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# No Exception to the Rule: The Unconstitutionality of State Immigration Enforcement Laws

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Issue Brief

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The Unconstitutionality of State Immigration  
Enforcement Laws**

**By Pratheepan Gulasekaram**

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*All expressions of opinion are those of the author or authors.  
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# No Exception to the Rule: The Unconstitutionality of State Immigration Enforcement Laws

Pratheepan Gulasekaram\*

Much scholarly and judicial ink has recently been spilled analyzing and determining the fate of several state and local laws that purport to control immigration, or at least critical aspects of immigrants' lives.<sup>1</sup> The Supreme Court has adjudicated disputes between federal and sub-federal entities in this arena for almost 150 years, siding overwhelmingly with the federal government and striking down state and local laws. Despite this historical and doctrinal background, in the last decade, jurisdictions from across the country have renewed these debates with particular vigor, once again enacting laws that impact the lives of non-citizens, especially undocumented ones.<sup>2</sup> Such laws run a wide gamut, involving state and local officers in immigration enforcement, penalizing businesses for the hiring of unauthorized workers, requiring non-citizens to carry proof of lawful status, sanctioning landlords for renting to undocumented persons, demanding documentation for voting, and preventing localities from enacting sanctuary-type provisions.<sup>3</sup> Predictably, these ordinances have galvanized bitterly contested court battles to determine their constitutionality.<sup>4</sup> Scholarly commentary, litigation, and judicial evaluation of these laws have focused primarily on the propriety of state and local involvement in the ostensibly federal realm of immigration regulation.

The state of Arizona has made itself ground zero for such battles, attempting repeatedly through legislation to vindicate states' ability to participate in immigration regulation. Arizona's elected officials have garnered significant national attention with passage of the Legal Arizona Workers Act (LAWA),<sup>5</sup> upheld in the Supreme Court's recent *Chamber of Commerce of the United States v. Whiting* opinion,<sup>6</sup> and SB 1070,<sup>7</sup> the notorious state immigration enforcement

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<sup>1</sup> See, e.g., *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (enjoining city's anti-illegal immigrant ordinance), *aff'd in part, vacated in part* by 620 F.3d 170 (3d Cir. 2010), *cert. granted and judgment vacated* by No. 10-772, 2011 WL 2175213 (U.S. June 6, 2011); Gabriel Chin, et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 (2010); Pratheepan Gulasekaram & Rose Villazor, *Sanctuary Ordinances & Immigration Federalism: A Dialectical Analysis*, 55 WAYNE L. REV. 1661 (2010); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008); Michael Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).

<sup>2</sup> See generally Migration Policy Institute, National Center on Immigrant Integration Policy, *State and Local Immigration Regulation*, available at <http://www.migrationinformation.org/integration/regulation.cfm>.

<sup>3</sup> See generally National Conference of State Legislatures, *State Laws Related to Immigration and Immigrants*, available at <http://www.ncsl.org/default.aspx?tabid=19897>; National Conference of State Legislatures, *Chart of 2011 Enacted Immigration-Related Laws and Resolutions in States*, available at <http://www.ncsl.org/default.aspx?TabId=23362>.

<sup>4</sup> See, e.g., *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011) (upholding the Legal Arizona Worker's Act); *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (striking down Arizona's SB 1070); *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010) *cert. granted and judgment vacated* by No. 10-772, 2011 WL 2175213 (U.S. June 6, 2011).

<sup>5</sup> Legal Arizona Workers Act of 2007, ARIZ. REV. STAT. §§ 23-211, 212, 212.01 (2010).

<sup>6</sup> 131 S.Ct. 1968 (2011).

law, much of it enjoined by the Ninth Circuit in its *U.S. v. Arizona* opinion.<sup>8</sup> Arizona has recently asked for Supreme Court review, and many predict the case will make its way to the high court in the near future.

In this resurgent contest over sub-federal participation in immigration policy and enforcement, the state of Arizona won the most recent battle with *Whiting*. There, the Court upheld LAWA, which mandates that businesses in the state use the federal E-Verify system to check the legal status of their employees, and then penalizes employers who continue to hire unauthorized workers by revoking their licenses to do business. Based on this decision, some believe that the Court is poised to re-align federal-state immigration responsibilities, and argue that *Whiting* portends a new era in which states may freely engage in immigration enforcement.<sup>9</sup>

That proposition, and the limits of sub-federal immigration regulation, will be tested if the Court decides to grant certiorari in *Arizona*. SB 1070, inter alia, provides state criminal penalties for violations of federal immigration law, requires non-citizens to carry proof of lawful status, and grants state law enforcement officers the latitude to discover immigration violations and enforce immigration law. Importantly, Arizona has made clear its regulatory purpose in enacting SB 1070:

“The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”<sup>10</sup>

In doing so, Arizona boldly declares that it intends to participate in the reduction of unlawfully present persons and thus, announces its entry into the core of immigration enforcement and policy.

This Issue Brief concludes that while *Whiting* may be a welcome sign for sub-federal entities desirous of using legal sanctions to discourage local businesses from hiring unauthorized workers, it does not otherwise alter the division of power between the nation and states vis-à-vis immigration policy. Fundamentally, *Whiting* sheds little light on the Court’s potential decision in *Arizona*. While states may carve out limited regulatory power in the business-licensing area, the larger and more important field of immigration enforcement and policy should remain the sole province of the federal government. Undoubtedly, viewed at the highest level of generality, LAWA and SB 1070 are both state laws intended to discover and disincentivize the presence of undocumented immigrants. However, state business licensing penalties that punish employers

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<sup>7</sup> Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, amended by H.B. 2162 (Ariz. 2010).

<sup>8</sup> 641 F.3d 339 (9th Cir. 2011).

<sup>9</sup> See, e.g., Kris Kobach, *Law and Border*, NATIONAL REVIEW, July 4, 2011, available at <http://www.nationalreview.com/articles/271090/law-and-border-kris-w-kobach?page=1>; John C. Eastman & Karen J. Lugo, *Arizona’s Immigration Storm*, 12 Engage 68 (2011), available at [http://www.fed-soc.org/doclib/20110603\\_EastmanLugoEngage12.1.pdf](http://www.fed-soc.org/doclib/20110603_EastmanLugoEngage12.1.pdf); Ilya Shapiro, *S.B. 1070: Constitutional but Bad Policy*, CATO INSTITUTE, July 13, 2011, [http://www.cato.org/pub\\_display.php?pub\\_id=13354](http://www.cato.org/pub_display.php?pub_id=13354).

<sup>10</sup> S.B. 1070 § 1.

are necessarily different than state criminal immigration laws that punish undocumented immigrants and seek to achieve “attrition through enforcement.” Indeed, even apart from the putative objects of enforcement of the respective laws, several factors differentiate SB 1070 from LAWA, including historical background, the nature of the legal claims and analysis, the identity of the plaintiffs, the nature of regulations, and the ramifications of the decisions in other constitutional areas. As such, anti-immigrant and restrictionist forces will celebrate a pyrrhic victory with *Whiting*, but may be disheartened by the final outcome in *Arizona*.

To be clear, this is a discussion relevant to more than an isolated, outlier state or city. Arizona is not alone. Inspired by SB 1070, Alabama passed, and is currently defending in court, an even more punitive state immigration enforcement law.<sup>11</sup> So, too, have Georgia and other states.<sup>12</sup> In addition, the consequences of *Whiting* and *Arizona*, will determine the viability of several current and nascent sub-federal enactments currently in litigation. Already, in the wake of *Whiting*, the Court vacated and remanded *Lozano v. Hazleton*,<sup>13</sup> in which plaintiffs challenged the city of Hazleton, Pennsylvania’s ordinance penalizing rental of property to undocumented persons and regulating businesses that hire unauthorized workers.<sup>14</sup> By clarifying the responsibility for immigration and immigrant control between federal and non-federal entities, these cases will affect broad swaths of our national population, including the nearly 40 million non-citizens and the estimated 11-12 million undocumented persons residing in our midst.<sup>15</sup> The sooner the Supreme Court curbs over-enthusiastic state assertions of immigration enforcement authority, the sooner state and local governments, police, and public education and social systems can regain the trust of, and continue serving, all state residents and communities, including the 4 million U.S.-citizen children of undocumented parents.<sup>16</sup>

Part I of this Issue Brief examines the Court’s methodology and reasoning in the business-licensing case, concluding *Whiting*’s preemption framework cannot justify broader state immigration enforcement schemes. While federal law expressly contemplates and permits certain state licensing sanctions, in contrast, enforcement schemes like SB 1070 do not fall into any recognized exceptions in federal law, run afoul of federal policy, and incite violations of other important constitutional provisions. Part II considers more wide-ranging immigration federalism concerns occasioned by sub-federal enactments like LAWA and SB 1070. Again, here, this paper concludes that the nature of interaction between federal and sub-federal sovereigns militates against state power to criminalize unlawful presence and enforce immigration policy, other than through federally approved, cooperative agreements. Finally,

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<sup>11</sup> Alabama Taxpayer and Citizen Protection Act of 2011, Ala. Laws 535, *et seq.* (2011); Richard Fausset, *U.S. Sues over Alabama Immigration Law*, L.A. TIMES, Aug. 2, 2011, available at <http://articles.latimes.com/2011/aug/02/nation/la-na-alabama-immigration-20110802>.

