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On The Precipice of Uniformity and Decentralization: Immigration Enforcement Issues

and the Skirmish of United States v. Arizona.

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I. INTRODUCTION

"The Constitution was . . . framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Economic protectionist legislation and state regulations placing its burdens on other states, in matters of federal power, and in the absence of

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1 Baldwin v. G.A.F. Seelig, Inc. 294 U.S. 511, 523 (1935); see also Edwards v. California, 314 U.S. 160, 167 (1941) (prohibiting the ability of any state to “isolate itself from difficulties common to all of them”).
Congressional action, have been of primary importance to the Supreme Court. In fact, caustic state regulations are the catalyst responsible for some of the plenary powers of Congress. However, when Congress intrudes on what a state believes is within its police powers, the state legislature is posed with an equally troubling dilemma of impotence in light of the federal scheme, or following their legislative responsibility to protect their citizens’ health, prosperity and general welfare. Congressional responsibility to establish a “uniform rule of naturalization” has always been regarded as an exclusive power as well as its immigration authority. Furthermore its reasonable execution of those powers through law have preemptive force. Yet this authority has not precluded state

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2 H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533 (1949) (“When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began . . . [state’s] would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view. This came to threaten at once the peace and safety of the Union.”) (citations omitted) (internal quotation marks omitted).

3 See Id. at 534-35. In this decision Justice Jackson established the reasoning for the dormant commerce clause establishing that “[w]hile the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of Congressional action . . . [p]erhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution.” Id.


5 U.S. CONST. art. I, § 8, cl. 4.

6 De Canas v. Bica, 424 U.S. 351, 354-55 (1976) (“[T]o regulate immigration is unquestionably exclusively a federal power . . . who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”).

7 U.S. CONST. art. VI, cl. 2 (“The laws of the United States shall be the Supreme law of the Land.”).
enforcement, and federal acquiescence of that enforcement, of federal immigration law.\(^8\)
The resulting difference in enforcement initiatives of illegal immigration between sovereigns has put the federal government and individual states at odds.

This continually shifting dynamic is what brought Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act to fruition. The purpose of Senate Bill 1070 ("SB 1070"), signed into Arizona law on April 23, 2010, is to establish a state system of "uniformity" by ridding the state of sanctuary cities as well as fighting the “rampant illegal immigration” in the state due to the lack of federal enforcement.\(^9\) The United States brought a facial preemption challenge against the bill to the United States District Court for the District of Arizona, and it filed for an injunction which was granted on July 8, 2010.\(^10\) The injunction is currently on appeal to the Ninth Circuit, where five provisions are at issue. These are sanctions against illegal workers, mandatory police procedures for determining immigration status, warrantless arrests based on removability, and sanctions for not carrying immigration papers and aiding in illegal immigrant trafficking.\(^11\) Some of the provisions are not likely to survive a preemption analysis, however the provisions based on mandatory immigration status checks are drafted subtly enough to avoid direct conflict with federal law and certain facial invalidity. These police

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\(^8\) Plyler v. Doe, 457 U.S. 202, 225 (1982) ("[T]he States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.").

\(^9\) United States v. Arizona, 703 F. Supp. 2d 980, 995 (D. Ariz. 2010), appeal docketed, No. 10-16645 (9th Cir. argued Nov. 01, 2010) (explaining that the goal of Arizona was to make “attrition through enforcement” the policy of every locality in Arizona).

\(^10\) Id.

\(^11\) Id. at 984.
procedures have, however, created enough social, constitutional and ideological conflicts to bring it to the forefront of national debate.

The concerns of Arizona are not unwarranted as the most exacerbated immigration problems tend to gestate in border states, considering they usually receive the greatest number of immigrants and undocumented aliens.\textsuperscript{12} This is why state legislative efforts to enforce federal law through state law on illegal immigration, have been proposed and enacted in states like Arizona\textsuperscript{13} and California for well over a decade.\textsuperscript{14} However an unprecedented amount of enactments came in 2007 where, in the span of seven months, 1404 bills were introduced to state legislatures, with 170 of them becoming laws in forty one states.\textsuperscript{15} This trend has continued,\textsuperscript{16} and further complicating the legislative atmosphere is the consideration that enforcement policies differ drastically among localities within their respective state.\textsuperscript{17} While some cities in the past have reacted

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\textsuperscript{12} Jeffrey Passel & D’Vera Cohn, \textit{A Portrait of Unauthorized Immigrants in the United States}, PEW HISPANIC CENTER (Apr. 14, 2009), http://pewhispanic.org/reports/report.php?ReportID=107(summarizing a study in 2009 where California ranked number one in the highest amount of illegal immigrants, ranging between 2.5 and 2.85 million, and Arizona placed in sixth with 475,000 to 550,000 illegal immigrants).
\textsuperscript{13} Id. at 989.
\textsuperscript{17} United States v. Arizona, 703 F. Supp. 2d 980, 995 (D. Ariz. 2010), \textit{appeal docketed}, No. 10-16645 (9th Cir. argued Nov. 01, 2010) (examining the Tucson’s policy with SB
to this strict enforcement with “sanctuary city”\textsuperscript{18} policies to protect immigrants by refusing to enforce federal law or aid the federal government, these actions have constitutional implications of their own.\textsuperscript{19} Arizona claims, among other things, that the influx of illegal immigrants carries with it gang violence from across the border, increasing crime rates and hampers economic and job growth for legal citizens and legal immigrants.\textsuperscript{20} Arizona argues that it is the state’s prerogative to protect its citizens from the negative and dangerous effects of unbridled illegal immigration.\textsuperscript{21}

A variety of responses have ensued in the wake of SB 1070, which has been deemed “the toughest [illegal immigration bill] in the country,”\textsuperscript{22} ranging from the potential adoption of similar measures to threats of economic boycotts.\textsuperscript{23} Overall there

\textsuperscript{18} See, e.g., New York v. United States, 179 F.3d 29, 31 (2d Cir. 1999) (discussing the city ordinance prohibiting any officer from “transmitting information regarding the immigration status of any individual to federal immigration authorities”).

\textsuperscript{19} Id.

\textsuperscript{20} United States v. Arizona, 703 F. Supp. 2d 980, 984 (D. Ariz. 2010), \textit{appeal docketed}, No. 10-16645 (9th Cir. argued Nov. 01, 2010).

\textsuperscript{21} Id.

\textsuperscript{22} \textit{Arizona’s Immigration Law: Hysterical Nativism: A Conservative Border State is at Risk of Becoming a Police State}, \textit{ECONOMIST}, Apr. 24, 2010, at 28, 29 (“Republicans run Arizona and are now in a state of hysteria, competing with one another to deal most toughly with the threat.”).

\textsuperscript{23} Aaron Smith, \textit{Arizona to L.A.: Lights Out!}, CNN \textit{MONEY} (May 21, 2010, 7:04 PM), http://money.cnn.com/2010/05/20/news/economy/arizona_los_angeles_boycott/index.htm?hpt=T2 (describing the decisions by the L.A. city council to boycott Arizona, estimating an impact of up to 56 million dollars and Arizona’s response that it will refuse to supply electricity to the city).
are currently twenty-five states considering legislation similar to Arizona’s, some stricter than others, in their 2011 legislative sessions. The implications of similar policy adoptions is daunting, as regardless of SB 1070’s constitutionality, the discriminatory policies that underlie many of these provisions will likely continue to pull the country through years of litigation over the vagaries of immigration law and enforcement.

This note posits that the conflict preemption analysis of Section 2(b) (which codifies the mandatory police practices) is not an adequate barrier to prohibiting Arizona’s and similar discriminatory state policies. Without sufficient protections in place for the Congressional immigration power, the next decade will be filled with inadequate and contradictory laws between the several states, regardless of their shared goals of enforcement. This note further argues that the district court, when considering Section 2(b), applied a flawed preemption analysis, making it unclear how SB 1070 will fare in future decisions. This is due to conflict preemption analyses that, through years of precedent, can’t quite find their way into the traditional preemption doctrines. Therefore SB 1070 actually turns on whether it violates other Constitutional underpinnings of our jurisprudence, namely the licensing provision’s possible violation of the dormant commerce clause and the entirety of Section 2’s imposition of a burden common to the many states onto the few. An understanding of these analyses is necessary if the federal government wants to avoid a plethora of similarly exclusionary state policies.

The goal of this note is not to determine the constitutionality of every provision of SB 1070 or their likelihoods of success. It will however will take an overview of the provisions, view their policies and the arguments surrounding them before delving into the specific weaknesses of the preemption analysis. Section II of this note will first take a background look at the federal governments immigration statutes, then offer an overview of the arguments for federal exclusivity, the concurrent enforcement policies taken by states, and jurisprudence leading up to Arizona’s SB 1070. Section III will look to the district court’s opinion in United States v. Arizona with a specific focus on Section 2(b) and the current arguments surrounding its pending litigation. Section IV will examine the flaws of the preemption analysis, and its inapplicability to Section 2(b). It will also suggest an applicable analysis for the immigration powers of Congress, and suggest workable doctrines for preventing similar state policies and ways of achieving the primary goals of Congress and states alike.

II. STRUCTURING THE UNITY OF FEDERAL AND STATE POWERS

The Constitutional powers given to Congress include establishing a “uniform Rule of Naturalization” which is interpreted to provide immigration, deportation, and some general foreign powers. Within the scope of the Constitutional powers of Congress is the authority create laws “necessary and proper” to the use of those powers, and those laws are Supreme. This structure pre-empts any state laws that overlays the

25 U.S. CONST. art. I, § 8, cl. 4.
27 U.S. CONST., art. I, § 8, cl. 18.
28 U.S. CONST. art. VI, cl. 2.
express or implied intentions of Congress. However, outside any conflict with state law there is no preemption or displacement. The use of these powers and Congressional policy have changed drastically over the years. This section will begin by exploring the current federal immigration enforcement scheme, then examining the pre-emptive powers of Congress and precedent affecting the outcome of *U.S. v. Arizona*, and will conclude by looking to the push for comprehensive reform in immigration policy.

A. *The Flight to the Existing Congressional Scheme*

The seminary immigration laws in the United States were state legislative efforts, receiving no congressional response for over a century (except for the Alien and Sedition Acts aimed at the French). In 1849, and thereafter, the gold rush in the west brought waves of immigrants from China, seeking to aid in its construction through projects such as the transcontinental railroad. Fear of their encroaching populace usurping legal citizens’ economic opportunities led America to enact its first major immigration restriction, the Chinese Exclusion Act of 1882. This act, eventually becoming a permanent policy, restricted the ability of Chinese immigrants to become Citizens or

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29 *Hines*, 312 U.S. at 62.


31 Julie P. Stumpf, *States of Confusion: The Rise of States and Local Power Over Immigration*, 86 N.C. L. Rev. 1557, 1566 (2008) (explaining that during this century there were only two federal statutes passed which did not displaced state enforcement).


enter the country. With the opening of Ellis Island in 1892, the first federal immigration station, persecution of European citizens led to an even greater increase in immigration. By the mid 1900’s an estimated twelve million immigrants had come to the country through Ellis Island alone. Congressional policies only became stricter from 1924 until 1965, with laws mandating racial quotas, entry and re-entry fees. While a wide range of diverse policies ensued, the war effort in the early 1940’s became the priority of the country, and it became necessary for the country to rely on Mexican workers for agriculture and China’s alliance against the Axis. As a result, the national policy of immigration enforcement was relaxed, and laws, like the Chinese Exclusion Act, were eventually repealed.

