August 2, 2013

The Localization of Federal Immigration Law -- A "Show Me Your Papers" Paper

J. Gabriel Castro, Cumberland School of Law

Available at: https://works.bepress.com/jgabriel_castro/1/
The Localization of Federal Immigration Law
A “Show-me-Your-Papers” Paper
J. Gabriel Castro
“La justicia, la igualdad del mérito, el trato respetuoso del hombre, la igualdad plena del derecho: eso es la revolución.”

-Jose Marti

I. Introduction

As one of the most polarizing and controversial political issues, immigration control and reform has plagued American politics for the last half-century. With the rapid growth in the number of undocumented immigrants arriving at the turn of the millennia, the controversy was brought to the center of the public’s attention throughout the last decade.¹ The arguments for and against immigration control differ in many ways and apply different forms of reasoning.

The immigration debate took center stage in April of 2010 when Governor Jan Brewer of Arizona signed into law the Support our Law Enforcement and Safe Neighborhood act, commonly known as SB 1070.² The Arizona legislature passed the act in order to regulate and control immigration within the state’s borders. Proponents and opponents agree that the law was the “broadest and strictest immigration measure in generations.”³ SB 1070 gives broad discretion to state officers to enforce immigration laws. The law makes it illegal to transport unauthorized migrants and makes it a crime for unauthorized migrants to work within the state.⁴ SB 1070 also gives state officials the authority to arrest any person unlawfully present in the state.⁵ The most controversial provision of the Act, provision 2(b) the so-called “show-me-your-papers” provision required all state officers to demand the immigration papers of anyone the officers

---

¹ Stephen Legomsky & Christina Rodríguez, Immigration and Refugee Law and Policy 23 (5th ed. 2009).
³ Id.
⁵ Id.
reasonably suspect of being an unauthorized migrant.\textsuperscript{6} Although it is common in other countries for government officials to demand identification papers, SB 1070 represents the first time that a state has required such law enforcement.\textsuperscript{7} This type of intrusive law enforcement is unfamiliar to American society and bears a resemblance to the regulations of a police state. It was this implication that concerned so many and created the bulk of the controversy.

Governor Brewer perceived the law as giving the police the power necessary for any border state to protect its citizens. She claimed the law “represents another tool for our state to use as we work to solve a crisis we did not create and the federal government has refused to fix.”\textsuperscript{8} However, many were not as optimistic about SB 1070 as Governor Brewer.

The law caused great controversy across the country, leading thousands to protest and many politicians to speak out against the law. President Obama criticized the law in a speech the day it was signed. He stated that the law threatened “to undermine basic notions of fairness that we cherish as Americans, as well as the trust between police and our communities that is so crucial to keeping us safe.”\textsuperscript{9} Critics argued a number of reasons why the law was ill advised. Forbes magazine published an article arguing that the law hurts the labor market, especially in agriculture and reduces consumer spending in the state.\textsuperscript{10} In a congressional hearing on SB 1070 Arizona Senator Dennis Doncini argued the law had an ulterior motive. “SB 1070 targets those with brown skin. And in

\textsuperscript{6} Ariz. Rev. Stat. Ann. § 11-1051(B) (West 2012)).
\textsuperscript{8} \textit{Id}.
\textsuperscript{9} \textit{Id}.
\textsuperscript{10} Erik Kain, \textit{Why Arizona’s Controversial Immigration Law is Bad for Business}, FORBES, April 27, 2012.
my state, those are my neighbors, my friends…Whenever you mix politics and law enforcement, you create a toxic environment, and that is what’s happened.”¹¹

Kris Kobach, a conservative immigration law scholar, authored the act. In order to avoid constitutional concerns, Kobach wrote the act in accordance with his mirror-image theory¹². That is, the act created similar or identical immigration laws that the federal government has already passed.¹³ This would allow state officers to enforce immigration law under the authority of the state of Arizona, instead of enforcing federal immigration law through cooperation with federal authorities.¹⁴

The goal of Kobach’s law is to incentivize unauthorized migrants to self-deport.¹⁵ Kobach argues that the current enforcement by federal authorities lacks a legitimate threat that would concern unauthorized migrants.¹⁶ The limited resources have created “no credible threat of enforcement against most illegal aliens…[thus, the violators] know that the probability of actually encountering federal immigration enforcement officers is very low.”¹⁷ Greater participation by state enforcement agencies would create a legitimate threat to unauthorized migrants living within the state. This theory was central to SB 1070 and Kobach used the same theory and constitutional principles in authoring similar legislation for Alabama, Indiana, Georgia, Missouri and Nebraska.¹⁸

Despite the careful composition by Kobach, the constitutional challenge of the law was inevitable. The challenge came to the Supreme Court in Arizona v. United

---

¹¹ Id.
¹³ Id.
¹⁴ Id.
¹⁶ Id.
¹⁷ Id.
¹⁸ Suzy Khium, Kris Kobach, Nativist Son, MOTHER JONES, March/April 2012.
The Court struck down most of the law, but narrowly upheld the “show-me-your-papers” provision. The Court’s decision left many unanswered questions as to the future of “show-me-your-papers” and the similar legislation in other states.