<sup>12</sup> GA. CODE §§ 16-5-46, 17-5-100 (2011); S.C. CODE §§ 16-9-460, 23-6-60 (2011); MISS. CODE §71-11-3(c)(i) (2011).

<sup>13</sup> *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007), *aff’d in part, vacated in part* by 620 F.3d 170 (3d Cir. 2010), *cert. granted and judgment vacated* by No. 10-772, 2011 WL 2175213 (U.S. June 6, 2011).

<sup>14</sup> Julia Preston, *Judge Voids Ordinance on Illegal Immigrants*, N.Y. TIMES, July 27, 2007, available at <http://www.nytimes.com/2007/07/27/us/27hazleton.html>; Associated Press, *Pennsylvania Town Enacts Strict Illegal Immigration Ordinance*, FOX NEWS, July 14, 2006.

<sup>15</sup> JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR. UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS 2010 (2011), available at <http://pewhispanic.org/files/reports/133.pdf>.

<sup>16</sup> JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR. A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES iii, Fig. 4 (2009), available at <http://pewhispanic.org/files/reports/107.pdf>.

Part III explores the meaning and significance of this recent spate of sub-federal activity, arguing that while SB 1070 and its ilk will not withstand judicial scrutiny, they nevertheless sound a useful warning and provide a blueprint for federal immigration reform.

## I. Distinguishing Employer Sanctions Laws from Broader Immigration Enforcement Schemes

Courts tasked with evaluating sub-federal policies that purport to control immigration, or some aspect of immigrants' lives, generally focus on structural power analysis – that is, the allocation of regulatory power between federal and sub-federal sovereignties. A long line of cases, starting from *Chy Lung v. Freeman*,<sup>17</sup> to *Hines v. Davidowitz*,<sup>18</sup> *Graham v. Richardson*,<sup>19</sup> *De Canas v. Bica*,<sup>20</sup> and finally to contemporary cases like *Whiting*, showcase this basic framework. Although some of these cases measure state law against constitutional norms and structure,<sup>21</sup> courts are generally wont to avoid constitutional pronouncements unless necessary.<sup>22</sup> In the immigration context, the Supreme Court's avoidance of constitutional rulings in favor of statutory decisions generally results in more favorable outcomes for immigrants.<sup>23</sup>

Grounded in the Supremacy Clause of the U.S. Constitution,<sup>24</sup> the immigration preemption framework operates from granular, textual comparison between particular state and federal statutes to more nebulous assessments of state schemes against constitutional structure. Congress may expressly preempt sub-federal enactments by legislating its preemptive intent into a federal statute. Even if Congress has not legislated its preemptive intent, sub-federal laws may still be invalidated if the Court finds that it is impossible to comply with both federal and sub-federal law at the same time, or when sub-federal law is an obstacle to accomplishing the full purpose and objectives of federal law. More generally, if the Court finds that the Congress intended to occupy the entire regulatory field, state laws in that field are also preempted.

Beyond these preemption methodologies which focus on textual analysis and the interplay between federal and sub-federal enactments, in the immigration arena, courts will sometimes apply “constitutional” preemption analysis, under which they will strike down a state

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<sup>17</sup> 92 U.S. 275 (1875) (striking down California law regulating immigration from China, stating that the federal government has the exclusive power to regulate immigration).

<sup>18</sup> 312 U.S. 52 (1941) (striking down Pennsylvania alien registration scheme).

<sup>19</sup> 403 U.S. 365 (1971) (striking down Arizona law denying noncitizens' eligibility for public assistance).

<sup>20</sup> 424 U.S. 351 (1976) (upholding, prior to passage of IRCA, California's employer-sanctions law for hiring of unauthorized workers).

<sup>21</sup> See, e.g., *United States v. Arizona*, 641 F.3d 339, 367-69 (9th Cir. 2011) (Noonan, J., concurring) (arguing that SB 1070 interferes with national foreign policy prerogatives, and is therefore unconstitutional on that basis).

<sup>22</sup> *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Building*, 408 U.S. 568, 575 (1988) (discussing doctrine of constitutional avoidance and stating “[if] an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”); cf. *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1068 (2011) (focusing solely on narrow, statutory preemption analysis).

<sup>23</sup> Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 548-49, 565 (noting that subconstitutional rulings have been more favorable to immigrants).

<sup>24</sup> U.S. CONST. art. VI, cl. 2.

or local ordinance that attempts to regulate “pure immigration law.”<sup>25</sup> Constitutional preemption, which can be found even in the absence of enacted federal law, occurs when sub-federal laws attempt to govern entry and exit of noncitizens, and the conditions under which they remain in the country.<sup>26</sup> It is based in the federal government’s plenary power over immigration and the federal power to conduct foreign affairs.<sup>27</sup>

Part I.A explains how the Court employed the express preemption methodology in *Whiting* to uphold the state business-licensing law. Despite that favorable result for states, Part I.B will show that *Whiting*’s reasoning and methodology actually portend the invalidation of SB 1070 and other state immigration enforcement schemes. Finally, Part, I.C discusses other constitutional defects with SB 1070.

A. Express Preemption and State Regulation of Business-Licensing: The Limitations of *Whiting*

In the immigration context, the Supreme Court has consistently struck down sub-federal lawmaking using preemption analysis. Rarely, sub-federal enactments have survived, but only when the state or locality has regulated in an area of traditional state concern, and when the federal government had not disapproved of state action. The most relevant example is *De Canas v. Bica*, in which the Court upheld a 1971 California law that imposed fines on in-state employers who knowingly employed unlawfully present persons if such hiring adversely affected lawfully present workers.<sup>28</sup> In preserving California’s employer sanctions law, the Court in *De Canas* noted that while the “power to regulate immigration is unquestionably... a federal power,” states nevertheless retain broad police powers over the employment relationships of workers within the state.<sup>29</sup>

*De Canas* would seem to make LAWA an easy case, but for the fact that Congress can respond to state enactments like the California employer sanctions law upheld in *De Canas* (assuming Congress acts within its Article I powers). Indeed, in 1986, Congress exercised those powers by enacting the Immigration Control and Reform Act (IRCA) expressly to preempt state laws that sanction employers for the hiring of unauthorized persons.<sup>30</sup> Taking direct aim at laws like California’s unauthorized worker law, IRCA explicitly prohibited sub-federal entities from enacting “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ... unauthorized aliens.”<sup>31</sup> This provision, a by-product of one of Congress’ prior attempts to pass comprehensive federal immigration reform, provides Arizona with a plausible and specific defense for LAWA, as Congress appears

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<sup>25</sup> See Stumpf, *supra* note 1, at 1600-01.

<sup>26</sup> *Hines*, 312 U.S. at 56-60; see also *Toll v. Moreno*, 45 U.S. 1, 10 (1982) (striking down Maryland’s law denying certain nonimmigrant state residents in-state tuition rates, and stating “Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders.”).

<sup>27</sup> *Chae Chan Ping v. United States (Chinese Exclusion Cases)*, 130 U.S. 581 (1889) (determining that Congress’ power to exclude aliens was immune from searching judicial inquiry, and was grounded in the federal government’s power to conduct foreign affairs); see also *THE FEDERALIST* No. 4, at 40-44 (John Jay) (Clinton Rossiter ed., 1961).