Around this time the first major reform of immigration was introduced in 1952, known as the Immigration and Nationality Act (“INA”) and the strict quota system was

34 Harris, supra note 33, at 1946.


39 Harris, supra note 33, at 1996.

abolished through amendment of the INA in 1965.\textsuperscript{41} With the establishment of the INA came a comprehensive naturalization scheme,\textsuperscript{42} specific determinations of aliens,\textsuperscript{43} immigration violations,\textsuperscript{44} numerical limitations,\textsuperscript{45} immigrant visas,\textsuperscript{46} as well as removal procedures for arrests.\textsuperscript{47} These procedures are currently enforced by the Department of Homeland Security through Immigration and Customs Enforce (“ICE”), U.S. Citizenship and Immigration Service, Customs and Border Protection, and the Law Enforcement Support Center (“LESC”), which is administered through ICE.\textsuperscript{48} As per the individual states, the INA provides the Department of Homeland Security the ability to provide significant immigration power to states when there is such a massive entrance of aliens that it creates and poses an urgent burden,\textsuperscript{49} or to permit state officers to arrest immigrants who remain after committing felonies.\textsuperscript{50}


\textsuperscript{48} Lozano v. City of Hazleton, 620 F.3d 170, 197 n.21 (3d Cir. 2010).


\textsuperscript{50} 8 U.S.C. § 1373(a)-(b) (2006).
Congress has updated the INA through the 1986 Immigration Reform and Control Act ("IRCA") as well as the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). One tenet of the IRCA creates civil and criminal fines and sanctions for employing illegal immigrants. The statute makes it unlawful to recklessly fail to use the verification system to check immigrant’s lawful admittance into the country and eligibility to work, as well as expressly prohibiting employers from discriminating based on a person’s “national origin.” The statute considers intimidation and retaliation forms of such discrimination. In turn the IIRIRA adds many new provisions throughout the INA including the establishment of the E-Verify and I-9 systems for employers checking immigration status, as well as 1357(g) ("287(g)") officers. 287(g) officers are specifically qualified state officers who function as federal immigration officers, while communicating and cooperating with the federal government. This further fosters the communication and participation between state and local officers in immigration enforcement. Since March 2010 “more than 1,075 local officers have been trained and certified through the program under the 67 active

51 8 U.S.C § 1324a(a)-(d) (2006).
54 Lozano v. City of Hazleton, 620 F.3d 170, 200 (3d Cir. 2010).
Memoranda of Agreement (MOAs) in 24 states.”\(^{58}\) While the current Congressional scheme has various applications, states are not prohibited to involvement in 287(g) agreements, and typically may enact their own “harmonious” legislation with the INA.\(^{59}\) Therefore while these state police departments, given federal authority, can create a problematic dissonance between federal and state priorities, litigation over the concurrent enforcement of immigration law, in light of the federal scheme, is far greater.

B. The Preemptive Power and Concurrent Enforcement

As mandated by the Supremacy clause, any state enactments that deal with the exclusive powers reserved to Congress are pre-empted.\(^{60}\) In immigration this would essentially be any state law that determines the “conditions under which a legal entrant may remain” as well as who should or should not be naturalized into the country.\(^{61}\) Enacting such legislation would violate one of the three types of pre-emptive force, either express, field or conflict preemption.\(^{62}\) Express preemption occurs when a congressional statute’s provisions (intent and plain language) specifically refer to preemption and

\(^{58}\) Local Enforcement of Immigration Laws Through the 287(g) Program, IMMIGR. POLICY CENTER (Apr. 02, 2010), http://immigrationpolicy.org/just-facts/local-enforcement-immigration-laws-through-287g-program.


\(^{60}\) U.S. CONST. art. VI, cl. 2.


indicate which state laws the national statute displaces.\textsuperscript{63} Field preemption is when Congress legislates in a specific field, not expressly preempting any state action, however the intent of Congress is so “pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.”\textsuperscript{64} The final, and most difficult version to determine, is conflict preemption.\textsuperscript{65} Here state police powers receive the greatest deference, as their legislation is only preempted when there is so great a conflict between state and federal law that “it is impossible to comply with both” or it stands as an obstacle to the accomplishment and execution of the full “purposes and objectives” of Congress.\textsuperscript{66} Furthermore, any powers that have historically been within the police powers of states are given a presumption against preemption, and are only superseded if it was the “manifest purpose of Congress.”\textsuperscript{67}

One might assume that it would take an effort to directly regulate, for example naturalization, for a state measure to be preempted. However even regulations that only imply restrictions on physical entry, such as housing regulations, might be viewed as effectively expelling illegally present immigrants from the country, thus conflicting with Congress’s mandate.\textsuperscript{68} Not all state or local legislation is focused on prohibiting illegal immigration either, as some localities adopt “sanctuary city” policies prohibiting the

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\item \textsuperscript{63} Sprietsma v. Mercury Marine, 537 U.S. 51, 62-63 (2002).
\item \textsuperscript{64} Gade v. Nat’l Solid Wastes Mgmt. Ass’n, 505 U.S. 88, 98 (1992).
\item \textsuperscript{66} Id.
\item \textsuperscript{67} Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
\item \textsuperscript{68} Lozano v. City of Hazleton, 620 F.3d 170, 212, 221 (3d Cir. 2010).
\end{itemize}
transmission of immigration information to federal authorities.\textsuperscript{69} However such policies have been held to be pre-empted by the Congressional scheme as well.\textsuperscript{70}

In light of these prohibitions, there is a “special delicacy”\textsuperscript{71} of maintaining the balance between federal and state powers, as states can still enact regulations in areas within the Congressional power.\textsuperscript{72} The issues presented by these state policies, both enforcing and refusing to enforce the federal scheme, are exacerbated when considering the federal government must maintain a careful equilibrium with the states as they are an important source of immigration information and enforcement, and there are congressional requirements for fostering this relationship.\textsuperscript{73} Yet the congressional policy in allowing some state enforcement and legislative cooperation with the federal law should not be misconstrued as acquiescence to all state regulations that might be enacted under the guise of concurrent enforcement and traditional state police powers.

\textsuperscript{69} See, e.g., New York v. United States, 179 F.3d 29, 31 (2d Cir. 1999).

\textsuperscript{70} Id. at 29.


\textsuperscript{72} See Lozano v. City of Hazleton, 620 F.3d 170, 218 (3d Cir. 2010) (“To be consistent with federal law, states and localities that use regulatory enactments to sanction employers who have been . . . employing unauthorized aliens must impose sanctions of equal severity on employers found guilty of discriminating.”); \textit{but see id.} at 206 (explaining Congress’s enactment of the IRCA did not sweep away state police powers in prohibiting the employment of illegal aliens).

\textsuperscript{73} Id. at 32.
It is left to the courts to decide whether their concurrent enforcement adheres to the federal scheme or is impermissibly supplementary.\textsuperscript{74} When state legislation creates a hostile environment such as Arizona’s law, pro-federalists argue states should have no authority often analogizing to the other Congressional powers, such as the Commerce Clause, with exclusive federal power.\textsuperscript{75} While immigration authority is exclusive to Congress, it is axiomatic that states do have a subordinate power in immigration enforcement\textsuperscript{76} and that state laws that merely effect aliens in some way are not always regulations of immigration.\textsuperscript{77} It’s also erroneous to assume that the exclusive power over commerce is similar to immigration, as although state’s may not commandeer Congressional authority,\textsuperscript{78} it’s evident through all the INA that Congress has always been aware of the importance of the aid of the sovereign states and has chosen to “tolerate whatever tension” arises from the concurrent enforcement of these powers.\textsuperscript{79} The resulting dichotomy is therefore undoubtedly constitutional so long as a state’s action

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\item \textsuperscript{74} See Chamber of Commerce v. Edmondson, 594 F.3d 742, 766 (10th Cir. 2010) (refusing to uphold employment penalties); but see Gray v. City of Valley Park, 567 F.3d 976, 987 (8th Cir. 2009) (upholding similar employment provisions).
\item \textsuperscript{75} Lozano v. City of Hazleton, 620 F.3d 170, 220 (3d Cir. 2010) (describing the government’s stance that immigration is an “exclusively federal domain . . . usurp[ing] authority that the Constitution has placed beyond the vicissitudes of local governments”).
\item \textsuperscript{76} Hines v. Davidowitz, 312 U.S. 399 (1941).
\item \textsuperscript{77} De Canas v. Bica, 424 U.S. 351, 355 (explaining the federal law does not prohibit “every state enactment which in any way deals with aliens”).
\item \textsuperscript{78} Plyler v. Doe, 457 U.S. 202, 219 n. 19 (1982).
\item \textsuperscript{79} Wyeth v. Levine, 129 S. Ct. 1187, 1200 (2009); see also 8 U.S.C. § 1644 (2006) (“[N]o State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from information regarding the immigration status, lawful or unlawful, of an alien in the United States”).
\end{itemize}
“mirrors federal objectives and furthers a legitimate state goal.” However, arriving at such a situation is never simple, and the precedent and politics emerging from such an analysis has led to divergent understandings of permissible state policies.

C. Immigration Enforcement Jurisprudence Affecting SB 1070

The district court’s opinion in *United States v. Arizona* relies heavily on *Hines v. Davidowitz* ("Hines"), so an understanding of that case is necessary to understanding the holding. Furthermore, to better understand the arguments between Arizona and the United States, the Supreme Court case *De Canas v. Bica* ("De Canas"), the Ninth Circuit opinion in *Chicanos Por La Causa, Inc. v. Napolitano* ("Chicanos") as well as the Third Circuit opinion in *Lozano v. City of Hazleton* ("Lozano"), all contribute to a better understanding of current preemption analysis.

*Hines* involved a Pennsylvania statute known as the Alien Registration Act, which required every alien to register with the state. Each registered alien would receive an identification card that had to be carried at all times, and produced when demanded by any police officer of the state, while failure to register under the act resulted in a fine.

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80 *Plyler*, 457 U.S. at 225 (1982); see also *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 869 (9th Cir. 2009).

81 312 U.S. 399 (1941).


83 558 F.3d 856 (9th Cir. 2009).

84 620 F.3d 170 (3d Cir. 2010).


86 *Id.*
Federal provisions at the time required registration as well and established a criminal offense for a willful failure to register.\(^87\) The scheme enacted by Pennsylvania consisted mostly of provisions that mirrored federal law, except that the state included the compulsory production of registration to police officers.\(^88\) Justice Black explained that “extraordinary burdens . . . upon aliens such as subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation . . . bears an inseparable relationship to the welfare and tranquility of all the states and not merely to the welfare and tranquility of one.”\(^89\) He then noted the clear implication of the foreign affairs power in that when one considers our treaty obligations, through which our country demands recognition of foreign nationals and their purpose is for each country to avoid discrimination “against the citizens of the other.”\(^90\) In addition, any conduct of an alien, that is a “specialized” regulation by the state, implicates Congress’ ability to establish a rule of naturalization, due also to its responsibility to maintain our foreign relations.\(^91\)

Justice Black concluded that since Congress provided a single standard for alien registration, and its purpose was to protect “law-abiding aliens” from the imposition of police “inquisitorial practices”, the Pennsylvania statute would generate negative internal

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\(^{87}\) *Id.* at 61.

\(^{88}\) *Id.*

\(^{89}\) *Id.* at 65.

\(^{90}\) *Id.* at 65-66.

