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January 24, 2012

Why Arizona Senate Bill 1070 Is Constitutional and Not Preempted by Federal Law

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WHY ARIZONA SENATE BILL 1070 IS CONSTITUTIONAL AND NOT PREEMPTED BY FEDERAL LAW

ABSTRACT

On April 23, 2010, Arizona Governor Janet Brewer signed into law a bill titled the “Support Our Law Enforcement and Safe Neighborhoods Act,” commonly referred to as “SB 1070.” The law was designed to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.” This law, along with a set of amendments, set off a firestorm of controversy nationwide, including street protests, economic boycotts, court challenges, and political posturing. The controversy centers around the broad authority the law gives law enforcement officials to check the immigration status of individuals suspected of being in the United States illegally. A major fear is that such broad police authority will lead to racial profiling against Hispanics and the abuse of civil liberties. Not unexpectedly, the federal government sued Arizona to block the legislation. The case is now before the United States Supreme Court, and the key issue is whether SB 1070 is preempted by federal immigration law where there is neither express nor conflict preemption, but rather a claim that SB 1070 is impliedly preempted by comprehensive federal law that occupies the field. Fortunately, the Supreme Court case of DeCanas v. Bica provides the right standard for deciding this case. Applying that standard to SB 1070 produces a clear and fair decision that the Arizona law is not preempted by federal immigration law and is a proper, legal, and constitutional exercise of the state’s police authority.
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I. INTRODUCTION

On April 23, 2010, Arizona Governor Janet Brewer signed into law a bill titled the “Support Our Law Enforcement and Safe Neighborhoods Act”.\(^1\) This law, along with a set of amendments she signed a few days later, set off a fire storm of controversy, including street protests, economic boycotts, court challenges, and political posturing.\(^2\) Commonly referred to as “SB 1070,” the law was designed to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”\(^3\) The controversy centers around the broad authority it gives law enforcement officials to check the immigration status of individuals suspected of being in the U.S. illegally and to arrest those suspected of committing certain crimes for which they could be deported.\(^4\) A major fear is that such broad police authority will lead to racial profiling against Hispanics and the abuse of civil liberties.\(^5\)

As with most controversial laws, this one quickly made its way into the court system.\(^6\) Specifically, the federal government filed suit against the state of Arizona to block it from enforcing SB 1070.\(^7\) The suit is based on several Constitutional challenges, the most important of which is that SB 1070 is preempted by federal law.\(^8\) In other words, the federal government claims that SB 1070 is illegal because it attempts to regulate immigration, which the federal government claims is an area solely and exclusively within the power of the federal government.\(^9\) Federal officials claim that Arizona, like the other states, have no authority to regulate immigration, and therefore SB 1070 oversteps Arizona state authority and illegally invades the federal government’s supreme authority in this area.\(^10\) This supreme authority is recognized under the Supremacy Clause of the U.S. Constitution; however, the extent to which it applies in this case is the issue here.\(^11\) The legal challenges to SB 1070 have made their way


\(^{3}\) Ariz. S.B. 1070.

\(^{4}\) See id; see also Harris ET AL., supra note 2 (discussing the controversies surrounding SB 1070).

\(^{5}\) See, e.g. Jonathan J. Cooper, Arizona Immigration Law Target of Protest, ASSOCIATED PRESS (Apr. 26, 2010, 8:02 AM), http://www.msnbc.msn.com/id/36768649#.Tw37XUp1M7A. This complaint comes in spite of an amendment to SB 1070 that prohibits law enforcement officials from “solely” considering race, color, or national origin in enforcing the law. See H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010).


\(^{7}\) See id.

\(^{8}\) Id. at 986.

\(^{9}\) See id.

\(^{10}\) Id.

\(^{11}\) See U.S. Const. art. VI., cl. 2.
through the federal District Court\textsuperscript{12} and the 9\textsuperscript{th} Circuit Court of Appeals\textsuperscript{13} and now sits before the U.S. Supreme Court for decision.\textsuperscript{14} The key issue before the Supreme Court is whether SB 1070 is preempted by the Federal Immigration and Nationality Act, a comprehensive set of federal statutes that control immigration.\textsuperscript{15}

This article explains why SB 1070 is not preempted by federal immigration law and is, instead, a proper exercise of state police power to effectively maintain communities and protect state interests. This includes the “[state’s] power to arrest, detain, or otherwise police their communities in manners consistent with the criminal provisions of federal immigration law.”\textsuperscript{16} The inherent authority of the state police power to enforce the criminal aspect of federal immigration law is central to these efforts.\textsuperscript{17} Since SB 1070 merely enforces federal criminal law in a manner that is consistent with and supplemental to federal law, there is no conflict and no basis for holding that Arizona police powers are preempted.