<sup>28</sup> *De Canas*, 424 U.S. 351 (1976).

<sup>29</sup> *Id.* at 354-56.

<sup>30</sup> 8 U.S.C. § 1324a(a)(1)(A) (2006).

<sup>31</sup> *Id.* § 1324a(h)(2).

to have gone out of its way to note that state licensing penalties were to be treated differently than direct employer sanctions.

Read together then, *De Canas* and IRCA stand for the proposition that state regulation of employment relationships between state employers and unlawfully present persons is permissible, if the federal government has not otherwise prohibited it.<sup>32</sup> Thus, the question left for the Court in *Whiting* was an exceedingly narrow one: Did LAWA count as a “licensing” law within the exception written into IRCA? It is a question that the Court answered with in-depth textual analysis and interpretation, focusing primarily on the meaning of “licensing or similar law.”<sup>33</sup> In fact, the five-member majority took pains to distinguish state licensing laws in the employment field from all other manner of state regulation that could affect immigrants.<sup>34</sup>

This analytic methodology, itself, is the primary indication of the limited utility of *Whiting* to states’ arguments in cases involving other types of state laws. The Court eschewed broad pronouncements regarding the Constitution’s division of federal-state responsibility in the area of immigration in favor of a detailed comparison of LAWA’s text to the text of IRCA and the federal Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). This methodological point is important because it limits *Whiting*’s reach to the specific context of business licensing-type laws that sanction employers for hiring unauthorized workers. While LAWA achieves the same result as the pre-IRCA California employer sanctions law, IRCA’s text and its licensing exception at least provide a colorable basis upon which to uphold LAWA. Importantly, the Court’s reasoning requires that, if Congress were to amend IRCA to erase the licensing exception, LAWA would also be plainly unconstitutional. Further, absent the licensing exemption, any state attempt to make the federal E-Verify mandatory would also be preempted, as the Court would have no basis to believe the federal government authorized states to legislate in the immigration-employment arena.

#### B. Inapplicability of *Whiting* to SB 1070 and Judicial Analysis of State Enforcement Schemes

Despite upholding state business-licensing policies that target employers of unauthorized workers, the Court will most likely strike down state immigration enforcement schemes like SB 1070. Unlike Arizona’s plausible argument for LAWA, the state’s entire legal defense of its unilateral decision to criminalize unlawful presence and participate in immigration enforcement rests dubiously on a few disparate Immigration and Nationality Act (INA) provisions that

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<sup>32</sup> Note that this should not be read as an endorsement of either expanded federal use of E-Verify as some have proposed, or approval of state business-licensing schemes like LAWA. Despite *Whiting*, federal and state use of E-Verify will still lead to risk of erroneous prosecution. 131 S.Ct. at 1991 (2011) (Breyer, J., dissenting). Further, serious concerns remain about the expansion of E-Verify into the employment space, as a matter of sound policy. See *How Expanding E-Verify Would Hurt American Workers and Business*, (Immig. Pol’y Center), Mar. 2, 2010, available at [http://www.immigrationpolicy.org/sites/default/files/docs/Everify\\_030210.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/Everify_030210.pdf).

<sup>33</sup> See *Whiting*, 131 S. Ct. at 1978-79, 1987-88 (Breyer, J., dissenting) (reasoning that LAWA cannot be fairly termed a “licensing or similar law”, and is therefore preempted by IRCA).

<sup>34</sup> *Id.* at 1981, 1983 (“IRCA expressly preempts some state powers dealing with the employment of unauthorized aliens and it expressly preserves others.... [LAWA] falls within ... the confines of the authority Congress chose to leave to the States....” The majority also noted that the several cases in which state laws were preempted involved “uniquely federal areas of regulation”).



recognize a narrow and well-defined role for states in enforcement matters. No provision in the federal scheme approximates the specificity and lucidity of IRCA's carved-out exception for licensing penalties that formed the *sine qua non* of the Court's *Whiting* opinion. In addition, the Court will strike down laws like SB 1070 because they intrude on the traditionally federal area of immigration enforcement. Defining immigration violations and then enforcing them is a field occupied by federal law, leaving room only for supervised, directed, and enumerated forms of state involvement.

Arizona's SB 1070 attempts to discourage and diminish the presence of undocumented immigrants within the state by (1) requiring local law enforcement officers to determine the immigration status of any detainee or arrestee they suspect is an unauthorized immigrant,<sup>35</sup> (2) levying state criminal penalties for failure to comply with federal alien registration laws or carry a registration document,<sup>36</sup> (3) providing state criminal penalties for unauthorized persons who solicit or perform work,<sup>37</sup> and (4) allowing warrantless arrest of persons based on probable cause that the arrestee is removable from the U.S.<sup>38</sup> None of the enjoined provisions of SB 1070 are saved by any textual exception in the federal immigration law analogous to IRCA and its express exemption for business licensing.

States like Arizona, that have enacted SB 1070-type ordinances essentially advance two major arguments in defense of their laws to overcome preemption claims: (1) state immigration laws mirror federal law and are therefore not preempted; and (2) federal immigration law provides for state involvement in immigration enforcement, and therefore state immigration enforcement schemes are not preempted.<sup>39</sup> In addition, states may advance a theory of inherent state power to enact and enforce immigration laws.<sup>40</sup> This final catch-all theory of state immigration power directly implicates constitutional, as opposed to primarily statutory, questions, and will be addressed later in this Issue Brief.

As both the federal trial court in Arizona and the Ninth Circuit Court of Appeals held, neither of the states' primary defenses survives analysis.<sup>41</sup> First, the Supreme Court has already held that state law can be preempted even when the state's purpose echoes the goals of a federal policy.<sup>42</sup> Further, laws like SB 1070 do not mirror the mechanism and consequences of federal law. SB 1070 attaches criminal penalties to conduct and action that federal law only treats as a

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<sup>35</sup> Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070 § 2(B), *amended by* H.B. 2162 (Ariz. 2010).

<sup>36</sup> *Id.* § 3.

<sup>37</sup> *Id.* § 5(C).

<sup>38</sup> *Id.* § 6.

<sup>39</sup> See Defendants Response to Plaintiff's Motion for Preliminary Injunction, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB).

<sup>40</sup> See, e.g., Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005); Eastman and Lugo, *supra* note 9, at 68 ("Arizona Has Sufficient Inherent Police Power to Authorize Enforcement of Federal Immigration Law Alongside Federal Authorities.").

<sup>41</sup> See *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010), *affirmed by* 641 F.3d 339 (9th Cir. 2011).

<sup>42</sup> See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) ("The conflicts are not rendered irrelevant by the State's argument that there is no real conflict between the statutes because they share the same goals.... The fact of a common end hardly neutralizes conflicting means....") (citing *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88 (1992)).

civil violation.<sup>43</sup> Noncitizens who are unlawfully present after having entered lawfully – a category into which approximately 40% of the unlawfully present population falls – are deportable through the civil removal process, but have not otherwise committed any federal crime.<sup>44</sup>

In addition, as *Whiting*'s discussion of IRCA highlights, federal law punishes employers who hire undocumented workers, but does not attach criminal penalties to unlawfully present persons solely for seeking employment. Because LAWA mimicked this basic structure, it survived preemption analysis; it also punished employers without penalizing the workers themselves. Based on *Whiting*'s reasoning, if Arizona had included criminal penalties against unauthorized workers as part of LAWA, the law would certainly have been declared unconstitutional; it would not have mirrored federal law, and IRCA's licensing exception would not have provided safe harbor. SB 1070, in comparison, criminalizes exactly this behavior, levying sanctions on unlawfully present persons for the state crime of seeking employment while unauthorized to work. By definition then, SB 1070, with its criminal penalties, is not a facsimile of federal law.