This paper will discuss the policy concerns behind state enforcement of federal immigration law, the substance of these laws, and their future following the Supreme Court’s decision in *United States v. Arizona*. It will also cover what needs to be done for the laws to be repudiated or applied more successfully. Part II will deal with the historical development behind the Supreme Court’s treatment of authority over immigration control and regulation. Part III discusses the reasoning behind the outcome of the case determining the validity of SB 1070, *Arizona v. United States*. Finally, part IV will look to the future of “show-me-your-papers” and the possible avenues that opponents of the law may try to take to end the enforcement of the law.

III. Preemption and Immigration Law

The trend in the Supreme Court remained to defer to the “plenary power” of Congress to regulate immigration for nearly 80 years. However, in the Mid-Twentieth Century the Court would begin to examine immigration cases on preemption grounds.

The most important developments in immigration preemption law leading up to the

---

*See Chae Chan Ping v. United States* (The Chinese Exclusion Case) 130 U.S. 581, 606 (1889) (“to preserve the independence and give security against a foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated….The exercise of exclusion of foreigners…are incapable of transfer to any other parties...Nor can their exercise be hampered.”), *Ekiu v. United States* 142 U.S. 651, 659 (1892) (it is an accepted maxim in international law, that every sovereign nation has the power, as an inherent in its sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”), and *Fong Yue Ting v. United States* 149 U.S. 698, 707 (1893) (differing to Congress on Due Process determinations dealing with immigrants since “the right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country”).
passage of SB 1070 deal with two Supreme Court cases: *Hines v. Davidowitz*\(^{21}\) and *DeCanas v. Bica*.\(^{22}\) In *Hines*, the Court looked at a Pennsylvania statute that regulated the registration of aliens within the borders of the Commonwealth.\(^{23}\) The act required aliens to register with the Pennsylvania Department of Labor and show the card to any police officer that demanded to see it.\(^{24}\) Shortly after the law was passed the United States passed a federal alien registration act, which provided for many of the same regulations.\(^{25}\) The Court rejected Equal Protection and civil rights violation arguments.\(^{26}\) The majority of the discussion involved the preemption challenge to the statute. Writing for the Court, Justice Black found “that the power to restrict, limit, regulate and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but whatever power a state may have is subordinate to supreme national law,” Black wrote.\(^{27}\) The Court held that the Pennsylvania registration act conflicted with the federal act and was thus preempted.\(^{28}\) “Having the constitutional authority so to do, [Congress] has provided a standard for alien registration in a single integrated and all-embracing system.”\(^{29}\) The Court in *Hines* applied field preemption in determining the Pennsylvania law was unconstitutional. This case marked the first time the Court recognized state authority to control immigration absent federal legislation. However, it was understood for the next 40 years that the immigration acts passed by Congress were

\(^{21}\) 312 U.S. 52 (1941)
\(^{22}\) 424 U.S. 351 (1976).
\(^{23}\) *Hines*, 312 U.S. at 59.
\(^{24}\) *Id.*
\(^{25}\) *Id.* at 60.
\(^{26}\) *Id.* at 61.
\(^{27}\) *Id.* at 68.
\(^{28}\) *Hines*, 312 U.S. at 73-74.
\(^{29}\) *Id.*
comprehensive and all entailing and had left no room for state legislation in the area.

This theory changed after *De Canas*.

The Court in *De Canas* upheld a California statute that provided “[n]o employer shall knowingly employ and alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.”

The Court agreed that the regulation of immigration was “exclusively a federal power” but held that not every state law that affects aliens is per se preempted. The Court ruled that this statute was well within the “broad authority [states posses] under their police powers to regulate the employment relationship to protect workers.” Thus the Court held that the law was constitutional, absent a conflicting federal law. The decision in *De Canas* established that there was some room for state legislation in certain areas of immigration law where Congress had not comprehensively regulated. *DeCanas* created the basis for the “mirror image” theory. The theory provided that states could pass immigration laws identical to federal laws and thus enforce the laws under state police power. Identical laws would not be preempted as identical laws could not “conflict” and only complement the Federal laws already in place. This theory was central to SB 1070 and the other state immigration bills. However, Kobach would find that only some parts of their legislation would be able to escape preemption. These issues would be decided by the Supreme Court in *Arizona v. U.S.*

---

30 *De Canas*, 424 U.S at 352.
31 *Id.* at 355.
32 *Id.* at 357.
34 *Id.*
35 *Id.*
36 *Id.*
IV. *Arizona v. United States*

In June of 2012 almost two years after the passing of SB 1070 The Supreme Court finally heard the constitutionality of four provisions of the act. In *Arizona v. U.S.*, the Court looked to sections 2(b), 3, 5(c), and 6. The Court found sections 3, 5(c), and 6 preempted, but upheld section 2(b) as constitutional.

The Court began its discussion by reemphasizing the supremacy of the Federal government on the subject of immigration control; however, the Court noted the importance of the interest to the state. Especially since the state of Arizona is situated on the border between the United States and Mexico. The result led Arizona to bear a disproportionate share of the burden created by the current immigration system. One example the Court used of the burden on Arizona was a road sign on a highway outside of the city of Phoenix that read, “DANGER—PUBLIC WARNING—TRAVEL NOT RECOMMENDED/Active Drug and Human Smuggling Area/Visitors May Encounter Armed Criminals and Smuggling Vehicles Traveling at High Rates of Speed.” Taking this into account the Court then began its discussion of the various challenged provisions of the act.