\textbf{II. SUMMARY OF THE KEY PROVISIONS OF SENATE BILL 1070}

Collectively, the provisions of SB 1070 create a very aggressive state scheme to enforce immigration laws.\textsuperscript{18} Potentially sweeping in effect, SB 1070 requires state and local law enforcement officials to facilitate the detection of unauthorized aliens in their daily enforcement activities. \textit{It} … also establishes criminal penalties under state law, in addition to those already imposed under federal law for alien smuggling … and failure to carry or complete alien registration document[s]. Further, it makes it a crime under Arizona law for an unauthorized alien to apply for or perform work in the state, either as an employee or an independent contractor.\textsuperscript{19}

The following provisions of SB 1070 are of special interest:

\begin{itemize}
  \item \textsuperscript{12} \textit{See} United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010).
  \item \textsuperscript{13} \textit{See} United States v. Arizona, 641 F.3d 339 (9th Cir. 2011).
  \item \textsuperscript{14} Arizona v. United States, 11-182, 2011 WL 3556224 (U.S. Dec. 12, 2011).
  \item \textsuperscript{15} \textit{See} 8 U.S.C. §§ 1101-1537 (2011).
  \item \textsuperscript{16} \textit{See} Nicholas D. Michaud, \textit{From 287(G) to SB 1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Immigration Enforcement}, 52 ARIZ. L. REV. 1083, 1085 (2010). Numerous courts have addressed the federal preemption issue and failed to find the requisite congressional intent. \textit{See} United States v. Vasquez-Alvarez, 176 F.3d 1294 (10th Cir. 1999); United States v. Salinas-Calderon, 728 F.2d 1298 (10th Cir. 1984); Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983), overruled on other grounds by Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999); People v. Barajas, 147 Cal. Rptr. 195, 199 (Cal. Ct. App. 1978)).
  \item \textsuperscript{17} \textit{See} Keith Cunningham-Parmeter, \textit{Forced Federalism: States as Laboratories of Immigration Reform}, 62 HASTINGS L.J. 1673, 1680 (2011); Nicholas D. Michaud, \textit{From 287(G) to SB 1070: The Decline of the Federal Immigration Partnership and the Rise of State-level Immigration Enforcement}, 52 ARIZ. L. REV. 1083, 1113 (2010).
  \item \textsuperscript{18} \textit{See} S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).
  \item \textsuperscript{19} Kate Manuel, Michael John Garcia, and Larry M. Eig, Cong. Research Serv., R41221, \textit{State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona’s SB 1070}, (June 7, 2011).
\end{itemize}
**Enforcement of Immigration Law.** Section 2, subsection 2(B) “requires officers to make a reasonable attempt, when practicable, to determine an individual’s immigration status during any stop, detention or arrest where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.”\(^{20}\) Section 2(B) also “requires that all persons who are arrested have their immigration status verified prior to release.”\(^{21}\) Importantly, police officers may not “solely” consider race, color, or national origin in enforcing this provision.\(^{22}\) Subsection 2(C) requires state officials to contact the U.S. Immigration and Customs Enforcement (ICE) or the U.S. Customs and Border Patrol (CBP) whenever an unlawfully present alien is discharged or assessed a monetary penalty after being convicted of a crime.\(^{23}\)

**Willful Failure to Complete or Carry an Alien Registration Document.** In addition to the controversial provisions cited above, several other provisions have raised objections. Section 3 of SB 1070 makes it a state crime to willfully fail to complete or carry an alien registration document, provided the alien is in violation of federal law requiring aliens to register and carry certain immigration documents.\(^{24}\)

**Human Smuggling.** Section 4 criminalizes the intentional smuggling of humans for profit or commercial purpose.\(^{25}\)

**Unlawfully Picking Up Passengers for Work.** Section 5 makes it a crime for the occupant of a vehicle that is stopped on the street to attempt to hire or pick up passengers for work at a different location if that vehicle blocks or impedes traffic.\(^{26}\) At the same time, section 5 makes it a crime for a person to enter such a vehicle.\(^{27}\) Moreover, Section 5 makes it a crime for persons unlawfully present in the country to solicit work in a public place, knowingly apply for work, or to perform work in the state.\(^{28}\)