Even though laws like SB 1070 use federal immigration status as the touchstone for state criminal consequences, and are ostensibly enacted to help ensure enforcement of federal immigration law, such state policies still violate federal prerogatives. Decisions to use congressionally-defined immigration status as the trigger for civil and criminal consequences are left to the federal executive, not to individual states. As part of the executive's Article II duties, the President is tasked with "taking care" that federal laws are carried out.<sup>45</sup> Using this authority, the prosecutorial branch of the Department of Homeland Security routinely issues directives on the priority order for arrest of unlawfully present persons, and the use of prosecutorial discretion and deferral for some unlawfully present persons.<sup>46</sup> As federal courts have held, this discretion and its impact on on-the-ground enforcement is integral to defining the limits and meaning of

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<sup>43</sup> See 8 U.S.C. § 1229a (2006) (delegating removability decisions to immigration judges, not federal courts); *Harisidades v. Shaughnessy*, 342 U.S. 580 (1952) (reaffirming that deportation is a civil procedure, not a criminal one). SB 1070 makes it a state crime to be unlawfully present, subject to prosecution in a state court; in comparison, the Immigration and Nationality Act generally treats unlawful presence as a civil transgression, subject to an administrative procedure. See Margaret Stock, *Arizona v. United States: The Tail Wagging the Dog on Regulating Immigration Enforcement*, SCOTUS BLOG, July 14, 2011, available at <http://www.scotusblog.com/2011/07/arizona-v-united-states-the-tail-wagging-the-dog-on-regulating-immigration-enforcement/>.

<sup>44</sup> 8 U.S.C. § 1227(a)(1)(C)(i) (2006). The remaining unlawfully present persons are likely those who entered without inspection. In addition to making one removable, unlawful entry can be charged as a federal misdemeanor under 8 U.S.C. § 1325, although federal authorities routinely do not – either because of resource constraints or exercises of discretion – prosecute it. See Ingrid Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1329-1334 (2010).

<sup>45</sup> U.S. CONST., art. II, § 3.

<sup>46</sup> Memorandum from John Morton, Director of U.S. Immigration and Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 3 (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; see also Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigration and Customs Enforcement, Prosecutorial Discretion (Oct. 24, 2005), available at <http://www.shusterman.com/pdf/prosecutorialdiscretionimmigration1005.pdf> (setting out reasons, principles, and guidelines for exercise of prosecutorial discretion by federal immigration prosecutors).

federal enforcement law and policy.<sup>47</sup> Thus, states' adopting different schemes to achieve ostensibly similar goals fails to mirror these nuances of federal policy, and further, usurps the President's power of execution.<sup>48</sup>

The state's second major claim – that federal law already contemplates state involvement in enforcement – also does not survive preemption inquiry. SB 1070 is a unilaterally-created, federally-unsupervised state enforcement scheme that requires enforcement of all manner of criminal and civil immigration law violations. Devastating to Arizona's argument, federal law envisions state cooperation in immigration enforcement only for certain criminal violations or under direct supervision and express agreement with the federal government.

Federal law, in isolated and circumscribed instances, permits state involvement in immigration enforcement. Section 287(g) of the INA authorizes the federal government to enter into a "written agreement" with a state to allow qualified state officers to perform investigations and detentions of non-citizens.<sup>49</sup> Other sections of 8 U.S.C. §1357 permit, without written agreement, voluntary communication of state officers with federal officials regarding the immigration status of an individual and the cooperation of state officers with the federal officials.<sup>50</sup> Further, 8 U.S.C. §1252c authorizes state officials to arrest and detain individuals who have illegally reentered the country after deportation, and §1324 allows state officers to arrest those who might be smuggling, transporting, or harboring unlawful migrants.

While these isolated sections of the INA permit state involvement in immigration enforcement, that permission is bound to particular circumstances.<sup>51</sup> Under 287(g), general state involvement in immigration law enforcement can occur only under written agreement with the federal government and under conditions in which the federal officials have provided training to local officers on immigration enforcement. Thus, the only state assistance contemplated by 287(g) is closely supervised, contractually agreed upon cooperation; not the freewheeling, unilateral state enforcement envisioned by SB 1070. Sections 1252c and 1324 are limited to defined conduct (illegal reentry and smuggling, respectively) and deal with criminal, not civil, violations. Because Congress has already contemplated state participation in immigration

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<sup>47</sup> *United States v. Arizona*, 641 F.3d 339, 351-52 (9th Cir. 2011) ("By imposing mandatory obligations on state and local officers, Arizona interferes with the federal government's authority to implement its priorities and strategies in law enforcement....[§ 2B] interferes with Congress' delegation of discretion to the Executive Branch in enforcing the INA."); *Lozano v. City of Hazleton*, 620 F.3d 170, 212 (2010) ("The Supreme Court has consistently found state and local laws which alter the careful balancing of objectives accomplished by a federal law to be pre-empted...."), *cert. granted and judgment vacated* by No. 10-772, 2011 WL 2175213 (U.S. June 6, 2011).

<sup>48</sup> Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2062-65 (2008) ("De facto policy is still policy, and federal immigration law is a matter of inaction as much as affirmative decisionmaking. Consequently, any decisions by state and local officials put them in conflict with the knowing balance of enforcement and tolerance that constitutes federal immigration law.").

<sup>49</sup> 8 U.S.C. §1357(g) (2006).

<sup>50</sup> *Id.* at §1357(g)(10).

<sup>51</sup> The Secure Communities Program also bears mentioning for its use of state and local law enforcement officers in immigration enforcement. Under S-Comm, the fingerprints of state and local arrestees are automatically checked against federal criminal and immigration databases, ostensibly to identify criminal noncitizens. See *Secure Communities*, U.S. Immigration and Customs Enforcement, [http://www.ice.gov/secure\\_communities](http://www.ice.gov/secure_communities). S-Comm, in contrast to the types of state involvement discussed in this Issue Brief, is a federal program, created and administered by DHS, utilizing sub-federal arrest authority to further immigration goals in a manner dictated by the federal government.

enforcement, but relegated such cooperation to specific crimes or under specific procedures, the Court will most likely rule that Congress has occupied the field and SB 1070 is impliedly preempted.

Indeed, to rule otherwise is to accept implausible and logically flawed premises. The Court would have to read federal authorization for states to participate in certain instances, under fixed conditions, as a general authorization for states to unilaterally participate in immigration law enforcement under conditions determined by the state itself. Relatedly, it would have to interpret the federal law's isolated permissions for particular types of state involvement – and exclusion of others – as somehow meaning that Congress really meant to include what it excluded from the statute. In other words, the Court would have to, under the guise of preemption analysis, wholly rewrite the INA and render several sections of federal immigration law superfluous and toothless. Why list particular crimes and conditions of state cooperation if the federal statute is to be read to authorize state enforcement under any circumstances for any type of immigration violation? Congress need not have bothered to deliberate and legislate the 287(g) system of federally-supervised, written agreements between the federal and states governments if it was actually authorizing unwritten, unwelcome, unsupervised, and untrained state and local immigration enforcement. Statutory drafting and federal court interpretation of that drafting simply doesn't work the way Arizona needs it to, and for good reason.

Under this well-established interpretative framework, the state's only recourse is to persuade the Court of a highly dubious proposition: that states have inherent constitutional authority to enforce all manner of federal immigration law, without agreement or permission from the federal government. Such a reading drastically alters the long-standing constitutional balance between the federal and state governments vis-à-vis immigration enforcement. The Supreme Court has never endorsed a unilateral expansion of state law enforcement power into a historically federal domain. To the contrary, the Supreme Court has long been wary of state intrusion into federal immigration law.<sup>52</sup> In the end, to support this implausible claim, states are forced to rely on one, non-binding, Office of Legal Counsel Memorandum from the George W. Bush administration in 2002 supporting states' claims of inherent authority to enforce

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<sup>52</sup> See *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875); *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) (“That the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization, and deportation, is made clear by the Constitution was pointed out by authors of the *Federalist* in 1787, and has since been given continuous recognition by this Court.”). Further, circuit courts have expressed concern and doubt about state or local authority to enforce immigration law generally, or the civil provisions of federal immigration law, specifically. See Michael Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. CONST. L.J. 1084, 1089-1095 (2004) (citing *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983) (upholding city police arrest for criminal violations of immigration law, but assuming that federal law preempts state and local authority to enforce civil immigration law) and *Carrasca v. Pomeroy*, 313 F.3d 828 (3d Cir. 2002) (questioning New Jersey park ranger authority to detain individuals for immigration violations)). In addition, note that Professor Hiroshi Motomura has powerfully critiqued the civil-criminal distinction drawn by *Gonzales v. Peoria*, arguing that any sub-federal immigration arrest (civil or criminal) usurps the critical discretionary stage of immigration enforcement from the federal government and will likely change federal enforcement priorities and consume federal resources. Hiroshi Motomura, *The Discretion That Matters, Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1846-49 (2011).