The Court first looked to section 3 of SB 1070. Section 3 makes illegal the “willful failure to complete or carry an alien registration document in violation of 8 United State Code section 1304(e) or 1306(a).” The Court cited to *Hines*, noting that the registration scheme of the Federal government, although different, is even more

---

37 *Arizona*, 132 S.Ct. at 2499.
38 *Id.*
39 *Id.* at 2499-2500.
40 *Id.* at 2500.
41 *Arizona*, 132 S.Ct. at 2500.
42 *Id.*
43 *Id.* at 2501.
comprehensive that the scheme was at the time *Hines* was decided.\(^{45}\) Thus the Court decided that legislation passed by Congress continued to occupy the field of alien registration, and “even complimentary state regulations are impermissible.”\(^{46}\) “Field preemption reflects a congressional decision to foreclose any state regulations in the area, even if it is parallel to federal standards.”\(^{47}\) The Court found, therefore, that section 3 intruded upon the field of alien registration and was thus preempted.

The Court then looked to section 5(c),\(^{48}\) which, unlike section 3, did not replicate a federal law, but instead enacted “a state criminal prohibition where no federal counterpart exists.”\(^{49}\) The provision made it a misdemeanor for “an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor.”\(^{50}\) The Court, looking to the reasoning in *De Canas*, noted, “where there was no comprehensive federal program regulating the employment of unauthorized aliens… a State had authority to pass its own laws on the subject.”\(^{51}\) However, the Court distinguished *De Canas*, since Congress had enacted the IRCA after that case was decided.\(^{52}\) IRCA make it “illegal for employers to knowingly hire, recruit, refer or continue to employ unauthorized workers.”\(^{53}\) The Court noted that Congress enacted laws punishing only the employers and not the employees.\(^{54}\) The Court inferred from the omission that Congress had intended not to punish the employees.\(^{55}\) The

\(^{45}\) *Arizona*, 132 S.Ct. at 2502.

\(^{46}\) *Id.*

\(^{47}\) *Id.*


\(^{49}\) *Arizona*, 132 S.Ct. at 2503.


\(^{51}\) *Arizona*, 132 S.Ct. at 2503 (quoting *De Canas*, 424 U.S. at 356.)

\(^{52}\) *Id.* at 2504.

\(^{53}\) *Id.* (citing 8 U.S.C. §§ 1324(a)(1)(1), (a)(2)).

\(^{54}\) *Id.*

\(^{55}\) *Id.*
The legislative history confirmed congressional intent on the subject.\textsuperscript{56} The Court then looked to section 5(c) as a direct contradiction that stood as an obstacle to congressional intent and thus was preempted.\textsuperscript{57}

The Court then looked to section 6, which grants that a state officer, “without a warrant, may arrest a person if the officer has probable cause to believe...[the person has committed any public offense that makes [him] removable from the United States.”\textsuperscript{58} The Court first mentioned that it has never been a crime for a removable alien to remain present in the United States.\textsuperscript{59} Congress has made removal a civil, not criminal, matter.\textsuperscript{60} The Court emphasized that Congress has given great discretion to the Attorney General over removal priorities.\textsuperscript{61} Only in certain infrequent occasions is arrest appropriate in removal proceedings and in these occasions only federal officers are authorized to make such arrests.\textsuperscript{62} Thus, “Section 6 attempts to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers.”\textsuperscript{63} The provision would allow for state officers to look to their own discretion in determining which aliens to remove, therefore undermining the discretion Congress has given to the Attorney General to determine priorities for enforcement of immigration control.\textsuperscript{64} The Court found, therefore, that section 6 created an obstacle to Congressional intent and was thus preempted by Federal law.\textsuperscript{65}

\textsuperscript{56} Arizona, 132 S.Ct. at 2504.
\textsuperscript{57} Id. at 2505.
\textsuperscript{60} Arizona, 132 S.Ct. at 2505.
\textsuperscript{61} Id. at 2506.
\textsuperscript{62} Id. at 2505-2506.
\textsuperscript{63} Id. at 2506.
\textsuperscript{64} Id.
\textsuperscript{65} Arizona, 132 S.Ct. at 2507.
The Court then ruled on the final provision, section 2(b). Section 2(b), the “show-me-your-papers” provision, mandates every state officer “to make a ‘reasonable attempt…to determine the immigration status’ of any person they stop, detain, or arrest on some other legitimate basis if ‘reasonable suspicion exist that the person is an alien and is unlawfully present in the United States.’” There are a few important limitations to the authority of state officers under this provision. First, there is a presumption that any detainee presenting a valid Arizona driver’s license is not unlawfully present. State officers are also instructed not to “consider race, color or national origin…except to the extent permitted by the United States Constitution.” The Court examined two issues within this provision: First the “mandatory nature of the status checks;” Second, the “possibility of prolonged detention while the checks are being performed.”

The United States argued that the mandatory status checks would interfere with the federal immigration priorities. State officers would not have to consider federal discretion when making status checks. The Court rejected this argument. The Court looked to congressional statutes that required federal authorities to answer state request for immigrant status as evidence of Congress’s intent for state officers to employ these types of checks.