**Unlawfully Transporting or Harboring Unlawful Aliens.** Additional provisions of section 5 make it illegal to engage in certain activities with persons unlawfully present in the state, to wit: to knowingly or recklessly, in violation of the law, transport or attempt to transport, conceal, harbor, or shield (or attempt to conceal, harbor, or shield) such persons, or to encourage or induce an alien to come to or reside in the state.\(^{29}\)

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\(^{21}\) *Id.* (citing ARIZ. REV. STAT. § 11-051(B) (2010)).

\(^{22}\) ARIZ. REV. STAT. ANN. § 11-051(B) (2010).

\(^{23}\) *Id.* § 11-1051(C).

\(^{24}\) *Id.* § 13-1509(A).

\(^{25}\) *Id.* § 13-2319 (A).

\(^{26}\) *Id.* § 13-2928(A).

\(^{27}\) *Id.* § 13-2928(B).

\(^{28}\) *Id.* § 13-2928(C).

\(^{29}\) *Id.* § 13-2929(A).
Miscellaneous. Finally, a few other provisions of SB 1070 are the subject of challenge. Section 6 authorizes a peace officer to make a warrantless arrest if the officer has probable cause to believe the person has committed any crime that makes the person deportable under federal immigration law. Sections 7, 8, and 9 of SB 1070 amend Arizona’s law and impose sanctions on those who hire unlawfully present aliens.

III. OBJECTIONS TO SB 1070

The objections and challenges to SB 1070 came early and often, and from various sectors of the United States population and the world. Among the bill’s critics is President Obama, who called the bill “misguided.” Certain foreign nations have voiced their disapproval as well, including Mexico, Ecuador, and Argentina. Civil rights groups have protested, and even some Arizona law enforcement groups expressed their disapproval. On the other hand, opinion polls consistently show substantial support for the bill among the American people.

The principle complaint from the bill’s critics center around a belief that the bill will lead to racial profiling, that Hispanic persons will be targeted for detention and arrest with a resultant violation of their civil liberties. However, the legitimacy of SB 1070 will be determined not on issues of racial profiling or civil liberties, but on the legal issue of federal preemption, that is, whether SB 1070 illegally invades the supremacy of the federal government in the area of immigration, an area that the federal government has for many years regulated through various legislative enactments.

30 Id. § 13-3883(A).
31 See id. §§ 23-212 - 23-212.01; 23-214.
33 See, e.g. Howard Fischer, Ecuador, Argentina Join Mexico in Legal Fight Against SB 1070, CAPITOL MEDIA SERVICES (July 13, 2010, 5:32 PM), http://www.eastvalleytribune.com/arizona/article_0e2b64cc-8edf-11df-b592-001cc4e002e0.html.
IV. WHAT’S AT STAKE: FEDERAL AND STATE INTERESTS

To fully appreciate the issue at hand, we start by analyzing what the stakes are for the players involved, which include (among the many possible players) the federal and state governments.39

**Federal Interests**

The federal government interest in immigration is essentially about retaining central control over admission into this country.40 Centralized federal control provides the efficiency and uniformity needed in the formal admissions and removal process.41 Without such unifying control, each state could enact its own laws controlling immigration, resulting in a patchwork of laws and procedures that would be unworkable in determining admission into the United States.42 Centralized federal control also allows consideration of international and diplomatic aspects of immigration law, and permits the federal government to mitigate the consequences of any discriminatory practices or undue influence by state and local governments.43 Without a doubt, too much state incursion into certain aspects of immigration would be inappropriate and counterproductive.44 The question is how much is too much state regulation?

**State Interests**

The states, too, have compelling interests in immigration. Unlike the federal government, states are tasked with providing expensive public services to the illegal immigrant community, including emergency health care, law enforcement assistance, and public education.45 Empirical data runs the gamut as to the economic net effect of illegal immigration on the states, but the Congressional Budget Office (CBO) has concluded that illegal immigrants actually consume more in public services than they pay in taxes.46 In addition, there is the economic and social impact that criminal activities have on state and local communities when committed by illegal immigrants.

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39 See generally Michael J. Winshie, Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism, 76 N.Y.U. L. REV. 493, 532 (2001) (discussing the roles that both the federal and state government have in immigration enforcement and concluding that, in most cases, federal power to regulate immigration is “incapable of transfer”).