\(^{91}\) *Id.*
relations and disloyalty.\footnote{Id. at 74.} Since Justice Black’s primary determination was whether the state law poses an obstacle to “full purposes and objectives of Congress,” the imposition of a high burden on “law abiding” aliens, or a regulation of illegal aliens implicates the federal power and state law cannot stand in the way of those purposes.\footnote{Id. at 67.} The dissenting Justice Stone opined that at the time there was no indication by Congress to preclude state police powers from being exercised against aliens inside their borders.\footnote{Id. at 78 (Stone, J., dissenting).}

The analysis in \textit{Hines} was given further recognition in \textit{De Canas}, which involved a California labor statute that prohibited employers from hiring aliens without legal residence in the United States, for any employment that affects legal workers.\footnote{De Canas v. Bica, 424 U.S. 351 (1976).} Justice Brennan admitted that sometimes there is no per-se preemption of state enactments dealing with aliens, and recognized that the Court in \textit{Hines} was required to look to congressional enactments and intent, meaning there is no full exclusivity in all dealings with aliens both legal and illegal.\footnote{Id. at 354.} However, even in light of harmonious state legislation with federal law, it may still be invalid. In these cases the “federal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons either that the nature of the regulated subject matter permits no other conclusion, or Congress has unmistakably so ordained.”\footnote{Id. at 355 (quoting Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963)).} Justice Brennan explained that in order to

\begin{itemize}
  \item [92] Id. at 74.
  \item [93] Id. at 67.
  \item [94] Id. at 78 (Stone, J., dissenting).
  \item [96] Id. at 354.
  \item [97] Id. at 355 (quoting Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963)).
\end{itemize}
succeed the plaintiffs must have shown a specific indication in the wording or intent of
the INA to preclude harmonious state regulations.\textsuperscript{98} This is an important standard because
it protects the “broad authority” of the state’s police power, and the problems of illegal
employment of aliens depriving citizens and legal immigrants of jobs.\textsuperscript{99} Justice Brennan
was concerned about the immigration problems posed to the states as they were
specifically “acute in California in light of the significant influx into that State of illegal
aliens from neighboring Mexico” thus the unanimous Court held the statute was a
legitimate use of the state police power.\textsuperscript{100}

The analyses of these precedents bore heavily upon the outcome of those cases in
the Circuit Courts where state legislation was created with similar harmonious intent.
\textit{Lozano} involved a different Pennsylvania statute, one that created employment
regulations that mandated the use of the federal E-Verify system, the requirement of
employer affidavits evincing that the employers don’t employ illegal workers,\textsuperscript{101} rental
housing provisions, and the invalidation of leases that illegal immigrants had entered
into.\textsuperscript{102} The provision closest to being upheld was the mandatory use of the E-Verify
system, and the Third Circuit had no issue specifically with that requirement.\textsuperscript{103}
However, the state legislature had ignored the significant discrimination protections that

\textsuperscript{98} Id. at 355-56.

\textsuperscript{99} Id.

\textsuperscript{100} Id. at 364.

\textsuperscript{101} Lozano v. City of Hazleton, 620 F.3d 170, 184 (3d Cir. 2010).

\textsuperscript{102} Id. at 188.

\textsuperscript{103} Id. at 210-12.
Congress included in its employer sanctions.\textsuperscript{104} The concern of Congress was that the employment provision would create an atmosphere of discrimination against anyone who appeared foreign, and this intent preempted the Hazleton provision because it ignored this core of Congress’s intent.\textsuperscript{105} Furthermore since \textit{Lozano’s} housing provisions denied rights based solely on immigration status, which is specifically against the intent of Congress, it was therefore held to be in opposition of the federal enforcement scheme.\textsuperscript{106}

\textit{Chicanos}, in which an Arizona statute was at issue, also involved an employment provision similar to \textit{Lozano} which mandated the use of the E-Verify system by employers.\textsuperscript{107} The court upheld the mandate, as even though the IRCA doesn’t mandate its enforcement, that does “not in and of itself indicate that Congress intended to prevent states from making participation mandatory.”\textsuperscript{108} As to the discrimination protections on account of which the \textit{Lozano} ordinance was struck down, the court saw no issue as the United States provided no evidence of any increase in discriminatory practices by employers, or any greater likelihood of discrimination, merely because other states had the option of relying exclusively on the I-9 verification process.\textsuperscript{109}

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\item \textsuperscript{104} \textit{Lozano}, 620 F.3d at 210-212; \textit{see also} 8 U.S.C. § 1229b(b)(2) (2006).
\item \textsuperscript{105} \textit{Lozano}, 620 F.3d at 212.
\item \textsuperscript{106} \textit{Id.} (explaining the provisions are conflict preempted as an immigrant student or a battered spouse who the government specifically denied to enforce proceedings against would effectively be denied housing in the city).
\item \textsuperscript{107} Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 866 (9th Cir. 2009).
\item \textsuperscript{108} \textit{Id.} at 866-67.
\item \textsuperscript{109} \textit{Id.} at 867.
\end{itemize}
Though these precedents may be distinguished it is clear that beyond that a state regulation that merely enforces specific provisions of the INA is likely to be upheld as harmonious legislation. It is therefore left to Congress to decide whether it wishes to specifically preclude state regulation or mandatory enforcement policies, as explained by Justice Brennan.\footnote{De Canas v. Bica, 424 U.S. 351, 355 (1976).} While there is currently a strong push for new comprehensive policies when it comes to state enforcement, Congress has yet to take any action in precluding the mandatory state policies of \textit{Lozano} and \textit{Chicanos}, including certain provisions of SB 1070 at issue in \textit{United States v. Arizona}.

\textbf{D. Comprestrictive Reform for a Perpetually Evolving Nation}

Even with the comprehensive nature of the existing scheme, the push for immigration reform is greater than ever. The United States Census Bureau estimates there are over 45 million Hispanic citizens making up over 15\% of the population of the United States.\footnote{2005-2009 American Community Survey 5-Year Estimates, U.S. Census Bureau, http://factfinder.census.gov/ (last visited Feb. 06, 2011) (follow “Main” hyperlink; then follow “Fact Sheet” hyperlink).} Our population landscape has changed drastically considering that little over a century ago the \textit{entire} foreign born population consisted of about the same percentage.\footnote{Report on Population of the United States Eleventh Census, U.S. Census Bureau (Oct. 22, 1894), http://www.census.gov/prod/www/abs/decennial/1890.html.} In addition non-citizens or “illegal immigrants” were at a high of 11.9 million in 2008 and were at an estimated 11.1 million in 2009.\footnote{Immigration and Emigration, N.Y. Times, http://topics.nytimes.com/top/reference/timestopics/subjects/i/immigration-and-emigration/index.html?inline=nyt-classifier (last updated Feb. 02, 2011).} While the racial makeup of the entirety of immigrants is undeterminable, it is estimated the majority come from Mexico, seeking
economic opportunities unavailable to them in their home country.\textsuperscript{114} While it’s easy to empathize with the necessity of their flight and plea, many citizens view them simply as job competitors.

The obviousness of the moral obligations we owe to other human beings, enhanced by our fluctuating social makeup, and the need to satisfy the subset of our legal population also in dire straits, has lead to attempted reform with no clear answer of what exactly is the primary goal of immigration enforcement. In 2004, the most sweeping change in immigration policy in over twenty years was proposed by President Bush, which would give amnesty to many illegally present workers, and offer legal status by allowing illegal immigrants to register as temporary workers.\textsuperscript{115} However, the opposition declared that these measures aided those who voluntarily break our laws, an attack that was repeatedly launched on similar bills introduced by Senator McCain and the late Senator Kennedy, as well as the second attempt by President Bush in 2007, which all ultimately failed to pass.\textsuperscript{116} The Obama administration’s push seems to be in line with its predecessor’s, with the proposal of the Development, Relief and Education for Alien Minors Act (“DREAM” Act) that also failed to pass in the House on December 18, 2010.\textsuperscript{117} This bill would have provided a path to permanent status for over eight hundred


\textsuperscript{115} \textit{Immigration and Emigration}, supra note 112.

\textsuperscript{116} \textit{Immigration and Emigration}, supra note 112.

thousand aliens that came to the U.S. illegally as minors, and are now college students or serve in the military.118 While there is widespread fear of unemployment exacerbated by illegal workers in an already downward spiraling economy, President Obama does not share this fear, and explains “[o]ur nation is enriched by their talents and would benefit from the success of their efforts.”119 Indeed he may be correct, as some studies show a legalization of undocumented workers would actually improve our economy, rather than lead to the usurpation of legal citizens employment.120

Unfortunately the only actualized policy changes during these years of proposed reforms have been worked to restrict movement over the border and steps to actually avoid integration. Examples are the recently severe enforcement policies of ICE, which deported 350,000 illegal immigrants in 2008 alone, a record number that has only increased.121 Recently we have seen a renewal of the challenges to birthright citizenship, thought for a long time to be upheld in United States v. Wong Kim Ark.122 Though it’s Supreme Court precedent over a hundred years old, that has not even been watered down, on a narrow reading it has become part of a vehement debate as to whether children born in the United States to immigrants currently in the country illegally, should be considered


119 Id. (explaining the DREAM act would actually benefit our economy thus reducing unemployment).


121 Herszenhorn, supra note 116.

122 169 U.S. 649 (1898); see also Plyler v. Doe, 457 U.S. 202, 211 n.18 (1982).
citizens. Whether these are purely contentious efforts or sound analyses, they certainly suggest a discord with the aforementioned chief executive’s interests.

To even describe these American paradigms as “contradictory” would be a severe understatement. While the President seems to think the national direction is more aligned with the elegiac tones of Emma Lazarus’ inscription, another branch of the executive is doing the most it can, with what power it has, to expel all of the country’s “burdens.” Whatever is left for states to deduce from a smorgasbord of competing rhetoric is anybody’s guess, and from this disarray is the only clear answer we have for why no state’s concurrent enforcement policy completely imitates another’s and new state legislation is constantly arising. The frenzied public debate is therefore greatest when state policies are situated on either end of the spectrum. While one may look at SB 1070 and similar state attempts with disdain, it may actually seem the only logical reaction in such an atmosphere of uncertainty and confusion. While not a patently egregious concept, however, a state of confusion is not necessarily a license to create an environment hostile enough to force the burden of the many states onto the few, purely because one legislature is frustrated by the harmful effects on its own state. Policies like these seem to tell other states to “either let your enforcement priorities be commandeered by ours, or

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124 Emma Lazarus, *Selected Poems* 58 (John Hollander ed., Am. Poets Project 2005) (1883) (“Keep, ancient lands, your storied pomp! . . . Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore, send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door.”).
suffer the consequences alone of a burden we are no longer willing to accept.” The enmity created by such a proposal is what has brought such state and federal prerogatives to an inevitable clash.

III. **United States v. Arizona: Undoubtedly Preempted or Clearly Constitutional?**

Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act has various purposes, one of them is establishing a state system of “uniformity”, fighting “rampant illegal immigration,” while recognizing the “compelling interest” of discouraging all “economic activity” and “unlawful presence” of illegal aliens. The bill establishes that it intends to provide the same discriminatory protections of the INA as well as the United States Constitution. However, its effects and purposes are arguable, which is why the U.S. government’s facial preemption challenge addressed five provisions, four of which have been enjoined by the District Court of Arizona. The focus of this note is on Section 2, which codifies the mandatory police practices that are at the forefront of the political debate. This section will, however, begin with a brief examination of the other enjoined sections so as to provide an understanding of the bill as a whole, and the reasons why these provisions are unlikely to survive a preemption challenge. The following sections will then undertake an in depth examination of section

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125 United States v. Arizona, 703 F. Supp. 2d 980, 992 (D. Ariz. 2010), *appeal docketed*, No. 10-16645 (9th Cir. argued Nov. 01, 2010).

126 *Id.* at 988-89 (explaining that unlawful entry, economic activity, as well as presence is unlawful and must be discouraged throughout Arizona).

127 Arizona, 703 F. Supp. 2d at 988-89; *see also* ARIZ. REV. STAT. § 11-1051 (LexisNexis 2011).

128 Arizona, 703 F. Supp. 2d at 1008.
2, through the lens of the opinion of the district court, and will finish with an analysis of the significant arguments on appeal both for and against the section’s constitutionality.

