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A LEGAL LABYRINTH: ISSUES RAISED BY ARIZONA SENATE BILL 1070

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INTRODUCTION

The summer of 2010 may prove to be an especially historic one for immigration policy in the United States. At long last there is evidence of federal engagement that may lead to significant reform. If significant national policy reform does emerge, then the Arizona legislature may be credited as a primary catalyst for such change.

In late spring 2010, Arizona passed Senate Bill 1070¹—an extraordinary law that reflects and has provoked intense reactions by political leaders, commentators, and the public. The bill raises critical issues of race, security, sovereignty, civil rights, state power, and foreign relations. Such issues encompass larger debates about modern immigration law and policy, and are worthy of sustained public commentary and scholarly discourse.

The impact of S.B. 1070 on the criminal justice system of Arizona—the duties and powers of Arizona law enforcement and prosecutorial authorities, and the relationship of the state legislation to federal law and policy—are being described in commentary and in cartoons. But many descriptions have little to do with the text of the bill, with the relevant background legal principles, or with plausible policy and interpretations.

We believe that it is possible to get the facts right even for myriad questions whose answer is open to debate. The goal of this Article is to identify the central legal issues raised by this legislation—to get the facts right and frame the issues so that both scholars and the public can engage in real and not imagined or created discourse. Identifying the central issues raised by S.B. 1070, however, is no simple task. The statute raises difficult

1. The document at issue is S.B. 1070, 49th Leg., 2d Sess., Ariz. Sess. Laws ch. 113 (2010), available at <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2R/laws/0113.htm>, as amended by H.B. 2162, 49th Leg., 2d Sess., Ariz. Sess. Laws ch. 211 (2010), available at <http://www.azleg.gov/legtext/49leg/2r/bills/hb2162c.pdf>.

issues of federalism, criminal law and procedure, and interaction with existing law. The bill creates many new crimes and duties, some of them previously unknown not only in Arizona, but also in federal or state law. To understand the legal issues raised by this bill requires the expertise of one-half of a law school faculty, because issues arise about both structural and substantive constitutional law, immigration law, criminal law, criminal procedure, state and local government law, and other fields. S.B. 1070 includes many provisions that are open to a range of interpretations.

Critically, what this law means, including ultimate judgments about its constitutionality, will turn on decisions yet to be finally made. U.S. District Judge Susan Bolton has preliminarily enjoined parts of the law and left others in force.² The State of Arizona has appealed to the U.S. Court of Appeals for the Ninth Circuit, and the U.S. Supreme Court may ultimately decide the fate of S.B. 1070, either at the preliminary injunction stage, or after a final judgment.

Although this Commentary addresses legal issues raised by legislation in one state, the issues identified and addressed have nationwide importance. News reports state that a majority of Americans appear to support Arizona's S.B. 1070. Several lawsuits against S.B. 1070 have been filed, including a challenge of the law by the United States, on preemption and commerce clause grounds. The United States Supreme Court also accepted certiorari in a related matter, which involves the Legal Arizona Workers Act and its interaction with federal laws regarding employment of undocumented persons.³ Other states, such as Florida, are considering similar legislation. Thus, the decisions made about S.B. 1070 and other Arizona legislation will have a lasting impact on the role that states can and will play in immigration policy and enforcement.

This Commentary answers central questions that have led to great confusion in public and indeed even in scholarly discourse. Does S.B. 1070 authorize racial profiling? (It does). Does S.B. 1070 require racial profiling? (Again, it does in text, but it may not in administrative policy). Does S.B. 1070 authorize arrest or detention based on race alone? (No). May Arizona police under S.B. 1070 arrest or stop based on undocumented status alone? (Probably). Are people in Arizona now required to carry identification? (Not generally). How can police tell if someone is undocumented? (It is a contextual evaluation). What is the purpose of Arizona making state crimes based on violations of federal law? ("Attrition through enforcement").⁴ Does S.B. 1070 simply replicate and enforce federal immigration law? (To some extent yes, but to a greater extent no).

2. *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (order on motion for preliminary injunction).

3. *See Chamber of Commerce v. Candelaria*, 130 S. Ct. 534 (2009), *cert. granted*, 78 U.S.L.W. 3065 (U.S. June 28, 2010) (No. 09-115).

4. S.B. 1070, 49th Leg., 2d Sess., §1 (2010).

The Commentary proceeds in three parts. Part I identifies and discusses the new crimes that the legislation creates. Part II identifies and discusses the new police powers that the legislation creates as well as the new law enforcement duties that it imposes. Part III addresses the largest legal question raised by this specific legislation and more generally when states attempt to participate in immigration policy and enforcement—whether such actions are permitted under principles of federalism.

I. NEWLY CREATED CRIMES

S.B. 1070 creates or amends four sections of the Arizona Revised Statutes, which impose criminal liability based on undocumented presence in the United States. The offenses range from direct borrowing of federal law through actual citation of a federal statute (Ariz. Rev. Stat. 13-1509(A)), to making criminal in Arizona conduct that is not criminal under federal law (Ariz. Rev. Stat. 13-2928). In the middle are statutes roughly patterned on federal law, but which differ in various ways. (Ariz. Rev. Stat. §§ 13-2319 & 13-2929).

We explore the meaning of the new law below with two background principles in mind. First, Arizona courts construe statutes, where reasonably possible, to avoid constitutional questions.⁵ Second, under the rule of lenity, ambiguous criminal statutes are construed favorably to the defendant.⁶

A. *Willful Failure to Complete or Carry an Alien Registration Document*

1. *Elements of the Offense and Penalty*

The Act creates a *new state crime* of “Willful failure to complete or carry an alien registration document.”⁷ A person is guilty if she does not “maintain authorization from the federal government to remain in the United States”⁸ and is “in violation of 8 United States Code 1304(e) or 1306(a).”⁹ These sections of federal law originated as part of the Alien Registration Act of

5. *State v. Gomez*, 127 P.3d 873, 878 (Ariz. 2006) (“We . . . construe statutes, when possible, to avoid constitutional difficulties.”). *See also, e.g., Skilling v. United States*, 130 S. Ct. 2896, 2932 (2010) (“[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity” (citation omitted)).

6. *State v. Tarango*, 914 P.2d 1300, 1302 (Ariz. 1996) (“When a statute is ‘susceptible to more than one interpretation, the rule of lenity dictates that any doubt should be resolved in favor of the defendant.’ *State v. Pena*, 140 Ariz. 545, 549–50, 683 P.2d 744, 748–49 (App. 1983) (decision approved and adopted in *State v. Pena*, 140 Ariz. 544, 683 P.2d 743 (1984)).”). Notably, the Arizona legislature appears to have attempted to abrogate the rule of lenity. *See ARIZ. REV. STAT. ANN.* §§ 1-211(C), 13-104 (2010). However, state courts continue to apply the rule. *See Cawley v. Arizona Bd. of Pardons and Paroles*, 701 P.2d 1195, 1196 n.1 (Ariz. App. 1984) (“We note that §§ 13-104 and 1-211(C) abolish the general rule of strict construction for penal statutes. However, Arizona decisions continue to apply the rule of lenity.”), *aff’d*, 701 P.2d 1188 (Ariz. 1985).

7. S.B. 1070 § 3, ARIZ. REV. STAT. ANN. § 13-1509 (2010).

8. ARIZ. REV. STAT. ANN. § 13-1509(F) (2010).

9. ARIZ. REV. STAT. ANN. § 13-1509(A) (2010).

1940, which requires registration within thirty days of arrival of non-citizens who: 1) are fourteen or older; 2) did not enter under immigrant or non-immigrant visas issued under 8 U.S.C. § 1201(b); and 3) remain in the United States for thirty days or longer.¹⁰ Section 1304(e) requires those issued a Certificate of Alien Registration or Alien Registration Receipt Card by the federal government to carry it; noncompliance is a misdemeanor punishable by 30 days in jail, a \$100 fine, or both.¹¹ Section 1306(a) provides that a person required to register who “willfully fails or refuses to make such application” is guilty of a misdemeanor punishable by 6 months in jail, a \$1,000 fine, or both.

To be convicted under the *new state statute* a person must *not* be authorized by the federal government to be in the United States; that is, it is inapplicable to those who have valid visas or other legal grounds to remain in the United States.¹² The defendant’s status may be determined by “a law enforcement officer who is authorized by the federal government to verify or ascertain an alien’s immigration status.”¹³ This probably refers to the 287(g) program,¹⁴ under which state and local officers are trained and authorized to enforce federal immigration law. Status may also be determined by federal authorities “pursuant to 8 United States Code 1373(c),” which allows the Immigration and Naturalization Service (and therefore its successor agencies) to share “citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law.”

The crime is a Class 1 misdemeanor, punishable by up to twenty days in jail and a \$100 fine for a first offense,¹⁵ and thirty days for a second offense.¹⁶ *The federal penalties for violation of the federal provisions are different.* Section 1304(e) provides for punishment of up to thirty days in jail and a \$100 fine. Section 1306(a) provides for punishment by up to 6 months

10. 8 U.S.C. § 1302(a) (2006) (parents are required to register children less than 14 years old). 8 U.S.C. § 1302(b) (2006) (when a person required to register turns 14, he or she must register under § 1302(a)).

11. The specific forms described in 8 U.S.C. § 1304(e), the Alien Registration Receipt Card, and Certificate of Alien Registration, are not currently used; perhaps this means that the section is defunct, because no one is issued these precise documents. However, 8 C.F.R. § 264.1(b) describes the forms, including the successor to the Alien Registration Receipt Card, the Permanent Resident Card, that “constitute evidence of registration.” Changing the names of the forms used in the statute, or treating them as categories rather than as names of particular forms, is probably within the power of federal authorities. If so, § 1304(e) requires non-citizens to carry the forms listed in 264.1(b) if issued. In any event, courts still treat § 1304(e) as requiring non-citizens to carry immigration documents. *See, e.g.,* United States v. Vasquez-Ortiz, 344 Fed. Appx. 551, 555 (11th Cir. 2009) (foreign birth plus lack of immigration documents “established reasonable suspicion and probable cause to believe that [defendant] was violating 8 U.S.C. § 1304(e)”; United States v. Moya-Matute, 559 F. Supp. 2d 1189, 1221 (D.N.M. 2008) (after defendant “told agents he was from Honduras and did not have his immigration papers on his person, he gave sufficient information for them to have probable cause to arrest him under 8 U.S.C. § 1304(e)”).

12. ARIZ. REV. STAT. ANN. § 13-1509(F) (2010).

13. ARIZ. REV. STAT. ANN. § 13-1509(B)(1) (2010).

14. 8 U.S.C. § 1357(g) (2006).

15. ARIZ. REV. STAT. ANN. § 13-1509(H).

16. *Id.*

incarceration and a \$1,000 fine. Judge Bolton preliminarily enjoined this section of S.B. 1070.

2. *Issues*

The statute has extremely limited application because it is tied to federal statutes that are difficult to violate. The statute is not violated simply because the defendant is undocumented or removable; the defendant also must be “in violation” of one of two specific federal statutes—8 U.S.C. § 1304(e) or § 1306(a). The legislature likely did not intend this limited application, but the interaction of state and federal law imposes such restrictions.

Failure to Carry Documents in Violation of § 1304(e).

It is likely that few intended defendants will have violated § 1304(e), failure to carry an immigrant registration document issued by the United States: Most will never have been issued an immigration document, so they are not covered. S.B. 1070 targets “the unlawful entry and presence” of non-citizens, according to Section 1. Also, research has uncovered no cases involving a conviction under § 1304(e) for failure to carry an expired or invalid immigration document. If § 1304(e) does not require carrying expired or invalid documents, then § 13-1509 can never be the basis for prosecution of anyone who was lawfully admitted. People lawfully admitted on a visa are not required to register under § 1306(a)(2). If a person later lost her right to live in the United States, and there is no duty to carry expired or invalid documents, then she cannot have violated § 1304(e). If the person fails to carry valid documents while remaining authorized to live in the United States, she cannot be successfully prosecuted because Arizona Revised Statutes § 13-1509(F) limits liability to those who are not authorized to live in the country.

While conviction may be difficult, this section may be a rich source of probable cause to arrest. Courts have held that evidence of foreign birth coupled with a lack of immigration documentation amounts to probable cause.¹⁷ Accordingly, a person who casually admits that she was born in Mexico and has no immigration documents makes an arrest lawful even if,

17. See, e.g., *United States v. Vasquez-Ortiz*, 344 Fed. Appx. 551, 555 (11th Cir. 2009) (foreign birth plus lack of immigration documents “established reasonable suspicion and probable cause to believe that [defendant] was violating 8 U.S.C. § 1304(e)”; *United States v. Moya-Matute*, 559 F. Supp. 2d 1189, 1221 (D.N.M. 2008) (after defendant “told agents he was from Honduras and did not have his immigration papers on his person, he gave sufficient information for them to have probable cause to arrest him under 8 U.S.C. § 1304(e)”; U.S. Atty’s Manual, Criminal Resource Manual, 1918, Arrest of Illegal Aliens by State and Local Officers, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01918.htm (“Consequently, a law enforcement officer confronting an alien who is unable to produce documentation arguably has probable cause to believe that a violation of 8 U.S.C. § 1304(e) (failure to possess documents) or 8 U.S.C. § 1325(a) (entry without inspection) has occurred. (If the alien is undocumented and has been in the United States for longer than 30 days, he or she has also violated 8 U.S.C. § 1306(a))”).

for example, the person has been naturalized or was born a citizen because she had U.S. citizen parents.

Failure to Register in Violation of § 1306(a).

