media attention, but local initiatives deal with everything from restrictions on renting to unauthorized migrants[251]

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[245] *See, e.g.*, *Frequently Asked Questions*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/faq.htm (last visited Dec. 6, 2012) [hereinafter *Frequently Asked Questions*].

[246] *See, e.g.*, *Secure Communities*, NAT'L IMMIGR. F., http://www.immigrationforum.org/images/uploads/Secure_Communities.pdf (last visited Dec. 6, 2012) [hereinafter *Secure Communities*, NAT'L IMMIGR. F.].

[247] *See, e.g.*, *Frequently Asked Questions*, *supra* note 245.

[248] Wayne Cornelius, *Preface to* TAKING LOCAL CONTROL, at vii (Monica Varsanyi ed., 2010) ("When the U.S. Congress failed to enact comprehensive immigration reform in 2006 and again in 2007, this failure—and the political paralysis that it signified—opened a veritable Pandora's Box of state and local immigration control initiatives seeking to fill the policy void. While there had been some significant attempts by the states in the 1990s to legislate by ballot box in this area . . . there was a quantum leap in such policy activism in 2006 and 2007.").

[249] *See, e.g.*, Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, 2011 Ala. Acts 535, *amended by* H.B. 658 (Ala. 2012) (resembling Arizona's S.B. 1070 in its attempt to increase the role of local law enforcement in immigration enforcement).

[250] *See id.*; Georgia Illegal Immigration Reform and Enforcement Act of 2011, 2011 Ga. Laws 252 (codified as amended in scattered sections of GA. CODE ANN. tits. 13, 16, 17, 35, 36, 42, 45, and 50); Act of May 10, 2011, Pub. L. No. 171-2011 (codified as amended in scattered sections of IND. CODE ANN. tits. 4, 5, 6, 11, 12, 22, 34, and 35); South Carolina Illegal Immigration and Reform Act, 2008 S.C. Acts 280 (codified as amended in scattered sections of S.C. CODE ANN. tits. 6, 8, 12, 16, 23, 40, 41, and 59); Illegal Immigration Enforcement Act, 2011 Utah Laws 21 (codified as amended in scattered sections of UTAH CODE ANN. tits. 76 and 77).

[251] *See, e.g.*, HAZLETON, PA., Ordinance 2006-18 (2006), *invalidated by* Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007), *affirmed in part, vacated in part by* Lozano v. City of Hazleton, 620 F.3d 170 (3d Cir. 2011), *vacated sub nom.* City of Hazleton, Pa. v. Lozano, 131 S. Ct. 2958 (2011) (remanding in light of *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011)).

to solicitation of work[252] to "alien smuggling"[253] and human trafficking.[254] These laws provide local law enforcement with further facially legitimate law enforcement reasons to engage in the policing of noncitizens.

With the nationwide implementation of the Secure Communities program and the growth of local laws targeting migrants, the role of state and local law enforcement in immigration has shifted nearly 180 degrees in the last two decades. In the mid-1990s, such involvement was rare.[255] The limited attention given to the issue by courts had resulted in the pronouncement that state and local officials were not empowered to make civil immigration arrests,[256] and this position was adopted by the Department of Justice.[257] In 2012, on the other hand, states and localities are not only enabled but are required (and sometimes required against their will) to submit arrest data for federal screening of immigration status, albeit indirectly.[258] Officials in many jurisdictions take an even more proactive role, either through participation in a

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[252] *See, e.g.*, Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465, 490–95 (2005–2006) (discussing such ordinances in Redondo Beach and Los Angeles); *see also* Lopez v. Town of Cave Creek, 559 F. Supp. 2d 1030, 1036 (D. Ariz. 2008) (granting a preliminary injunction against a Cave Creek ordinance aimed at day-laborer solicitation); Cent. Am. Refugee Ctr. v. City of Glen Cove, 753 F. Supp. 437 (E.D.N.Y. 1990) (upholding local anti-solicitation ordinances that prevented day laborers from congregating against equal protection and First Amendment challenges).

[253] Eagly, *supra* note 131, at 1768–70.

[254] Jennifer M. Chacón, *Tensions and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1643–50 (2010).

[255] *See* Wishnie, *supra* note 222, at 1089, 1091.

[256] *See, e.g.*, Gonzalez v. City of Peoria, 722 F.2d 468, 476 (9th Cir. 1983), *overruled in part on other grounds by* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999).

[257] Memorandum from Seth Waxman, Assoc. Deputy Att'y, to the U.S. Att'y for the S. Dist. of Cal. (Feb. 5, 1996), *available at* http://www.justice.gov/olc/immstopo1a.htm; *see also* Wishnie, *supra* note 222, at 1085–86, 1090 (discussing the 1996 memorandum and subsequent policy changes).