A. The Inevitable Preemption of Sections 3, 5, and 6

Section 3 creates a class one misdemeanor in the state for willful failure to carry alien registration documents and bears fines.\textsuperscript{129} The district court decided that since this provision supplements federal law, by adding new penalties to the already existing federal scheme, it is likely to be preempted by federal law.\textsuperscript{130} This seems to be a clear field preemption argument, as states are not permitted to supplement a field in which Congress has already legislated.\textsuperscript{131} Thus it is fairly clear this provision was correctly enjoined by the district court. Section 5, specifically subsection (c), establishes penalties against illegal immigrants who knowingly apply for work as an employee or independent contractor.\textsuperscript{132} When looking to the enactment of the IRCA, which specifically addresses employer sanctions and not employee sanctions,\textsuperscript{133} states seemingly could take some legislative action against illegal employees if not directly in conflict with Congressional intent. With that analysis in mind the district court had Ninth Circuit precedent to rely on, where it was decided that specifically choosing not to criminally sanction employees in

\begin{itemize}
  \item \textsuperscript{129} \textit{Ariz. Rev. Stat.} § 13-1509 (LexisNexis 2011).
  \item \textsuperscript{130} \textit{Arizona}, 703 F. Supp. 2d at 999.
  \item \textsuperscript{132} \textit{Ariz. Rev. Stat.} § 13-2928(c) (LexisNexis 2011).
  \item \textsuperscript{133} \textit{Arizona}, 703 F. Supp. 2d at 1001. The only part of the Congressional scheme addressing employees are civil sanctions for presenting false documents, an area where state law is already prohibited. \textit{Id}.
\end{itemize}
the IRCA was part of clearly expressed policy choice of Congress in the enactment of the IRCA.\textsuperscript{134} The district court agreed with the precedent’s reasoning and decided Section 5 was likely to be conflict pre-empted.\textsuperscript{135} On appeal the Ninth Circuit judges opine that they are an \textit{en banc} court just as the decision in \textit{Nat’l Center for Immigrants’ Rights, Inc v. INS}, and they have no authority to overturn the opinion.\textsuperscript{136} The only way this will change is through a Supreme Court decision on the issue, or Congressional action,\textsuperscript{137} therefore a conflict preemption argument is going to be successful unless one of these changes takes place.

Section 6, specifically subsection (a)(5), allows an Arizona police officer to make a warrantless arrest of a person for probable cause of any public offense making them removable from the United States.\textsuperscript{138} The interpretation posed by Arizona, is that if an alien commits a crime in another state that is also a crime in Arizona, and it makes them deportable, a warrantless arrest can be made.\textsuperscript{139} The issue this poses is the difficulty of determining whether an alien is removable from the United States. Even though there are

\textsuperscript{134} \textit{Id.} (quoting Nat’l Ctr. for Immigrants’ Rights, Inc. v. I.N.S., 913 F.2d 1350, 1370 (9th Cir. 1990) \textit{rev’d on other grounds}, 502 U.S. 183 (1991)) (“While Congress initially discussed the merits of fining, detaining or adopting criminal sanctions against the employee, it ultimately rejected all such proposals.”).

\textsuperscript{135} \textit{Arizona}, 703 F. Supp. 2d at 1002. Another part of Section 5 was at issue but was found unlikely to be pre-empted. \textit{Id.} at 1004.

\textsuperscript{136} Oral Argument at 19:57, United States v. Arizona, No. 10-16645 (9th Cir. Nov. 01, 2010), \textit{available at} http://www.c-spanvideo.org/program/296345-1.

\textsuperscript{137} Oral Argument at 22:30, United States v. Arizona, No. 10-16645 (9th Cir. Nov. 01, 2010), \textit{available at} http://www.c-spanvideo.org/program/296345-1.

\textsuperscript{138} \textit{ARIZ. REV. STAT.} § 13-3883(a)(5) (LexisNexis 2011).

\textsuperscript{139} United States v. Arizona, 703 F. Supp. 2d 980, 1005 (D. Ariz. 2010), \textit{appeal docketed}, No. 10-16645 (9th Cir. argued Nov. 01, 2010).
specific offenses listed federal immigration judges ultimately determine removal, and there is no set of standards for a state officer to determine removability. While Arizona argued that the Law Enforcement Support Center could be contacted to determine deportability, it appears nowhere in the statute, and the court did not read it into the meaning of the provision. This would then unreasonably impose a burden on lawful citizens, who the district court believed would be substantially likely to be wrongfully arrested, and Hines only allows such burdens to be enforced by the federal government. This argument is similar to that of the Third Circuit opinion in Lozano but this provision is somewhat less clear as the district court posed a reading that was more likely to fit within the scheme of “arresting aliens based on civil deportability” for which the provision is said to be based. While it is clear that if it extraordinarily burdened lawful citizens it would conflict with the federal scheme, a more cleverly adopted provision would be likely to survive this analysis. Therefore this remains a likely

140 Id. at 1005-06.

141 Id. at 1006. The court noted that the federal statute only requires LESC to determine immigration status to support state and federal law enforcement. Id. at 1006 n. 21.

142 Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 65-66 (1941)) (internal quotation marks omitted) (“By enforcing this statute, Arizona would impose a distinct, unusual and extraordinary burden on legal resident aliens that only the federal government has the authority to impose.”).

143 Lozano v. City of Hazleton, 620 F.3d 170, 198 (3d Cir. 2010) (noting impossibility of predicting which aliens the federal government will ultimately elect to remove from the country).

144 Arizona, 703 F.Supp.2d at 1005. The opinion points out a meaning it seems to deem constitutional that “[the] intent may have been to provide for the warrantless arrest of an alien who was previously convicted of a crime in Arizona but never referred to DHS for potential removal proceedings.” Id.
target for other state legislatures to adopt despite the fact that for the moment the United States has successfully enjoined these provisions.145

B. The Mandatory Police Practices of Section 2

Part (a) of Section 2146 mandates nothing less than the full enforcement of federal immigration law by every city and subdivision of the state.147 Part (b) then establishes that for any lawful stop or arrest by state police officers,148 if they have reasonable suspicion that the subject is an illegal immigrant, they must make a reasonable attempt to determine that person’s immigration status through the U.S. Immigration and Customs Enforcement.149 Furthermore, if an arrest is made the arrestee’s immigration status must be determined before release.150 The second part of (b) establishes that a suspected illegal immigrant is presumed lawful if he can provide an Arizona driver’s license, a non-operating license, or a form of tribal identification.151 A suspect can also be presumed

145 Id. (citing Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 379-80 n. 14 (2000) (“[T]he federal government’s ability to enforce its policies and achieve its objectives will be undermined by the state's enforcement of statutes that interfere with federal law, even if the Court were to conclude that the state statutes have substantially the same goals as federal law.”)).


149 Ariz. Rev. Stat. § 11-1051(b) (LexisNexis 2011) (establishing that the permissible stops in the statute include any state, county, city, or town’s laws or ordinances and the reasonable suspicion may not be based on race, color or national origin except what is already permitted under the federal and state constitution).


lawful if they have another state’s license as long as that state requires proof of legal presence before issuance.\footnote{ARIZ. REV. STAT. § 11-1051(b)(4) (LexisNexis 2011).}

The district court’s opinion began with concern over the fact that the first sentence of Section 2(b) only included “lawful contact” and not arrest so the second sentence mandating immigration checks of every arrestee applied to everybody arrested, and not those based solely on reasonable suspicion of illegal status.\footnote{United States v. Arizona, 703 F. Supp. 2d 980, 994 (D. Ariz. 2010), appeal docketed, No. 10-16645 (9th Cir. argued Nov. 01, 2010).} The court then decided to isolate the sentence, which would make it mean that if a legal immigrant is arrested, and provides a valid Arizona driver’s license, they would still be subject to detention until a response from ICE is received.\footnote{Id.} It then explains that for legal immigrants under programs that don’t provide promptly available information, it would subject them to unreasonable “inquisitorial practices and police surveillance”.\footnote{Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 53 (1941)).} The court then notes the liberty interests at stake for all lawful immigrants as all who are arrested will be denied reasonable detention periods when being held until their status is determined.\footnote{Arizona, 703 F. Supp. 2d at 995.} Since \textit{Hines} establishes that legal immigrants should not be subject to constant checking of papers and legal status this poses an impermissible burden.\footnote{Id. at 997.}

Therefore, Congress’ concern to create a uniform treatment of legal aliens conflicts with
this policy, and would therefore pre-empt its enactment.\textsuperscript{158} The court makes further use of \textit{Hines} to establish that it is the federal government’s responsibility to maintain a uniform foreign policy which would be adversely affected by the great burden posed to those both legal and illegal in our country.\textsuperscript{159}

Beyond the effect on legal immigrants, the court established that federal agencies in the past have been burdened by state policies that threatened and impeded their functioning.\textsuperscript{160} Considering that under 8 U.S.C. § 1373(c), DHS and its agencies (the LESC as administered through ICE) are mandated to respond to all federal, state, and local government inquires, these state requests would fit into that scheme. The district court concluded that as the current focus of the LESC is to national security objectives based on the terrorist threats to vulnerable areas of national interest, that the increase in status checks from Arizona police officers would impermissibly divert the resources and objectives of these federal agencies.\textsuperscript{161} This reasoning, while not citing any empirical research on the possible increase in requests, is based on the district courts reading of the second sentence as it notes that the determination of immigration status of “every arrestee” will automatically result in a large increase in requests, which will only be exacerbated by states considering similar legislation and the resulting patchwork of

\textsuperscript{158} \textit{Id.} at 994.

\textsuperscript{159} \textit{Id.} at 997.

\textsuperscript{160} \textit{Id.} at 995 (citing Buckman Co. v. Plaintiffs’ Legal Comm., 531 U.S. 341, 351 (2001)) (explaining their functioning was impeded by states submitting “a deluge of information” that the government “neither wants or needs”).

\textsuperscript{161} \textit{Id.} at 996.
immigration laws.\textsuperscript{162} Thus, because of the burden on legal immigrants prohibited in \textit{Hines} and the diversion of the federal agencies prerogatives, Section 2(b) was enjoined by the court.\textsuperscript{163}

\textbf{C. Arguments on Appeal of Section 2’s injunction}

Arizona estimates that illegal immigrants cost the state at least two billion dollars per year due to their makeup of seventeen percent of the state’s prison population on top of hospital costs and school enrollment.\textsuperscript{164} It also claims that fifty percent of all aliens that enter the country do so through Arizona, giving rise to its special state interest against illegal immigration.\textsuperscript{165} When considering these facts, along with concerns of Mexican drug cartels, and gang violence that seeps across the border, Arizona argues it has a very legitimate need of an immigration policy that is not lackadaisically enforced.\textsuperscript{166} Its claim against the injunction is that the district court ignored the government’s burden in satisfying a facial challenge and refused to interpret the statute in a constitutional manner.\textsuperscript{167} Had the district court not read the entire section, especially the second sentence, in the way it did, the burdens on legal immigrants and the federal government would be seen in a greatly reduced fashion and therefore the courts reliance

\textsuperscript{162} \textit{Id.} at 996 n.7.

\textsuperscript{163} \textit{Id.}

\textsuperscript{164} Brief for Petitioner at 11, United States v. Arizona, No. 10-16645 (9th Cir. Aug. 26, 2010).

\textsuperscript{165} Brief for Petitioner, \textit{supra} note 163, at 11.

\textsuperscript{166} United States v. Arizona, 703 F. Supp. 2d 980, 984 (D. Ariz. 2010), \textit{appeal docketed}, No. 10-16645 (9th Cir. argued Nov. 01, 2010).

\textsuperscript{167} Brief for Petitioner, \textit{supra} note 163, at 15-16.
on *Hines* would be unjustified. In light of these “mistakes” of the district court’s analysis, Arizona believes it should be left to enforce its police powers and protect its citizens from the strenuous burdens posed by illegal immigration.

1. FACIAL CHALLENGES AND STATUTORY INTERPRETATION

The preliminary injunction standard requires the United States show a likelihood of success, comparative hardship, irreparable harm and harm which is against the public interest if no injunction were granted (a harm which must be clearly expressed). A facial challenge on the other hand is a taxing standard as *United States v. Salerno* requires the establishment of “no set of circumstances . . . under which the Act would be valid.”

While it’s not clear that Arizona espoused a set of conditions where 2(b) would not be decoupled, if it did that would be sufficient to rebut the facial challenge. Also in facial challenges courts are required to assume that those charged with the law’s implementation will do so in a constitutional manner and when posed with multiple interpretations of a provision, the doctrine of constitutional avoidance requires the court to choose the interpretation that makes the statute constitutional. Arizona argues that if

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168 Brief for Petitioner, *supra* note 163, at 15-16.