— Duty to Register. For people who never entered lawfully, there are substantial impediments to proof of liability under § 1306(a). First, conviction requires proof of when the person entered. If the person has been in the United States for less than 30 days, then there is no duty to register.¹⁸ On the other hand, if the person has been in the United States for more than five years and thirty days, then the statute of limitations may have expired.¹⁹ In such a case, there is an argument that the person is no longer “in violation” of § 1306(a), as required by the statute. For the State of Arizona to prosecute a violation of federal law that Congress has deemed unenforceable may raise a preemption question, which is discussed below in Section VI. There is also an argument that failure to register is a continuing offense, for which the statute never ends because it never starts before arrest.²⁰

— Mens Rea. Prosecution predicated on failure to register will be extremely difficult for another reason. In general, ignorance of the law is no excuse; that is, even if you do not know that possessing a hand grenade or heroin is illegal, you may still be liable for doing so. In some areas of complex regulation, such as tax, legislatures change the rule and impose liability only for “willful” violations; that is, liability only occurs when based on a “voluntary, intentional violation of a known legal duty.”²¹ This principle, usually applied to regulatory, technical laws, protects people from being convicted of a crime unless they specifically intended to act contrary to law.

The Supreme Court has explained that § 1306(a) requires willfulness in this strong sense. In *Hines v. Davidowitz*,²² the Court held that a Pennsylvania alien registration law was invalid because it conflicted with the federal Alien Registration Act of 1940. The Court noted that “under the federal Act aliens . . . can only be punished for wilful failure to register”²³ and “the Congressional decision to punish only wilful transgressions was deliberate

18. 8 U.S.C. § 1302(a)(3) (2006). The oddity of requiring registration after only 30 days in the United States, when almost all people register at the time of issuance of a visa, 8 U.S.C. § 1201(b), or admission, is explained by the fact that the requirement was added as part of the Alien Registration Act of 1940. Previously, non-citizens had not been required to register or be fingerprinted. So the deadline initially applied to people already lawfully admitted to the United States.

19. 18 U.S.C. § 3282(a) (2006).

20. If failure to register is a continuing offense, as the Supreme Court suggested in dicta, *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1047 n.3 (1984), that has implications for the offenses created by S.B. 1070 § 5, adding Arizona Revised Statutes §§ 13-2929, which require, among other things, that the defendant be “in violation of a criminal offense.”

21. *Ratzlaf v. United States*, 510 U.S. 135, 141-42 (1994); *Cheek v. United States*, 498 U.S. 192, 201 (1991).

22. 312 U.S. 52 (1941).

23. *Id.* at 73.

rather than inadvertent is conclusively demonstrated by the debates on the bill.”²⁴ The debates included statements such as that by Senator Richard Russell: “This provision says ‘wilfully refuses.’ We would not punish for willfully refusing a man who did not file any application because he did not know about the necessity of doing it.”²⁵ Accordingly, violation of § 1306(a), and therefore conviction under Arizona Revised Statutes § 13-1509, requires proof beyond a reasonable doubt that the defendant knew of the duty to register.

In a prolonged discussion among a group of law professors who teach immigration law after S.B. 1070 was passed, no scholar was able to identify a specific government form²⁶ or other mechanism for registration under § 1306(a). Accordingly, either there is no way to register and the program is defunct, or the program is so obscure that even specialists do not know how it works. Under those circumstances, almost all potential defendants will have a valid claim that they did not know of the duty to register, and thus did not “willfully” fail to do so.

The government’s own behavior almost certainly has suppressed registration.²⁷ Most people subject to § 1306(a) entered without inspection, and many do not have high levels of formal education; thus it is unlikely that many either know about the duty to register or try to register. Given both widespread non-compliance and the availability of other grounds for removal whenever authorities encounter such people, the government has little reason to publicize the registration requirement or to develop and distribute registration forms. But if the government makes it practically impossible to register, and fails to publicize the process, it becomes ever more likely that even individuals who would be willing to obey the law never will know of their duty to register.

— Self-Incrimination. This section also potentially raises a self-incrimination issue. In general, a requirement to file a report or record, incident to a civil regulatory regime, such as a tax return, does not violate the privilege against self-incrimination of the Fifth Amendment. However, the Supreme Court has held that reporting requirements focused on criminal conduct do violate the privilege. Thus, the Supreme Court has invalidated a special

24. *Id.* at 73 n.36.

25. 86 CONG. REC. 8344 (1940).

26. U.S. Citizenship and Immigration Services forms are available here: <http://www.uscis.gov/portal/site/uscis>.

27. It is similar, in this context, to the alien change of address requirements of federal law. As the U.S. General Accountability Office reported in 2002, “Some aliens may be unaware that they need to file a change of address form and do not comply. This may be understandable given that the INS does not publicize the change of address requirement.” U.S. GENERAL ACCOUNTING OFFICE, HOMELAND SECURITY: INS CANNOT LOCATE MANY ALIENS BECAUSE IT LACKS RELIABLE ADDRESS INFORMATION 3 (GAO-03-188 2002), available at <http://www.gao.gov/new.items/d03188.pdf>. The report notes that the “INS has not made the Form AR-11 available at post offices as required by the Code of Federal Regulations.” *Id.* at 16–17.

registration and reporting statute focused on illegal gamblers²⁸ and a tax on marijuana dealers.²⁹ Of course, people can still be prosecuted for underlying crimes, but not for failing to confess the crimes to the government.

Arizona Revised Statutes § Section 13-1509 arguably has a similar flaw. Non-citizens are protected by the privilege against self-incrimination.³⁰ 8 U.S.C. § 1306(a) and similar statutes have been upheld, in general, because their purpose is civil regulation, not catching criminals.³¹ By contrast, the Arizona statute applies exclusively to those who are here unlawfully; however, those who fail to carry their documents or have failed to register, but are allowed by the United States to be here, are not covered. Because the law applies exclusively to those unlawfully present, registration would require admission of a crime. It may be that under the United States or Arizona³² constitutions, courts will conclude that this amounts to compelled self-incrimination and thus is invalid.

B. *Work and Hiring*

1. *Elements of the Offense and Penalty*

This new section of the Arizona Revised Statutes creates a crime of impeding traffic in order to hire an individual for work or if being hired for work. The law applies only when motor vehicles are “stopped on a street, roadway or highway” and when the vehicles are blocking or impeding “the normal movement of traffic.”³³ Judge Bolton did not enjoin this section.

An existing statute prohibits driving “a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic”³⁴ and permits law enforcement officers to issue citations for the violation of that statute.³⁵ Section 13-2928 differs from this existing statute in two important respects: First, it applies when a motor vehicle is impeding or blocking traffic for a particular purpose—the hiring of an individual to be transported to another location for work—and second, violation of the statute is a Class 1 misdemeanor.³⁶

28. See *Marchetti v. United States*, 390 U.S. 39, 61 (1969); *Grosso v. United States*, 390 U.S. 62, 66-67 (1968).

29. See *Leary v. United States*, 395 U.S. 6, 27 (1969).

30. See *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *United States v. Rodriguez-Rodriguez*, 441 F.3d 767, 773 (9th Cir. 2006).

31. See *Rajah v. Mukasey*, 544 F.3d 427, 443 (2d Cir. 2008) (“The statements required under the Program were merely a condition on the continued receipt of the government benefit of being allowed to remain in this country”); *United States v. Sacco*, 428 F.2d 264, 271 (9th Cir. 1970) (“The defendant makes no effort to explain in what way complying with any of those statutes would have tended to incriminate him”).

32. ARIZ. CONST., art. II, § 10.

33. ARIZ. REV. STAT. ANN. § 13-2928(A), (B) (2010).

34. ARIZ. REV. STAT. ANN. § 28-704(A) (2010).

35. Letter Opinion No. 62-17-L, Op. Ariz. Att’y Gen. R-185 (1962).

36. ARIZ. REV. STAT. ANN. § 13-2928(D) (2010).

The section also prohibits any person who is in the United States unlawfully from applying for work, soliciting work in a public place, or performing work either as an employee or independent contractor.³⁷ Judge Bolton enjoined this part of S.B. 1070.

2. *Issues*

As a general matter, the state may enact legislation to minimize traffic congestion. However, state legislation that imposes criminal sanctions for the hiring of undocumented aliens is preempted by the federal Immigration Reform and Control Act of 1986 (“IRCA”).³⁸ IRCA explicitly preempts “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”³⁹

Section 13-2928 unquestionably imposes a criminal sanction—a Class 1 misdemeanor is punishable by up to six months imprisonment.⁴⁰ Furthermore, § 13-2928(A), which punishes any “occupant of a motor vehicle that is stopped on a street, roadway or highway to attempt to hire or hire and pick up passengers for work at a different location if the motor vehicle blocks or impedes the normal movement of traffic,” is targeted at immigrants.

Although the provision does not specifically mention immigration, courts are likely to interpret it that way because courts interpret legislation “against the background of the legislative history . . . and the historical context from which the Act arose.”⁴¹ Section 13-2928 was one portion of a bill explicitly designed to address illegal immigration.⁴² Indeed, subsection (C) of this section—the section that prohibits any person who is in the United States unlawfully from applying for work, soliciting work in a public place, or performing work—clearly indicates that this section was created in response to the perception that undocumented aliens solicit and obtain day laborer positions from residents who pick them up from street corners.

Complicating the preemption issue is that this section does not solely regulate employment; it also regulates the flow of traffic. The government has a recognized interest in “promoting the free flow of traffic on streets and

37. ARIZ. REV. STAT. ANN. § 13-2928(C) (2010).

38. 8 U.S.C. §§ 1324a-1324b (2006).

39. 8 U.S.C. § 1324a(h)(2) (2006). The Ninth Circuit recently held that IRCA did not preempt the Legal Arizona Workers Act, designed to discourage the employment of undocumented non-citizens. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 866–67 (9th Cir. 2009), cert. granted, 78 U.S.L.W. 3065 (U.S. July 24, 2009) (No. 09-115). However, that legislation regulated employer conduct through suspension or revocation of state licenses—the explicit exemption from preemption included in IRCA. *Chicanos*, 558 F.3d at 862.

40. ARIZ. REV. STAT. ANN. § 13-707(A)(1) (2010).

41. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201 (1979).

42. Indeed section 1 of S.B. 1070, which sets forth the legislative intent, makes this abundantly clear: “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.” S.B. 1070, 49th Leg., 2d Sess., § 1 (2010).

sidewalks.” Even if a court were to conclude that § 13-2928 was intended to regulate the employment of undocumented aliens, it may hesitate to invalidate legislation where “the state law is fashioned to remedy local problems,” such as traffic congestion.

Some might also argue that this provision raises First Amendment concerns. Recent cases from a U.S. District Court in Arizona and another in California have invalidated somewhat similar local ordinances regulating solicitation from streets or highways on First Amendment grounds. One of those decisions was recently overturned, two to one, by the Ninth Circuit.⁴³ However, § 13-2928 differs from those ordinances in two important respects. First, unlike the ordinances at issue in those cases, § 13-2928 is written more narrowly and applies only when people involved are blocking traffic. That distinction may ultimately make an important difference, because whether a statute is broader than necessary to protect the government’s interests is an important consideration under prevailing First Amendment analysis.⁴⁴ Second, § 13-2928 restricts only solicitation of employment to be performed at another location; the other ordinances were aimed at all forms of solicitation.⁴⁵ That difference may be important, as a court may decide that an ordinance prohibiting only a certain type of speech is not content-neutral, which is another important consideration under prevailing First Amendment analysis.⁴⁶ Further complicating the First Amendment question is the fact that the Ninth Circuit’s decisions evaluating ordinances that prohibit solicitation or certain types of solicitation are not always entirely consistent.⁴⁷

43. See *Lopez v. Town of Cave Creek*, 559 F. Supp. 2d 1030, 1034–35 (D. Ariz. 2008); *Comite De Jornaleros De Redondo Beach v. City of Redondo Beach*, 475 F. Supp. 2d 952,966 (C.D. Cal. 2006), *rev’d*, 607 F.3d 1178 (9th Cir. 2010).

44. See *Ward v. Rock Against Racism*, 491 U.S. 781, 789–791 (1989); see also *Lopez*, 559 F. Supp. 2d at 1035; *Comite De Jornaleros De Redondo Beach*, 475 F. Supp. 2d at 964–66.

45. For example, the Redondo Beach ordinance prohibits “solicit[ing], or attempt[ing] to solicit, employment, business, or contributions.” REDONDO BEACH MUN. CODE § 3-7.1601, available at <http://www.qcode.us/codes/redondobeach/>.

46. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

47. Compare *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F.3d 1178, 1181, 1196 (9th Cir. 2010) (upholding following ordinance: “It shall be unlawful for any person to stand on a street or highway and solicit, or attempt to solicit, employment, business, or contributions from an occupant of any motor vehicle”), and *Acorn v. City of Phx.*, 798 F.2d 1260, 1262, 1273 (9th Cir. 1986) (upholding the following ordinance: “No person shall stand on a street or highway and solicit, or attempt to solicit, employment, business or contributions from the occupants of any vehicle” and invalidating an ordinance that regulates handbills that “propose one or more commercial transactions”), with *ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 800–01 (2006), and *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1140, 1140 n.3, 1148 (9th Cir. 1998) (invalidating an ordinance that prohibited: “(a) distributing, handing out, or offering on public sidewalks, handbills, leaflets, brochures, pamphlets or other printed or written literature, materials, or information, which advertise or promote services or goods for sale lease or rent or which otherwise propose one or more commercial transactions and which specifically refer to products or services for sale, lease or rent and which are distributed with an economic motivation or commercial gain; or (b) soliciting on public sidewalks, pedestrians to purchase, lease, or rent services or goods or otherwise propose one or more commercial transactions”). See also *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F.3d 1178, 1196–97 (Wardlaw, J., dissenting) (noting the tension between the majority opinion and other Ninth Circuit opinions in this area).