41 See Cristina M. Rodríguez, The Significance of the Local in Immigration Regulation, 106 Mich. L. REV. 567, 572 (2008) (arguing that while states might have some right to control their own immigration policy, the policy should still be in line with federal guidelines).

42 See Winshie, supra note 39, at 534.

43 See Chin, supra note 40 at 1907.

44 See Rodríguez, supra note 41 at 572.

45 See Cunningham-Parmeter, supra note 17 at 1709.

aliens. The states rely on their police power to effectively maintain communities and protect state interests from such illegal activity, a power that is hamstrung if state and local authority to enforce immigration laws is interpreted too narrowly.

**Divergent Interests**

Economically speaking, the federal and state governments have divergent interests regarding the net effects of illegal immigration. A general consensus among many economists holds that the federal government endures less of a drain (or possibly gains) from illegal immigration. The federal government enjoys the addition of scores of unauthorized younger workers who underpin the retirement system by paying in an estimated $7 billion a year to Medicare and Social Security, the majority of which will go unclaimed, resulting in a “fiscal windfall” for the federal government. The receipt of additional or possibly sustaining tax proceeds without the burden of providing additional services may explain the reluctance of federal policymakers to enforce existing immigration regulations. Peter Schuck explains the inequality as a “fiscal mismatch under which most tax revenues generated by immigrants, both legal and illegal, flow to Washington . . . while almost all of the costs . . . are borne locally.” As a result, states do not share in the same fiscal bounty as the federal government and have a more pressing desire to limit or control the draining effects of the illegal community.

Under the current immigration regulatory scheme, federal policymakers have little to no incentive to enforce existing legislation or enact new legislation that would provide a more equitable division of the expenses and income of illegal immigration. In the court of public opinion, however, Americans overwhelming believe that unauthorized immigrants negatively impact the economy by paying little or no taxes and utilizing hospital and school services.

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47 See id at 8-9. (estimating that the border states of Arizona, California, New Mexico, and Texas spend a reported $108 million on criminal activities involving unauthorized individuals).

48 See id.

49 See Cunningham-Parameter, supra note 17 at 1707-09.


52 See Cunningham-Parameter, supra note 17 at 1709.

53 See id. at 1708. “Peter Schuck is a leading proponent of the view that illegal immigration impacts states more than the federal government.” Id.; see also Peter Schuck, Taking Immigration Federalism Seriously, 2007 U. CHI. LEGAL F. 57, 80 (2007); Peter H. Shuck, Law and the Study of Migration, in MIGRATION THEORY: TALKING ACROSS DISCIPLINES 197 (Caroline B. Brettell & James F. Hollifield, eds., 1st ed. 2000).

54 See Cunningham-Parameter, supra note 17 at 1709.

55 See id. at 1710.

56 See Randal C. Archibold & Megan The-Brenan, Poll Finds Serious Concern Among Americans About Immigration, N.Y. TIMES, May 4, 2010, at A15 (summarizing that roughly two-thirds of Americans hold this belief).
V. PREEMPTION – THE KEY ISSUE

What is Preemption?

Federal preemption derives from the Supremacy Clause of the U.S. Constitution, which states that federal law is the supreme “Law of the Land.”57 “States cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.”58 State and local laws cannot be enacted in an effort to supersede federal laws,59 nor can they have the intent or the effect of overriding federal laws.60 In the case of SB 1070, the issue is whether this state immigration law is preempted by the Federal Immigration and Nationality Act, a comprehensive set of federal statutes that control immigration.61

How Preemption Works

An act of Congress may preempt state or local action in a given area [e.g. immigration] in any one of three ways: (1) the statute expressly states preemptive intent (express preemption); (2) a court concludes that Congress intended to occupy the regulatory field, thereby implicitly precluding state or local action in that area (field preemption); or (3) state or local action directly conflicts with or otherwise frustrates the purpose of the federal scheme (conflict preemption).62

In the case of SB 1070, the Federal Immigration & Naturalization Act (INA) does not expressly state preemptive intent, so any claims of preemption must be based on field preemption or conflict preemption.63

What the Courts Have Said

The Supreme Court has conclusively stated that the “[p]ower to regulate immigration is unquestionably exclusively a federal power.”64 However, the Court “has never held that every