169 Brief for Justice and Freedom Fund as Amici Curiae Supporting Appellants at 5, United States v. Arizona, No. 10-16645 (9th Cir. Sept. 02, 2010).

170 *See generally* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978); *see also* Rizzo v. Goode, 423 U.S. 362, 378 (1976) (explaining an injunction is only to be granted “sparingly, and only in a clear and plain case”).


173 *Id.* at 584 (granting the assumption that by the reading of the statute the court could expect “compliance with state as well as federal law”).
the court had chosen the constitutional interpretation, it would be read to say in every arrest with reasonable suspicion of unlawful immigration, the arrestee’s immigration status must be determined before release.\textsuperscript{175}

2. THE IMPERMISSIBLE BURDEN AGAINST LEGAL IMMIGRANTS

The impermissible burden analysis was the first reason for finding the statute likely to be conflict preempted. Arizona’s reading of the provision would reduce the burden on legal immigrants, but not entirely as it seems fairly certain that in assessing the low standard of reasonable suspicion, some legal aliens would be suspected of being illegal. SB 1070 does not elucidate on what facts determine whether a person is in the country illegally or not. However, in oral argument before the Ninth Circuit, Arizona explained that the most common situation is when lawfully stopped persons actually admit that they are not in the country legally.\textsuperscript{176} Counsel for Arizona also claimed that the average response time from ICE is eleven minutes so the enhanced burden on legal and illegal immigrants is minimal\textsuperscript{177} and that the seizures codified in Section 2(b) have been enforced daily by Arizona law enforcement officers long before the introduction of the bill.\textsuperscript{178}

\textsuperscript{174} Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application.”).

\textsuperscript{175} Oral Argument at 11:05, United States v. Arizona, No. 10-16645 (9th Cir. Nov. 01, 2010), available at http://www.c-spanvideo.org/program/296345-1.

\textsuperscript{176} Oral Argument at 17:45, United States v. Arizona, No. 10-16645 (9th Cir. Nov. 01, 2010), available at http://www.c-spanvideo.org/program/296345-1.

\textsuperscript{177} Oral Argument at 28:35, United States v. Arizona, No. 10-16645 (9th Cir. Nov. 01, 2010), available at http://www.c-spanvideo.org/program/296345-1.
The United States adopted the district court’s interpretation of the second sentence of Section 2(b), agreeing that it puts all lawful immigrants at risk for an extended detention period. The government added that regardless of the interpretation of the second sentence, the foreign policy powers and enforcement of immigration are subverted by the provisions of SB 1070. Since the stops established in SB 1070 include anything from jaywalking to bicycle violations, and make the immigration determination mandatory, the government believes it completely ignores the flexible nature of the immigration policy intended by Congress. This is because the status checks are made mandatory, thus it necessarily disregards the ability for state’s and their respective localities to work together, posing a threat to the federal control of immigration and its dealings with foreign nations which would compromise the

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179 Brief for Respondent at 56-57, United States v. Arizona, No. 10-16645 (9th Cir. Sept. 23, 2010).

180 Brief for Respondent at 25, United States v. Arizona, No. 10-16645 (9th Cir. Sept. 23, 2010) (“By establishing a regime outside federal control, the Arizona scheme impairs the federal government’s conduct of foreign policy and its enforcement of the immigration laws”).

181 Brief for Respondent, supra note 178, at 43-44.

182 Brief for Respondent, supra note 178, at 45 (quoting United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950)) (“flexibility and the adaptation of the Congressional policy to infinitely variable conditions constitute the essence of the program.”).

183 Brief for Respondent, supra note 178, at 45.

ability of the President to speak for our nation with one voice.\textsuperscript{185} The brief filed to the Ninth Circuit, on behalf of the government, seems to avoid the \textit{Salerno} issue, excluding any direct statements of how these arguments establish no set of circumstances for facial constitutionality.\textsuperscript{186}

\textit{Amici} supporting the U.S. mostly mirror the district court’s interpretation of the second sentence to establish unconstitutionality.\textsuperscript{187} However, some adopt Arizona’s interpretation, and address \textit{Salerno} arguing that the mandate of the immigration check will be unconstitutional in every application by pointing to police departments in Arizona that have enforced similar immigration policies and are involved in vexatious litigation due to their actions.\textsuperscript{188} Beyond that are a multitude of other challenges, some going as far to say SB 1070 is facially invalid on First Amendment grounds.\textsuperscript{189} Others argue for the

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\textsuperscript{185} Brief for Respondent at 45, United States v. Arizona, No. 10-16645 (9th Cir. Sept. 23, 2010) (explaining the President needs flexibility in order to speak for the nation with one voice).

\textsuperscript{186} See generally Brief for Respondent, United States v. Arizona, No. 10-16645 (9th Cir. Sept. 23, 2010).

\textsuperscript{187} Brief for Friendly House as Amici Curiae Supporting Appellees at 12, United States v. Arizona, No. 10-16645 (9th Cir. Sept. 30, 2010) (Deciding to read the second sentence as not having reasonable suspicion, saying under any stop there officers are “compelled to conduct an investigation of the motorist’s immigration status”).

\textsuperscript{188} Ray Rivera et. al., \textit{A Few Blocks, 4 Years, 52,000 Police Stops}, N.Y. TIMES (July 11, 2010), http://www.nytimes.com/2010/07/12/nyregion/12frisk.html (reporting 52,000 police stops over the previous 4 years over only a few blocks in Brooklyn).

\textsuperscript{189} Brief for Friendly House as Amici Curiae Supporting Appellees at 14, United States v. Arizona, No. 10-16645 (9th Cir. Sept. 30, 2010) (“[I]n making determinations under § 2(B), members of minority groups would be discouraged from engaging in protected speech and expressive activity . . . pure speech protected by the First Amendment.”).

\end{footnotesize}
federal right of full exclusivity in the domain of immigration, however that currently only applies to civil enforcement and the government has already conceded the necessity of state support so a federally exclusive immigration policy seems like an unlikely outcome. Therefore some of these more spurious challenges are unlikely to be seen in any future opinion, as the real issue bears on the interpretation of the statute, partially through the reading of the second sentence, and the mandatory nature of the immigration checks.

3. THE IMPEDING NATURE OF THE INCREASE IN STATE REQUESTS

The second reason for the district court finding that Section 2 was conflict preempted was the increase of informational requests from ICE impeding the function of the agency. The United States, and the briefs supporting it, adopt this analysis while reiterating the mandatory nature of the statute. The United States concedes that state officers can provide assistance to federal officers in immigration enforcement, and that the type of police inquiry based on reasonable suspicion is permissible. It also agrees that state agencies are of great assistance to federal immigration regulation, especially in light of terrorism threats since September 11, 2001, and are an invaluable resource to the


191 See Wyeth v. Levine, 129 S. Ct. 1187, 1200 (2009) (explaining that to be pre-empted the burden on the federal agency must “pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

192 Brief for Respondent at 51, United States v. Arizona, No. 10-16645 (9th Cir. Sep 23, 2010) (“The issue here, however, is not whether a state officer may provide assistance to federal officials in their enforcement of federal immigration laws, or engage in the type of inquiry properly based on reasonable suspicion regarding unlawful immigration status.”).
federal government. 193 However the mandatory status checks are without consideration of federal prerogatives and cooperation. 194 It notes that the incompatibility of this and similar laws with the federal scheme would create a “patchwork” of state immigration law as prohibited in cases like Lozano. 195 Thus the burden on the government is not only in the increase of requests but the self serving patchwork of state policies conflicting with federal enforcement.

As to the federal scheme Arizona points to several portions of the bill which demand adherence to the Constitution of the United States, and the federal law created by Congress. 196 When examining the burden upon LESC, in addition to the argument against the court’s interpretation of the second sentence, 197 is Arizona’s claim that there are plenty of state officials authorized under the 287(g) program that can access ICE

193 Brief for Respondent, supra note 191, at 50.

194 Brief for Respondent, supra note 191, at 50 (“The Arizona statute, by contrast, [creates] a scheme over which the federal government would have no control, and would proceed without regard to federal practice and policy and the essential nature of the cooperative relationship.”).

195 Brief for Respondent, supra note 191, at 50-51.

196 Oral Argument at 14:41, United States v. Arizona, No. 10-16645 (9th Cir. Nov. 01, 2010), available at http://www.c-spanvideo.org/program/296345-1 (explaining the statute contains the provision that says it will be construed with federal immigration law, preserving constitutional immunities, which incorporates the fourth amendment standards. Officers can go as far as the fourth amendment allows and then release them).

197 Which greatly increases the burden on legal immigrants and federal functioning if seen as requiring the immigrant status of every arrestee regardless of the circumstances, and Arizona argues statutory interpretation requires it be construed with Congressional intent and a way that makes it constitutional.
computer databases, thus not being required to contact them at all.\textsuperscript{198} Even so, while the statute mandates a determination, LESC is required to respond to all inquires under 8 U.S.C. 1373(c),\textsuperscript{199} with no discretion in the matter, and under 8 U.S.C. 1357 (g)(10)\textsuperscript{200} no provision requires an agreement between state and federal officers to aid in the apprehension of illegal aliens.\textsuperscript{201} Acting together these sections establish a system for states to communicate with Congress and federal officers. Therefore as long as they act in a constitutional manner, Arizona is acting perfectly within the powers granted to it.\textsuperscript{202}

\textit{Amici} in support of Arizona, took issue with the entire consideration of the district court claiming it ignored the constitutional mandate of separation of powers\textsuperscript{203} by choosing the intent of federal agencies over Congressional intent,\textsuperscript{204} effectively

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\item \textsuperscript{198} Brief for Petitioner at 38, United States v. Arizona, No. 10-16645 (9th Cir. Aug. 26, 2010) (“Moreover, it is not the case that Arizona’s law enforcement officers \textit{must} contact the LESC each time the officers inquire into a person’s immigration status.”).
\item \textsuperscript{199} 8 U.S.C. § 1373(c) (2006).
\item \textsuperscript{200} 8 U.S.C. § 1357(g)(10) (2006).
\item \textsuperscript{201} Brief for Petitioner at 38, United States v. Arizona, No. 10-16645 (9th Cir. Aug. 26, 2010).
\item \textsuperscript{202} Brief for Petitioner, \textit{supra} note 200, at 38.
\item \textsuperscript{203} Brief for Mountain States Legal Foundation as Amici Curiae Supporting Appellants at 3, United States v. Arizona, No. 10-16645 (9th Cir. Sept. 02, 2010) (citing Pub. Citizens v. U.S. Dept. of Justice, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring) (“Framers of our Government knew that the most precious liberties could remain secure only if they created a structure of Government based on a permanent separation of powers.”)).
\item \textsuperscript{204} American Unity Legal Defense Fund, Inc. as Amici Curiae Supporting Appellants, United States v. Arizona, No. 10-16645 (9th Cir. Sept. 01, 2010) (citing Louisiana Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 374 (1986)) (“An agency may not confer power upon itself.”)).
\end{itemize}
destroying traditional state police powers. LESC prioritizes requests having to do with national security and potential terrorism targets, which the district court heavily considered in its opinion leading to the belief that Congressional intent was never part of the holding. Since the authority of the federal agency is only given by Congress, the priorities of the agency do not bear on Congressional intent. This may have merely been a misnomer in the opinion, but it seems the court did not make clear that the purpose for looking to the federal priorities was to establish if the federal agency’s function had been impeded. While this disagreement with the court’s analysis may lead to future negative treatment, the ultimate outcome of Section 2(b), in this part of the analysis, depends on the actual effect the increase in requests will create, and whether LESC’s functioning is impeded as a result.

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205 Wyeth v. Levine, 129 S. Ct. 1187, 1194-95 (2009) (“[H]istoric police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”).