[258] *See Frequently Asked Questions*, *supra* note 245 (stating that "the information-sharing partnership between DHS and the FBI that is the cornerstone of Secure Communities is mandated by federal law, which means that state and local jurisdictions cannot prohibit information-sharing between agencies in this respect"). Several jurisdictions have unsuccessfully sought to opt out and have attempted to limit their participation in the program in other ways. *See, e.g.*, Elise Foley, *Secure Communities Immigration Checks Resisted in District of Columbia*, HUFFINGTON POST (June 4, 2012), http://www.huffingtonpost.com/2012/06/04secure-communities-immigration-district-of-columbia_n_1569327.html; Martine Powers & Stewart Bishop, *Menino Threatens to Quit Plan Targeting Crime by Immigrants*, BOSTON.COM (July 11, 2012), http://www.boston.com/news/local/massachusetts/articles/2011/07/11/menino_threatens_to_quit_plan_targeting_crime_by_immigrants/; Karina Rusk, *County Wants Feds to Keep Hands Off Fingerprints*, ABC NEWS (Sept. 28, 2010), http://abclocal.go.com/kgo/story?section=news/local/south_bay&id=7694228 (noting that Santa Clara followed San Francisco in attempting to opt out of the program).

287(g) program, through the exercise of their purported "inherent authority" to perform immigration status checks during other law enforcement efforts,[259] or through the enforcement of state and local criminal law provisions aimed at migrants.[260] Indeed, with the explosion of sub-federal involvement in immigration policing, it seems that states and localities are, in many cases, actually exercising the discretion that definitively shapes federal enforcement.[261]

B. The Static Legal Regime Governing Enforcement

While state and local law enforcement involvement in immigration policing has exploded, enforcement agencies and courts have been insufficiently attentive to the nuances that have long divided immigration policing from the forms of policing that are generally the province of sub-federal law enforcement. Attention to these details signals the potential pitfalls of sub-federal immigration enforcement. First, immigration policing is one of the few areas where the courts and the executive branch continue to expressly sanction the use of racial profiling.[262] This has remained true even after the Department of Justice prohibited the use of racial profiling in other forms of policing; the exception for immigration policing was retained by the Department of Justice in its 2003 memorandum prohibiting racial profiling.[263] The enabling case law, and the policies implementing it, rests upon stated assumptions that the law enforcement agents who are relying on these forms of profiling will have a certain level of expertise in immigration enforcement that will allow them to assimilate the information about race into their superior training to attain accurate results.[264] In

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[259] *See* Eagly, *supra* note 131, at 1777, 1780.

[260] *See id.* at 1780 (discussing Arizona's anti-smuggling law); *see also* Chacón, *supra* note 254, at 147–50 (characterizing a number of state anti-trafficking efforts as backdoor means of policing migration).

[261] *See generally* Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011).

[262] The Supreme Court sanctioned the use of "Mexican appearance" in conjunction with other factors as a basis for reasonable suspicion in immigration policing. United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975). The case continues to be cited with approval and relied upon by the Justice Department in cases involving immigration policing. *See* Chin et al., *supra* note 95, at 67.

[263] *See* U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (2003), *available at* http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf. For an analysis of the 2003 guideline, see Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67 (2004); *see also* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) (discussing the practical consequences of *Brignoni-Ponce* when read in conjunction with *Whren*).

[264] *See, e.g.*, *Brignoni-Ponce*, 422 U.S. at 884–85 (1975).

other words, these cases generally assume that trained federal immigration agents are responsible for immigration enforcement.[265]

Second, citing the strong national security interest of the federal government in effective policing of the borders, the Court has frequently deemed "reasonable" seizures that would be unreasonable in other contexts.[266] This allows for suspicionless searches at ports of entry, even where such searches have involved the disassembly of a gas tank[267] or a review of laptop contents.[268] It justifies thirty-six-hour detentions and strip searches at ports of entry upon "reasonable suspicion."[269] It allows for suspicionless referrals to secondary inspection at border checkpoints in the interior of the country, even when such referrals are made on the basis of race.[270] In short, the strong interest of the government in controlling national borders allows for stops and searches that, in other contexts, would likely be deemed unreasonable, and this has been true both at and away from the border.[271]

Third, in the context of otherwise lawful stops, the Court has been unreflectively permissive about allowing federal officials to ask questions about an individual's immigration status.[272] In the case of *Muehler v. Mena*,[273] the Court confronted the case of a landlady who was handcuffed early in the morning and detained for several hours by federal agents executing a warrant for the arrest of one of her tenants.[274] During her detention, she was questioned about her immigration status by federal immigration agents.[275] She argued that her detention (including the questioning) constituted an unreasonable seizure for purposes of the Fourth Amendment.[276] The Court concluded that the detention was reasonable[277] and determined that the questioning

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[265] *See, e.g.*, *id.* at 885.