C. *Transporting Aliens While Committing Another Crime*

1. *Elements of the Offense and Penalty*

This new section of the Arizona Revised Statutes, borrowed from federal law, creates an Arizona crime with several distinct requirements. First, the law applies when a person “is in violation of a criminal offense”⁴⁸; that is, the person must be committing some crime apart from § 13-2929. Second, the person must transport, move,⁴⁹ harbor, conceal or shield non-citizens,⁵⁰ or encourage or induce their entry into Arizona.⁵¹ Third, the defendant must know or recklessly disregard the fact that the non-citizens have come to, entered or remained in the United States in violation of the law.⁵² Finally, at least for the transportation offense, the defendant must act “in furtherance of the illegal presence” of the non-citizen.⁵³ Thus, the core misconduct these statutes are aimed at punishing is associated with smuggling: transporting non-citizens across the border, or from the border to the interior of the United States, hiding them along the way, and helping them evade law enforcement (or, perhaps, concealing them from law enforcement officers who would free them from compelled labor). The “in violation of a criminal offense” section of the statute apparently contemplates that the smuggling will be discovered while enforcing some other provision of law, such as a traffic crime.⁵⁴

Violation is a Class 1 Misdemeanor, but an offense involving ten or more undocumented non-citizens is a Class 6 Felony.⁵⁵ The potential penalties for the federal versions of the offenses are much higher—up to five years imprisonment, or more if there are certain aggravating factors.⁵⁶ Judge Bolton declined to preliminarily enjoin this section.

2. *Issues*

“In Violation.” Although the core purpose is clear enough, several interpretive puzzles remain. One question is the full contours of when a person “is in violation of a criminal offense.” A Westlaw search suggests that this phrase is not used in any other state or federal statute now in force, so its meaning is a matter of speculation. It seems to apply to a person who, at the

48. ARIZ. REV. STAT. ANN. § 13-2929(A) (2010).

49. ARIZ. REV. STAT. ANN. § 13-2929(A)(1) (2010), based on 8 U.S.C. § 1324(a)(1)(A)(ii) (2005).

50. ARIZ. REV. STAT. ANN. § 13-2929(A)(2) (2010), based on 8 U.S.C. § 1324(a)(1)(A)(iii) (2005).

51. ARIZ. REV. STAT. ANN. § 13-2929(A)(3) (2010), based on 8 U.S.C. § 1324(a)(1)(A)(iv) (2005).

52. ARIZ. REV. STAT. ANN. § 13-2929(A)(1)-(3) (2010).

53. ARIZ. REV. STAT. ANN. § 13-2929(A)(1) (2010).

54. The legislature’s concern with non-citizens in vehicles is supported by Section 4 of S.B. 1070, which adds a rather incongruous section to Arizona’s human smuggling law: “[I]n the enforcement of this section, a peace officer may lawfully stop any person who is operating a motor vehicle if the officer has reasonable suspicion to believe the person is in violation of any civil traffic law.” ARIZ. REV. STAT. ANN., § 13-2319(E) (2010).

55. ARIZ. REV. STAT. ANN. § 13-2929(F) (2010).

56. 8 U.S.C. § 1324(a)(1)(B) (2006).

time of transporting, harboring or encouraging an undocumented alien, is also committing a crime, for example, a person transporting undocumented people across the border while going 20 miles an hour or more over the speed limit.⁵⁷ However, a person transporting undocumented non-citizens who violated a mere civil traffic rule⁵⁸ would not seem to be “in violation of a criminal offense” and therefore would not be liable under the statute.

Some crimes are deemed “continuing offenses” that exist not only from the point when every element has occurred, but until the offense stops. Tax evasion is a continuing offense according to some courts.⁵⁹ Failure to register as a sex offender is another example.⁶⁰ If an individual committed a “continuing offense” that has not yet terminated, perhaps including failure to register as required by federal immigration law,⁶¹ he or she may be liable under the statute if he or she transported or harbored non-citizens.

It also would be possible to argue that someone who violated a criminal statute in the past, say, failure to file an income tax return, when the statute of limitations has not expired, and the case has not otherwise been resolved, is “in violation” of a criminal offense. Of course, this would make liability very broad, and is a doubtful construction given the rule of lenity.⁶² The statute also does not say whether violation of an Arizona crime is required, or if a federal violation would be sufficient. If a federal violation is enough, then if unlawful entry to the United States is deemed a continuing offense, perhaps most undocumented people could be liable.

Relationship to Federal Law. Another difficulty is the precise relationship of the Arizona enactments to federal law. Like § 13-1509, the section that creates a new state crime of failure to complete or carry an alien registration document, § 13-2929 draws from several federal statutes. However, unlike § 13-1509, § 13-2929 does not simply cite to the relevant federal immigration statutes; it recapitulates them in text with slightly different wording. Therefore, violation of § 13-2929 does not require a violation of federal law; it requires violation of Arizona laws that are textually similar to federal laws.

This creates an interpretive puzzle: Did the legislature intend to create new Arizona transporting and concealing enactments with their own, distinct meaning? This reading might be implied based on the difference in language and the difference from the structure of § 13-1509.⁶³ Or did the legislature

57. ARIZ. REV. STAT. ANN. § 28-701.02(A)(2) (1956).

58. ARIZ. REV. STAT. ANN. § 28-1521 (1956) (“A person who violates a provision of chapter 3 of this title or this chapter is subject to a civil penalty unless the statute defining the offense provides for a criminal classification”).

59. *United States v. Barker*, 556 F.3d 682, 689 (8th Cir. 2009).

60. *State v. Helmer*, 53 P.3d 1153, 1156 (Ariz. Ct. App. 2002).

61. *See supra* note 20.

62. *See Chamber of Commerce v. Candelaria*, 130 S.Ct. 3498 (2010), *cert. granted*, 78 U.S.L.W. 3065 (June 28, 2010) (No. 09-115).

63. *State v. Kelly*, 112 P.3d 682, 684 (Ariz. Ct. App. 2005) (“We generally presume that when the legislature amends the language of a statutory provision, it intended that the change have meaning. *See State v. Garza Rodriguez*, 164 Ariz. 107, 791 P.2d 633 (1990).”).

intend to adopt the federal laws and their associated federal caselaw, but for purposes of clarity or simplicity did so without copying the statutes in their entirety or simply citing them?⁶⁴ An argument against this reading might be as follows. While Arizona cannot enact criminal statutes regulating the entire United States, if Arizona intended simply to make violation of federal law an Arizona violation as well, it could have done so simply by providing that whoever violated specified federal statutes *in Arizona* was guilty of a state crime, just as it did with § 13-1509. Accordingly, there is likely some reason for Arizona's adoption of its own law, rather than merely referring to federal law. Uniformity seems not to be the purpose or effect of this provision; Arizona's law is one of several in the United States criminalizing the transportation of illegal aliens, including Colorado,⁶⁵ Florida,⁶⁶ Missouri,⁶⁷ Oklahoma,⁶⁸ South Carolina,⁶⁹ Utah,⁷⁰ and an earlier version in Arizona itself.⁷¹ None is identical in coverage, the exceptions provided, or the penalties established. Accordingly, these laws may mark the beginning of a network of customized local regulation of the same area of law across the nation.

Inconsistency of Federal Precedent. Assuming that federal case law is relevant, it leaves open many questions. These statutes are among the murkiest and most unsettled in the U.S. Code.⁷² Different circuits follow a variety of different tests.⁷³

Nevertheless, some generalizations may be possible.⁷⁴ As the Fifth Circuit explained, "Willful transportation of illegal aliens is not, per se, a violation of the statute, for the law proscribes such conduct only when it is in furtherance of the alien's unlawful presence."⁷⁵ So not all transportation or "harboring"

64. *Wylie v. Douglas Lumber Co.*, 8 P.2d 256, 258 (Ariz. 1932) ("While it is not verbatim the statute of California (section 1186, Kerr's Code Civ. Proc. 1920), we take it that it was probably borrowed from California and has the same meaning.").

65. COLO. REV. STATS. ANN. § 18-13-128.

66. FLA. STATS. ANN. § 787.07.

67. MO. STATS. ANN. § 577.675.

68. OKLA. STAT. ANN. tit. 21, § 446 (West Supp. 2010).

69. S.C. CODE ANN. § 16-9-460 (Supp. 2009).

70. UTAH CODE ANN. § 76-10-2901 (West 1953).

71. ARIZ. REV. STATS. 13-2319.

72. See Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 GEO. IMMIGR. L.J. 147, 147 (2010).

73. See *United States v. Barajas-Chavez*, 162 F.3d 1285, 1288-89 (10th Cir. 1999) (en banc) (holding long-distance transportation to a new job is "in furtherance of" illegal presence, and describing tests of various circuits, citing *United States v. Velasquez-Cruz*, 929 F.2d 420 (8th Cir.1991) (direct or substantial relationship test); *United States v. 1982 Ford Pick-Up*, 873 F.2d 947, 951 (6th Cir.1989) (applying "intent-based approach"); *United States v. Merkt*, 764 F.2d 266, 271-72 (5th Cir.1985) (considering intent, and direct or substantial relationship); *United States v. Parmelee*, 42 F.3d 387, 391 (7th Cir.1994) (declining to follow other circuits)).

74. See generally William G. Phelps, Annotation, *Validity, Construction, and Application of § 274(a)(1)(A)(ii) of Immigration and Nationality Act (8 U.S.C.A. § 1324(a)(1)(A)(ii))*, *Making It Unlawful to Transport Alien Who Has Entered United States in Violation of Law*, 133 A.L.R. FED. 139 (1996).

75. *United States v. Merkt*, 764 F.2d 266, 272 (5th Cir. 1985). See also *United States v. Hernandez-Franco*, 189 F.3d 1151, 1155 (9th Cir. 1999) ("[A] conviction under this section requires

in the sense of, say, employing or housing, violates the federal statutes in the absence of an additional intent to violate or frustrate federal law.

Ordinary arms-length transactions by non-employers may be excluded. For example, the Seventh Circuit said that taken literally, federal law:

could conceivably criminalize the actions of a cab driver who transports in a routine commercial transaction an individual who announces his illegal alien status during the course of the ride. We do not read section 1324(a)(1)(B) as enacting such sweeping liability. Relevant considerations bearing on this issue include whether the defendant received compensation for his transportation activity, whether the defendant took precautionary efforts to conceal the illegal aliens, and whether the illegal aliens were the defendant's friends or co-workers or merely human cargo.⁷⁶

Most transportation cases involve smugglers, rather than social friends or family members of the undocumented people. In *United States v. Moreno*,⁷⁷ the Ninth Circuit held that a foreman who transported non-citizens "as part of the ordinary and required course of his employment as foreman" was not liable because "[i]t was too attenuated to come within the boundaries" of the law. The court explained:

A broader interpretation of the transportation section would render the qualification placed there by Congress a nullity. To do this would potentially have tragic consequences for many American citizens who come into daily contact with undocumented aliens and who, with no evil or criminal intent, intermingle with them socially or otherwise. It could only exacerbate the plight of these aliens and, without adding anything significant to solving the problem, create, in effect judicially, a new crime and a new class of criminals. All of our freedom and dignity as people would be so reduced.⁷⁸

Nevertheless, another appellate case holds that transporting undocumented people to and from work can constitute a violation.⁷⁹ In any event, even family members or friends who lie to the police or take other affirmative steps to prevent the detection of an undocumented person will be liable.

more than just the defendant's knowledge or reckless disregard of the fact that the alien transported was illegally present in the United States: the Government must also prove that the defendant 'intended to further the alien's illegal presence in the United States.'" (quoting *United States v. Barajas-Montiel*, 185 F.3d 947, 954 (9th Cir.1999)).

76. *United States v. Parmelee*, 42 F.3d 387, 391 (7th Cir. 1994).

77. 561 F.2d 1321, 1323 (9th Cir. 1977).

78. *Id.* See also *United States v. 1982 Ford Pick-Up*, 873 F.2d 947, 951 (6th Cir. 1989) (transportation for work insufficient); *United States v. Moreno-Duque*, 718 F. Supp. 254, 259 (D. Vt. 1989).

79. *United States v. One 1982 Chevrolet Crew-Cab*, 810 F.2d 178, 182 (8th Cir. 1987).

Another wrinkle comes from the exceptions to the transportation statute: Exempted is a “child protective services worker acting in the worker’s official capacity or a person who is acting in the capacity of a first responder, an ambulance attendant or an emergency medical technician and who is transporting or moving an alien in this state pursuant to title 36, chapter 21.1.”⁸⁰ The implication that a first responder or bystander *not* working for an emergency medical services provider⁸¹ is liable, or that without the exception CPS workers driving an undocumented child to juvenile hall would be liable, suggests that the scope of the statute may be quite broad.

II. NEWLY CREATED POLICE POWERS AND RESPONSIBILITIES

S.B. 1070 imposes new duties and creates new powers designed to increase investigation of immigration status,⁸² arrests of removable individuals,⁸³ reporting of undocumented status to federal authorities,⁸⁴ and assistance in removal by delivering removable non-citizens to federal authorities.⁸⁵ The overall point is to have Arizona police more involved in all phases of immigration enforcement.

A. Arrest for Any Removable Offense

Section 6 of S.B. 1070 adds a new section to Arizona’s warrantless arrest statute, Arizona Revised Statutes § 13-3883. This section allows peace officers to arrest without a warrant based on probable cause if “[t]he person to be arrested has committed any public offense that makes the person removable from the United States.”⁸⁶ Although clearly aimed at expanding state arrest authority, it seemed to be redundant if the point was to allow arrests for federal crimes. The U.S. Court of Appeals for the Ninth Circuit,⁸⁷ among other authorities,⁸⁸ holds that local police have inherent authority to arrest for federal crimes, including immigration misdemeanors. The Arizona Supreme Court held in 1954 that state peace officers may make arrests for federal crimes under their general arrest authority.⁸⁹ Existing law also permitted

80. S.B. 1070 § 5, Ariz. Rev. Stat. Ann. § 13-2929(E).

81. The law referred to in the exception deals with emergency medical services. See Ariz. Rev. Stats. § 36-2201 et seq.

82. ARIZ. REV. STAT. ANN. § 11-1051(B) (2010) (mandatory investigation in some circumstances).

83. ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2010).