206 United States v. Arizona, 703 F. Supp. 2d 980, 995 (D. Ariz. 2010), appeal docketed, No. 10-16645 (9th Cir. argued Nov. 01, 2010).

207 Reply Brief for Petitioner at 6, United States v. Arizona, No. 10-16645 (9th Cir. Oct. 12, 2010) (“An executive agency, such as DHS, can preempt state law only by acting pursuant to Congressionally-prescribed authority.”).

208 It is however an argument put forth by the United States. Brief for Respondent at 51, United States v. Arizona, No. 10-16645 (9th Cir. Sep 23, 2010) (explaining that SB 1070 “diverts federal resources from carefully crafted priorities, such as the pursuit of criminal aliens who pose the largest threats to public safety and national security.”).

IV. AN EMERGING UNDERSTANDING OF A TRADITIONAL POLICY: THE COMPELLING REASONS FOR A SEPARATE STANDARD OF CONSTITUTIONALITY

“The interests of the States . . . ought to be made joint in every possible instance in order to cultivate the idea of our being one nation, and to multiply the instances in which the people shall look up to Congress as their head.”210 This understanding of the Constitutional structure is not limited to the specific powers of Congress, but instead is applicable to its plenary powers. This is an important scheme considering that, regardless of the district court’s holding, states including Arizona will still opt to engage in similar legislation that pushes the legal boundaries, until they have the strictest policy that is permissible by federal law. The likelihood of success in the future for provisions of this sort is great as even here it was arguably only one imprecise sentence that resulted in its invalidation. If left to this preemption analysis and not the ability to mandate full enforcement policies will remain. This is why a closer look at the principles behind the Constitution is necessary in this area, as without its use during the next decade we will see a patchwork of similar laws that won’t be constitutionally prohibited. This section will begin by discussing why the district courts preemption analysis is inadequate, then examine what sufficient arguments exist to avoid similar hostile policies.

A. The Inadequacy of Preemption: An Interpretive Inquiry of Cooperation or Opposition

The preemption holding in United States v. Arizona has a major flaw, which led to two failings in the analysis. This was the reading of the second sentence of Section 2(b) which was read against the entire policy of SB 1070, an anti illegal immigration bill with

210 THOMAS JEFFERSON, THE JEFFERSONIAN CYCLOPEDIA 601 (Funk & Wagnalls Co. 1900) (1785).
no provision based on sanctions or arrests of legal immigrants or natural born citizens. Therefore it was not read within the entire scheme of the statute. The court took no issue with the fact that the first sentence of the statute requiring mandatory checks when reasonable suspicion arises from a lawful stop. However it unnecessarily interpreted the status determinations of arrestee’s to not require reasonable suspicion at all while requiring immigration status checks on every arrestee in Arizona. The reason the district court read it this way, was because the court also considered the original draft of the statute which made this understanding plausible. While the analysis may be argued to not be totally unreasonable this would create an especially vague and technical holding as it suggests that any bill with Arizona’s current wording, in its first draft, would create an entirely different case. While an original draft of a statute may provide context for a court as to the purpose of its current form, the drafted version cannot be justified as the meaning of a statute when its current form has different wording considering “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” Under this analysis the actual burden on legal immigrants could not be adequately determined by the district court. Likewise the court may have assumed an exaggerated impediment to ICE and LESC’s function, believing the percentage of status

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212 United States v. Arizona, 703 F. Supp. 2d 980, 994 (D. Ariz. 2010), appeal docketed, No. 10-16645 (9th Cir. argued Nov. 01, 2010).


checks would be far greater than what the statute actually mandates. This choice of interpretation may have been due to a lack of actual evidence of burdens on legal immigrants at the time or the fact that it was the only way to establish “no set of circumstances” for constitutionality.

1. REASSESSING THE BURDEN ON LEGAL IMMIGRANTS AND THE LESC

In order to establish the facial preemption standard, the courts first focus should have been less on linguistic technicalities and instead on the direct effect the mandatory police procedures codified in the statute would have on legal immigrants in the state of “reasonable suspicion.” This would provide a true analysis of whether the statute itself is “harmonious” with federal policy, and whether in light of its cooperative policy it is nevertheless prohibited under De Canas because of the burden on legal immigrants.

The current argument posed for facial invalidity under this standard is the relatively benign grounds on which someone is deemed to be reasonably suspicious of being “illegal,” when considering the composition of our society, and the low probative worth of someone’s accent, skin color, or native language. However true that may be, this argument in general, cites no authority describing what specific facts are actually

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216 See generally ARIZ. REV. STAT. § 11-1051 (LexisNexis 2011).


219 Brief for The United Mexican States as Amici Curiae Supporting Appellees at 40-41, U. United States v. Arizona, No. 10-16645 (9th Cir. Sept. 30, 2010) (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)) (“[A]t this point in our nation’s history, and given the continuing changes in our ethnic and racial composition, Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required.”).
used to determine immigrant status by state officers, what the federal policy
determinations are or even what factual findings the federal government authorizes
287(g) officers to use. The argument also fails to address Supreme Court precedent
allowing police investigation into immigration and other status during lawful contact with
a suspect regardless of pretext or the holding that the reasonable suspicion standard is
generally adequate in protecting civil liberties. Nor does Section 2(b) fit under the
foreign policy analysis of Hines, where the prohibited “inquisitorial practices” were
unconstitutional because that provision included a compulsory production of papers of
any legal immigrant, at any time independent of permissible Fourth Amendment practices
by police officers. Of course there are troublesome courses of action taken against
legal and illegal immigrants, and those impermissible police practices whether by a state

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220 Even the infamous MCS police department of Arizona does not base their stops on
purely discriminatory factors such as these. See Brief for Friendly House as Amici Curiae
Supporting Appellees at 14, United States v. Arizona, No. 10-16645 (9th Cir. Sept. 30,
2010) (describing MCS policies claims that officers watch for vehicles appearing to pick
up illegal immigrants to establish probable cause for a stop).

221 Brief for Friendly House as Amici Curiae Supporting Appellees at 23, United States v.
Arizona, No. 10-16645 (9th Cir. Sept. 30, 2010) (“Federal law also requires that when
immigration agents make warrantless arrests for immigration violations, the individual
arrested is provided with procedural protections that are specifically adapted to the
federal immigration system.”).

PERFORMANCE OF 287(G) AGREEMENTS 34 (2010).

status by an INS agent without reasonable suspicion as to illegality); see also Whren v.
United States, 517 U.S. 806, 811-819 (1996) (upholding a pre-textual lawful stop as non-
violative of the Fourth Amendment regardless of the additional investigatory agenda of
the officer).


or federal official are subject to equal protection violations under their own set of circumstances.\textsuperscript{226} Since the government has already conceded the authority of these police practices, it seems the argument can hardly hope to prove there are no circumstances under which reasonable determination of immigration violations would be enforced in a constitutional manner.\textsuperscript{227}

If this rationale were ever accepted it would pose a very dim view of the police forces that span across our nation, as just because of the actions of one police force or officer, it clearly does not follow that every department subsequently adopting a similar policy would disregard the constitutional interests of state citizens. For example across only a few blocks of Brooklyn, from 2006-2010, there were an estimated 52,000 police stops.\textsuperscript{228} New York CCRB, however, reports only 7,395 complaints against officers in 2009 and 7,664 complaints filed in 2010.\textsuperscript{229} Can one really submit that of the population of over nineteen million people in New York, this exhibits a lack of concern for the rights of all citizens?\textsuperscript{230} While there are certainly arguments of strong merit against the

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  \item[\textsuperscript{227}] Brief for Respondent at 51, United States v. Arizona, No. 10-16645 (9th Cir. Sep 23, 2010).
  \item[\textsuperscript{228}] \textsc{New York City Civilian Complaint Review Board, Status Report Jan-December 2009 10 (2010)} (reporting 7,664 complaints were received in 2009 while 7,395 complaints against officers were filed in 2008). These complaints are not limited to police stops and seizures. \textit{Id.} at 12.
  \item[\textsuperscript{229}] \textit{Id.}
\end{itemize}
discriminatory practices of police forces across our country, 287(g) and federal officers alike,\textsuperscript{231} assuming that all police departments and police officers exhibit no concern for our civil liberties is preposterous. This all ultimately falls into the problem of being focused on some sets of circumstances as it surely doesn’t show that every interaction between a federal or local officer and a legal or illegal immigrant would rise to the level of an unconstitutional seizure and a negative impact on the enforcement of the federal scheme.

Thus, this unworkable analysis leaves as possibly justifiable grounds for invalidation only the impeding of the federal enforcement agencies function through the increase in status requests. The district court’s concern with federal agencies rested on \textit{Buckman Co. v. Plaintiffs’ Legal Comm.}\textsuperscript{232} which established that impeding the function of a federal agency will pre-empt the state law only if the federal agency can no longer function, therefore inhibiting the policies of Congress from being carried out.\textsuperscript{233} This analysis was also affected by the reading of the second sentence, as instead of a status determination of every arrestee it would actually be conducted only in circumstances of reasonable suspicion of illegal immigrants.\textsuperscript{234} To establish an applicable standard of the

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\item \textsuperscript{232} 531 U.S. 341 (2001).
\item \textsuperscript{233} \textit{Id.} at 351.
\item \textsuperscript{234} This section of the district court’s opinion also led to multiple separation of powers claims, calling for an invalidation of the opinion. Brief for Thomas More Law Center et al. as Amici Curiae Supporting Appellants at 2, United States v. Arizona, No. 10-16645 (9th Cir. Sept. 02, 2010) (“[T]he lower court’s preemption analysis conflates this agency position with Congressional intent.”).
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impeding nature one must explore the extent that the scheme is permissible under federal law, and then determine the actual of the impositions on the DHS agencies ICE and LESC.

It’s difficult to view Section 2(b), under any reading, in a way that it actually supplements or is incongruous with the INA. Congressional intent is actually to foster a good informational relationship with the states, and since it cannot “commandeer” states in doing so it must rely on their cooperation.\(^{235}\) When considering Congress specifically mandates LESC’s response to state, federal and local, inquires the submission of these requests is nothing more than exactly what is permitted under federal law.\(^ {236}\) All that’s left to consider is whether the suspension of the mere priorities of the agency prohibits its functioning. With that consideration there is no direct evidence that it will impair the ability of the agency to function, beyond assuming that every arrestee will instigate an investigation, as this is a practice police officers routinely make in Arizona.\(^ {237}\) To submit that a cooperative policy between the state’s and federal government is necessary, but then to posit that the scheme under which this policy is mandated prohibits the ability of the agency to function, seems to be more of a complaint of the current rigidity of the INA.

Thus the conflict preemption argument is unconvincing unless based on some extrapolated intent of Congress to prohibit state involvement, which Justice Brennan


\(^{236}\) 8 U.S.C § 1373(c) (2006).

recognized should not be assumed in immigration enforcement.\textsuperscript{238} As asked by the Ninth Circuit, would the Chief of Police be unable to mandate this policy in his department, or at least set a higher standard of communication with the LESC, regardless of codification in a state statute?\textsuperscript{239} In fact, these arguments seem to completely ignore Congressional intent, as while they must concede federal uniformity is not the objective it leaves no set of circumstances under which compliance with these provisions of the INA would be permissible. Whether Section 2(b) fosters a desired or effective immigration enforcement policy, is an entirely different question from whether or not it is preempted, and while the outcry over its vitriolic nature is understandable it should not launch courts into annulling permissible legislation. The preemptive schema in immigration needs to remain balanced between federal uniformity and a treacherous road to decentralized state power.