---

66 Id.
67 Id. (quoting Ariz. Rev. Stat. Ann. § 11-1051(B) (West 2012)).
69 Id.
70 Arizona, 132 S.Ct. at 2508 (quoting Rev. Stat. Ann. § 11-1051(B) (West 2012)).
71 Id.
72 Id. The provision “making status verification mandatory interferes with the federal immigration scheme….not allowing state officers to consider federal enforcement priorities in deciding whether to contact ICE about someone they have detained.” Id.
73 Id.
The law creates the possibility that state officers could prolong certain stops for no reason other than to check the status of individuals; this creates a problem under the Fourth Amendment. The Court, however, noted many ways the provision could be interpreted to be constitutional. The Court predicted that state courts could “conclude that, unless the person continues to be suspected of some crime for which he may be detained by state officers, it would not be reasonable to prolong the stop for the immigration inquiry.” Thus, the possible interpretation would require state officers to release detainees before the results of the status check have been returned. The Court also noted that stop prolongment would unlikely be a problem when the individual is arrested or otherwise detained overnight for another crime, as it would be unlikely the status check would not be returned before the individual would be released. The Court then reemphasized that the ruling is limited and the final constitutionality of the case would be determinative of the interpretation of the law by the state courts. “This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.”

In a dissenting opinion, Justice Scalia argued that Arizona has the authority inherent in its sovereignty “to exclude persons from its territory,” and that the Constitution was not intended to limit this authority. Each provision of SB 1070 was within the authority of the state and should not have been preempted. Scalia then argued that the States would not have ratified the Constitution had it contained the

---

75 Arizona, S.C.t at 2509.
76 Id.
77 Id.
78 Id. The Court here is directing state courts how to interpret the law in order for it to be upheld.
79 Id.
80 Arizona, 132 S.Ct. at 2510.
81 Id. at 2511. (Scalia, J dissenting).
82 Id. at 2511-2515 (Scalia, J. dissenting).
Court’s holding. Whether this would be true about the original intention of the founders, Scalia’s dissent ignores a hundred and fifty years of immigration precedent.

The Court in Arizona v. U.S., found that federal law preempted three of the four provisions and only upheld section 2(b) on a very narrow reading of the provision. Overall, the Court made a “strong re-statement of federal primacy in the regulation of immigration.” However, the ruling left many questions open upon the enactment of section 2(b) and created opportunities for even more legislation granting local officers authority to enforce federal immigration law.

III. The Future of “Show-me-Your-Papers”

The Supreme Court expressly left open the possibility of future constitutional challenges to section 2(b) of SB 1070 and similar provisions of other state’s immigration laws. The future of the provision will be determined on the implementation of the law by state officers and the interpretation of the law by state courts. Future legal challenges to the law may be based on violations to the Fourteenth and Fourth Amendments, as well as other possible preemption challenges. Even without success in the courtroom, opponents of the law may find other venues to end the implementation of the law.

A. Equal Protection Challenges

---

83 Id. at 2512. (Scalia, J. dissenting).
84 See Jennifer M. Chacon, Arizona’s S.B. 1070: Who Won, Why and What Now?, LexisNexis Emerging Issues Analysis, 2012 Emerging Issues 6515 (July 2012) (stating “Scalia..appeared to cast aside the last 150 years of constitutional developments in immigration law, arguing that each state has the sovereign power to exclude noncitizens from its borders.”).
85 Id.
86 Arizona, 132 S.Ct. at 2510. “This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.” Id.
87 Id.
Some opponents of the “Show-me-your-papers” law have made an argument that such a law violates the Equal Protection Clause of the Constitution. The argument provides that the law discriminates against individuals based on certain classifications. But not all classifications are necessarily the type the Fourteenth Amendment was designed to protect. Equal protection law applies tougher scrutiny to classifications it deems are “suspect.” Opponents of the law will have two classifications to use to attempt this argument: classifications based on alienage and classifications based on race.

In an early Equal protection case dealing with aliens, the Supreme Court in *Graham v. Richardson*, struck down Arizona and Pennsylvania laws barring lawfully permanent residents welfare benefits. The Supreme Court did not distinguish lawfully and unlawfully present aliens, stating “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.” This would be a great outlet for the opponents, however, less than five years later, the Supreme Court overruled *Graham* in *Mathews v. Diaz*. The Court in *Diaz* upheld federal rules that denied Medicare to some unlawfully present noncitizens. The Court ruled that strict scrutiny does not apply to federal laws that disadvantage lawfully permanent residents. The distinction became even more distinct in *Plyer v. Doe*, in which the Supreme Court held that unauthorized migrants are not a suspect class and thus

---

88 See Transformation at 615-616, supra note 36 and Inherent Flaws at 966-967 supra note 34.
89 See Transformation at 615-616 supra note 36.
91 Id.
93 *Graham*, 403 U.S. at 372.
95 Id. at 77-87.
96 Id.
strict scrutiny did not apply.\textsuperscript{97} \textit{Plyer} insured the difficulty, if not impossibility, of successfully bringing an equal protection argument against laws that classify based on alienage.