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57 See U.S. Const. art. VI., cl. 2.
64 DeCanas, 424 U.S. at 354.
state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power ....”65 States can and have promulgated laws in the area of immigration without being pre-empted by federal immigration regulation.66 One such example is the Legal Arizona Workers Act (LAWA), an Arizona statute requiring employers to use the federal E-Verify program to confirm that all new hires are legally employable in the United States or face harsh penalties for non-compliance.67 Controversial and groundbreaking, this Arizona state law has withstood multiple pre-emption challenges.68 As another example, “[i]n the 1976 case of DeCanas v. Bica, the Court held that state regulation of matters within their jurisdictions that were only tangentially related to immigration would ‘absent congressional action [...] not be an invalid state incursion on federal power.’ The Court further indicated that field preemption claims against state action that did not conflict with federal law could only be justified when the ‘complete ouster of state power ... was the clear and manifest purpose of Congress.’”69

Importantly, the Supreme Court has stated that the regulation of immigration involves “a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”70 This defining language can be used as a guidepost for determining the limit to which states or local statutes may regulate immigration without pre-empting federal law.71

Conflicts and Uncertainty in the Law of Preemption

“The power to set rules for which aliens may enter and remain in the United States is undoubtedly federal, and the breadth and detail of regulation Congress has established in the INA precludes substantive state regulation concerning which noncitizens may enter or remain.”72 (emphasis added). However, beyond this broad legal principle, the picture is less certain, leaving states and localities uncertain as to the extent of their immigration regulation and enforcement powers.73 We know that not all state regulation of immigration is pre-empted by federal law, but

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65 Id. at 355.
66 See Michaud, supra note 16 at 1090-91.
68 See e.g., Arizona Contractors Ass’n v. Candelaria, 534 F. Supp. 2d 1036 (D. Ariz. 2008); Chicanos Por La Causa v. Napolitano, 558 F.3d 856 (9th Cir. 2009), cert. granted, 130 S.Ct. 3498 (2010).
70 DeCanas v. Bica, 424 U.S. 351, 354 (1976) (emphasis added); see Michaud, supra note 16 at 1088.
71 See Michaud, supra note 16 at 1088; see also Equal Access to Education v. Merten, 305 F. Supp. 2d 585, 601-602 (E.D. Va. 2004) (explaining the first of the three preemption tests in DeCanas v. Bica as: whether the state’s policies “simply adopt federal standards, in which case they are not invalid under the Supremacy Clause, or instead create and apply state standards to assess the immigration status of applicants, in which case the policies may run afoot of the Supremacy Clause”).
72 See Manuel ET AL., supra note 19 at 8.
73 See Chin, supra note 40 at 1862.
discerning and distilling when preemption does and does not come into play requires a fine and refined analysis of key statutes and cases. 74

VI. SETTING THE RIGHT LEGAL STANDARD FOR PREEMPTION

A review of immigration regulation reveals a rich history of laws favoring a mix of federal and local control. In the past, partnerships between local and federal agencies authorized local law enforcement personnel to investigate and detain persons suspected of violating selected provisions of federal immigration law, assisting in their transfer to ICE facilities and commencement of removal proceedings. 75 Indeed, INA section 287(g) expressly authorizes cooperative agreements between the federal government and state and local officials in enforcing federal immigration regulations. 76 At the same time, there is no denying the different interests at stake and the concomitant friction caused by these competing interests. 77

Arguably, the 1996 Illegal Immigration and Immigrant Responsibility Act (IIRIRA) is at the forefront of the friction between federal and state governments. 78 IIRIRA represented a kind of federal policy shift, spearheading an effort to standardize immigration enforcement by focusing efforts upon priority aliens, thereby cultivating an uncooperative environment that compels local governments to take some immigration enforcement into their own hands. 79 Rep. Lamar Smith, co-author of the IIRIRA, had a hand in legislation that created the cooperative 287(g) program, enabling federal, state and local officials to work together in immigration enforcement. 80 Smith contends that the 287(g) program “was created to let state and local law-enforcement officials help enforce all immigration laws, not a select few. It only makes sense to remove illegal immigrants from the streets before they commit more serious crimes.” 81

Hence, we come to the crossroads that is the central issues here. Given (1) the legitimacy of both federal and state interests in immigration enforcement; (2) a history of cooperative enforcement efforts in the area; (3) certain current legislation (INA 287(g)) enabling cooperation; and (4) federal court opinions supporting some state and local involvement in immigration

74 See e.g., DeCanas v. Bica, 424 U.S. 351 (1976); Arizona Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036 (D. Ariz. 2008); Chicanos Por La Causa v. Napolitano, 558 F.3d 856 (9th Cir. 2009), cert. granted, 130 S.Ct. 3498 (2010).