B. \textit{The Emerging Nation Under the Permitted Legislation: Establishing an Analysis that Prohibits Hostile Policy}

The unlikely outcome of a preempting a state’s criminal enforcement of immigration, or even barring it through an equal protection claim, has been consistently recognized as a key emerging issue. It requires a legal analysis beyond these two poles.\textsuperscript{240} The quandary exhibited by these inapplicable standards is that lawmakers and

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\textsuperscript{239} Oral Argument at 49:15, United States v. Arizona, No. 10-16645 (9th Cir. Nov. 01, 2010), available at http://www.c-spanvideo.org/program/296345-1.
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courts will either recognize the negative impact of state policies or ultimately “fail to curb unduly harsh measures and heavier sanctions that subnational governments place on noncitizens.” 241 In light of similar unduly burdensome measures there has emerged a certain level of “judicial protection” for illegal immigrants, with no political power or access to the legal system. 242 However the actual result of any protections for immigrants is more than likely piecemeal. This is why a superior resolution needs to be used to avoid a complex and forced doctrinal analysis, or an undesired prohibition of state enforcement. In order to provide such a resolution, this section will first establish arguments for why the licensing provision of Section (2)(b) may violate the dormant commerce clause, and will then breakdown the entirety of Section 2, and explain why its impermissible shift of an unreasonable burden to other states should also violate the Constitution (while adopting a rationale that will support both state and federal enforcement prerogatives).

1. THE LICENSING PROVISION’S FAVOR OF STATE CITIZENS

“[The Dormant Commerce Clause] prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” 243 The licensing provision of Section 2(b) establishes that a suspected illegal immigrant is presumed lawful if he can provide an Arizona driver license, or non-operating license (as well as tribal identification) but identification from another state

241 Stumpf, supra note 237, at 1613.

242 Stumpf, supra note 237, at 1613 (citing Graham v. Richardson) (explaining the case established that aliens are a politically disempowered group requiring judicial protection from state power).

suffices only if that state requires proof of legal presence before issuance.\textsuperscript{244} This provision is well-informed as there are state’s that don’t require legal presence before issuing identification including neighboring New Mexico and Utah as well as Washington and Maryland.\textsuperscript{245} This provision may restrict interstate movement through Arizona of out of state legal immigrants while favoring in state immigrants as well as those states licensing provisions with which Arizona agrees. If that is found to be the case, it would violate the dormant commerce clause as an impermissible state regulation of out of state citizens that prohibits the flow of interstate commerce.

As established in \textit{Kassel v. Consolidated Freightways Corp}. (“\textit{Kassel}”) not all protectionist legislation need be economic in nature, but may be based on safety and still violate the Dormant Commerce Clause.\textsuperscript{246} In \textit{Kassel} an Iowa statute prohibited the use of 65 foot trucks on its highways except in cities abutting the state borders, with which Iowa was permitted to adopt the limitations of that state, and allowing Iowa truckers to apply for a 70 foot truck license.\textsuperscript{247} The Court found the statute unconstitutional as the safety to the state was “illusory” and it came at great economic cost to out of state truck drivers who must either drive around the state or alter the internal structure of their

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\textsuperscript{244} \textsc{Ariz. Rev. Stat.} \textsect{11-1051(b)(1)-(4)} (LexisNexis 2011).
\textsuperscript{247} Id. at 664-66 (majority opinion) (“[T]he incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause.”).
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organization.\textsuperscript{248} Finally the statute favored Iowa truck drivers, and states on its border, which was seen as a substantial promotion of in-state interests.\textsuperscript{249} Also Justice Kennedy recognized in \textit{Carbone v. Clarkstown} that a state law is \textit{per se} invalid under the Commerce Clause if it discriminates in favor of local interests, unless the state can prove that it has no other means to legitimately advance that interest.\textsuperscript{250} This standard is not merely a prohibition of discrimination by intent, but discrimination by effect.\textsuperscript{251} Thus when a statute prohibits “the persons by whom the highways may be used” while allowing others to use the same highway for the same purpose, it has been struck down as a proscribed regulation of interstate commerce.\textsuperscript{252}

Should we expect businesses and truck drivers from specific states to be subject to a heightened \textit{mandatory} police inquiry just because their driver’s license is not provided in the preferred manner of the Arizona state legislature? The argument for a legitimate local interest, being advanced by no other means, is a difficult one for Arizona to make as this provision seems an attempt to hijack New Mexico’s legislative decision to provide its

\textsuperscript{248} \textit{Id.} at 673-75 (“Each of these options engenders inefficiency and added expense.”).

\textsuperscript{249} \textit{Id.} at 678 (“State cannot constitutionally promote its own parochial interests by requiring safe vehicles to detour around it.”).

\textsuperscript{250} \textit{C & A Carbone, Inc. v. Town of Clarkstown}, 511 U.S. 383, 392 (1994) (“Discrimination against interstate commerce in favor of local business or investment is \textit{per se} invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.”); \textit{see also Id.} at 389 (“It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow.”).

\textsuperscript{251} \textit{Id.} at 394 (explaining that a state regulation does not have to be an explicit attempt to regulate commerce between states but will be prohibited if “it does so nonetheless by its practical effect and design”).

\textsuperscript{252} \textit{Buck v. Kuykendall}, 267 U.S. 307, 315 (1925).
own licensing standards rather than an attempt to curb illegal immigration. This would be a challenge for Arizona unless it can provide the specific ways in which it advances the state’s ability to fight illegal immigration in the state and if a court ignores the fact that it shares a border with two of the states that have licensing provisions not sharing its prohibitory policy. The entire scheme of the statute isn’t clear on how this licensing provision actually would stop illegal immigration in the state considering if one does have a New Mexico license, and is traveling through Arizona, whether illegal or not it doesn’t follow that the licensee would be traveling through the state to establish domicile there. In fact, why would they if they already live in a state where they are licensed and established? Additionally the fact that a Washington truck driver cannot rebut reasonable suspicion that he is an immigrant and is seized from continuing to make a shipment to Texas, or a driver from New Mexico to California, while a resident of Texas can avoid the mandatory seizure seems wholly discriminatory of these states citizens. This would violate the restrictions of mobility and local market access, established by Justice Cardozo, given continual recognition and support by the Supreme Court, as well as the prohibition against states from prohibiting the movement of people and property across its borders in *Edwards v. California* by discriminating against other states, their

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254 *See, e.g., H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 532-33 (1949).*

255 *Edwards v. California, 314 U.S. 160, 167 (1941)* (“This does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders.”).

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citizens and their legal immigrants. Indeed the only response a state would have to this provision, in order to protect its own citizens, would be to adopt the exact provision Arizona has in its own licensing scheme.

The problem with the Dormant Commerce Clause analysis here is that there is no perfectly analogous case law considering that this is not a direct regulation of interstate commerce (which could still be prohibited but would be left to a court’s discretion of the effect). For example trucking companies who make shipments through Arizona may restructure the composition of their staff, or if they find that reprehensible merely avoid Arizona altogether at great cost to their businesses. In fact it is pretty clear that Arizona’s law has had a resultant effect on interstate commerce, but whether that is enough to convince a court of the disfavor of the provisions against lawful citizens in state’s like New Mexico, is not absolutely clear. That said it is extraordinarily prohibitory and burdensome on all citizens of these shrewdly selected states. In the event of what seems to be a very possible upholding of Section 2(b), however, this remains an avenue in seeking the full prohibition of at least one section of the statute. Moreover, even if not sought, it is not the only applicable analysis that could result in a prohibition of the law.

2. IF THE CITIES ARE SANCTUARIES THE STATES ARE BATTLEFIELDS: WHY STATE BURDENS SHOULD BE SHARED AND NOT DISPLACED

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256 H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 532-33 (1949) (“Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result.”).

257 Brief for Mountain States Legal Foundation as Amici Curiae Supporting Appellants, supra note 273, at 4.
"To the State governments are reserved all legislation and administration in affairs which concern their own citizens only, and to the federal government is given whatever concerns foreigners or the citizens of other States; these functions alone being made federal."\textsuperscript{258} Section 2(b) strips police officers of judgment, and demands that they enforce their immigration authority in every possible instance, which would explicitly prohibit discretionary practices, such as Tucson’s cite and release provision.\textsuperscript{259} The law leaves officers no choice in the matter, unless state officer’s wish to be subject to fines, eliminating any prioritization of enforcement against actually dangerous criminals. This is a troublesome policy, as it is clearly stricter than the 287(g) program, which the Department of Homeland Security has suggested needs a massive revamping due to lack of concern for civil liberties, compliance with ICE, and unsatisfactory training systems.\textsuperscript{260} Thus it is clear why such a level of fear has arisen due to the injurious nature of Section 2(b), especially since it has already resulted in a variety of unfavorable responses from citizens, ranging from race related violence\textsuperscript{261} to a general trepidation of victims aiding

\textsuperscript{258} THOMAS JEFFERSON, THE JEFFERSONIAN CYCLOPEDIA 328 (Funk & Wagnalls Co. 1900) (1824).

\textsuperscript{259} Brief for Mountain States Legal Foundation as Amici Curiae Supporting Appellants at 3-4, United States v. Arizona, No. 10-16645 (9th Cir. Sept. 02, 2010) (explaining that the policy allows Tucson offers discretion in making an arrest which greatly reduces detention costs and effectively prioritizes serious offenders).

\textsuperscript{260} RICHARD L. SKINNER, U.S. DEPARTMENT OF HOMELAND SECURITY, THE PERFORMANCE OF 287(G) AGREEMENTS 8-29 (2010) available at http://www.aila.org/content/default.aspx?docid=31682 (calling for a massive reform of MOA’s as the terms haven’t been complied with, states do not follow their objectives, there is no consistency in supervision, civil liberties are not consistently considered, and the training systems have not been fully effective).

\textsuperscript{261} Council of La Raza et al. as Amici Curiae Supporting Appellee’s at 56, United States v. Arizona, No. 10-16645 (9th Cir. Sept. 02, 2010) (‘‘[T]he murder of a third-generation,
police and even a forestalling the pursuit of medical or social help. This policy, and its resulting effect, is disconcerting especially considering slews of similar state policies will be following. It is the resulting nature of this policy that should tarnish Arizona with the sobriquet of a “battlefield state” as an allegory to the cities that protect immigrants being deemed “sanctuary cities.” Some may argue that the dread created by this battlefield state can be simply written off to the frenzy of an outraged media, but this is not the cause as the hostile nature of this policy is clearly evinced by the Arizona’s governor’s attempted creation of a climate of fear.

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263 Legal Momentum as Amici Curiae Supporting Appellee’s at 41-43, United States v. Arizona, No. 10-16645 (9th Cir. Sept. 30, 2010) (“[T]he law would cause significant harm to immigrant women by impeding their ability to access federally guaranteed benefits such as emergency Medicaid . . .federally qualified community health clinics, emergency shelters and transitional . . .housing, soup kitchens, treatment for mental illness or substance abuse, crisis counseling and intervention, and violence and abuse prevention.”).

264 Dana Milbank, *Headless Bodies and Other Immigration Tall Tales in Arizona*, WASH. POST (July 11, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/07/09/AR2010070902342.html (examining the claims of beheadings, increases in border violence, drug cartels, and Mexican violence against police officers and determining they are all false through FBI statistics).
Even Jefferson, a champion of state sovereignty, believed conflicts between the states, and not solely economic ones, were the concern of Congress.\textsuperscript{265} Though such a rationale is based in the Constitution itself,\textsuperscript{266} the prohibition of state protection of citizens that burden out of state citizen’s has traditionally been applied in a dormant commerce clause analysis.\textsuperscript{267} This was primarily due to a fear of state’s acting to force economic burdens on each other, resulting in a sort of economic warfare.\textsuperscript{268} It’s easy to draw a multitude of parallels between Arizona’s treatment of immigrants, specifically Mexicans, as a contaminant that must be expelled from the state and purely economic protectionist legislation.\textsuperscript{269} This is especially so when one looks to the economic boycott’s states have threatened as a result of such a policy, and the interstate commercial effects of the licensing provision.\textsuperscript{270}

However, because the commerce clause is viewed as exclusively federal with no concurrent enforcement permitted by the states, the legal profession has been leery of applying this similar understanding to a Congressional power. Yet when searching for an analysis that would prohibit policies similar to Arizona, this idea of comparing the dormant analysis to the immigration power has received some support when it forces

\textsuperscript{265} Jefferson, supra note 254, at 328.