The other avenue for an equal protection argument would be through racial classifications. In \textit{Lozano v. City of Hazelton}, plaintiffs attempted to argue equal protection claims on laws governing employment and occupancy permits for unauthorized migrants.\textsuperscript{98} The challengers based the claim of discrimination based on race, ethnicity and national origin.\textsuperscript{99} The district judge rejected the argument, noting the law was facially neutral and the case lacked sufficient evidence of discriminatory intent.\textsuperscript{100} Section 2(b), the “show-me-your papers” provision is also facially neutral, and even contains limiting language that it shall not be enforced in a discriminatory way that violates the U.S. constitution.\textsuperscript{101} Even with discriminatory effects found in the enforcement of the law, an equal protection claim would be difficult to prove.\textsuperscript{102} “As long as the touchstone in prevailing constitutional doctrine is intent rather than effect, race or ethnic discrimination is an unpromising way to argue that sub-federal laws violate equal protection.”\textsuperscript{103} Thus it would be in the best interest of the opponents of “show-me-your-papers” to find another route to overturning the law. One such route could be through the potential Fourth Amendment violations through the application of the provision by state enforcement officers.

\textsuperscript{97} Id. at 219 n. 19. “Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into this class is itself a crime.” Id.
\textsuperscript{98} 496 F. Supp 2d 477 (M.D. Pa. 2007).
\textsuperscript{99} Id. at 484-485.
\textsuperscript{100} Id. at 540-542.
\textsuperscript{103} Id.
B. Fourth Amendment Violations

When the Supreme Court in *Arizona*, left the door open for future as applied challenges, Fourth Amendment violations were at the top of this list.\(^{104}\) In fact the Court explicitly mentioned Fourth Amendment issues in its discussion over provision 2(b).\(^{105}\) Although “show-me-your-papers” has the potential for violations of the amendment the Court decided to withhold its judgment until a state court has interpreted the law.\(^ {106}\) The opponents of the law argue that it could lead to prolonged stops for some people solely on account of their race or national origin, or prolonged stops for anyone absent reasonable suspicion of an actual crime committed.\(^ {107}\) Even with a narrow reading from the state courts further issues of abuse could arise under the application of “show-me-your papers.” However, some issues may be speculative and the real impact of the law may be minimal.

The essential case dealing with Fourth Amendment seizure law is *Terry v. Ohio*.\(^ {108}\) In *Terry*, the Supreme Court established a reasonableness standard for searches and seizures that still governs seizure law today.\(^ {109}\) The determination involves a balance of “the need to search [or seize] against the invasion which the search or seizure entails.”\(^ {110}\) The principles announced in the *Terry* case still are the focus in the determination of the scope of conduct for police during traffic stops.\(^ {111}\)

\(^{104}\) *Arizona*, 132 S.Ct. at 2510.  
\(^{105}\) Id. at 2508.  
\(^{106}\) Id. at 2510.  
\(^{107}\) Transformation at 612-615, supra note 36.  
\(^{108}\) 392 U.S. 1 (1967).  
\(^{109}\) Id. at 20.  
\(^{110}\) Id.  
\(^{111}\) United States v. Everett, 601 F.3d 484, 488 (6th Cir. 2010).
In the application of *Terry*, courts have determined that the stop (seizure) must be limited in both scope and duration.\(^{112}\) The main concern with "show-me your-papers" is the possibility of prolonging the duration of a legally valid stop. The Supreme Court has determined the duration of the stop to be based on the legally valid reason for the stop.\(^{113}\) "This much…is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."\(^{114}\) Thus, the immigration status check during the routine traffic stop may not take any longer than the time it would usually take for the stop alone.

SB 1070 encounters the problem that before "show-me-your-papers" was enacted the usual amount of time it took ICE to respond to a immigration status check was 70 minutes, and that wait time is predicted to rise incredibly with the addition of the law and many like it in other states.\(^{115}\) Therefore an immigration status check could not be executed quickly enough to fit in the time of a routine traffic stop. Any routine stop prolonged an extra 70 minutes or more would be considered "unreasonable" and would be unconstitutional.\(^{116}\) The Supreme Court noted an important question that was left unanswered in *Arizona*, whether reasonable suspicion of a civil immigration violation could be valid evidence to legally extend the duration of the stop.\(^{117}\) If this were the case, an immigration status check during a traffic stop would always be constitutional as long as the officer had reasonable suspicion that the individual had violated a civil immigration offense.

\(^{112}\) Id.
\(^{114}\) Id.
\(^{116}\) Royer, 460 U.S. at 500.
\(^{117}\) *Arizona*, 132 U.S. at 2509.
Kobach and the other supporters of “show-me-your-papers” rely on *United States v. Di Re.* In *Di Re.*, the Supreme Court upheld the authority for state officers to arrest for federal crimes. The supporters of “show-me-your-papers” see this as the authority for state officers to arrest for immigration crimes. This would be correct, however, Congress has made careful distinctions between immigration crimes and immigration civil offenses.