84. ARIZ. REV. STAT. ANN. § 11-1051(C) (2010).

85. ARIZ. REV. STAT. ANN. § 11-1051(D) (2010).

86. ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2010).

87. *Gonzales v. City of Peoria*, 722 F.2d 468, 474–76 (9th Cir.1983) (federal law allows local police to arrest for criminal provisions of the Immigration and Nationality Act), *overruled on other grounds by* *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1040 (9th Cir. 1999).

88. Assistance by State and Local Police in Apprehending Illegal Aliens, Memo. Op. for the U.S. Att’y, S.D. Cal. (1996), available at <http://www.justice.gov/olc/immstopp1a.htm>.

89. *Whitlock v. Boyer*, 271 P.2d 484, 487 (Ariz. 1954) (noting that New York police officers make arrests for federal felonies and misdemeanors; “[w]e think this practice states the general rule and we

warrantless arrests for felonies, misdemeanors and petty offenses based on probable cause.⁹⁰

The mystery of the purpose of the statute was resolved in the lawsuit brought by the United States. The U.S. District Judge enjoined the section on the ground that it was intended to allow arrests based on the ground of deportability. As such, it tied into the recent inclusion of civil immigration warrants in the NCIC computer database; the lawfulness of local officers arresting on this basis alone is disputed.⁹¹ The section also provided a statutory basis for a test of the theory that local police have “inherent authority” to arrest for civil immigration violations.⁹² In any event, given the complexity of civil deportation, the court found that it was likely that errors would be made.⁹³

B. Mandatory Investigation of Suspected Undocumented Non-Citizens?

S.B. 1070 § 2, which adds Arizona Revised Statutes § 11-1051(B) provides:

For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state or a law enforcement official or a law enforcement agency of a county, city, town or other political subdivision of this state in the enforcement of any other law or ordinance of country, city or town or this state *where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person’s immigration status determined before the person is released. The person’s immigration status shall be verified with the federal government pursuant to 8 United States Code section 1373(c). A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution.* A person is presumed to not be an alien who is

approve of it for Arizona”) (citing *Marsh v. United States*, 29 F.2d 172, 173 (2d Cir. 1928) (L. Hand J., joined by Swan and A. Hand JJ.)).

90. ARIZ. REV. STAT. ANN. § 13-3883(A) (2010).

91. *National Council of La Raza v. Gonzales*, 468 F. Supp. 2d 429, 445 (E.D.N.Y. 2007) (dismissing challenge to including immigration warrants in NCIC for lack of standing), *aff’d*, 283 F. App’x 848 (2d Cir. 2008).

92. *Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations*, Op. O.L.C. (2002), available at <http://www.aclu.org/files/FilesPDFs/ACF27DA.pdf>.

93. *United States v. Arizona*, 703 F. Supp.2d 980, 1006–07 (D. Ariz. 2010) (order granting preliminary injunction in part).

unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:

1. A valid Arizona driver license.
2. A valid Arizona non-operating identification license.
3. A valid tribal enrollment card or other form of tribal identification.
4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.⁹⁴

Breaking this section down, it seems to provide the following. The statute requires taking reasonable steps to investigate immigration status, when: 1) a person has been lawfully stopped, detained or arrested, and 2) there is reasonable suspicion that the individual is an undocumented non-citizen, unless it is impracticable or would interfere with an investigation. When the person has been stopped or detained, certain kinds of identification are presumptive evidence that the person is not an undocumented non-citizen.

When a person is arrested, the person's status "shall be verified with the federal government"; that is, apparently a driver's license or other document identified in the statute is insufficient. This is potentially significant, because a stop and issuance of a citation in lieu of arrest is defined by Arizona law as an "arrest."⁹⁵ Accordingly, this provision could result in jailing of many people charged with low-level offenses who would ordinarily be released in the field. Universal checking of arrestees also helps carry out Arizona Revised Statutes § 11-1051(C), which requires notification of federal authorities upon discharge from confinement or imposition of a money penalty for a state or local criminal offense. It would be impossible to notify federal authorities in every case unless the status of every defendant were known and in the record. Therefore, the structure of the statute requires that it means what it says—everyone arrested has to have their status checked.

Notably, this section imposes duties on the police, but not restrictions. That is, there are certain occasions where investigation is required, but there are none, here or elsewhere in S.B. 1070, where investigations are prohibited. In particular, there is no prohibition on investigating the immigration status of victims, witnesses or bystanders. That much is nothing new; police officers have always been able to make voluntary (consensual) inquiries of anyone—about nationality, immigration status, reason for being in a particular location, or pretty much anything else.⁹⁶ What is new, however, is that any agency policy restricting investigation of victims or witnesses would risk

94. S.B. 1070, 49th Leg., 2d. Sess., § 2 (Ariz. 2010) (emphasis added).

95. ARIZ. REV. STAT. ANN. § 13-3883(A)(4) (2010) (citing ARIZ. REV. STAT. ANN. § 13-3903 (2010)).

96. See *Muehler v. Mena*, 544 U.S. 93, 101 (2005) (affirming questioning about immigration status of person held during execution of a home search warrant).

running afoul of § 11-1051(A). Note also that the duty of the police is limited. They have a duty to investigate but no duty to report or take any other action if the suspect does turn out to be undocumented, except after conviction. Thus, if investigation shows that someone is undocumented, the police may nevertheless release them, and are under no duty to report them to federal authorities.⁹⁷

Importantly, the mandatory duty to investigate applies in some cases to people not suspected of a crime. Normally, suspects are “stopped” or “arrested.” The Supreme Court has used the word “detain” or “detention” to refer to people forcibly seized without any suspicion, such as passengers held in a traffic stop, or residents of a home or business held during the execution of a search warrant.⁹⁸ Since § 11-1051(B) requires police officers in Arizona to investigate the immigration status of those lawfully detained, it appears to require investigation of people not otherwise suspected of a crime. Arizona law authorizes the police to stop and detain suspected civil traffic offenders, so they are seemingly included in the law as well.⁹⁹

The limitation of the duties to situations involving a “lawful stop, detention or arrest” and the distinct requirement that officers not release anyone who has been arrested without determining their immigration status leave no plausible reading that would require investigation during a voluntary encounter. However, again, nothing in the statute precludes immigration status investigations in such cases.

Judge Bolton preliminarily enjoined this provision.

1. *Reasonable Suspicion and Race*

A challenging question is what S.B. 1070 authorizes as grounds for reasonable suspicion “investigatory” stops and reasonable suspicion searches (or “frisks”). Particularly controversial is whether it allows, encourages, or forbids racial profiling in making decisions about whether to stop, search, or inquire about a person’s nationality and immigration status. Racial profiling has been defined as “the reliance on race, skin color and/or ethnicity as an indication of criminality, reasonable suspicion, or probable cause, except when part of a description of a suspect, and said description is timely, reliable, and geographically relevant.”¹⁰⁰ Arizona Governor Jan Brewer has

97. Another provision of Arizona law requires courts to deny bail to some undocumented non-citizens. Ariz. Const., § 2, Art. 22(4).

98. See, e.g., *Brendlin v. California*, 551 U.S. 249, 256 (2007) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 436-437 (1984) (“[W]e have long acknowledged that stopping an automobile and detaining its occupants constitute a seizure” (internal quotation marks omitted)); *Muehler v. Mena*, 544 U.S. 93, 102 (2005) (“the officers’ detention of Mena in handcuffs during the execution of the search warrant was reasonable”).

99. ARIZ. REV. STAT. ANN. § 13-3883(B) (2010).

100. See *Arnold v. Ariz. Dep’t of Pub. Safety*, No. CV-01-1463-PHX-LOA, 2006 WL 2168637, at *8. (D. Ariz. July 3, 2009) (decision approving settlement agreement); JOYCE MCMAHON ET AL., U.S. DEP’T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., HOW TO CORRECTLY COLLECT AND

stated that it is “crystal clear and undeniable that racial profiling is illegal, and will not be tolerated in Arizona.”¹⁰¹ The author of S.B. 1070, Arizona State Senator Russell Pearce, has written that S.B. 1070 “explicitly prohibits racial profiling.”¹⁰²

However, these statements do not fit with the text of the statute, or with the text of the Executive Order signed by Governor Brewer on the same day that she signed S.B. 1070.¹⁰³ The original text of S.B. 1070 stated:

A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state *may not solely consider race*, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution.¹⁰⁴

As revised by HB 2162, the relevant legislative language now states:

A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state *may not consider race*, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution.¹⁰⁵

What changed? The revised version deletes the term “solely,” which originally appeared before “consider.” But removing “solely” may expand rather than contract the use of race in making determinations about whether to stop or inquire under the statute. If the purpose of amending the original text of S.B. 1070 in HB 2162 was to prohibit the consideration of race as part

ANALYZE RACIAL PROFILING DATA: YOUR REPUTATION DEPENDS ON IT!, 97 (2002) (defining “bias-based policing” as “the act (intentional or unintentional) of applying or incorporating personal, societal, or organizational biases and/or stereotypes as the basis, or factors considered, in decision-making, police actions, or the administration of justice”); Farah Brelvi, *Un-American Activities*, 48 FED. LAW. 68, 72 (2001) (“However, it is easy to lose sight of the fact that racial profiling—while seemingly more subtle, more marginal, more diffuse, and more tailored than internment—rests on the identical premise. The considerable difference between locking up an entire population and allowing race or ethnicity to be, ostensibly, only one of a series of factors in certain kinds of otherwise necessary decision-making (i.e., security and law enforcement) should not obscure an honest assessment of what profiling is. It is guilt by association; it is guilt by inheritance.”); William Moffitt, *Race and the Criminal Justice System* 36 GONZ. L. REV. 305, 308 (2000–01) (“We talk about things like racial profiling. What does that mean? The use of race as a presumption of guilt without evidence of criminal conduct.”).

101. Arizona Governor Jan Brewer, Statement of Signing of HB 2162 (April 30, 2010) *available at* <http://janbrewer.com/article/statement-by-governor-jan-brewer-signing-of-hb-2162>.

102. Russell Pearce, *Arizona or San Francisco: Which Path Will America Take on Immigration?*, TOWNHALL.COM (May 12, 2010), http://townhall.com/columnists/RussellPearce/2010/05/12/arizona_of_san_francisco_which_path_will_america_take_on_immigration.

103. Ariz. Exec. Order No. 2010-09 (May 21, 2010).

104. S.B. 1070, 49th Leg., 2d Sess., Ariz. Sess. Laws ch. 113, § 2 (2010) (emphasis added).

105. H.B. 2162, 49th Leg., 2d Sess., Ariz. Sess. Laws ch. 211, § 3(2010) (emphasis added), codified at ARIZ. REV. STAT. § 11-1051(B).

of determinations whether to stop or inquire about nationality or immigration status, then the revised language should have eliminated the final clause, which suggests that race may be considered “to the extent permitted by the United States or Arizona Constitution.” Governor Brewer’s Executive Order simply repeats this language.

There’s the rub. According to the 1975 United States Supreme Court decision *United States v. Brignoni-Ponce*, the United States Constitution allows race to be considered in immigration enforcement: “The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor.”¹⁰⁶ The Arizona Supreme Court agrees that “enforcement of immigration laws often involves a relevant consideration of ethnic factors.”¹⁰⁷ In 1996, the Arizona Supreme Court reaffirmed the relevance of race in determinations of reasonable suspicion:

Mexican ancestry alone, that is, Hispanic appearance, is not enough to establish reasonable cause, but if the occupants’ dress or hair style are associated with people currently living in Mexico, such characteristics may be sufficient. The driver’s behavior may be considered if the driving is erratic or the driver exhibits an “obvious attempt to evade officers.” The type or load of the vehicle may also create a reasonable suspicion.¹⁰⁸

Federal and state courts generally recognize that apparent race can be part of a reasonable suspicion calculus for an investigative stop. In *United States v. 1982 Ford Pick-Up, Texas Lic. No. VM-5394*, the United States Court of Appeals for the Sixth Circuit, in a case arising out of Louisville, Kentucky, affirmed the legality of a stop based on reasonable suspicion of willfully transporting an illegal alien where “all the individuals appeared to be of Hispanic origin, . . . none of the men or women spoke English, but . . . each individual spoke Spanish with a recognizable Salvadoran accent. They also wore huaraches and heavy tweeds, the typical dress of Central American natives.”¹⁰⁹ Notably, modern cases on this question involve only persons of apparent Hispanic or Mexican origin in particular geographical locations.

106. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–887 (1975) (emphasis added). *See also*, e.g., *United States v. Hernandez-Moya*, 335 F. App’x 930, 934 (5th Cir. 2009) (unpublished) (reaffirming relevance of race in affirming roving border patrol stop). *See generally* Kevin R. Johnson, *How Racial Profiling Became the Law of the Land: United States v. Brignoni-Ponce and When V. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010); Gabriel J. Chin & Kevin R. Johnson, *Profiling’s Enabler: High Court Ruling Underpins Arizona Immigration Law*, WASH. POST, July 13, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/12/AR2010071204049.html>.

107. *State v. Graciano*, 653 P.2d 683, 687 n.7 (Ariz. 1982) (citing *State v. Becerra*, 534 P.2d 743 (Ariz. 1975)) (emphasis added).

108. *State v. Gonzalez-Gutierrez*, 927 P.2d 776, 780 (Ariz. 1996).