[266] For a more complete discussion of this "border exceptionalism" in Fourth Amendment jurisprudence, see Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129 (2010). In this paragraph, I am summarizing some of the cases discussed at length in that article. For additional discussion of several of the cases discussed here, see Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011).

[267] United States v. Flores-Montano, 541 U.S. 149 (2004).

[268] United States v. Arnold, 533 F.3d 1003 (9th Cir. 2008), *cert denied*, Arnold v. United States, 129 S. Ct. 1312 (2009).

[269] United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985).

[270] United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976).

[271] *See* Johnson, *supra* note 263, at 1075–76.

[272] For a detailed criticism of this trend, see generally Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137 (2008).

[273] 544 U.S. 93 (2005).

[274] *Id.* at 96.

[275] *Id.*

[276] *Id.*

[277] For this portion of the holding, the Court relied on *Michigan v. Summers*, 452 U.S. 692 (1981), which upheld the detention of occupants of premises upon which police were

did not constitute a separate seizure in violation of the Fourth Amendment.[278] "We have 'held repeatedly that mere police questioning does not constitute a seizure.'"[279] Analogizing the questioning to the use of drug-sniffing dogs, the Court found that the questioning did not prolong the otherwise valid detention and that no further justification was needed for Fourth Amendment purposes.[280] This decision left wide berth for federal immigration agents to engage in questioning about immigration status during the course of otherwise lawful stops.[281]

Finally, courts have been reluctant to impose Fourth Amendment remedies in removal proceedings that would be comparable to those available in criminal proceedings, with the result that there is less deterrence for Fourth Amendment violations in cases that are likely to end with removal, not criminal charges.[282] In *INS v. Lopez-Mendoza*,[283] the Court declined to apply the exclusionary rule in civil removal proceedings notwithstanding the apparent violation of the Fourth Amendment during a workplace raid.[284] The Court reasoned that the application of the rule would result in the loss of valuable evidence, and the costs would not be outweighed by the minimal deterrence of constitutional violations that the application of the rule would create.[285] To explain why the Court felt that the deterrent value of the exclusionary rule in removal proceedings would be low, the Court offered a number of explanations, including the fact that most individuals will simply submit to removal rather than arguing for exclusion of evidence,[286] that "the INS has its own comprehensive scheme for deterring Fourth Amendment violations,"[287] and that "[t]he possibility of declaratory relief against [the INS, a "single agency under central federal control,"] . . . offers a means for challenging the validity of INS practices."[288] The Court also justified its decision by noting the lack of evidence of widespread violations in immigration proceedings and the difficulty of determining the existence of Fourth Amendment violations in workplace raids.[289] What is striking

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attempting to execute an arrest warrant on the grounds that such detentions were necessary to secure the scene and protect the safety of the officers. *Mena*, 544 U.S. at 98.

[278] *Id.* at 100–01.

[279] *Id.* at 101.

[280] *Id.*

[281] *See* United States v. Mendez, 476 F.3d 1077, 1080 (9th Cir. 2007), *cert. denied*, 550 U.S. 946 (2007); *see also* United States v. Stewart, 473 F.3d 1265, 1269 (10th Cir. 2007).

[282] For a more detailed discussion of this problem, see Chacón, *supra* note 200, at 1611–15.

[283] 468 U.S. 1032 (1984).

[284] *Id.* at 1050.

[285] *Id.*

[286] *Id.* at 1044.

[287] *Id.*

[288] *Id.* at 1045.

[289] *Id.* at 1043, 1049–50. This invited a response from the dissenting Justice White that "this argument amounts to a rejection of the application of the Fourth Amendment to the activities of INS agents." *Id.* at 1059 (White, J., dissenting).

is the degree to which the Court assumes that individuals in removal proceedings will arrive there as a result of federal immigration enforcement agents' actions.[290]

These conditions form the backdrop for the Court's immigration federalism decisions. The mismatch between the law governing immigration policing and the realities of immigration policing are either unacknowledged or unreflectively embraced in *Arizona v. United States*.[291]

III. IMMIGRATION FEDERALISM ON THE GROUND NOW: RE-READING *ARIZONA V. UNITED STATES*

Understanding the lay of the land in contemporary immigration enforcement sheds light on both the questionable assumptions that undergird the Court's reasoning in *Arizona v. United States* and the likely practical effect of the Court's ruling. Specifically, in upholding Section 2(B), the majority elided the distinction between civil and criminal immigration enforcement and between the authority of federal immigration agents and other law enforcement officials.[292] These elisions made the decision to uphold Section 2(B) read like a self-evident outgrowth of existing law.[293] In fact, this portion of the decision can also be read as the Court's first legal endorsement of the vast expansion of the power of sub-federal immigration enforcement that has taken place over the last decade,[294] an expansion that the federal government is currently striving to bring back under its control.[295] This section reviews the decision in an attempt to expose the implicit assumptions at work in the majority's decision with regard to Section 2(B) of S.B. 1070 and the likely practical effects of these assumptions.