Congressional legislation has defined certain immigration violations as crimes and others as civil offenses. Circuit courts applying *De Ri* to immigration law have distinguished the two. *De Ri* only gives state officers the authority “to enforce the criminal provisions of the Immigration and Nationality Act…however, this authorization is limited to criminal violations.” Police officers can only stop an individual with reasonable suspicion of an unlawful act that the officer has the authority to enforce. Thus a state officer enforcing “show-me-your-papers” would have the authority to prolong a traffic stop if he had reasonable suspicion of a criminal immigration violation. However, the problem lies in the differences between criminal and civil violations of the Immigration and Nationality Act.

The act makes criminal illegal entry, reentry, and entry for immoral purposes among others but unlawful presence in the country is only a civil offense. The distinction is important because courts have determined that entry related crimes are

---

118 332 U.S. 581 (1948).
119 Id. at 588-590.
120 Gonzales v. City of Peoria, 722 F.2d 468, 476 (9th Cir. 1983).
121 Id.
122 Id.
123 *Terry*, 392 U.S. at 20.
125 8 U.S.C 1326 (2012).
perpetrated at the time of entry. As there are many reasons for unlawful presence other than illegal entry, such as visa expiration, it would be difficult for a police officer to distinguish unauthorized migrants that have violated federal immigration crimes from those that have only committed civil offenses. This would make it next to impossible for a police officer to have “reasonable suspicion” of a criminal immigration violation absent an admission by the individual of such violation. Thus absent a federal court granting state officers the authority to arrest for civil immigration violations, a reasonable suspicion of an immigration violation cannot be a constitutionally valid reason for prolonging the duration of a stop.

The status check would thus prolong almost all stops to an unlawful duration; it would be unlikely, however, that a status check during a full arrest, as opposed to routine stop or detainment, would result in such a prolonging that would create a violation. Therefore state courts could interpret the law not to allow full status checks during routine stops or, as the Supreme Court suggested, to allow the stopped individual to leave before the check was completed. Thus the scope of “show-me-your-papers” may not be as expansive as the opponents argue. “Show-me-your-papers” under this interpretation would likely apply only to arrested individuals whose arrest would not be prolonged in duration by the check or individuals suspected of violating criminal immigration violations, checks that state officers already had the authority to conduct before SB 1070.

---

128 United States v. Rincon-Jiminez, 594 F.2d 1192, 1194 (9th Cir. 1979).
129 Gonzales, 722 F.2d at 476.
130 Id.
131 Arizona, 132 S.Ct. at 2509.
132 Id.
Also proponents of the law note an important limitation, the presumption of lawful presence with a valid Arizona driver’s license. Thus, most traffic stops where “show-me-your-papers” would apply the police officer would have a major infraction to investigate (driving without a license), an infraction that would usually lead to an arrest. Thus the status check could just as easily be done during the arrest period. However, this only applies to the driver, not the passenger, and only if the driver has an Arizona driver’s license, thus drivers with New Mexico or California licenses driving through Arizona would not be given the same presumption. The limitation would apply to the majority of traffic stops in Arizona, however, a large number of drivers passing through could still potentially be threatened by the “show-me-your-papers” law as they are not awarded the same presumption as drivers with Arizona licenses.

Even absent Fourth Amendment violations, opponents of “show-me-your-papers” are concerned with two possibilities for abuse. The first deals with the potential rise in pretextual stops. These involve police officers stopping cars for “technical violations” of motor vehicle laws that officers would not usually enforce except for a suspicion that the driver has committed another violation, in this instance in immigration law. The Supreme Court has found that these types of stops do not violate the Fourth Amendment. The Court argued that to hold otherwise would require a case-by-case analysis into the individual police officer’s subjective intentions that would lead to an incredible evidentiary burden that would usually be difficult to prove.

134 Id.
135 Transfomation at 614-617, supra note 32.
137 Id.
138 Id.
Under “show-me-your-papers” there lies the potential for police officers to begin to pull over individuals they predict to be unlawful migrants for minor infractions such as a busted taillight or not giving full time and attention to the operation of a vehicle.\textsuperscript{139} Since automobiles are “so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation.”\textsuperscript{140} This profiling could result in large numbers of legally present Hispanics and Latinos being stopped and pulled over for relatively minor offenses, simply so the police officer can check their immigration status. This type of profiling is well within the limits of the Fourth Amendment and could easily be abused by state authorities enforcing “show me your papers.”

Opponents’ second major concern deals with issues of unnecessary arrest. If the state court systems indeed interpret “show-me-your-papers” along with the Fourth Amendment to not allow enough time to complete status checks during traffic stops,\textsuperscript{141} this may incentivize police officers to arrests those individuals whom they would otherwise only give a citation. In \textit{Atwater v. City of Lago Vista}, the Supreme Court held that arrests of traffic violations or other offenses that were usually dealt with by citation were constitutional.\textsuperscript{142} Thus state officers have the power to arrest for the same pretextual violations that they are able to stop a vehicle.\textsuperscript{143} Arresting a suspected unauthorized migrant would allow officers the time necessary to do the status check without violating the Fourth Amendment, because a status check usually could be done in the amount of time that an individual would be arrested.