immigration laws.<sup>53</sup> But before that recent turn, the OLC had long-been convinced of the exact opposite conclusion.<sup>54</sup> More importantly, the legal reasoning used by Assistant Attorney General Jay S. Bybee to reach his ahistorical and unprecedented 2002 opinion has been roundly criticized as “mak[ing] little sense”<sup>55</sup> and “misconstr[uing]” prior decisions.<sup>56</sup> Thus, what might be mistakenly interpreted as a two-sided debate, in truth, boils down to one aberrant view set against a consistent narrative distrustful of state intrusion into immigration enforcement.<sup>57</sup>

Beyond this comparison between federal and sub-federal laws, the identity of the respective plaintiffs and enforcement targets make the SB 1070 case easy to resolve against the state of Arizona. Whereas *Whiting* was brought by private business interests represented by the U.S. Chamber of Commerce, the plaintiff in *U.S. v. Arizona* is the federal government itself. This fact is significant because the Supreme Court is likely to give more weight to the federal government’s attempt to protect erosion of its own power than it is to a private party asserting that the federal government’s supremacy was violated by state action.<sup>58</sup> Indeed, while the U.S. is jealously guarding its control over immigration enforcement in the SB 1070 case, the U.S.’s briefing to the Court in *Whiting*, in contrast, explained that mandatory use of E-Verify would not overburden the federal government’s data systems. In essence, the federal government in that case disagreed with the contention that its prerogatives would be compromised by state action.

### C. Other Constitutional Flaws in State Immigration Enforcement Schemes

Of equal or greater concern than those bringing the respective suits, are those against whom the laws will be enforced. Just like the federal policy effected by IRCA, business-licensing laws strike at employers. IRCA and these state licensing laws reduce the incentive for job-seeking migration by punishing businesses that hire unauthorized workers; importantly, they do not punish the putative unauthorized employees themselves. This policy reflects the shared moral and legal culpability for undocumented migration between business enterprises and the migrants themselves. While migrants may make decisions to circumvent lawful entry procedures, their ability to obtain employment in the United States is in the hands of employers willing to hire them. The federal decision to focus workplace immigration enforcement on employers, and not unauthorized workers, reflects the underlying notions that some citizens also

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<sup>53</sup> Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep’t of Justice, to John Ashcroft, Attorney Gen., U.S. Dep’t of Justice, Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations (Apr. 3, 2002) (on file with author).

<sup>54</sup> Memorandum from Teresa Wynn Roseborough, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, Assistance by State and Local Police in Apprehending Illegal Aliens (Feb. 5, 1996), available at <http://www.justice.gov/olc/immstopo1a.htm>; Memorandum from Joseph R. Davis, Assistant Attorney Gen., to Assistant Director – Legal Counsel, Federal Bureau of Investigation, Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File, (Apr. 11, 1989), available at [http://www.aclu.org/files/images/asset\\_upload\\_file438\\_29970.pdf](http://www.aclu.org/files/images/asset_upload_file438_29970.pdf).

<sup>55</sup> Wishnie, *supra* note 52, at 1095.

<sup>56</sup> Press Release, American Civil Liberties Union, Secret Immigration Enforcement Memo Exposed (Sept. 7, 2005), available at <http://www.aclu.org/immigrants-rights/secret-immigration-enforcement-memo-exposed>.

<sup>57</sup> See generally Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 966, 975-78 (2004).

<sup>58</sup> Kevin R. Johnson, *S.B. 1070: Federal Preemption and Why the Court Won’t Address Civil Rights Issues*, SCOTUS BLOG, July 11, 2011, <http://www.scotusblog.com/2011/07/s-b-1070-federal-preemption-and-why-the-court-won%E2%80%99t-address-civil-rights-issues/>.

bear responsibility for undocumented migration and that workers require protection regardless of immigration status.

Enforcement schemes like SB 1070, in contrast, mobilize the might of state governments directly against undocumented persons. This is more than simply a rhetorical or trivial distinction. Indeed, state enforcement directly against undocumented persons for immigration violations raises grave constitutional concerns of racial injustice and due process separate from the preemption and structural power concerns.<sup>59</sup> Supporters of SB 1070 implausibly argue that racial profiling against Latinos and others who “look” foreign or undocumented will not occur because the law expressly forbids law enforcement officers “to consider race, color, or national origin in implementing the requirement of [the law] except to the extent permitted by the United States or Arizona Constitution.”<sup>60</sup>

First, it belies logic and human experience to believe that this statutory language will prevent implicit use of race, color, and apparent national origin, when officers are tasked with determining the legal status of an individual whom they have “reasonable suspicion” to believe is unauthorized, or when they need “probable cause” to believe the individual has committed a removable offense. Second, by allowing use of these constitutionally suspect factors “to the extent” permitted by U.S. or Arizona law, the statute perversely endorses use of race, color, and national origin by local police officers.<sup>61</sup> In *U.S. v. Brignoni-Ponce*, a 1975 Supreme Court decision regarding U.S. border enforcement actions near the U.S.-Mexico border, the Court reasoned that “the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor.”<sup>62</sup> Not to be outdone, the Arizona Supreme Court opined that while “Mexican ancestry” and “Hispanic appearance” alone may not be sufficient to constitute reasonable suspicion, those factors coupled with a “dress” or “hair style” associated with Mexican identity could be.<sup>63</sup> Further, under the Court’s Fourth Amendment jurisprudence, officers may escape liability by proffering any objectively reasonable basis for stopping and investigating an individual – even a pre-textual one that masks the officers’ true motivations.<sup>64</sup>

Given this legal backdrop, the “prohibition” written into SB 1070 not only fails to prevent racially disparate enforcement, it actually appears to encourage it.<sup>65</sup> Even with SB 1070

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<sup>59</sup> See generally Kevin R. Johnson, *How Racial Profiling Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010).

<sup>60</sup> See Carol Swain, *Why the Court Should Uphold S.B. 1070*, SCOTUS BLOG, July 14, 2011, <http://www.scotusblog.com/2011/07/why-the-court-should-uphold-s-b-1070/> (“Fears of racial profiling are overblown because the law specifically forbids law enforcement officials from considering ‘race, color, or national origin’ in making decisions about immigration matters.”); see also Shapiro, *supra* note 9 (“Note also that racial profiling is not at issue here. S.B. 1070 bends over backwards to make clear that it does not allow (let alone require) any use of race not permitted under federal law....”).

<sup>61</sup> See Chin, et al., *supra* note 1, at 47, 65-68.

<sup>62</sup> 422 U.S. 873, 885-888 (1975).

<sup>63</sup> *State v. Gonzales-Guitierrez*, 927 P.2d 776, 780 (Ariz. 1996).

<sup>64</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996) (upholding plainclothes officers stop and drug arrest, where ostensible reason for stop was a traffic violation, which plainclothes officers were not lawfully allowed to make, and stating “We think these cases foreclose any arguments that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.”).

<sup>65</sup> Chin, et al., *supra* note 1, at 68.

yet to go into effect, Arizona officials, including vocal proponent of rigorous enforcement, Sheriff Joe Arpaio, have repeatedly been sued for violating the civil rights of immigrants.<sup>66</sup> Empowering state and local law enforcement officers to enforce federal immigration law and new state immigration crimes will only exacerbate civil liberties concerns. Thus, aside from preemption problems with state immigration enforcement schemes, the equality and due process concerns alone are sufficient basis upon which the Court could and should declare them unconstitutional.