As previously noted, in *Arizona*, the Court reiterated its long-standing acknowledgement of federal primacy in immigration law and its enforcement.[296] The Court actually employed this traditional approach with regard to Section 3, 5(C) and 6 of S.B. 1070,[297] and as a result, these provisions of the law were struck down.[298] But with regard to Section 2(B), the Court implicitly took a different tack. The Court accepted as lawful the ongoing sub-federal practices of participation in immigration enforcement and used those practices as the baseline against which S.B. 1070 would be measured, rather than assessing the law against the baseline of existing law.[299]

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[290] *Id.* at 1048–49 (majority opinion).
[291] 132 S. Ct. 2492 (2012).
[292] *See id.* at 2504, 2508.
[293] *See id.* at 2507–10.
[294] *Id.*
[295] *See supra* text accompanying notes 237–38.
[296] *See supra* notes 21–22 and accompanying text.
[297] *Arizona*, 132 S. Ct. at 2502–03, 2505–06.
[298] *Id.* at 2502–03, 2505–06, 2509.
[299] *See id.* at 2509–10.

Section 2(B) requires that, during a "stop, detention or arrest," a law enforcement agent make "a reasonable attempt . . . to determine the immigration status of the person" they have stopped.[300] It also requires that any individual who has been arrested "shall have the person's immigration status determined before the person is released."[301] As the Supreme Court noted, the "accepted" way to check on an individual's status is for the agent to contact ICE so that ICE can do a check of its database.[302]

The Court analyzed this provision from the questionable starting assumption that individual officers are already empowered to do these status checks under existing law.[303] If a local agent lawfully stops someone for a violation of the law—such as driving under the influence of alcohol—the Court reasoned that there is nothing in existing law that would prevent that agent from contacting ICE to ascertain the immigration status of the person stopped.[304] Indeed, according to the Court, Congress actually provided in the statute for communication between local agents and the federal government on questions of immigration status and in 1996 required the establishment of a system that would enable state and local agents to verify immigration status with the federal government.[305] Although Congress did not require a state or local agent to verify the immigration status of a detainee, the Court reasoned that there is no reason that the State of Arizona could not require this.[306] The Court assumed that the initial stop or detention would be lawfully grounded in a

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[300] Ch. 113, 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, and 41).

[301] *Id.*

[302] *Arizona*, 132 S. Ct. at 2507. The ICE database has been subject to a variety of critiques, including the fact that individuals who are in status (including lawful permanent residents) or who are citizens have in many cases not been cleared by a search of this database. *See, e.g.*, Julia Preston, *Immigrants Are Matched to Crimes*, N.Y. TIMES, Nov. 13, 2009, at A13 ("According to ICE figures, about 5,880 people identified through the program turned out to be United States citizens."); Bill Ong Hing, *Immigration Detention and the Secure Communities Program*, ANGEL ISLAND IMMIGR. STATION FOUND., http://www.aiisf.org/about/articles/749-immigration-detention-and-the-secure-communities-program (last visited Dec. 6, 2012) (referencing ICE officials' admission that thousands of lawfully present U.S. citizens were wrongfully identified as a result of flaws in their database system in 2009); *Secure Communities*, NAT'L IMMIGR. F., *supra* note 246; Joe Wolverton, II, *States Ready to Fight Feds on Immigration Program*, THE NEW AM. (May 6, 2011), http://www.thenewamerican.com/usnews/immigration/item/2098-states-ready-to-fight-feds-on-immigration-program (critiquing the Secure Communities program, including the use of local policing in immigration policy, misuse and flaws, and the costs of implementation).

[303] *See Arizona*, 132 S. Ct. at 2507–08.

[304] *Id.* at 2508.

[305] *Id.* (citing 8 U.S.C. §§ 1357(g)(10)(A), 1373(c) (2006)).

[306] *Id.* The Court compares its reasoning with its decision in *Whiting* that a state could mandate employer use of the E-Verify system, even though the federal law made the program voluntary. *Id.*

state or local law rationale and that merely stopping someone to ascertain status would not be permissible under the law.[307]

Taken against these background assumptions, one could sensibly ask (as the Court seems to) whether S.B. 1070's Section 2(B) really even matters. State and local officials who wanted to communicate with the federal government about an individual's immigration status already had plenty of tools at their disposal to do so, even prior to the enactment of S.B. 1070.[308] As a matter of fact, in Arizona, where some local law enforcement agents have been vigorously enforcing Arizona's anti-smuggling provision for years, individuals have not only been subjected to checks of their immigration status during routine law enforcement stops, but they have had suspicions about their status serve as the express and legal basis for those stops upon an officer's reasonable suspicion of violation of the anti-smuggling law, and they have been subject to arrest and prosecution in state courts essentially because of their immigration status.[309]

But one need not accept as a constitutional baseline the practices noted by the Court. One may or may not have thought these practices were constitutional prior to the decision in Arizona, but one could not plausibly argue that the constitutional question had been decided one way or another. The Court treated ongoing practices as a constitutional baseline in a way that certainly was not legally compelled.