109. 873 F.2d 947, 949 (6th Cir. 1989). *See also* *United States v. Soto-Cervantes*, 138 F.3d 1319, 1324 (10th Cir. 1998) (in a case arising in New Mexico, court affirms finding of reasonable suspicion of immigration violations based on factors including “the defendant’s presence in an area known to be

Courts have also said that, in immigration proceedings, national origin may be considered: “*Evidence of foreign birth gives rise to a presumption that the person so born is an alien, and it is presumed that alienage continues until the contrary is shown.*”¹¹⁰ So if the police learn that someone was not born in the United States, that information can be evidence that the person is not a citizen.

It may be that S.B. 1070 actually requires racial profiling. S.B. 1070 prohibits restricting enforcement of immigration law “to less than the full extent permitted by federal law.”¹¹¹ Because federal law permits race to be a “relevant factor” in determining reasonable suspicion for stops and inquiries, the combined effect of these provisions may be to *require* state actors to use race to the full extent permitted by federal law. If a local police or prosecutorial agency decides not to consider race as a factor, as a matter of policy, then the agency may be sued by a citizen under Arizona Revised Statutes § 11-1051(H) citizen suit provisions, which are discussed in more detail below.

Federal law would prohibit decisions to stop made on race alone, but few stop or arrest laws or policies anywhere operate based on race alone, without regard to other factors, such as location or conduct. Even the most explicit forms of racial profiling use race as one factor along with other factors.¹¹²

Most of the Arizona cases allowing consideration of Mexican ancestry, like *Brignoni-Ponce* itself, involved stops by the U.S. Border Patrol, not by state or local police. Therefore, it may be an open question of whether the power to discriminate based on race allowed to federal immigration officers will also be available to state and local police in Arizona. In addition, even when dealing with the Border Patrol, Arizona cases seem to examine the use of race quite closely.¹¹³ Conceivably, Arizona could reconsider *Brignoni-Ponce* as a matter of state constitutional law. Finally, without questioning the

frequented by illegal aliens from Mexico”). *But cf.* United States v. Alarcon-Gonzalez, 73 F.3d 289, 293 (10th Cir. 1996) (no reasonable suspicion even in high undocumented area).

110. Corona-Palomera v. Immigration & Naturalization Serv., 661 F.2d 814, 818 (9th Cir. 1981) (emphasis added). See also ARIZ. REV. STAT. ANN. § 13-1509(A) (2010).

111. ARIZ. REV. STAT. ANN. § 11-1051(A) (2010).

112. For example, the Arizona Department of Public Safety (“DPS”) was accused by the ACLU of stopping motorists on the highway on the basis of race, and entered a court-approved settlement in 2005, which expired after three years. Arnold v. Arizona Dept. of Pub. Safety, No. CV-01-1463-PHX-LOA, 2006 WL 2168637 (D. Ariz. July 31, 2006) (approving settlement agreement) (full text of settlement agreement available at <http://www.azgovernor.gov/cts/documents/Settlement.pdf>). The DPS was not accused of stops or arrests based on race regardless of the circumstances; that is, there was no claim that if a DPS officer was assigned to work with a minority officer or escort a minority public official, the minority officer or official would automatically be arrested. Instead, the claim was that race was one factor in the mix along with non-racial indications of potential criminality.

113. State v. Gonzalez-Gutierrez, 927 P.2d 776, 781 (Ariz. 1996) (“Although defendant’s appearance or aspects of his behavior may have replicated the behavior of some illegal aliens entering the United States, the same pattern is easily applicable to a large population of both United States citizens and legal immigrants. Without more clearly articulated evidence, the pattern could not create a reasonable suspicion that defendant and his passenger were in the country illegally.”); State v. Maldonado, 793 P.2d 1138 (Ariz. Ct. App. 1990).

validity of *Brignoni-Ponce*, Arizona courts could conclude, as did the Ninth Circuit,¹¹⁴ that there are too many citizens and lawful residents of Hispanic ancestry for racial appearance to be a valid factor in Arizona.¹¹⁵

Perhaps in light of the statement by Governor Brewer, both the Arizona Peace Officer Standards and Training Board (“AZPOST”) and federal and state courts will read the revised language of H.B. 2162 as if it said, “A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state *may not consider race*, color or national origin in implementing the requirements of this subsection.”¹¹⁶

There is another possibility: *Brignoni-Ponce* and its state analogues in Arizona and elsewhere are dead. Perhaps the idea making race or ethnicity—and particularly having a Hispanic appearance, as that is the background at stake in the “race can be a relevant factor” cases—is now outside the pale. The Supreme Court of the United States and state high courts have yet to make the death official, but legislators, executive branch officials, and the general public understand the change.

The problem with this theory is that *Brignoni-Ponce* continues on a regular basis to be used by both the Department of Justice and courts of the United States. For example in May, 2009, in *United States v. Hernandez-Moya*, the United States Attorney’s Office for the Western District of Texas argued to the U.S. Court of Appeals for the Fifth Circuit that a traffic stop in an immigration case was based on reasonable suspicion in part because the “ethnicity of a vehicle’s occupants . . . is a relevant factor” in such cases.¹¹⁷ The Fifth Circuit unanimously affirmed, agreeing that “The Supreme Court has held that ethnic appearance may be considered as one of the relevant factors in supporting reasonable suspicion that a vehicle is involved in the transportation of illegal aliens.”¹¹⁸

The Obama Administration’s Department of Justice regularly makes such arguments,¹¹⁹ and the courts regularly accept them.¹²⁰ A change in federal

114. *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 (9th Cir. 2000) (en banc).

115. The Pew Hispanic Center reports that 30% of the Arizona population is Hispanic, of which 91% is of Mexican ancestry. Two-thirds of the Arizonans of Mexican ancestry were native-born; one-third was not. PEW HISPANIC CENTER, “Demographic Profile of Hispanics in Arizona, 2008,” (2008), available at <http://pewhispanic.org/states/?stateid=AZ>.

116. ARIZ. REV. STAT. ANN. § 11-1051(B) (emphasis added).

117. Brief for the United States, *United States v. Aldo Antonio Hernandez-Moya*, No. 08-51128, 2009 WL 5858722, at 17 (5th Cir. May 18, 2009).

118. *United States v. Hernandez-Moya*, 353 F. App’x 930, 934 (5th Cir. 2009) (per curiam).

119. See, e.g., United States’ Response in Opposition to Defendant’s Motion to Suppress and Memorandum of Law, *United States v. Gustavo Telles-Montenegro*, 2009 WL 6478237, *7 (M.D. Fl. Dec. 21, 2009) (reasonable suspicion supported by “the apparent Mexican ancestry of the occupants of the vehicle”), *defendant’s motion denied*, *United States v. Telles-Montenegro*, 2010 WL 737640, *7 (M.D. Fl. Feb. 4, 2010) (“Agent Fiorita testified that, in his experience, Hispanic males are typically the drivers of alien smuggling vehicles. Therefore, this is also a relevant consideration.”); Government’s Omnibus Opposition to Defendant’s Pretrial Motions, *United States v. Charles Davidson*, 07-CR-204 (LEK), 2009 WL 6539767, 18 n.10 (N.D.N.Y. Dec. 22, 2009) (“ethnicity can be ‘a relevant factor’ in satisfying a reasonable suspicion standard”); Government’s Memorandum in Resistance to Motion to Suppress, *United States v. Agriprocessors Inc.*, No. CR 08-1324 LRR, 2009

policy with regard to the use of race in immigration enforcement would be welcome. A similar statement of policy by Arizona executive branch officials would be welcome, too. But even then it would be hard for Arizona to plausibly interpret the phrase “*to the extent permitted by the United States or Arizona Constitution*” to limit the use of race, since it is the current constitutional doctrine, not “United States or Arizona law or policy” that (absent the current injunction) would have generated the obligation to consider race in decisions whether to inquire about immigration status.

2. *Quasi-Racial and Non-Racial Factors in Reasonable Suspicion*

Even if H.B. 2162 is read as if the last clause did not exist—or again modified by the Arizona state legislature to in fact eliminate that clause—two substantial issues regarding race, stops and inquiries under S.B. 1070 would remain. First, an affirmative not to consider something that is obvious, immediate, and central will be as likely to cause people to consider that factor as not. Consider the statement “do not think about an elephant; you are absolutely forbidden to think about an elephant.”

And even if, in good faith, agencies and officers not only produced rules, but confronted the sociological and psychological realities of the centrality of race and perceptions of race to the enforcement of immigration provisions, what would that mean in operation? Would reasonable suspicion be limited to people near the border who are walking in rural areas or appear to be evading law enforcement? Such facts might make for a very strong case indeed for an investigative stop, but if that is what satisfies the reasonable suspicion requirements of S.B. 1070 then—the important exception of voluntary exchanges notwithstanding—the public battles over the law will be all sound and fury, signifying nothing. We do not believe such narrow interpretation was the intent of this legislation.

Or will policy-makers (such as AZPOST and local police and sheriff departments) forbid the use of all factors in the multi-factor, highly contextual assessment of reasonable suspicion that might be closely associated with or substitute for race (e.g., accent, language skills, neighborhood)? We do not believe this is plausible.

The existing law of reasonable suspicion allows the use of multiple factors that are correlated with race and ethnicity. There is no hard and fast rule as to

WL 2565858, 27, n.11 (N.D. Iowa July 7, 2009) (“whether a person is of Hispanic origin is a relevant factor for officers to consider, among others, in determining whether to detain someone”), *denying motion to suppress for lack of standing*, United States v. Agriprocessors, Inc., No. CR 08-1324 LRR, 2009 WL 2255729, *5 (N.D. Iowa July 28, 2009).

120. United States v. Bautista-Silva, 567 F.3d 1266, 1270 (11th Cir. 2009) (reversing suppression of evidence; reasonable suspicion existed based on seven factors, including that “the driver and all five passengers were Hispanic adult males”); Barrera v. U.S. Dep’t of Homeland Sec., No. Civ. 07-3879 (JNE/SRN), 2009 WL 825787, *5 (D. Minn. Mar. 27, 2009) (“race may properly be considered by an official in making the determination to stop an individual to inquire about his immigration status”).

the number of factors necessary or the weight to be assigned to particular factors. “Reasonable suspicion” is a low standard. It is less than probable cause, which is less than a preponderance of the evidence.¹²¹ But federal and state courts have also said again and again that reasonable suspicion is context-specific and not quantifiable.

Reasonable suspicion can be based upon entirely legal conduct, and conduct consistent with innocence, because its only function is to determine whether it is appropriate to investigate further. On the other hand, there are many cases where courts find no reasonable suspicion, even when there is some evidence, if it appears the police were on a fishing expedition or acted precipitously.

Federal and state law allow language, accent, clothing and hairstyle to be relevant factors. Well-established doctrine also allows factors such as neighborhood (including whether it is said to be a high-crime neighborhood, or a neighborhood with a high number of undocumented people), proximity to the border, origin and destination of travel, the nature and location of a vehicle, any evasive driving or walking, nervousness, and “furtive behavior” to be taken into account. All of these factors are then filtered through the expertise, experience, and training of the officers involved.

Some, and perhaps most, of these factors are so closely correlated with race that a ban on the use of race as a factor should lead to a ban on many of these factors as well. To the extent it is a logical impossibility to have a multi-factor, expertise-filtered test of “reasonable suspicion” that excludes race, color or national origin, then even an explicit ban on race in the law would not (and could not) result in a ban on the use of race in practice.

Despite the requirement that police be able to articulate the basis for a reasonable suspicion stop, the courts’ willingness to permit reliance on largely subjective factors invites factors such as race to inform or influence the officer’s decision. The link between race and the most imprecise of these factors—“furtive behavior”—has been sharply illuminated by annual data on stops released by the New York Police Department.¹²² The most recent report of annual data on reasonable suspicion stops shows that blacks and Latinos were about nine times more likely to be stopped than whites. The New York Police Department reported more than 575,000 stops in 2009, resulting in 34,000 arrests, 762 guns, and more than 6,000 weapons other than guns. The arrest rates were lower for blacks than for whites, and significantly lower for gun possession (1.1% for blacks compared to 1.7% for whites).

Without knowing the “base” or general population rates of crime or weapon possession, and without knowing the final resolution for arrests, it is hard to fully assess these data. However, one thing is clear: Blacks and Latinos in New York City are stopped much more often than whites. (Note

121. A preponderance of the evidence is more than fifty percent.

122. See Al Baker, *City Minorities More Likely to Be Frisked*, N.Y. TIMES (May 13, 2010), at A1.

that these stop and arrest numbers would produce the appearance of a much higher proportion of blacks and Latinos in jail—but without explaining whether blacks and Latinos were committing crimes at a higher or lower rate than whites.)¹²³

Given the importance of the initial decision to stop, what grounds for reasonable suspicion did the New York police provide? In around fifteen percent of the stops, the reason was “fits a relevant description.” In nearly half the stops, one reason that officers checked was “furtive movements.” (Almost thirty percent were “casing a victim or location,” and almost nineteen percent pointed to a residual and unexplained category of “other.”)

Federal and state courts have identified a number of factors for determining whether reasonable suspicion exists that a person is undocumented. In immigration proceedings, national origin may be considered: “*Evidence of foreign birth gives rise to a presumption that the person so born is an alien, and it is presumed that alienage continues until the contrary is shown.*”¹²⁴ So if the police learn that someone was not born in the United States, that information can be evidence that the person is not a citizen.

In other words, as a matter of doctrine, experience and common sense, race is so pervasive to the underlying question of immigration status that it would be hard to remove it from law enforcement decision-making, whether explicit or implicit, even if the legislature, executive branch officials and courts *tried* to do so. (And so far, for the reasons explained above, we do not believe the statute supports the assertion that they have tried to do so.)