75 See Michaud, supra note 16 at 1085.

76 8 U.S.C. § 1357(g).

77 See supra Part IV.


79 See Michaud, supra note 16 at 1085.

80 8 USC § 1357(g). This provision allows the federal government to enter into agreements with state and local governments to assist in carrying out immigration functions such as investigation, apprehension, detention, and transportation of aliens.

enforcement.\textsuperscript{82} what exactly should the standard be for determining when state immigration legislation is preempted by federal law? Obviously, the answer calls for a formula that balances the various interests while acknowledging and respecting the federal government’s overarching supremacy and control, but also keeping in mind the stark contrasts in the economic benefits derived from the influx of illegal immigrants, with the states the least able to control their position due to federal mandates to provide basic services to the ever-increasing illegal immigrant community.\textsuperscript{83}

The best place to begin in determining this issue is with the obvious. State and local action is clearly preempted where it is expressly prohibited by federal legislation (express preemption) or where it directly conflicts with or otherwise frustrates the purpose of the federal scheme (conflict preemption).\textsuperscript{84} This leaves those situations, like the present one, where there is neither express preemption nor conflict preemption, but rather where federal legislation substantially exists but is not exclusive.\textsuperscript{85}

Fortunately, we do not have to look very far for the right formula in determining when preemption exists in this area.\textsuperscript{86} Indeed, the Supreme Court has already issued the proper guidance in the case of \textit{DeCanas v. Bica}, where it stated that “the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain.”\textsuperscript{87} In short, there can be no federal preemption unless and until state or local officials act in some way that formally determines who may be admitted and who may remain in the country or the conditions thereof.\textsuperscript{88} State and local regulations that fall into this category should be presumed to be preempted by federal law.\textsuperscript{89} However, the federal plenary power would be limited to the \textit{DeCanas} definition of immigration regulation, which opens up areas for the state to utilize state employment regulations and its traditional police power.\textsuperscript{90} In this way, state and local governments would bear the direct consequences (benefits and/or costs) of the legislation they enact.\textsuperscript{91} If a state’s immigration laws drive businesses out of state or reduce budget deficiencies related to illegal immigration, the states should be afforded

\textsuperscript{82} See e.g., DeCanas v. Bica, 424 U.S. 351; Arizona Contractors Ass’n v. Candelaria, 534 F. Supp. 2d 1036 (D. Ariz. 2008); Chicanos Por La Causa v. Napolitano, 558 F.3d 856 (9th Cir. 2009), cert. granted, 130 S.Ct. 3498 (2010).

\textsuperscript{83} See Swati Agrawal, Trusts Betrayed: The Absent Federal Partner in Immigration Policy, 33 SAN DIEGO L. REV. 755, 759 (arguing that, “the federal government appears to have adopted an agenda to shift the risks and costs of illegal immigration to the states”).


\textsuperscript{86} See De Canas, 424 U.S. at 355 (1976).

\textsuperscript{87} Id. (emphasis added).

\textsuperscript{88} See Chin, supra note 40 at 1907.

\textsuperscript{89} See id.

\textsuperscript{90} See id.

\textsuperscript{91} See Cunningham-Parmeter, supra note 17 at 1711.
the right to test the effectiveness of those state immigration reforms. Arizona, as a border state, is frequently in the forefront of immigration issues, concerns, and activism. S.B. 1070 attempts to balance the huge fiscal drain on the state economy and resources in the face of the federal government’s self-serving interest of non-enforcement.

For sure, states do not act in a vacuum when it comes to immigration. By enacting its own immigration legislation, a state like Arizona can adversely affect the economy of other states. For example, in response to SB 1070, illegal immigrants may flock to more favorable jurisdictions, thereby short-cutting the purposes of immigration uniformity. Still, states should have the authority to act in their own best interests on issues tangential to the crux of federal immigration authority but critical to the state’s welfare. By limiting federal preemption authority to matters concerning the determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain, states can still act for their own benefit and preservation with regard to tangential matters. To define exclusive federal immigration authority more broadly would render states powerless to exercise traditional police powers against persons illegally in the state, even as the states are required by federal law to spend precious and limited resources benefiting and policing such illegal persons. Such a broad interpretation of preemption in the area would be both unfair and illogical.