The fact that Congress had previously sanctioned state law enforcement communications with ICE under certain circumstances[310] did not make it a foregone legal conclusion that the pre–S.B. 1070 practices or the practices permitted by S.B. 1070's Section 2(B) are constitutional. Arguably, Arizona's reliance on the communication provisions is overbroad. These provisions were aimed squarely at eliminating sanctuary ordinances that prohibited state and local officials from communicating to the federal government known information about the unauthorized status of a person in their custody.[311] They were not intended to empower localities and states to investigate and punish immigration status.[312] In case there were any doubts on that point, Congress imposed specific limits on sub-federal agents seeking to investigate and make arrests for immigration violations and crimes.[313] Nor do the IIRIRA provisions requiring the federal government to respond to sub-federal inquiries about immigration status authorize ongoing practices in Arizona and elsewhere. Those

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[307] *See id.* at 2508–09.

[308] *See* Eagly, *supra* note 131, at 1777, 1780.

[309] *Id.* at 1773. Of course, a recent lawsuit has challenged the legitimacy of these practices due to the racial profiling endemic in its implementation, and thus far, federal courts have been receptive to the challenge. *See* Melendres v. Arpaio, 695 F.3d 990 (9th Cir. 2012).

[310] *Arizona*, 132 S. Ct. at 2508.

[311] *Secure Communities*, NAT'L IMMIGR. F., *supra* note 206, at 3.

[312] *See Arizona*, 132 S. Ct. at 2509 ("The program put in place by Congress does not allow state or local officers to adopt this enforcement mechanism.").

[313] *See* 8 U.S.C. § 1357(g).

provisions are clear that the communication with the federal government must be for a "purpose authorized by law,"[314] and the remainder of 8 U.S.C. § 1357(g) makes it clear that sub-federal agents shall not investigate immigration statutes without federal authorization and training.[315] Yet the Supreme Court sanctioned such unauthorized investigations and arrests in concluding that police can be required to communicate with ICE in every situation where "reasonable suspicion" arises concerning immigration status.[316]

As a practical matter, a critical point that the Supreme Court misses here is that the "reasonable suspicion" requirement will be triggered when a noncitizen fails to satisfy an officer's investigative questioning about his or her status.[317] (It would be all but impossible to ascertain anything about a person's immigration status merely by looking at the person unless the person's status is already known to the officer.) The Court cites to *Muehler v. Mena* to conclude that, so long as the questions about status do not prolong an otherwise lawful stop, the questions themselves do not constitute a distinct, unlawful seizure.[318] But *Mena* involved questioning by trained federal INS agents, not questioning by sub-federal law enforcement agents untrained in federal immigration law.[319] Indeed, because the police officers who were executing the warrant in *Mena* thought there might be immigration violators at the site, they brought a trained INS agent with them to make the relevant inquiries about immigration status; they did not perform these inquiries themselves.[320] The federal agent in *Mena* plainly thought that INS agents were needed to investigate immigration violations.

The Court's elision of the distinction between local police and federal immigration agents begs a question: does the immigration enforcement "expertise" that the Court relies upon in justifying racial profiling in federal immigration enforcement actually have substantive content?[321] If the answer is no, then there is no reason not

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[314] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 642(c), 110 Stat. 3009, 3009-707 (1996) (codified at U.S.C. § 1373 (2006)).

[315] 8 U.S.C. § 1357(g) (2006).

[316] *See Arizona*, 132 S. Ct. at 2508.

[317] *See id.* at 2508–09.

[318] *Id.* at 2509 (citing Muehler v. Mena, 544 U.S. 93, 101 (2005)).

[319] *Mena*, 544 U.S. at 96.

[320] *Id.*

[321] *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975) ("The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling." (citation omitted)); *see also* United States v. Manzo-Jurado, 457 F.3d 928, 938 n.10 (9th Cir. 2006) (agreeing with the dissenting view that deference was owed to the "skilled judgment of immigration officials," but finding that even according such deference in that case failed to support a finding of reasonable suspicion to justify the stop in question). Indeed, one of the Court's most recent and important formulations of the reasonable suspicion standard makes clear that an officer's "experience and specialized training" is an important part of the

to allow *all* law enforcement to participate in (and profile in) immigration enforcement. But the Court's reasoning in cases involving immigration enforcement relies on the answer to that question being "yes."[322] And since this is the case, it is not at all clear that in deciding whether states and localities are acting in ways that are in tension with federal law, the Court ought suddenly and for the first time to ignore the distinction between trained agents acting within their sphere of expertise and sub-federal law enforcement making "reasonable suspicion" determinations based upon no particular training whatsoever.