3. *Duty to Carry Identification?*

Does S.B. 1070 create a general duty on the part of all citizens and residents to carry identification? We have previously discussed the questions about enforceability (and impossibility) raised by the new crime in Arizona Revised Statutes § 13-1509, criminalizing the “willful failure to complete or carry an alien registration document.” But what about the provision of § 11-1051, which states:

A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:

1. A valid Arizona driver license.
2. A valid Arizona non-operating identification license.

123. See generally Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275 (2004); Bernard E. Harcourt, *The Shaping of Chance: Actuarial Models and Criminal Profiling at the Turn of the Twenty-First Century*, 70 U. CHI. L. REV. 105 (2003).

124. *Corona-Palomera v. Immigration & Naturalization Serv.*, 661 F.2d 814, 818 (9th Cir.1981) (emphasis added). See also ARIZ. REV. STAT. ANN. § 13-1509(A) (2010).

3. A valid tribal enrollment card or other form of tribal identification.

4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.¹²⁵

It is important to distinguish the legal and the practical effects of this provision. Section 11-1051 does not create a requirement that Arizona residents carry identification evidence of citizenship. Indeed, perhaps out of concern that the statute would be read to create such a requirement, § 11-1051(G) states that “This section does not implement, authorize or establish and shall not be construed to implement, authorize or establish the REAL ID Act of 2005 (P.L. 109-13, division B; 119 Stat. 302), including the use of a radio frequency identification chip.”¹²⁶ Perhaps S.B. 1070 will spur a national debate about the wisdom and constitutionality of a national or state-by-state mandatory identification document, but that does not appear to be the goal of its drafters.

The practical impact, especially for citizens or residents who might be more likely to be subject to police stops or inquiries, whether mandatory or discretionary, may be considerably different than the legal duty. Because of the presumption of legal presence created by the listed documents, it may be prudent for everyone to carry identification so status can be proven on the street rather than waiting in jail while records are checked.

The United States Supreme Court affirmed the constitutionality of a state statute granting powers to Nevada officers to request identification in *Hiibel v. Sixth Judicial District Court of Nevada*.¹²⁷ A majority of states have some form of what are called “stop and identify” statutes. The Nevada statute at issue in *Hiibel* provides that “The officer may detain the person pursuant to this section only to ascertain the person’s identity and the suspicious circumstances surrounding the person’s presence abroad. Any person so detained shall identify himself or herself, but may not be compelled to answer any other inquiry of any peace officer.”¹²⁸

Arizona is one of the several dozen states that have some form of “stop and

125. ARIZ. REV. STAT. ANN. § 11-1051(2010).

126. The REAL ID Act, Pub. L. No. 109-13, 119 Stat. 302 (May 11, 2005) established security standards for driver’s licenses issued by states. REAL ID has proved deeply unpopular in the states. See National Conference of State Legislators, Countdown to REAL ID, <http://www.ncsl.org/default.aspx?tabid=13577>.

127. 542 U.S. 177 (2004).

128. The relevant Nevada statute, NEV. REV. STAT. § 171.123, states:

1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
2. Any peace officer may detain any person the officer encounters under circumstances which reasonably indicate that the person has violated or is violating the conditions of the person’s parole or probation.

identify” statute. Arizona Revised Statutes § 13-2412 provides:

A. It is unlawful for a person, after being advised that the person’s refusal to answer is unlawful, to fail or refuse to state the person’s true full name on request of a peace officer who has lawfully detained the person based on reasonable suspicion that the person has committed, is committing or is about to commit a crime. A person detained under this section shall state the person’s true full name, but shall not be compelled to answer any other inquiry of a peace officer.

B. A person who violates this section is guilty of a class 2 misdemeanor.

While there is considerable variation in the text of the “stop and identify” statutes across the states, it is important to emphasize that the Nevada statute in *Hibel* was not read by the United States Supreme Court to empower officers to stop an individual just to check their identification. Nor was the Nevada statute interpreted to mean that someone legitimately stopped by the police because of the existence of reasonable suspicion of a crime must carry identification. What the Supreme Court said was that it was not a violation of the Fourth or Fifth Amendments to the United States Constitution to empower officers to request that a person identify him or herself once he or she is legitimately stopped; nor would it violate the federal constitution to arrest a person if he or she refused to answer the question as to his or her identity. In this limited situation, the Court held, a person does not have the right to remain totally silent. Similarly, Arizona Revised Statutes § 13-2412 does not require carrying or display of identification documents; it creates an offense of failing to provide any name or of providing a false name to a police officer under these specific circumstances.

Neither the United States Supreme Court nor, to our knowledge, state courts have held that police can involuntarily stop an individual to ask for his or her identification without reasonable suspicion or probable cause (though remember, police can request almost any information, including a person’s name, so long as the exchange remains voluntary and consensual). Nor have any states, to our knowledge, gone beyond the general concept of requiring a person to identify him or herself and additionally required that the identification or proof be in writing, or in any particular kind of document.

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3. The officer may detain the person pursuant to this section only to ascertain the person’s identity and the suspicious circumstances surrounding the person’s presence abroad. Any person so detained shall identify himself or herself, but may not be compelled to answer any other inquiry of any peace officer.
 4. A person must not be detained longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes. The detention must not extend beyond the place or the immediate vicinity of the place where the detention was first effected, unless the person is arrested.

C. *The Duty to Enforce “The Full Extent” of Federal Immigration Law & Citizen Suits*

S.B. 1070 includes two striking provisions previously unknown in United States law. The first is the provision in § 11-1051(A), which provides: “No official or agency of this state or a county, city, town or other political subdivision of this state may limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law.” The second is the citizen suit provision in § 11-1051(H), which provides:

A person who is a legal resident of this state may bring an action in superior court to challenge any official or agency of this state or a county, city, town or other political subdivision of this state that adopts or implements a policy that limits or restricts the enforcement of federal immigration laws, including 8 United States Codes Sections 1373 and 1644, to less than the full extent permitted by federal law.

Judge Bolton did not enjoin this section.

The meaning of a state provision that requires officials and agencies to enforce federal immigration provisions to “the full extent permitted by federal law” is unclear, other than that it increases the discretion of individual officers and decreases the authority of police supervisors and policymakers to set the workload of line officers.¹²⁹ One literal but highly implausible reading is that state officials and agencies must allow officers in the field to enforce federal immigration laws, if they choose, in preference to any other assignments they might be given. If so, the provision is extremely broad.

On the other hand, the provision might be read simply to prohibit agency heads from issuing policies affirmatively directing line staff not to enforce federal immigration laws. Perhaps law enforcement managers can set priorities; patrol officers could be told, for example, that they may investigate immigration offenses: 1) whenever required by § 11-1051(B); 2) if they are investigating serious felonies, such as reentry after deportation for crime; and 3) otherwise, if and only if there are no more pressing police matters, such as pending 911 calls for service or investigative needs on unsolved rapes, robberies, burglaries, or murders. If such a policy is permissible, it means there is little substance to § 11-1051(A); it prohibits only blanket prohibitions on enforcing federal immigration law, which are rare or non-existent in Arizona anyway. If such a policy is impermissible under the statute, it means that officers must be allowed to decline to respond to serious crimes if they would prefer to investigate immigration offenses, which, again, would be a radical alteration of normal police management authority.

129. See 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>.

There may be other interpretations in between these two readings, but they are not obvious from the language.¹³⁰ Absent the citizen suit provisions, the meaning of § 11-1051(A) would be left to executive branch officials to resolve. However, the citizen suit provisions make the uncertain meaning of § 11-1051(A) a critical question for local law enforcement agencies in Arizona.

The citizen suit provisions are extraordinary for many reasons, including the idea that suits can be brought for any policy that limits “full” enforcement—as opposed to, for example, a lawsuit for the excessive use of force by police officers. Indeed, federal and state law build very high barriers of immunity (sovereign immunity for agencies and qualified immunity for officers) that make it difficult for people to sue even for serious harms caused by public actors. Traditional tort law bars any recovery against an actor who fails to “rescue” some other person from harm, even if the rescue would be safe and effective. The courts have been reluctant to impose such a duty to act on public or private actors.

The citizen suit and “full extent” provisions may be unwise policies from the standpoint of public safety. They have the potential to tie up courts and law enforcement agencies, and to spend valuable resources defending policies and actions that we believe are likely in the end to be upheld by courts. We believe state courts will work hard within the law to avoid readings that would lead courts to regulate the day-to-day workings of local police departments.¹³¹ In our view, the legislature would be wise to eliminate the citizen suit provisions.

In any event, these provisions are so unfamiliar that it is not clear whether the “full extent” and citizen suit provisions raise additional federal or state issues. The question of the allocation of power between state and local entities is a question of state and local government law. While analogy to principles of federalism might suggest that the state cannot co-opt and direct local law enforcement, the analogy is a false one. States are not creatures of county and local government in the way that the federal Constitution and the federal government are a product of agreement among the states.¹³²

Typically, state law grants the power to counties and cities to issue local laws and regulations, and can limit or control that authority. But S.B. 1070 raises the question of whether the state government also can direct and

130. Conceivably, the section prohibits police agencies from having policies against entering into 287(g) agreements with federal authorities, for any agency deliberately choosing not to enter into a 287(g) agreement would have a policy that “limit[ed] or restrict[ed] the enforcement of federal immigration laws to less than the full extent permitted by federal law.” ARIZ. REV. STAT. ANN. § 11-1051(A) (2010).

131. Cf. *Sensing v. Harris*, 172 P.3d 856, 858 (Ariz. Ct. App. 2007) (“Law enforcement activities by police and prosecutors are generally considered to be discretionary and not appropriate for mandamus relief.”).

132. E.g., *Waller v. Florida*, 397 U.S. 387 (1970) (although state and federal governments are separate sovereigns for double jeopardy purposes, state and localities within that state are the same).

control the priorities for local expenditures. For example, can the state direct that all country or city or other local funds be expended only on the enforcement of one or a few crimes or priorities? It is perhaps one thing to say that states must grant the authority to counties and other local entities to form governments, issue laws, and raise revenues, but another to leave to the state legislature the determination of precisely how those local dollars are to be spent. The nuances of this aspect of state versus local government authority may depend upon variations in state constitutional and statutory law, as well as regional histories and policies.

III. IS S.B. 1070 INVALIDATED BY FEDERAL LAW?

There is little serious question that many parts of the statute are constitutional. For example, Arizona may allow or require its police to enforce federal law to the extent “permitted by federal law”;¹³³ and it may require state officers to report convictions to the federal government.¹³⁴

The question of constitutionality applies primarily to the new Arizona immigration crimes that are based on federal immigration crimes, and to additional mandatory enforcement procedures. The first question is whether the state has power to regulate immigration at all. The second is, assuming there is some state power, whether these laws are preempted by federal law.

A. *State Power to Regulate Immigration*

The Supreme Court has often said that immigration is exclusively a federal power.¹³⁵ In the earliest years of the country, immigration was not federally regulated. Late nineteenth-century cases invalidated a number of state efforts to regulate the entry of aliens it deemed undesirable on the ground that regulation of immigration was an exclusively federal power.¹³⁶

In *Chy Lung v. Freeman*, for example, the Court invalidated a statute designed to keep prostitutes from immigrating to California. The Court explained that state policies might cause international tension:

[H]as the Constitution done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible? The Constitution of the United States is no such instrument. The passage of laws which concern the admission of citizens and subjects of

133. ARIZ. REV. STAT. ANN. § 11-1051(A) (2010).

134. ARIZ. REV. STAT. ANN. § 11-1051(C) (2010).

135. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 n.21 (1976) (immigration authority is “vested solely in the Federal Government, rather than the States”).

136. *Chy Lung v. Freeman*, 92 U.S. 275 (1876); *Henderson v. New York*, 92 U.S. 259 (1876); *see also* *Edye v. Robertson*, 112 U.S. 580 (1884).

foreign nations to our shores belongs to Congress, and not to the states.¹³⁷

The enforcement of federal laws by state officers, the Court explained, also risked relations with foreign nations: “A silly, an obstinate, or a wicked [state] commissioner may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend.”¹³⁸

In the absence of federal law, the Arizona statute would be invalid under these authorities as indistinguishable from the old state statutes designed to exclude undesirable immigrants. The Court has allowed some incidental regulation of immigration in the course of pursuing other goals,¹³⁹ and does not require that non-citizens be treated identically to citizens, although statutes must justify distinctions.¹⁴⁰ S.B. 1070 cannot be characterized as an incidental regulation of immigration. Rather, Arizona’s statute is explicitly a direct regulation of immigration: undesirable immigrants are seized and incarcerated. S.B. 1070 states its purpose as follows:

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.¹⁴¹

Arizona could not have enacted this law in the absence of federal regulation; if it is valid now, it must be because the rise of federal immigration law itself somehow increased state authority over the subject. There is no explicit delegation of regulatory authority in federal immigration law to Arizona or other states, so the authorization, if it exists, is implied.

Professor Kris Kobach, who has been identified as assisting with the bill, has argued in a law review article that the very fact that the United States has enacted immigration statutes gives states authority to regulate the same area: “State governments possess the authority to criminalize particular conduct concerning illegal immigration, provided that they do so in a way that mirrors

137. 92 U.S. at 280.

138. *Id.* at 279.

139. *DeCanas v. Bica*, 424 U.S. 351, 355–56 (1976) (“California has sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country; even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration”).

140. *Compare In re Griffiths*, 413 U.S. 717 (1973) (impermissible for state to exclude non-citizens from bar), *with Ambach v. Norwick*, 441 U.S. 68 (1979) (state could prohibit non-citizens from teaching positions).