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In sum, the Court's decision to uphold LAWAA against preemption claims does not predict the same for SB 1070. While both clearly intend to discourage the presence of undocumented immigrants, federal law contemplates the existence of state business-licensing laws through a textual exception in federal immigration law itself. And, even with this express exception, *Whiting* is neither a unanimous nor far-reaching opinion. At most, *Whiting* stands for the proposition that state business-licensing laws that regulate employers will not reflexively be struck down. Arizona's SB 1070, in contrast, is not saved by a textual exception to the federal regulatory scheme that defines civil and criminal immigration violations and prescribes the circumstances for federal and state cooperation in enforcement of those laws. A state's decision to create its own immigration crimes and engage its law enforcement officers in civil and criminal immigration regulation, untethered from federal oversight, violates basic notions of federal supremacy and likely creates equal protection and due process concerns as well.

## II. Immigration Regulation: Federal v. State Domains

While the Court's analysis will likely focus on the statutory preemption framework discussed above, the recent increase in sub-federal immigration enactments – from employer sanctions to rental ordinances to state immigration crimes – raises a more elemental question about the respective roles of federal and sub-federal governments vis-à-vis immigrants and immigration. Even as courts wrestle with the intricacies of statutory interpretation and congressional intent to determine conflicts between federal and state laws in this area, courts must also make judgments about the proper allocation of immigration power and the power over immigrants.

Consider, for example, the business-licensing laws that target employers of unauthorized workers. Both *Whiting*, and *De Canas* before it, rely on the notion that employer relationships are traditionally the province of states, even if immigration control has traditionally been the

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<sup>66</sup> Press Release, Center for Constitutional Rights, One Year After Arrest and Detention CCR Legal Observer to Arizona Immigration Protest Files Suit against Maricopa County, Sheriff Joseph Arpaio, and County Officials (July 29, 2011), available at <http://ccrjustice.org/newsroom/press-releases/one-year-after-arrest-and-detention%2C-ccr-legal-observer-arizona-immigration-protest-files-suit-again>; *Federal Judge Faults Arizona Sheriff in Immigration Raid*, FOX NEWS LATINO, Apr. 27, 2011, available at <http://latino.foxnews.com/latino/news/2011/04/27/federal-judge-faults-arizona-sheriff-immigration-raid/>; Martha Neil, *Unprecedented DOJ Suit Seeks Documents from Sheriff Joe Arpaio for Civil Rights Probe*, ABA JOURNAL, Sept. 2, 2010, available at [http://www.abajournal.com/news/article/feds\\_sue\\_arpaio\\_to\\_get\\_docs\\_1st\\_time\\_in\\_30\\_years\\_a\\_sheriff\\_hasnt\\_cooperated/](http://www.abajournal.com/news/article/feds_sue_arpaio_to_get_docs_1st_time_in_30_years_a_sheriff_hasnt_cooperated/) (discussing U.S. DOJ seeking documents concerning sweeps conducted by Arpaio that allegedly violated the constitutional rights of immigrants). The suit has since been settled.

province of the federal government. In essence, courts must make some determination – whether explicitly or implicitly – regarding where they think any particular regulation falls on the spectrum of traditional state sovereignty and control versus constitutionally-conferred federal power. Focusing specifically on enforcement schemes like SB 1070, this federalism balance tips in favor of the federal government.

As mentioned above, Arizona could prevail in the SB 1070 case if the Court were to rule that states have inherent power to enforce immigration laws. To do so, however, effects lasting and permanent change to the constitutional order. It would render the realm of immigration federalism beyond the future reach of either Congress or state lawmakers, and deprive them of the opportunity to engage in iterative legislating vis-à-vis immigration enforcement. In this regard, the evolution from *De Canas* to IRCA to *Whiting* marks an on-going legislative conversation between state and federal governments. Because the Court made a limited, statutory ruling in *Whiting*, Congress could in the future, delete IRCA’s exemption and invalidate LAWA. Alternatively, if Congress is not bothered by the result in *Whiting*, it could choose to leave IRCA unmodified and allow states to continue enacting business-licensing laws. In contrast, were the Court to hold that states have inherent authority in immigration enforcement, it would leave the federal government no ability to set its immigration priorities through policy debate and representative governance.

Undoubtedly, regulating for the public welfare and maintaining local policing are within the traditional province of states.<sup>67</sup> But, the creation of a state scheme of immigration crimes and local enforcement of federal immigration laws are exactly the types of sub-federal policy the Court has repeatedly struck down.<sup>68</sup> This is because, at base, defining immigration crimes and calibrating enforcement are things that the federal government – and only the federal government – has historically done. Although some states had immigration laws in the early and middle parts of the 19<sup>th</sup> Century,<sup>69</sup> those existed before Congress began exercising its power of naturalization and foreign commerce to establish federal legislation defining the qualifications, conditions, and procedures for entry, residence, and expulsion from the country. Since the late 1800’s, the basics of immigration law – entry, exit, naturalization, and duration and conditions of stay – have been under federal control. State participation, in areas such as business-licensing, welfare provision, and supervised, cooperative enforcement, have all been at the pleasure and discretion of the federal government, permitted by delegations and exceptions legislated into federal policy.

When Arizona or any other state boldly announces that the intent of their policy is “attrition through enforcement,” it unambiguously declares its intention to enter the core of immigration law and policy. The Court of Appeals reached the same conclusion, labeling SB 1070 the state’s “own immigration law enforcement policy.” Notably, this section of SB 1070 was not enjoined, as the District Court concluded that “[t]he Court cannot enjoin a purpose; the

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<sup>67</sup> *United States v. Lopez*, 514 U.S. 549 (1995) (“Under the theories the Government presents in support of [the constitutionality of the federal law], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.”).

<sup>68</sup> *See Chy Lung v. Freeman*, 92 U.S. 275 (1875) (striking down California’s policy of requiring bonds from arriving to non-citizens); *Hines v. Davidowitz*, 312 U.S. 52 (striking down state scheme of alien registration).

<sup>69</sup> *See Gerald L. Neuman, The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).



Arizona Legislature is free to express its viewpoint and intention as it wishes, and Section 1 has no operative function.” While the statute’s purpose alone cannot define crimes or enforcement, it clearly affects how law enforcement officers interpret the operative sections of the law. And, because it expressly states Arizona’s desire to rid itself of the undocumented immigrant population through enforcement – an exclusively federal function – it could indeed be sufficient basis to declare the entirety of the statute unconstitutional under constitutional preemption principles.

Aside from usurping core immigration policy functions, the other problem with state immigration enforcement policies is their subversion of federal immigration priorities. Like Arizona, the federal government is interested in discovering and apprehending unlawfully present persons. However, given the scale of the issue, the complexity of immigration status and removability determinations, economic realities, and resource limitations, the federal government does not arrest and remove all unlawfully present persons.<sup>70</sup> This is especially true as applied to noncitizens who have not committed serious crimes or otherwise broken immigration laws. In fact, as prioritized by the Director of Immigration and Customs Enforcement (ICE), federal field agents and prosecutors are to focus their attention on those undocumented persons who (1) are national security risks, (2) are serious felons or have lengthy criminal records, (3) are known gang members, and (4) have an egregious record of immigration violations.<sup>71</sup> Arizona’s SB 1070, by requiring the discovery of legal status of stopped and detained individuals, those who fail to carry an alien registration document, those who solicit work without authorization, and those whom officers believe may have committed a removable offense, subverts the federal government’s priority order. Indeed, Arizona’s law appears intentionally crafted to catch the most easily discoverable and least culpable among unlawfully present persons, in the dogged pursuit of “attrition” regardless of national public safety priorities.

Relatedly, state enforcement schemes necessitate substantial federal involvement. State business-licensing sanctions are, for the most part, wholly contained state actions. State authorities handle the investigation, prosecution, and punishment of LAWA violations. The federal government’s involvement is limited to the state’s use of the federal E-Verify database to check the lawful work status of the individual employee. The United States, writing *amicus curiae* in *Whiting*, confirmed that such usage was consistent with its purpose in creating the program, and that mandatory usage by all Arizona businesses would not overburden the system.<sup>72</sup> Further, once the federal database is accessed and issues a response, state prosecutors and state courts are responsible for punishing the offending employer. The statute requires the state to “notify” federal authorities, but the federal government need not take any action. Arizona accomplishes its goals without further federal involvement.