\textsuperscript{139} Transformation at 614-617, supra note 36.
\textsuperscript{140} \textit{Id.} at 810.
\textsuperscript{141} See \textit{Arizona}, 132 U.S. at 2509.
\textsuperscript{142} \textit{Atwater v. City of Lago Vista}, 532 U.S. 1536, 1557-1558 (2001).
\textsuperscript{143} \textit{Id. See also W hren}, 517 U.S. at 813.
This practice would raise serious concerns over the rights of individuals who raise “reasonable suspicion” of unlawful presence who otherwise are lawful residents or visitors of the country.\textsuperscript{144} These individuals could both begin to be stopped on a more regular basis based off of pretextual violations and possibly arrested for these same minor infractions. Thus “show-me-your-papers” threatens the possibility for overzealous police departments with “attrition through enforcement” mindsets to abuse the law and the rights of residents in the area who bring up “reasonable suspicion” of unlawful presence.

The Fourth Amendment issues represent the strongest possibilities for the opponents of “show-me-your-papers” to challenge the law judicially. However, the success of this challenge would depend on the interpretation of the provision in the Arizona courts. But even if the state court interprets the provision similar to the suggestions of the Supreme Court to remain constitutionally permissible,\textsuperscript{145} the application of the law then may be so limited as to end the concerns of the opponents. If the opponents of the provision are still unsatisfied or are unsuccessful with a Fourth Amendment challenge, there remains other constitutional avenues to pursue in the attempt to overturn “show-me-your-papers.”

C. Obstacle Preemption and “Reverse Commandeering”

In Arizona, the Court stated that the decision “does not foreclose other preemption...challenges.”\textsuperscript{146} The Court only ruled that on its face “show-me-your-
papers” did not conflict with the purposes and effects of congressional statues.\textsuperscript{147} However, once the law goes into effect, the resulting bulk of investigations could hinder federal priorities and objectives. The result could produce a great obstacle to congressional purpose.

The power for congressional acts to preempt state law is a “fundamental principle of the Constitution.”\textsuperscript{148} Thus congressional intent can be explicitly stated in the statute but if not the Court could infer such an objective on two occasions: when “Congress intends federal law to ‘occupy the field’” and when a state law directly conflicts with a federal statute.\textsuperscript{149} The conflict can be from the impossibility to abide by both laws or when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”\textsuperscript{150} The Court in Arizona made it clear that Congress had not “occupied the field” of immigration enforcement and had actually encouraged state officials to enforce immigration laws to a certain extent.\textsuperscript{151} The Court pointed to 8 U.S.C. section 1373(c) as evidence that Congress intended for state and federal cooperation in immigration law.\textsuperscript{152} The section requires that Immigration and Customs Enforcement (ICE) respond to requests from state officials investigating the immigration status or citizenship of individuals.\textsuperscript{153} But it is with this same section that “show-me-your-papers” may create a conflict.

ICE has setup the Law Enforcement Support Center (LESC) to respond to these requests as well as sending similar information to other federal officers. The center

\begin{itemize}
\item \textsuperscript{147} Id. at 2509-2510.
\item \textsuperscript{149} Id. at 2294.
\item \textsuperscript{150} Id.
\item \textsuperscript{151} Arizona, 132 S.Ct. at 2509.
\item \textsuperscript{152} Id. (citing 8 U.S.C. § 1373(c)(2012)).
\item \textsuperscript{153} 8 U.S.C. § 1373(c)(2012).
\end{itemize}
provides this service on a “24-hours-a-day, seven-day-a-week basis.”\textsuperscript{154} Like other agencies that work to enforce immigration control, the LESC “prioritizes its efforts to focus on criminal aliens and those that most likely to pose a potential threat to their communities.”\textsuperscript{155} However, for timeliness concerns the center will answer queries first where the subject may not be stopped or detained long, such as during a routine traffic stop.\textsuperscript{156} The LESC answers just over one million status queries a year.\textsuperscript{157} David C. Palmatier, the Unit Chief of the LESC predicts, however, that if just a small percentage of the arrests, stops, and detainments the center would “be forced to process thousands of additional [status queries] annually…reducing [the center’s] ability to provide timely responses to law enforcement on serious criminal aliens.”\textsuperscript{158} Moreover, the addition of additional mandatory status queries from Alabama, Indiana, Georgia and other states with “similar legislation could overwhelm the system.”\textsuperscript{159} The result would force the center to ignore its own priority system and instead focus on the mandatory queries from state officials.\textsuperscript{160} Congress could not have foreseen states passing laws making status checks mandatory to such a nature that would overwhelm and overload the ICE system for status checks. “Show-me-your-papers” has thus created an obstacle to the intents and purposes of Congress and thus should be preempted.

The legislation in effect would produce the inverse of the Anti-commandeering Doctrine. The Anti-commandeering Doctrine prohibits federal legislators from

\begin{itemize}
  \item \textsuperscript{154} Decl. of David C. Palmatier at ¶ 5, Arizona v. United States 132 S.Ct. 2492 (2012). No. 11-182.
  \item \textsuperscript{155} Id. at ¶ 7.
  \item \textsuperscript{156} Id.
  \item \textsuperscript{157} Id.
  \item \textsuperscript{158} Id. at ¶ 15.
  \item \textsuperscript{159} Decl. of David C. Palmatier at ¶ 15, Arizona v. United States 132 S.Ct. 2492 (2012). No. 11-182.
  \item \textsuperscript{160} Id.
\end{itemize}
conscripting state officials to implement federal programs. The Court established the Anti-commandeering Doctrine as a means to protect the separation of powers between state and federal governments as well as to clear the lines of accountability as to elected officials. The Court was concerned that federal decision makers could delegate unpopular acts to state officials, thus blurring the distinction between the decision maker and the actor. This doctrine, originally set forth in *New York v. United States*, and *Printz v. United States*, concluded that “commandeering is unconstitutional under principles of federalism, as commandeering violates the vertical separation of powers between the state and federal governments. What this means in practice is that while federal law can regulate people, it cannot regulate states.”