141. S.B. 1070, § 1.

the terms of federal law.”¹⁴²

The argument is beguilingly simple: Why would a government object to getting help with carrying out a mirror-image of its own policy? But concrete examples show that the argument is flawed: The fact that Congress created criminal laws for Indian Reservations and assigned the FBI to enforce them is not evidence that it would like state law enforcement to make arrests on Indian reservations.¹⁴³ The Uniform Code of Military Justice criminalizes, among other things, missing a movement of a ship¹⁴⁴ or disrespecting a superior officer.¹⁴⁵ If a state enacted mirror-image criminal offenses for active duty members of the armed forces, it would not be free to prosecute violators on the ground that it is helping carry out federal policy.

Professor Kobach cites cases allowing state officers to make arrests for federal crimes, and then turn over defendants to federal authorities for prosecution. From these he concludes that states can enact their own statutes, prosecute defendants in state courts, and imprison them in state prisons.¹⁴⁶

However, there is a material difference between states making arrests, and states arresting, charging, prosecuting, convicting and incarcerating. Under the conduct approved in the cases cited, federal authorities can decline to prosecute in furtherance of some uniform federal policy, or they can apply other ameliorative measures which are part of the law. It might not interfere with federal policy for local police to arrest a sailor who ran off from her ship before it steamed out of port, and turn her over to the U.S. Navy. It would interfere with federal policy if, for example, the state decided to prosecute and imprison the sailor in state prison under a mirror-image statute when the Navy wanted to impose some other discipline and return the sailor to duty.

Similarly, it would interfere with federal policy for the state to imprison an immigration violator when the federal government would have exercised its power to decline to prosecute criminally and its statutory power to grant some form of relief.¹⁴⁷ It would be an even more serious interference if the United States were in the process of seeking a diplomatic solution with some of the home countries of the undocumented population, but bad blood

142. Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 475 (2008).

143. *Bressi v. Ford*, 575 F.3d 891 (9th Cir. 2009) (tribal police have no inherent authority to enforce Arizona law on highway running through reservation).

144. Uniform Code of Military Justice § 887, 10 U.S.C. § 887 (2006).

145. Uniform Code of Military Justice § 889, 10 U.S.C. § 889 (2006).

146. Kobach, *supra* note 127, at 475, nn. 83-85 (citing *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983); *Marsh v. United States*, 29 F.2d 172 (2d Cir. 1928)).

147. With respect to any given undocumented person, the national government can elect: 1) criminal prosecution; 2) civil removal of the alien from the United States; 3) to exercise prosecutorial discretion to allow the non-citizen to stay and work, e.g., 8 C.F.R. § 274a.12(c)(14) (2010); 4) to grant formal relief under some treaty or statute, such as withholding of removal under INA § 241(b)(3) that would allow the alien to live in the United States and work; or asylum, or 5) granting some form of temporary or permanent relief, such as through registry under INA § 249, or a T-1 visa available to a person who has been trafficked.

generated by “a silly, an obstinate or a wicked”¹⁴⁸ state officer frustrated those efforts.

The Supreme Court has recognized that declining to pursue criminal charges is as much a part of “tak[ing] Care that the Laws be faithfully executed” as is bringing a case.¹⁴⁹ In this context, non-prosecution may be regarded as a policy choice, one driven in part by traditional criminal justice considerations, but also in part by national economic, humanitarian, and foreign policy concerns. For example, it might be regarded as harming the international reputation of the United States if it incarcerated hundreds of thousands or millions of undocumented non-citizens; even if the United States were to attempt to deport large numbers overseas, it might be prudent to coordinate this exodus with the receiving countries. On this view, it is no small matter for the states to prosecute federal crimes that the federal government has not inadvertently overlooked, but consciously determined should not be brought.¹⁵⁰ The national government is, in principle, one of limited powers, and much of what it does is specialized and of national and international concern. Therefore, Professor Kobach’s notion that because the federal government can regulate something, that is strong evidence that the states can as well, is fundamentally amiss. If there is some source of state authority to generate immigration policy, it will have to come from somewhere else, presumably from its general police powers.¹⁵¹

B. *Federal Preemption*

A state law on a subject that is within its lawmaking authority may

148. *Chy Lung v. Freeman*, 92 U.S. 275, 279 (1876).

149. *Greenlaw v. United States*, 128 S. Ct. 2559, 2565 (2008) (“This Court has recognized that ‘the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.’”) (quoting *United States v. Nixon*, 418 U.S. 683, 693 (1974)); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“[W]e recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”) (citing U.S. CONST. art. II, § 3). Indeed, if the federal government were to *directly* demand that state officials execute its immigration laws, this likely would violate the “anti-commandeering” federalism and Article II-based principles articulated in *Printz v. United States*, 521 U.S. 898 (1997). The Article II-based argument is that state executive officials cannot be conscripted to enforce federal law because they lack constitutionally required federal executive oversight. Congress presumably could not “consent” to such usurpation of federal executive authority under separation of powers principles. Concerns about diversion of state and local law enforcement agencies to enforcement of the new state measure already have prompted the Arizona Association of Chiefs of Police to oppose the measure. See Press Release, Arizona Association of Chiefs of Police, AACOP Statement on Senate Bill 1070, available at http://www.leei.us/main/media/AACOP_STATEMENT_ON_SENATE_BILL_1070.pdf.

150. *Cf. Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (striking down Massachusetts law restricting purchases from companies doing business with Burma on ground that it interfered with national policy on Burma-U.S. relations).

151. In another paper, two of the authors of this paper propose that the mirror image theory is untenable. See Gabriel J. Chin & Marc L. Miller, *Cracked Mirror: SB1070 and Other State Regulations of Immigration Through Criminal Law*, ARIZONA LEGAL STUDIES DISCUSSION PAPER NO. 10-25, AUG. 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648685).

nevertheless be invalid because it is preempted. Article VI, Clause 2 of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

There are three basic doctrinal variations on preemption. First, Congress can expressly preempt state legislation by stating so in a statute. Second, under the doctrine of “field preemption,” state laws may be impliedly preempted because the breadth and depth of federal action indicates an intention to occupy the field to the exclusion of the states. Third, a state law is impliedly preempted even if none of the foregoing applies, but it is impossible to comply with both state and federal law, or state law will conflict with the achievement of congressional goals. The second and third varieties of preemption—which often overlap insofar as even complementary state laws may conflict with Congress’s agenda when federal law preempts the field—are potentially at issue here, because the states do have some authority over immigrants, and there is no statute by which the United States has excluded states from regulating non-citizens entirely.

The heart of the Department of Justice’s challenge of the Arizona act lies here. In *United States v. Arizona*,¹⁵² the government sets forth several arguments that the Arizona law invades federal authority over immigration and naturalization, including that the law violates Dormant Commerce Clause principles. The long-awaited case was filed in federal district court in Phoenix on July 6, 2010 and ignited a predictable firestorm of commentary and political posturing. The Department’s brief summarized the issues as follows:

The Constitution and federal law do not permit a patchwork of state and local immigration policies throughout the country. Although a state may adopt regulations that have an indirect or incidental effect on aliens, a state may not establish its own immigration policy or enforce state laws in a manner that interferes with federal immigration law. The State of Arizona has crossed this constitutional line.¹⁵³

152. No. 2:10-CV-01413 (PHX) filed in the U.S. District Court for the District of Arizona. July 6, 2010.

153. Plaintiff’s Motion for Preliminary Injunction and Memorandum of Law in Support Thereof, *United States v. Ariz.*, 703 F. Supp. 2d 980 (D. Ariz. 2010). As the brief notes, federal supremacy in the field of foreign affairs, including naturalization, immigration, and deportation, was addressed by the authors of *The Federalist* in 1787. *Id.* at 9. See also *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941).

There are several important precedents. In *Hines v. Davidowitz*,¹⁵⁴ the Supreme Court invalidated a Pennsylvania alien registration law that in some ways duplicated federal law. It involved the same federal laws that Arizona borrowed in Arizona Revised Statutes § 13-1509(A), namely parts of the Alien Registration Act of 1940. The United States Supreme Court reasoned that the state scheme interfered with a uniform federal program, and that such interference could have international implications. Accordingly, “where the federal government . . . has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulation.”¹⁵⁵

The Court in *Davidowitz* was concerned both that the state law might impose requirements not imposed by federal law, and with the possibility of overzealous enforcement. The federal law was intended to leave non-citizens “free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations, but might also generate the very disloyalty which the law has intended guarding against.”¹⁵⁶

This case is often read as preempting the field of alien registration,¹⁵⁷ which would invalidate Arizona’s law. Moreover, the Arizona statutes share some of the vices of the Pennsylvania law. They subject non-citizens to the possibility of two convictions for failing to register—one state, one federal—and therefore substantially more incarceration and fines than contemplated by the federal law. Perhaps this is an “additional or auxiliary” regulation that a state may not enforce under *Davidowitz*.

However, it is also clear that the Court in *Davidowitz* had in mind primarily “law-abiding aliens,” that is, those permitted to be in the United States. Arizona’s statutes punish only those who are not authorized to be in the United States, although under any understanding of the enforcement of the Arizona law, inevitably citizens of the United States and lawful permanent residents will also be affected.¹⁵⁸

State regulation of undocumented non-citizens, at least outside the area of registration, arguably raises fewer international issues of the type that

154. 312 U.S. 52 (1941).

155. *Id.* at 66–67.

156. *Id.* at 74.

157. *Baltimore & Ohio R.R. Co. v. Pa. Dep’t. of Labor and Indus.*, 334 A.2d 636, 639 (Pa. 1975); *Developments in the Law—Immigration Policy and the Rights of Aliens VI. Discrimination Against Documented Aliens*, 96 HARV. L. REV. 1400, 1416 (1983) (“*Hines v. Davidowitz* held that a Pennsylvania statute requiring aliens to register with state authorities was preempted by a less rigorous federal registration scheme. The Court decided that, in carefully balancing the government’s need for information against the infringement of aliens’ personal liberties, Congress had ‘occupied the field’ of alien registration.”).

158. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (noting that rules allowing searches for undocumented non-citizens had to account for “the Fourth Amendment rights of citizens who may be mistaken for aliens”).

concerned the Court in *Davidowitz*. In *DeCanas v. Bica*,¹⁵⁹ in an opinion written by Justice Brennan, the Supreme Court unanimously upheld a California law criminalizing companies that employed non-citizens who were not authorized to work in the United States. Since 1976, when *DeCanas v. Bica* was decided, Congress passed its own regulation and prohibition of undocumented labor, IRCA. However, a number of courts,¹⁶⁰ including the Ninth Circuit,¹⁶¹ have held that IRCA does not entirely preempt state legislation regarding undocumented non-citizens. Whether *Davidowitz* survives *DeCanas* intact is debatable; at a minimum, *DeCanas* signals a more accommodating approach to state law that touches on immigration issues than earlier cases implied.

Not debatable, however, is that S.B. 1070 represents Arizona's dissatisfaction with federal enforcement policy. Arizona's statute draws from federal statutes, but, as stated above, the Arizona legislature simply could have required all Arizona police to arrest people for violating those federal statutes and turn them over to federal authorities. This would have the advantage of imposing the cost of pretrial detention, prosecution, and incarceration on the United States rather than on the state.

But Arizona knows that the United States would not focus on prosecuting large numbers of garden variety violations, in part because the immigration-related federal agencies are working on bigger cases, and in part because the federal policy is to deal with the problem another way. Republican and Democratic Chief Executives alike have rejected even civil deportation as an overall solution to the problem of a large undocumented immigrant population, which would be a cheaper and more moderate response than criminal prosecution.¹⁶² In 2006, President Bush stated: "Massive deportation of the people here is unrealistic. It's just not going to work."¹⁶³ Similarly, in 2009, President Obama made clear that his policy is that people already here should be given a "pathway to citizenship."¹⁶⁴

159. 424 U.S. 351 (1976).

160. *Coma Corp. v. Kansas Dept. of Labor*, 154 P.3d 1080 (Kan. 2007) (Kansas law requiring earned but unpaid wages to be paid not preempted); *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246 (N.Y. 2006).

161. *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976 (9th Cir. 2008), *amended and motion for hearing and rehearing en banc denied*, 558 F.3d 856 (9th Cir. 2009), *cert. granted sub nom. Chamber of Commerce v. Candelaria*, 130 S. Ct. 534 (June 28, 2010) (No. 09-115).

162. This is not to deny, of course, that large number of non-citizens are being interdicted at or near the border and are formally or informally removed, and large numbers of non-citizens in the criminal justice system are removed, sometimes based on arrests for minor offenses.

163. George W. Bush, Address in Irvine, California: Immigration Reform (Apr. 24, 2006), available at <http://www.presidentialrhetoric.com/speeches/04.24.06.html>.

164. Barack Obama, News Conference in Guadalajara, (August 10, 2009) ("we can create a system in which you have strong border security, we have an orderly process for people to come in, but we're also giving an opportunity for those who are already in the United States to be able to achieve a pathway to citizenship so that they don't have to live in the shadows, and their children and their grandchildren can have a full participation in the United States"), available at http://www.nytimes.com/2009/08/11/world/americas/11prexy.text.html?_r=1&ref=americas&page_wanted=all.

In the legal system, the dual sovereigns jealously guard their ability to choose the forum as well as the substantive law, because it affects outcomes. For example, states have long resisted, and Congress has restricted, the ability of federal courts to review state criminal convictions on habeas corpus. The federal and state courts apply the same federal constitutional rules, but the states want to do it themselves. Statutes and constitutional provisions permitting removal of diversity cases and cases involving federal officers and rights from state to federal court are another example. Where important federal concerns are at stake, the law provides parties with the choice of a federal forum. Even when judicial jurisdiction is shared, however, the respective forums are obliged to follow the applicable substantive law of the sovereign with authority over that subject matter. The choice of forum is not to be “outcome determinative.”