Rather than simply assuming the constitutionality of sub-federal questioning concerning immigration status, the Court could have just as easily highlighted the distinction between the agents formulating and acting upon this suspicion. Had they done so, they would have noted that Congress requires special agreements and training for sub-federal agents seeking to investigate immigration status and enforce immigration laws[323] and concluded that any scheme that allows for immigration policing in the absence of such training runs afoul of the express requirements of Congress's immigration enforcement scheme and is therefore preempted.[324] The Court, citing *Mena*, notes that immigration questioning does not alter the character of a stop for Fourth Amendment purposes. But that Fourth Amendment truism actually does not answer the question at issue in the *Arizona* case, which is whether sub-federal agents are entitled by law to perform these immigration status investigations in the first place. One could conclude that there is absolutely no way for the "reasonable suspicion" provision to be implemented consistently with the other requirements of INA Section 287(g) and that the provision is therefore preempted.[325]

Unfortunately, in approving Section 2(B), the Court continued a new tradition that de-emphasizes the antidiscrimination goals and rationales of federal immigration policy.[326] The Court revealed the same tendency in *Whiting*. There, the Court noted that Arizona's LAWA imposed a heavy sanction on businesses for failure to

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"reasonable suspicion" inquiry. United States v. Arvizu, 534 U.S. 266, 273–74 (2002). This makes it all the more striking that the Court in *Arizona* completely failed to note the lack of training in federal immigration law that is the hallmark of virtually every state and local officer now charged with determining whether there is "reasonable suspicion" concerning an individual's immigration status.

[322] *See* discussion *supra* notes 32, 263–65 and accompanying text (discussing the Department of Justice Guidelines on racial profiling); *see also Brignoni-Ponce*, 422 U.S. at 886–87 (permitting the consideration of race—although not the use of race alone—by INS Border Patrol agents in stopping a vehicle upon "reasonable suspicion" of unlawful status).

[323] 8 U.S.C. § 1357(g) (2006) (requiring training for state and local officials to exercise stop and arrest authority under the INA).

[324] *Id.*

[325] This would have been more consistent with the approach that the Court actually took in analyzing S.B. 1070's Section 6. *See* Arizona v. United States, 132 S. Ct. 2492, 2506 (2012) (rejecting arrest authority for state and local officials based on immigration offenses).

[326] *See* Johnson, *supra* note 263, at 1011–12.

comply with IRCA's prohibition on hiring unauthorized workers, but had no comparable provisions requiring businesses' compliance with IRCA's accompanying antidiscrimination provisions.[327] It would be easy to conclude that such a structure encouraged discrimination in hiring and was therefore obstacle preempted by IRCA, which sought to balance immigration enforcement with discrimination protections.[328] But the Court rejected this conclusion.[329]

The Court's decision in *Arizona*, concerning Section 2(B), also assumes without any justification that sub-federal agents have legal authority to investigate immigration status.[330] Prior to this case, the Court had never before actually held that state and local officers were empowered to enforce either criminal or civil immigration laws.[331] Writing on a blank slate, the Court could have disapproved sub-federal enforcement of civil immigration laws.

At least one lower court to consider the question had drawn a distinction between sub-federal enforcement of the criminal provisions of the INA, which the court approved, and enforcement of civil immigration law, which it did not.[332] Although

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[327] Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1990 (2011) ("But the Arizona statute subjects [an Arizona employer who intentionally hires an unauthorized alien for the second time] to mandatory, permanent loss of the right to do business in Arizona . . . . At the same time, the state law leaves the other side of the punishment balance—the antidiscrimination side—unchanged.").

[328] Indeed, the Third Circuit reached that conclusion about a similar provision in a local ordinance in Hazleton, Pennsylvania. Lozano v. City of Hazleton, 620 F.3d 170, 217–18 (3d Cir. 2010), *cert. granted sub nom.* City of Hazleton, Pa. v. Lozano, 131 S. Ct. 2958 (2011).

[329] *See Whiting*, 131 S. Ct. at 1984.

[330] *See Arizona*, 132 S. Ct. at 2507–08.

[331] *See* Ryan Terrence Chin, Comment, *Moving Toward Subfederal Involvement in Federal Immigration Law*, 58 UCLA L. REV. 1859, 1865–80 (2011) ("The ambiguity over the extent to which states and localities can engage in immigration regulation leads to inconsistencies in immigration law.").