\textsuperscript{268} See Id.


\textsuperscript{270} Supra Part IV(B)(1).
immigrants out of the state into other states, being coined the “dormant immigration power.” 271 This application is sensible, as people have been deemed articles of commerce and the restriction of their interstate movement has been prohibited Edwards v. California. 272 The resulting rationale, then, comes into play where one state regulates immigration in a way that forces aliens into a second state. 273 It is at this point in which battlefield states would be deemed to have violated their grants of power by forcing the costs of immigration into another state by enforcing a regulation without providing any voice or concern for the legal and illegal alien populace. 274 The argument posed against this analysis is that “immigrants, like citizens, will sort themselves out, settling where they are more likely to fit in and be welcomed into public institutions.” 275 While their fair treatment is of concern, this argument ignores the external cost to other states, as in 2009 ICE detained over four hundred thousand immigrants for civil violations, at a cost of 1.7 billion dollars. 276 Of course that is the federal enforcement agency, but it exemplifies the

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272 314 U.S. 160, 167 (1941); see also Mary Sarah Bilder, The Struggle Over Immigration: Indentured Servants, Slaves, and Articles of Commerce, 61 MO. L. REV. 743, 823 (1996) (“For the twentieth century, the idea of ”commerce“ that includes people as its objects has been a comfortable abstraction.”).


274 Delaney, supra note 269, at 1846.


276 Esther Lardent, In the Absence of Sweeping Policy Reform, More Private Lawyers Need to Step Forward to Preserve the Rights of Immigrants and Promote Change, NAT’L L.J. (Aug. 09, 2010),
cost to state’s that enforce immigration as with a massive influx of immigrants to their state it will create an only more burdensome detention cost. This mandatory policy also comes at great cost to the localities of Arizona, as in Tucson’s brief it explains that its cite and release policy would be struck down under the statute, and the over twenty eight thousand immigrants it released in 2009 would instead have resulted in a detention or extended seizure.\textsuperscript{277} At a cost of two hundred dollars for a day of incarceration, a mandatory detention policy could result in an increase of five million dollars for Tucson alone.\textsuperscript{278}

While there are the associated negative effects of a massive exodus from Arizona there are also resultant positive externalities that other states will benefit from. As Tucson explains, it caters to Mexican tourists that add about one billion dollars to its economy, and at least forty percent of its residents are Mexican or Latin American and by their required demonstration of lawful citizenship they will inevitably decide, as well as the business that cater to them, to visit elsewhere.\textsuperscript{279} Other states would also benefit from the strong influence that Hispanic voters currently have in the political process of Arizona.\textsuperscript{280}

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\item \textsuperscript{277} Brief for Mountain States Legal Foundation as Amici Curiae Supporting Appellants at 3-4, United States v. Arizona, No. 10-16645 (9th Cir. Sept. 02, 2010).
\item \textsuperscript{278} Brief for Mountain States Legal Foundation as Amici Curiae Supporting Appellants, \textit{supra} note 273, at 4.
\item \textsuperscript{279} Brief for Mountain States Legal Foundation as Amici Curiae Supporting Appellants, \textit{supra} note 273, at 4.
\item \textsuperscript{280} Adam Nagourney, \textit{In California, Immigration Debate Defines the G.O.P. Race for Governor}, N.Y. TIMES (June 5, 2010), http://www.nytimes.com/2010/06/05/us/05calif.html (“Hispanics are becoming
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Furthermore, one of the greatest economic benefits would come from the loss in Arizona’s education system. Here an estimated 170,000 children of immigrants learn, and a large percentage has already been pulled out of school by their parent’s fear of this hostile policy, moving to more favorable states like New Mexico. Ultimately the result could leave an estimated 749 million dollar gap in the education budget of Arizona.

These positive results to other states do add credence to the claim that the affected citizens will find a place to settle that accepts them. Ultimately the immigration competition will force states to adopt more humanitarian policies when it realizes the loss of revenue to the state. Still one would have to ignore the utterly impermissible fact that it would restrict access to the political system within Arizona. In the end it wouldn’t be the voice of the people responsible for the alteration of the legislation, but merely the economic effect of their loss. In the context of the education system, illegal immigrants who remain in Arizona would foster illiterate children due to their lack of access to this normal benefit of our society, merely because of the fear created by SB 1070, while

\footnote{Pat Kossan, \textit{Schools: Immigrant Families Leaving Arizona Because of New Immigration Law}, ARIZ. REPUBLIC (May 28, 2010 12:00AM), http://www.azcentral.com/news/articles/2010/05/28/20100528arizona-immigration-law-schools.html (describing Claudia Suriano, an undocumented immigrant in Arizona, who’s husband is searching for a job and house in New Mexico, while she packs for the move from Phoenix, explaining "[h]e tells me over in New Mexico, it is like here when we first came: There is no fear and they treat you like human beings").}

\footnote{Kossan, \textit{supra} note 278 (describing a researcher who says this may be preferred as a reduction of overcrowding in schools and a more effective teacher to student ratio).}

\footnote{Cristina M. Rodriguez, \textit{The Significance of the Local in Immigration Regulation}, 106 MICH. L. REV. 567, 639 (2008).}
waiting for the realization of economic downturn to create change. Is that the immigration policy we want to foster on a state by state basis, the restriction of proper education of immigrant minors?

[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.\(^\text{284}\)

In *Plyler v. Doe* the Court recognized that although states have a right to regulate immigration, when it comes at a cost to illegal minor’s education a heightened interest is at stake, and should be viewed with scrutiny.\(^\text{285}\) Although the statute at issue in that case was directly regulating their education, the result under this policy rationale would have the same effect.

This is not to say strict policy can’t exist, but Arizona has effectively done its best to deter immigrants, legal and illegal from being in its state. This is why the negative external effect of a forced burden, or “dormant immigration” analysis is helpful and should be adopted because it is not based on a system of uniform power or a decentralization of power to the states, but tries instead to be as malleable as possible encourage both sovereigns to support each other. States will still be allowed to enforce their own policies, being somewhat discretionary, and provide information to ICE and the LESC but should be prohibited from exercising a negative effect onto the states that


\(^{285}\) *Plyler v. Doe*, 457 U.S. 202, 228 (1982) (“While a State might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population . . . [t]here is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy . . . available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money.”).
surround it. This maintains the balance that Congress is in search of, as well as the protective police procedures the states need in order to protect the health, safety, and welfare of their citizens. Therefore it seems logical to apply this Constitutional analysis, which doesn’t permit states to force the burdens of the many on the few. Future courts should look to these resultant negative effects, and, if they exist, should require such policies to provide protection, in the form of non-discriminatory procedures or less than mandatory police practices, to avoid the otherwise uninhibited and defective policy of these battlefield states. “The Supreme Court is now called on to perform its constitutional duty and declare what the law is in this hotly contested area . . . [it] will be anxiously awaited, unquestionably timely and far reaching.” Hopefully it will be far reaching, and in line with a somewhat similar analysis, but there is no indication in precedent or otherwise, that this or any similar standard will be adopted.

We cannot let battlefield states take the lead in our national discourse, the emerging question, in lieu of an applicable legal analysis, becomes whether the country waits for a new Congressional scheme that addresses the issues posed by these policies. While ICE has its own procedures, states will ultimately be given guidance for instigating protective measures to avoid any likelihood that they will treat immigrants


288 Esther Lardent, In the Absence of Sweeping Policy Reform, More Private Lawyers Need to Step Forward to Preserve the Rights of Immigrants and Promote Change, NAT’L L.J. (Aug. 09, 2010), http://www.law.com/nlj/PubArticleNLJ.jsp?id=1202464311291&slreturn=1&hbxlogin=1 (“These immigration laws affect not just the immigrants but also their families, employers, neighbors and those with whom they do business.”).
like a thing apart, even if some localities adopt permissible policies of strict immigration enforcement.\textsuperscript{289} It also seems that in light of the negative discrimination complaints received from the 287(g) program and federal enforcement alone, that Congress may otherwise have to expressly deny the rights of states to enact such policies. It’s problematic to say the least, as strict policies like Arizona’s only harm other states by bringing a call for the inhibition of their partnership. State’s that truly act in accordance with an effective national policy will be further restricted in their legitimate goals if caustic regulations such as these bring a stronger call against permissible legislation. This would ultimately oppose the original scheme Congress had in mind as the policies will inevitably slip further into full federal uniformity. Unfortunately it may be the only actual result as the predicament posed is at the inception of SB 1070, because it is only aimed at detaining and restricting illegal immigrants from Mexico and as such was created under false pretenses of beheadings and drug cartels which inevitably led to racial violence as the direct result of an anti-Mexican sentiment.\textsuperscript{290} To avoid travelling too far to either unworkable end, we cannot wait for all citizens or non-citizens of Latin-American decent to be harmed or to choose to depart from Arizona entirely due to a fear of a strong federal government. The balance required by our nation’s policies is not a veneer for an exclusive federal scheme but instead merely a requirement of “being honest about the

\textsuperscript{289} Evan Perez, \textit{Arizona Sheriff Arpaio Gets Favorable Audit}, \textit{WALL ST. J.} (Sept. 24, 2010), http://online.wsj.com/article/SB10001424052748703384204575509700664903676.html

\textsuperscript{290} Council of La Raza et al. as Amici Curiae Supporting Appellee’s at 56, United States v. Arizona, No. 10-16645 (9th Cir. Sept. 02, 2010).
problem, and getting past the false debates that divide the country rather than bring it together.”

V. CONCLUSION

The state legislation embodied in the Support Our Law Enforcement and Safe Neighborhoods Act, has a multitude of attributable interests. States and the federal government unquestionably have an interest in providing a safe and conducive society to its citizens, and the economic consequences of illegal immigrants, some of whom make no effort to assimilate with our society should not be able to attain the privileges of a culture they seek to take advantage of. Yet the resulting policies that attempt to prohibit such advantage seekers must maintain a balance between communicating a powerful message of reprehensibility and yet evince some sympathy for those who exhibit no such voracity but only strive to integrate and add to the nation’s wealth and prosperity. This stability amid tolerance and vigorous enforcement will encourage those who seek to aid us to thrive and those who seek to exploit us to scamper.

Yet the nature of SB 1070 is only concerned with one side of such a policy, one of strict, unforgiving, and forceful implementation. Its prohibitions have, and will continue to have, an extraordinarily negative effect on citizens and states themselves. That is why a search for a separate rationale is necessary, like the Dormant Commerce Clause’s prohibition of the harmful favoring of a states own economic interests at the cost of others, or the impermissible shifting of burdens onto other states. Without the use of these doctrines, the only resolution will come from Congress congregating to foster a more

291 President Barack Obama, Address at the American University School of International Services, (July 01, 2010) (transcript available at the White House Office of the Press Secretary).
effective policy. Unfortunately a comprehensive reform policy, that has been touted for years, may seem a long way off.

The primary concern of each individual state, in the interim, should be to establish an ambition to avoid ineffective policy that does not consider the importance of a balanced immigration scheme. What is required is a policy that allows a state freedom in enforcing effective means to protect its citizens while offering flexible support to the federal government. By choosing any other route, states will find a greater push for federal uniformity evolving in the national discourse, which all would imaginably want to avoid. Without a consideration of these important policy directives our immigration system will be worse off, and the thrust for a stronger federal policy will exponentially increase by the humanitarian issues raised over the continually escalating ousting of our “shadow population” and their legal brothers between dichotomies of state policies that may eventually resemble the old American South and North.

66 is the path of a people in flight, refugees from dust and shrinking land, from the thunder . . . from the desert’s slow northward invasion, from the twisting winds that howl up out of Texas, from floods that bring no richness to the land and steal what little richness is there 292 . . . the people in flight from the terror behind – strange things happen to them, some bitterly cruel and some so beautiful that the faith is refired forever. 293


293 Id. at 122.