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<sup>70</sup> See Motomura, *supra* note 48; see also Motomura, *supra* note 52; Robert Pear, *Fewer Youths to be Deported in New Policy*, N.Y. TIMES, Aug. 19, 2011 at A1, available at [http://www.nytimes.com/2011/08/19/us/19immig.html?\\_r=1&scp=1&sq=obama%20deportation%20priority&st=cs](http://www.nytimes.com/2011/08/19/us/19immig.html?_r=1&scp=1&sq=obama%20deportation%20priority&st=cs)

<sup>71</sup> See Morton, *supra* note 46, at 3; see also Howard, *supra* note 46 and accompanying text.

<sup>72</sup> Brief for the United States as Amicus Curiae Supporting Petitioners at 31-34, *Whiting v. Arizona*, 131 S. Ct. 1968 (2011). Notably, separate concerns regarding the accuracy and reliability of the E-Verify system and database abound, and could have constituted an independent basis to strike down LAWA. See *Whiting*, 131 S. Ct. at 1991-92 (Breyer, J. dissenting) (noting E-Verify’s error rate and possibility of aggravating the risk of erroneous prosecutions).

Enforcement schemes like SB 1070, however, are not self-contained and require substantial federal resources to complete. Arizona’s goal of “attrition” – i.e., reduction in the presence of unlawfully present persons – can only truly be realized by prosecution and removal of those persons from the United States. Although individuals convicted under the various provisions of SB 1070 must satisfy state criminal punishments, the state of Arizona cannot remove them. Only the federal government can issue a Notice to Appear in front of an immigration judge and an Order of Removal, and actually, physically remove an individual from the country.<sup>73</sup> State immigration arrest authority, even for federally-defined immigration crimes, alters the dynamics, priorities, and resource-use of the federal civil removal system. SB 1070 compounds the existing problem of state arrests for federal criminal immigration violations by funneling state arrests for federal civil immigration violations and state arrests for state criminal immigration violations into the federal system. It thereby exponentially increases the burdens on a federal enforcement and removal scheme of limited capacity.<sup>74</sup> In stark contrast to *Whiting*, where the federal government acquiesced in and encouraged Arizona’s use of federal resources, in the SB 1070 context, the U.S. responded by filing suit against the state; doing so unequivocally expresses the federal government’s disagreement with this form of resource diversion by a state.

These problems with a state immigration enforcement scheme – its subversion of national enforcement priorities, its inability to effect removal, its deterrence of non-citizen residence within the state, and its necessitation of substantial federal involvement – contribute to a final national problem: uniformity in immigration policy. When imagined as a subset of U.S. foreign policy or as an expression of Congress’ uniform power over naturalization, immigration law, as a constitutional matter, must be harmonized and unitary.<sup>75</sup> By creating state criminal penalties based on unlawful presence and activity in the United States, and embarking on a unilateral path of attrition through enforcement, Arizona has essentially decided to part ways with the nation as a whole, and other individual states who retain fidelity to federal immigration policy. Such a position is undesirable vis-à-vis relations with foreign nations.<sup>76</sup> Further, since Arizona cannot actually remove unlawfully present persons, the only possible outcome of rigorous SB 1070 enforcement is movement of immigrants, both lawful and unlawful, into other states. Effectively, Arizona exports its perceived public policy problems to neighboring states.<sup>77</sup> These types of state policies violate fundamental principles of free movement enshrined in the Constitution,<sup>78</sup> create state regulatory races to the bottom,<sup>79</sup> and undermine uniform national responses to national problems.

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<sup>73</sup> 8 U.S.C. §§ 1229, 1229a, 1229b, 1229c, and 1231 (2006).

<sup>74</sup> See Morton, *supra* note 46.

<sup>75</sup> THE FEDERALIST Nos. 11, 22 (Alexander Hamilton), Nos. 4, 5 (John Jay) (Clinton Rossiter ed., 1961); cf. U.S. CONST. art. I, § 8, cl. 4 (empowering Congress to create a Uniform Rule of Naturalization).

<sup>76</sup> Howard Fischer, *Mexico Asks U.S. Court to Reel in ‘Overbroad Net’ Cast by SB 1070*, ARIZ. DAILY STAR, June 23, 2010, available at [http://azstarnet.com/news/local/border/article\\_e694e2d0-78ee-5ffb-9595-09dba3b1a030.html](http://azstarnet.com/news/local/border/article_e694e2d0-78ee-5ffb-9595-09dba3b1a030.html).

<sup>77</sup> Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1692-98 (2011) (arguing that state immigration laws export costs to other states, and as such, violate an important condition of state policy experimentation).

<sup>78</sup> *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (striking down as unconstitutional, California’s durational residency requirement for public assistance and stating “the ‘constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence.”).

Undoubtedly, even with regard to immigrants and immigration, the Constitution and federal statutes tolerate some differentiation and policy experimentation. LAWAs and state business-licensing laws are one example. In addition, federal law delegates to states the power to deny state welfare benefits to certain non-citizens;<sup>80</sup> and some states allow undocumented students to pay in-state tuition at state universities.<sup>81</sup> In these instances, states have taken non-uniform positions vis-à-vis immigrants. But these variations are permitted in state policies using (1) the states' own resources, in (2) areas of extensive and traditional state regulation, and pursuant to (3) federal permission for states to engage in the activity. They lend no support to state immigration enforcement schemes. Unlike the examples cited, state immigration enforcement laws like SB 1070 strike at the heart of federal immigration prerogatives. They are attempts to control the entry, exit, and stay of non-citizens, in a manner unauthorized by federal law, and requiring the expenditure of substantial federal resources. Therefore, the disharmony created by Arizona's – and other isolated states' – unilateral exclusion policy cannot be tolerated in our federalist system.

In addition to corrupting federal-subfederal interactions, state enforcement schemes also upset intra-state dynamics by requiring local officers to perform tasks beyond their training, and inappropriately diverting local resources away from local community policing. SB 1070 §6 asks local law enforcement officers to arrest individuals if the officer has probable cause to believe the person to be arrested has committed a removable offense. Determining what constitutes a “removable offense,” however, is no simple task. There exists no database or convenient list of removable offenses; rather, whether an offense is a removable offense requires careful adjudication by those trained in immigration law. And, the INA contains several exceptions, waivers, and defenses to removal, even if one has committed a removable offense. As Justice Alito noted in *Padilla v. Kentucky*, “professional organizations and guidebooks ... are right to say that ‘nothing is ever simple with immigration law’ – including the determination whether immigration law clearly makes a particular offense removable.”<sup>82</sup> Given this complex immigration background, it is a mystery how local police officers in Arizona will determine proper arrestees under this provision.

Relatedly, by mandating that local officers perform tasks outside their expertise, state immigration enforcement schemes undermine local policing efforts themselves.<sup>83</sup> Sub-federal immigration enforcement schemes alienate immigrant communities and cannibalize state and local resources that should be used for traditional policing efforts. Thus, they perversely decrease public safety. Notably, these allegations are not the propaganda of immigrant-activist

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<sup>79</sup> *Cf. Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935) (striking down state economic protectionist legislation, and stating “The Constitution was framed under the dominion of a political philosophy less parochial in range. It 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 in division.”).

<sup>80</sup> 8 U.S.C. §§ 1621, 1622 (2006).

<sup>81</sup> National Conference of State Legislatures, *In-State Tuition and Unauthorized Immigrant Students*, (July 8, 2011), available at <http://www.ncsl.org/default.aspx?tabid=13100> (Listing states with such policies)

<sup>82</sup> *Padilla v. Kentucky*, 130 U.S. 1473, 1490 (2010) (Alito, J., concurring).

<sup>83</sup> Rick Su, Commentary, *The Overlooked Significance of Arizona's New Immigration Law*, 108 MICH. L. REV. FIRST IMPRESSIONS 76 (2010), available at <http://www.michiganlawreview.org/assets/fi/108/su.pdf> (noting how SB 1070 ties the hands of local law enforcement agencies that may not want to enforce immigration law because of the effect on local communities).

groups; rather, they are the expert opinion of those with the greatest experience and knowledge of local policing dynamics. Many state and local officials, including local law enforcement organizations, have resisted the calls to engage in immigration enforcement because of the toll it takes on the traditional public safety duty of state and local police.<sup>84</sup> The position taken by these state and local officials – and by jurisdictions enacting sanctuary ordinances – underscores a lurking reality likely to influence the Court: immigration enforcement simply does not look or feel like the type of regulatory activity in which sub-federal entities should engage in a federalist system that divides responsibility for national and local public policy challenges.