[332] Gonzales v. Peoria, 722 F.2d 468, 475–76 (9th Cir. 1983), *overruled on other grounds*, Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999) (en banc) (holding that "federal law does not preclude local enforcement of the criminal provisions" of federal immigration law); *see also* Chin & Miller, *supra* note 53, at 257 ("The idea that states can independently enforce federal and state *criminal* immigration provisions that deal directly with immigration is inconsistent with immigration jurisprudence, law, and policy."). *But see* Estrada v. Rhode Island, 594 F.3d 56, 65 (1st Cir. 2010) (upholding the lawfulness of a detention because the officer had an objectively reasonable belief that the arrestees "had committed immigration violations"); United States v. Vasquez-Alvarez, 176 F.3d 1294, 1296 (10th Cir. 1999) (stating that "state law-enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws"). Hiroshi Motomura raises a concern that, as a practical matter, the civil/criminal divide is difficult to maintain, and that once a state or locality is empowered to enforce any aspect of immigration law, the result is a fundamental shift in the exercise of prosecutorial discretion in immigration enforcement from federal to state and local agents. *See generally* Motomura, *supra* note 261.

it is certainly the practice of many sub-federal agents to make arrests based on immigration crimes or even civil immigration status,[333] that fact did not require the Court to find the practice constitutional. The Court could just as easily have concluded that authorizing such practices would result in the harassment of noncitizens in contravention of established law, and was therefore preempted.[334] This would have had implications for law enforcement practices well beyond Arizona and S.B. 1070, but that would not preclude the Court from reaching that conclusion, and was arguably a reason for them to do so.

Interestingly, even if the Court had struck down this portion of Section 2(B), Arizona still would have been able to rely on its own smuggling laws to achieve immigration enforcement through state criminal laws. Because Arizona routinely prosecutes unauthorized migrants under state law for the dubious offense of "smuggling" themselves, Arizona officials have an independent state law ground for making arrests on the basis of immigration status alone.[335] This provision was not enjoined in early S.B. 1070 litigation,[336] but recent successful challenges to these practices may undercut this method of local enforcement.[337] The *Melendres* litigation, which has unearthed evidence of discrimination against Latinos by the Maricopa County Sheriff's Office, highlights just what could be at stake in the implementation of Section 2(B). Opponents of S.B. 1070 are now directly challenging the alien smuggling provisions of Arizona law—as amended by S.B. 1070—as preempted.[338] Similar provisions in other jurisdictions are vulnerable to such challenges as well,[339] and they may be constitutionally prohibited.

There is a separate provision in Section 2(B) not yet considered here: one that requires that an individual who is arrested not be released until their immigration status is ascertained.[340] The *Arizona* Court made clear that they were presuming that checks would be made within the course of an authorized, lawful arrest, and

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[333] *See* Eagly, *supra* note 131, at 1773.

[334] *See* Lucas Guttentag, *Discrimination, Preemption, and Arizona's Immigration Law: A Broader View*, 65 STAN. L. REV. ONLINE 1, 4 (2012), http://www.stanfordlawreview.org/online/discrimination-preemption (citing Graham v. Richardson, 403 U.S. 365 (1971)). *See also* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418–20 (1948) (invalidating a California statute barring issuance of commercial fishing licenses to those "ineligible for citizenship" and holding that state laws cannot impose discriminatory burdens on aliens lawfully in the United States).

[335] *See* Eagly, *supra* note 131, at 1773.

[336] See *id.* at 1754 for a description of some of the difficulties facing would-be challengers.

[337] See the discussion of *Friendly House v. Whiting*, 846 F. Supp. 2d 1053 (D. Ariz. 2012), and *Melendres v. Arpaio*, 659 F.3d 990 (9th Cir. 2012), *supra* notes 128–134.

[338] *See Valle del Sol* Motion, *supra* note 10, at 41–42.

[339] For a noncomprehensive list of similar provisions, see Eagly, *supra* note 131, at 1817 n.411.

[340] Ch. 113, 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, and 41).

concluded unanimously that so long as this was the case, there was nothing to preempt the requirement of an immigration status check in this context.[341] The Court made it clear that the provision survived preemption, but only if read narrowly.[342] This could be read as a legal victory for opponents of the law, but here again, a different path was possible.

With the Secure Communities program, the federal government already attempts to make determinations of immigration status based on state and local arrests.[343] This is true not just in Arizona, but in all 3,074 jurisdictions in which the program has been implemented.[344] Localities that do not want the federal government to perform immigration status checks of their arrestees have tried, unsuccessfully, to opt out of the program.[345] Given existing programs and statutory provisions on cooperation, one could conclude (as the unanimous Court did) that it was not much of a stretch for the Court to allow the provision of Section 2(B) of the Arizona law, which required status checks for every arrestee,[346] to stand.