VII. WHY SB 1070 IS NOT PREEMPTED BY FEDERAL IMMIGRATION LAW

Application of DeCanas Preemption Doctrine to SB 1070

As stated earlier, immigration is not an area of either express preemption or conflict preemption. There is no express federal preemption because Congress has not expressly declared immigration an area of exclusive federal authority. To the contrary, Congress enacted INA 287(g), which specifically allows the federal government to make agreements with state and local governments to enforce federal immigration laws. Moreover, SB 1070 is not preempted based on a conflict with federal law as its drafters were careful to make it consistent with and supplemental to the INA. The Arizona law does not create its own immigration regulation or

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92 See id.
93 See Michaud, supra note 16 at 1091-93.
94 See Chin, supra note 40 at 1907.
95 See Cunningham-Parmeter, supra note 17 at 1714.
96 See id.
98 See supra note 62-63 and accompanying text.
100 Id.
scheme, but merely finds a “compelling interest” in cooperating to achieve the enforcement of the federal immigration laws within Arizona.  

This means the only plausible legal argument for claiming federal preemption of SB 1070 is on the grounds of field preemption, i.e., that through the enactment of and amendments to the INA, Congress intended to occupy the regulatory field, thereby implicitly precluding state or local action in the area.  

This would seem a stretch given a history of cooperative enforcement between federal and state officials and the explicit power given states under INA 287(g). On the other hand, there is no denying that the “[p]ower to regulate immigration is unquestionably exclusively a federal power.” However, the Court “has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power. . . .” States can and have promulgated laws in the area of immigration without being preempted by federal immigration regulation. Drawing the line between what is and is not preempted is the key, and that is where DeCanas comes to the rescue.

Under the DeCanas formula, state immigration regulation would be preempted only to the extent that it determines who should or should not be admitted into the country and the conditions under which a legal entrant may remain. SB 1070 does not concern entry or exit from the United States or the conditions under which legal entrants may remain. Accordingly, applying the DeCanas standard to Arizona SB 1070, it should not be preempted and would be a proper and constitutional exercise of the traditional police power of the state. This DeCanas formula makes both legal and practical sense, providing a useful formula to determine issues in this area, and enabling a fairer balancing of the competing interests of the federal and state governments. Importantly, should the federal government disagree with this formula, it can, through Congress, make clear its intent by passing legislation to expressly preempt the field. Until then, any ambiguity regarding this issue should properly be weighed against the federal government, given its power to make its intent clear through Congressional enactment.

VIII. CONCLUSION

107 See Michaud, supra note 16 at 1090-91.
108 See DeCanas, 424 U.S. at 354-55.
109 See id.
111 See DeCanas, 424 U.S. at 354-55.
112 See id.
Facing the critical need to address the economic and social consequences of the burgeoning illegal immigrant population in the state, Arizona passed the “Support Our Law Enforcement and Safe Neighborhoods Act,” commonly known as SB 1070. The law was established as a means to aggressively enforce existing federal immigration regulation by, among other things, identifying, detaining, and turning over to federal authorities those aliens unlawfully present in the state. In the opening paragraph of SB 1070, Arizona acknowledges the federal interest in controlling immigration through its federal regulation scheme. At the same time, Arizona sought to balance the federal interest with its own compelling interests in managing the problems of a large, illegal, alien population. Not unexpectedly, Arizona was sued in federal court to block the legislation on the grounds that it unconstitutionally preempted federal immigration law.

The key issue before the Supreme Court is whether SB 1070 is preempted by federal law under circumstances where there is neither express preemption nor conflict preemption, but rather a claim that the law is preempted because federal regulation occupied the field to such an extent that it is impliedly preempted. The problem here is that there is no clear standard to apply in such cases. Fortunately, the Supreme Court case of DeCanas v. Bica provides the right standard for deciding such cases based on a fair balancing of the interests at stake. DeCanas holds that “the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain.” In applying the holding of DeCanas to SB 1070, it produces a clear and fair decision that the Arizona law does not control who enters or exits the country nor the conditions under which legal entrants may remain. Accordingly, SB 1070 is constitutional and not preempted by federal immigration law.

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114 See id.


116 See supra Part II.

117 See supra Part V.


119 See id.

120 See supra Part VII.