Here, however, it is state legislation that is forcing federal ICE agents to disregard their own priorities of immigration enforcement and use substantial federal resources to answer queries from state officials. This would allow Arizona (or any other state with a similar law) to “dictate how the executive branch should allocate its scarce enforcement resources.” The “show-me-your-papers” laws can therefore “best be described as reverse-commandeering--a deliberate attempt to break the exclusive power of the federal government to dictate immigration policy.” This type of “reverse-commandeering” the constitution does not allow and the Court should find unconstitutional.

---

162 Id.
Margaret Hu argues that the same principles that led the Court to create the Anti-commandeering Doctrine would apply with equal force for “reverse commandeering.”

She cites a statement the Court made on the Anti-commandeering Doctrine to prove this point. “It is no more compatible with this independence and autonomy that [state] officers be ‘dragooned’…into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.”

Thus the basis of the doctrine relied on the premise that the inverse was already true, that it would offend the Constitution if states could conscript federal officials to work for them. A court recognizing the new Reverse-Commandeering Doctrine would hold the “show-me-your-papers” laws to be unconstitutional, as they create a system where the state governments can enlist federal officials to do their bidding. In enacting this doctrine the Court would not only settle the issue over “show-me-your-papers,” but would also help prevent future inefficiencies when the lines of the vertical separation of powers are blurred, and states use federal resources and authorities as their own.

However, this theory could be rejected as it was Congress that created the law that forced ICE to answer inquires from the state, and also that it would be simple for Congress to repeal the legislation in order to prevent the “reverse commandeering.”

Thus, even though state action has used federal resources, it is only with the permission of the federal government. And if Congress was offended by the inefficiency created by “show-me-your-papers,” Congress could simply enact legislation to prevent the situation

---

168 Id. at 552.
169 Printz, 521 U.S. at 928.
from occurring. Therefore, it would be unnecessary for courts to intervene in a situation where the political process would remedy the problem.

The biggest concern for the opponents of “show-me-your-papers” in bringing another preemption challenge is that the Court presumes that a state law is not preempted, and thus the burden is on the challenger of the law to prove that the state law conflicts with a federal statute. This creates an uphill battle for the challengers, making other challenges perhaps more suitable for the opponents of “show-me-your-papers.”

D. Legislative Action

The ruling in Arizona v. U.S., although leaving up the question to the validity of “show-me-your-papers,” the Court implicitly answered the question on the remedy: legislation.\textsuperscript{171} The Court reemphasized federal supremacy over immigration law, and upheld section 2(b) on the reading of implications of current federal laws.\textsuperscript{172} This allows for Congress to bypass “show-me-your-papers” laws just by passing a single bill. The terminology would not have to be over-inclusive or too broad not to allow state officers to make any status checks upon arrests or stops, but the bill could be simple: “States cannot pass legislation making immigration status checks \textit{mandatory} upon arrest, stop, or detainment.” Or if necessary the language could be even more limited, perhaps only prohibiting mandatory checks on “stops or detainees.”

This would allow states to pass laws to have mandatory checks for individuals whom the police already have probable cause to arrest but limit the risk of police prolonging stops. The difficult issue here is the current political landscape and the

\textsuperscript{171} Arizona, 132 S.Ct. at 2509-2510.
difficulty for both houses of Congress to agree on anything, nevertheless on such a polarizing issue as immigration control. Either way, legislation banning “show-me-your-papers” would be the simplest and most certain venue to preventing its implementation.

V. Conclusion

Immigration control has been a continuing problem in American political culture today. The issue has been highly polarizing leading to certain states passing laws that conflict with the stance of the federal government on the issue. Arizona’s SB 1070 was the first of these bills to pass. The passing of the bill resulted in great controversy within the state and in the country as a whole and to litigation in the court system. The Supreme Court in Arizona v. United States found that three provisions of the bill were preempted by federal law, however, the Court upheld the most controversial provision, section 2(b), the “show-me-your papers” provision. This provision requires state officers to investigate the immigration status of a stopped, arrested or detained individual when they have reasonable suspicion the individual is in the country illegally.

In its ruling the Court reemphasized federal supremacy over immigration law despite upholding the one provision. However, the Court explicitly left open the opportunity for as-applied challenges to the law once the law was put into place and the state courts had an opportunity to interpret the law. The future of “show-me-your-papers” will come down to the results of constitutional challenges as it pertains to the Fourteenth and Fourth Amendment as well as other preemption challenges. In the alternative or if the legal challenges fail, opponents of “show-me-your-papers” could pursue congressional legislation that would expressly preempt the provision and similar
provisions in other states. Either way, there are many potential routes for opponents of
the law to pursue that would be viable options at an attempt to overcome the law.