### III. The Lesson of Arizona and SB 1070: The Need for Federal Immigration Reform

One thing that the authors and supporters of restrictive state immigration laws, on the one hand, and immigrant-activists and opponents of such measures, on the other, can agree on: U.S. immigration policy needs fixing. These opposing camps may vehemently disagree on the substantive particulars of immigration reform. However, at base, both recognize that the unlawful migration should be addressed, and that something should be done regarding those unlawfully present persons already in the country.

Proponents of sub-federal immigration regulation, like SB 1070 and LAWA, use as their starting point, the fact that United States law has been violated by those who enter or remain unlawfully present. From this original sin, enforcement advocates argue that any dalliance in capturing and deporting unlawful migrants breeds disrespect for the rule of law, and governmental leniency towards this group may encourage more unlawful entry and presence.<sup>85</sup> This position is not without any merit.

The real problem is that, from this starting point, enforcement advocates draw the wrong conclusion. Migration has been, and always will be, a fact of human existence. Human movement to find work or reunite with family would be unremarkable, but for the legal construction of political borders between nation-states. But, these man-made demarcations have never, and will never, stem the tide of migrants in search of work and improved opportunities for themselves and their families. Further, the United States relies on, and requires, significant migration to fill its economic needs in both high-skilled and labor sectors.<sup>86</sup> Increased border

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<sup>84</sup> POLICE EXECUTIVE RESEARCH FORUM, POLICE CHIEFS AND SHERIFFS SPEAK OUT ON LOCAL IMMIGRATION ENFORCEMENT (2008), available at [http://policeforum.org/library/critical-issues-in-policing-series/Immigration%28\\$25%29.pdf](http://policeforum.org/library/critical-issues-in-policing-series/Immigration%28$25%29.pdf); see also Julia Preston, *Police Chiefs Wary of Immigration Role*, N.Y. TIMES, Mar. 4, 2011, at A15; Randal C. Archibold, *Arizona's Effort to Bolster Local Immigration Authority Divides Law Enforcement*, N.Y. TIMES, Apr. 22, 2010, at A16; Julia Preston, *States Resisting Program Central to Obama's Immigration Strategy*, N.Y. TIMES, May 6, 2011, at A18 (states declining participate in Secure Communities program instituted by the federal government).

<sup>85</sup> See, e.g., 149 CONG. REC. 29947-48 (2003) (Statement of Sen. Sessions) (“America’s strength is based on its commitment to the rule of law...In the world of immigration laws, a façade of enforcement that holds no real consequences for law breakers is both dangerous and irresponsible.”).

<sup>86</sup> Jonah Lehrer, *Why America Needs Immigrants*, WALL ST. J., May 14, 2011, available at <http://online.wsj.com/article/SB10001424052748703730804576313490871429216.html>; DEMETRIOS G. PAPADEMETRIOU, DORIS MEISSNER, MARC R. ROSENBLUM & MADELEINE SUMPTION, ALIGNING TEMPORARY IMMIGRATION VISAS WITH U.S. LABOR MARKET NEEDS: THE CASE FOR A NEW SYSTEM OF PROVISIONAL VISAS, MIGRATION POLICY INSTITUTE 13-16 (2009), available at [http://www.migrationpolicy.org/pubs/Provisional\\_visas.pdf](http://www.migrationpolicy.org/pubs/Provisional_visas.pdf).

vigilance and enforcement, combined with a mismatch between actual labor needs and lawful entry visas, has only led to increases in the undocumented population, greater number of border deaths, and increases in human smuggling prices paid to cartels and coyotes.<sup>87</sup> These are the hard and uncontrovertable economic, social, and human facts.

Thus, the crisis of legal legitimacy created by unenforced or ineffective federal immigration law (cited by advocates as reason for state involvement) cannot be solved by robust state and local enforcement of those federal laws. The sensible resolution to this perceived crisis requires enacting immigration laws that account for the geographic, economic, and social realities and needs of the United States and the population of putative immigrants. Rational immigration policy that reflects our country's true needs means increasing the number of lawful entry visas for both temporary and permanent workers. In addition, it requires eliminating or restructuring per-country limits on visas that have created insurmountable waitlists and backlogs from countries of high immigration like Mexico, China, and India. Unsurprisingly, the majority of the unlawfully present population – whether through illegal entry or visa overstay – hails from countries with years-long waiting lists for lawful entry.<sup>88</sup> Finally, a rational immigration policy requires practical responses to the existing undocumented population, currently estimated to number 11 to 12 million persons. On this score, immigration reform must at least include the DREAM Act to ensure that undocumented college students and military personnel have the opportunity to remain in and benefit the country.<sup>89</sup>

While mass deportation might be the emotional, knee-jerk response of restrictionist forces, it is clearly fantastical. Further calls for mass deportation will only exacerbate the crisis of legitimacy already plaguing immigration policy. Arizona's SB 1070 has the potential to criminalize the estimated 400,000 unlawfully present persons in the state. Actual discovery and prosecution of this entire population, and their subsequent removal, is practically impossible. In total, with current resources and capacity, the federal government can only deport a maximum of 400,000 noncitizens per year nationwide.<sup>90</sup> Thus, SB 1070 only widens the gap between law and on-the-ground realities, further increasing the legitimacy crisis in immigration law. In contrast, the suggested comprehensive immigration reforms better match law, reality, and need, thus producing greater fidelity to our nation's immigration law.

The existence of SB 1070, its copycats, and the general increase in sub-federal immigration regulation, is an indication of the urgent need for this reform. In passing LAWA, then-Governor, now-Secretary of DHS Janet Napolitano, described Arizona as backed into a corner by the lack of federal leadership. She noted that despite the fact that LAWA might be a

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<sup>87</sup> CHAD C. HADDAL, YULE KIM & MICHAEL JOHN GARCIA, BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 18-20, 26 (2009), available at <http://www.fas.org/sgp/crs/homsec/RL33659.pdf>; Mary Fan, *When Deterrence and Death Mitigation Fall Short: Fantasy and Fetishes as Gap-Fillers in Border Regulation*, 42 LAW & SOC'Y REV. 701 (2008); WAYNE CORNELIUS, CONTROLLING UNAUTHORIZED IMMIGRATION FROM MEXICO: THE FAILURE OF PREVENTION THROUGH DETERRENCE AND THE NEED FOR COMPREHENSIVE REFORM, IMMIGRATION POLICY CENTER 6 (2008), available at <http://www.immigrationforum.org/images/uploads/CCISbriefing061008.pdf>.

<sup>88</sup> PASSEL & COHN, *supra* note 16.

<sup>89</sup> Julia Preston, *After a False Dawn, Anxiety for Illegal Immigrant Students*, N.Y. TIMES, Feb. 9, 2011, at A15, available at <http://www.nytimes.com/2011/02/09/us/09immigration.html>.

<sup>90</sup> See Howard, *supra* note 46.

“business death penalty,”<sup>91</sup> pressing public policy concerns occasioned by unlawful immigration compelled Arizona to take sub-optimal legislative steps. The empirical validity of this claim aside, these types of enactments from across the country are a clear message that federal immigration reform is not just a national priority, it is a national imperative.

Just as undocumented migration is an unchangeable fact in the absence of immigration reform, so too will be sub-federal immigration laws like LAW A and SB 1070. While the United States and advocacy groups are likely to prevail in their suits against these emerging laws, valuable public resources have been squandered both enacting and defending those laws, and subsequently, protesting and challenging those laws. Even if the Court ultimately strikes down SB 1070, it is a virtual certainty that the next generation of sub-federal immigration laws, slightly modified from the original version, will emerge, perhaps from Arizona again. *Whiting*, *U.S. v. Arizona*, *Lozano*, and their ilk are the beginning of an absurd cycle, not its end. The message to the citizenry and elected officials – both federal and sub-federal – is that the sooner we address our immigration concerns through systemic, nation-wide reform, the sooner we can channel resources to other important national priorities.

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<sup>91</sup> David G. Savage, *The Enforcer of Border Laws*, L.A. TIMES, Nov. 23, 2008, available at <http://articles.latimes.com/2008/nov/23/nation/na-napolitano23>.