On the other hand, one could just as easily conclude that the Arizona arrest policy is completely inconsistent with the stated goals and the federal design of the Secure Communities program. In explaining the goals of the Secure Communities program, the federal government has been clear that its goal is to *eliminate* state and local inquiries into status. Federal policy evinces concern that leaving such inquiries in sub-federal hands increases the risk of impermissible discrimination. As a matter of fact, this antidiscrimination rationale is cited as a central justification of the Secure Communities program.[347] The federal government argues that it is seeking to implement a uniform system whereby all arrestees have information processed by *federal* agents through a *federal* database without state law enforcement inquiries into status, rather than by state officials investigating status and making direct inquiries to federal agents about status.[348] The latter approach allows for inconsistencies and discrimination in the implementation of federal immigration law that is arguably out

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[341] Arizona v. United States, 132 S. Ct. 2492, 2509, 2515, 2522 (2012) (citing each of the three opinions).

[342] *See id.* at 2509.

[343] *Secure Communities*, *supra* note 242.

[344] SECURE CMTYS, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ACTIVATED JURISDICTIONS (Aug. 22, 2012), *available at* http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf ("As of August 22, 2012, the biometric information sharing capability is activated in 3,074 jurisdictions in 50 states, 4 territories and Washington D.C. During FY2013, ICE plans to use this capability nationwide. The enforcement statistics are current as of July 31, 2012.").

[345] *See supra* note 258 and accompanying text (discussing the (failed) efforts of various jurisdictions to opt out of the program).

[346] S.B. 1070, 49th Leg., 2d Reg. Sess., § 2(B) (Ariz. 2010).

[347] *Secure Communities,* U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 242 ("Secure Communities reduces opportunities for racial or ethnic profiling . . . .").

[348] *See Frequently Asked Questions*, *supra* note 245.

of step with federal law and policy.[349] And because it permits impermissible forms of alienage and racial discrimination that are in contravention of federal law and policy, it also could have been deemed preempted.[350] It is only by de-emphasizing antidiscrimination norms that the Court is able to avoid a finding of obstacle preemption with respect to Section 2(B).[351]

Of course, critics contend that Secure Communities does not have the effect of decreasing discrimination, and in fact, results in an increase in discriminatory policing.[352] I share these concerns. The point here is simply that the federal government's explicitly stated goal in rolling out the program is to eliminate sub-federal discretion (and discrimination) in immigration policing.[353] In theory, Secure Communities allows federal agents to sort out the immigration status of local arrestees and decide what enforcement policy to pursue without involving sub-federal agents at all. The design of the program plainly reveals the federal determination to use state and local law enforcement efforts to complement immigration enforcement. It signals the executive's desire to return to the pre-2001 immigration federalism status quo—dominant throughout the last century—in which state and local police were formally uninvolved in the discretionary functions of immigration policing. That goal is consistent with—indeed mandated by—existing immigration laws enacted by Congress. The Supreme Court's decision in *Arizona v. United States* flatly undercuts that goal.

CONCLUSION

The courthouse doors are not closed to the opponents of S.B. 1070. The Court has made it clear that it is willing to entertain claims that arise if the Arizona law is implemented in ways that conflict with federal law or result in violation of the Fourth Amendment's prohibition on unreasonable seizures or the Fourteenth Amendment's guarantee of equal protection.[354] And the Court also made it clear that it will continue to guard federal primacy as a formal legal matter in immigration law and policy.[355] But in deciding the *Arizona* case as it did, the Court missed an

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[349] *See* discussion s*upra* notes 36–39 and accompanying text.

[350] *See* discussion *supra* note 334 and accompanying text.

[351] *See* discussion *supra* notes 326–29 and accompanying text.

[352] *See, e.g.*, AARTI KOHLI ET AL., CHIEF JUSTICE WARREN INST. ON LAW & SOC. POLICY, SECURE COMMUNITIES BY THE NUMBERS 2 (2011) (finding, among other things, that in Secure Communities jurisdictions, "people are being apprehended who should never have been placed in immigration custody, and that certain groups are overrepresented" among arrestees in Secure Communities jurisdictions).

[353] *See supra* note 347 and accompanying text (noting ICE justification of the Secure Communities program).

[354] *See* Arizona v. United States, 132 S. Ct. 2492, 2510 (2012).

[355] *Id.* at 2502–03, 2505–06.

opportunity to end a host of ongoing immigration enforcement practices that undercut federal authority in immigration policy. The Court has also raised the bar for future Fourth Amendment challenges by implicitly expanding Fourth Amendment cases on immigration policing to bestow on sub-federal agents the same authority granted to trained federal agents.[356] The most notable feature of the decision, however, is not the Court's implicit acceptance of the constitutionality of ongoing (and arguably unconstitutional) practices, but the Court's ongoing willingness to disregard the antidiscrimination goals of federal immigration policy even as the Court purports to reify federal primacy in immigration law.

[356] *See* discussion *supra* notes 310–39.