Policy choices involving prosecution with international and foreign policy overtones share this quality. The theme of protection of foreign relations as a reason that immigration law and policy largely reside in the federal government runs through more than 100 years of Supreme Court case law in this area.¹⁶⁵ The substantial concerns expressed about S.B. 1070 by foreign governments and foreign citizens therefore are relevant to the preemption issue—not because foreign law has a direct relevance to U.S. law, but because the history of U.S. immigration law and its assessment by the United States Supreme Court is so attentive to foreign relations as a reason that the federal government, not the states, must be the dominant voice in the immigration arena. Such criticisms include statements by President Calderón of Mexico speaking to Congress on May 20, 2010, when he said that S.B. 1070 “introduces a terrible idea: using racial profiling as a basis for law enforcement.”¹⁶⁶ Travel advisories issued by other countries also shore up the sense that Arizona’s actions have triggered foreign relations sensitivities if not a foreign relations crisis.¹⁶⁷ The brief for the United States government in *United States v. Arizona* underscores the foreign relations fall-out from S.B. 1070 and makes what may be the hardest preemption arguments for Arizona to overcome given the courts’ deference to the federal executive and

165. See, e.g., *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876) (“The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the states. It has the power to regulate commerce with foreign nations; the responsibility for the character of those regulations and for the manner of their execution belongs solely to the national government. If it be otherwise, a single state can at her pleasure embroil us in disastrous quarrels with other nations.”).

166. Brian Knowlton, *Calderón Assails Arizona Immigration Law on Detention*, N.Y. TIMES, May 20, 2010, at A6.

167. See Jonathan Cooper & Paul Davenport, *Lawsuits Target New Arizona Immigration Law*, Associated Press, Apr. 30, 2010, available at http://www.msnbc.msn.com/id/36853483/ns/us_news-crime_and_courts/ (discussing travel advisory by El Salvador); SECRETARIA DE RELACIONES EXTERIORES, TRAVEL ALERT (Apr. 27, 2010) (Travel advisory issued by Mexico), available at http://www.sre.gob.mx/csocia/contentido/comunicados/2010/abr/cp_121eng.html.

legislative branches in such matters¹⁶⁸

*Plyler v. Doe*¹⁶⁹ is relevant here, though the facts and plurality posture of the case limit its provenance. In *Plyler*, the Court, 5-4, held that Texas could not exclude undocumented non-citizen children from its schools. The case was decided on equal protection grounds, and focused on the harm to children, who were not responsible for their illegal presence. But the Court also concluded that there was a conflict with federal immigration policy, because of the likelihood that the children would not ultimately be deported. The prohibition, the Court said,

does not operate harmoniously within the federal program. To be sure, . . . these children are subject to deportation. But there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen It would of course be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.¹⁷⁰

Here, too, the national government has signaled that the ordinary, otherwise law-abiding undocumented person who is already here is not a priority even for civil deportation, to say nothing of criminal prosecution.

The Court in *Plyler* also noted that President Reagan's Attorney General, William French Smith, testified before Congress that the undocumented population

is largely composed of persons with a permanent attachment to the Nation, and that they are unlikely to be displaced from our territory: 'We have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community.'¹⁷¹

Of course, *Plyler* dealt with the arguably unique situation of education of undocumented children and the "sins of the father" concern about creating an underclass of innocent children who had no control over their parents' movements.¹⁷² *Plyler* also included an important footnote that recognizes the state's interest in protecting its economy.¹⁷³ As such, it may both undermine

168. See Plaintiff's Motion for Preliminary Injunction and Memorandum of Law in Support Thereof, *supra* note 138, at 16-19, 22-25.

169. 457 U.S. 202 (1982).

170. *Id.* at 226 (citations omitted).

171. *Id.* at 218 n.17 (citations omitted).

172. *Id.* at 219-20.

173. *Id.* at 228 n.23.

and support the state's interest in passing legislation like S.B. 1070.¹⁷⁴ But the Attorney General's testimony about persons who have become "members of the community" has a direct bearing on whether the non-enforcement of immigration law should be read as a statement of conscious federal policy, rather than as mere default in the face of the many practical impediments to full prosecution. Moreover, *Plyler* dealt with K-12 education—a traditional enclave of state power. The plurality nevertheless concluded that federal constitutional principles trumped state interests—even in this context, and despite arguments that the state economy would be unduly taxed by the duty to educate these children. Whether the current Court would reach a similar conclusion today is unclear; the evolution of immigration law and policy since 1982, as well as intervening economic developments and changes in the Court itself, all matter here. The current vigorous debate about the reach of the federal government in other arenas, and so-called "states' rights," also may have a bearing on how the Court effects the balance between federal power over immigration matters and state police powers. The difficult preemption question thus remains: Does the Arizona law supplant and undermine, or merely supplement and reinforce, federal law? As the law currently stands, states clearly cannot assert economic interests as a complete justification for policies adversely affecting undocumented persons.

In addition to the foreign policy concerns with regulation of people who are foreign nationals, there are also domestic Commerce Clause concerns. Strict Arizona enforcement undoubtedly will encourage some undocumented non-citizens to leave the United States, but others will go to other states. This will put pressure on other states to impose their own regulations, presumably even more energetic, or suffer an influx of undocumented individuals. Moreover, Section 5 of S.B. 1070 makes it illegal for a person who is in violation of a criminal offense to (1) transport an alien in Arizona in furtherance of the unlawful presence of the alien in the United States; (2) conceal, harbor, or shield an alien from detection in any place in the state; and (3) encourage or induce an alien to come to or reside in this state if the person knows that such coming to, entering, or residing in this state will be in violation of law.¹⁷⁵

The concerns, at least, of the Dormant Commerce Clause cases seem relevant here.¹⁷⁶ Dormant Commerce Clause cases,¹⁷⁷ as well as Article IV

174. Footnote 23 of *Plyler* suggests that states can deter "unchecked unlawful migration" when that might "impair the State's economy . . ." 457 U.S. at 228 n.23. See also *New Jersey v. United States*, 91 F.3d 463, 470 (3d Cir. 1996) (observing that "[d]ecisions about how best to enforce the nation's immigration laws in order to minimize the number of illegal aliens crossing our borders patently involve policy judgments about resource allocation and enforcement methods. Such issues fall squarely within a substantive area committed by the Constitution to the political branches . . .").

175. S.B. 1070, 49th Leg., 2d Sess., Ariz. Sess. Laws ch. 113 sec. 5(A) (sec.13-2929).

176. See *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't. of Natural Resources*, 504 U.S. 353, 359 (1992) ("As we have long recognized, the . . . Commerce Clause prohibits States from 'advanc[ing] their own commercial interests by curtailing the movement of articles of commerce,

Privileges and Immunities Clause cases,¹⁷⁸ repeatedly stress the concerns of state protectionism and discrimination against state outsiders. Both underscore the need for a national market, and both also note how state and local laws may privilege state insiders in ways that promote hoarding of state resources, that exclude labor from other jurisdictions, and that erect state-centered entry barriers to the flow of common concerns in ways that prevent the state from bearing its fair share of shared national burdens. These concerns become more serious, not less so, when the source of competition or threat to state interests is foreign rather than domestic.¹⁷⁹ For one thing, in the latter scenario the problems that arise are even more obviously within congressional jurisdiction to manage because the subjects are not citizens of any state; as such, they have no franchise or representation whatsoever. For another, where the commercial interests involve foreign affairs or relations, national coherence is particularly necessary.

The government argues in *United States v. Arizona* that the Arizona law not only restricts interstate movement in violation of the clause, but “is necessarily a restriction on unlawful entry into the United States” because Arizona is a border state.¹⁸⁰ In both arenas, the government argues, the measure constitutes an impermissible burden on the flow of commerce.¹⁸¹

Congressional authority also assures that the problem of uneven distributions of burdens across the states be handled in a form that takes all states’ interests into account; the governors have political vehicles for expressing their collective and individual concerns to the national government, and their

either into or out of the state.’ *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949). A state statute that clearly discriminates against interstate commerce is therefore unconstitutional ‘unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.’ *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988).’); *Edwards v. California*, 314 U.S. 160, 173 (1941) (“The issue presented in this case, therefore, is whether the prohibition embodied in Section 2615 against the ‘bringing’ or transportation of indigent persons into California is within the police power of that State. We think that it is not, and hold that it is an unconstitutional barrier to interstate commerce.”).

177. See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979) (one of the primary purposes of the Commerce Clause was to prevent “economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation”).

178. See, e.g., *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (noting that the Clause was designed to “fuse into one Nation a collection of independent, sovereign States”). Of course, the Clause does not literally apply to non-citizens; only citizens and natural persons (e.g., not corporations) can invoke Privileges and Immunities Clause of Article IV. The same is true of the Privileges and Immunities Clause of the Fourteenth Amendment. But the Article IV clause is further textual evidence that the Framers’ concern about arbitrary state-imposed barriers to the free flow of commerce and individuals trumped their competing concern about preserving state sovereignty in important respects.

179. See *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (noting that state restrictions that burden foreign commerce are subject to especially close scrutiny so that the federal government can “speak with one voice”).

180. Plaintiff’s Motion for Preliminary Injunction and Memorandum of Law in Support Thereof, at 45.

181. The government cites the following United States Supreme Court cases in support of this argument: *DeCanas*, 424 U.S. at 355; *Edwards v. California*, 314 U.S. 160 (1941); *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997).

citizens, of course, can influence the legislative process directly through voting and lobbying. Even states with very small populations have a powerful voice in the process of forging national policy, through the “Great Compromise”—creation of the United States Senate, which affords every state the same number of senators regardless of population.

The Dormant Commerce Clause also allows Congress to respond directly to state interests by expressly sanctioning state-level measures.¹⁸² As such, the preemption arguments and Dormant Commerce Clause arguments overlap substantially in matters that touch on interstate commerce. Moreover, proponents of the new state immigration laws do not veil their purposes, an important issue in Dormant Commerce Clause cases. Indeed, they make very clear both why they are acting and that a primary concern is the economic burden they believe undocumented persons represent.¹⁸³ The possibility of an inconsistent patchwork of varying solutions therefore suggests, at a minimum, that a uniform approach is desirable as a matter of national economic policy, if not constitutional demand. Additionally, the more states that enter this legislative tangle, the stronger the federal government’s argument becomes that a uniform, national solution is necessary. That is, growing political support for Arizona’s law is a double-edged sword.

It is important to emphasize, however, that an assessment of whether a state law is either expressly or impliedly preempted is often not a simple matter. Just as the Framers anticipated that the federal government would reign supreme in key areas of national concern, they also recognized the need to preserve state sovereignty over matters that traditionally belonged to state and local authority. The line between plenary exclusive federal authority over naturalization and related concerns, and shared or “cooperative federalism” in areas that involve traditional state “police powers,” thus is often hazy.¹⁸⁴ In fact, courts have stated that there is a presumption against preemption of state power in areas of traditional state power.¹⁸⁵ Again, a plausible, but hardly dispositive, argument in favor of field preemption derives from *Davidowitz*,¹⁸⁶ which stated that the federal registration act creates a “single integrated

182. See, e.g., *New York v. United States*, 505 U.S. 144 (1992) (upholding provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that authorized states with federally approved waste sites to discriminate against interstate commerce by rejecting waste from nonconforming states).

183. See *Kobach*, *supra* note 142, at 459 (asserting that “[w]ithout question, the single largest factor motivating state governments to enact legislation discouraging illegal immigration is the fiscal burden that it imposes on the states.”).

184. Here again, the footnote from *Plyler* is relevant. The Court there concedes that states have a powerful interest in protecting the state economy and its ability to provide essential services. See *supra* note 100.

185. See *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 864 (9th Cir. 2009) (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)). But see *Lozano v. City of Hazleton*, 496 F. Supp.2d 477 (M.D. Pa. 2007), *appeal pending* (striking down local anti-immigration law on, inter alia, preemption grounds).

186. 312 U.S. 52 (1941).

and all-embracing system.”¹⁸⁷

As applied to S.B. 1070, arguments about federal intention to divest states of power (or correlatively, that the federal government has acted to grant states this power) point both ways. On the one hand, President Obama and other members of the Executive Branch have expressed deep concern about the wisdom of the measure, and the states themselves effectively concede this part of the preemption point by declaring openly that they are acting because the federal government has not acted in this same area. If the states believed they had been granted power to act, their legislators presumably would rely on that express or implied authority rather than on congressional silence.

On the contrary, even the staunchest proponents of these new measures make clear that they are stepping into a perceived void where Congress is expected to act first and foremost, if not exclusively.¹⁸⁸ Although they also are asserting that preemption power is weakest where it butts up against “traditional” state powers, they are not relying exclusively or even primarily on Tenth Amendment or “states’ rights” arguments.¹⁸⁹ That is, they are not insisting—it would be pointless to do so in the immigration arena—that Congress has no legitimate power here, or that it has overstepped its enumerated authority. Rather, they are complaining that the federal government has failed to exercise its power.

In addition, it has become common to intone these days that “all states are border states.” As such, a national solution to the border issue seems imperative, lest interstate dynamics thwart our ability to forge sensible policy in this arena. The stunning proliferation of new state laws that attempt to grapple with the consequences of immigration¹⁹⁰ compound the need for a coherent solution; were a comparably Byzantine new patchwork of laws to emerge regarding bankruptcy, interstate highway safety, or other aspects of homeland security, this need for a federal trumping solution would be obvious and incontrovertible.

On the other hand, if Congress remains inert in the face of Arizona’s demand that the federal government step up to the regulatory plate and “do something,”¹⁹¹ then the argument that the measure usurps federal authority

187. *Id.* at 78.

188. Kobach, *supra* note 142, at 464 (“[I]mmigration is a field in which the federal government enjoys plenary authority under Article I of the U.S. Constitution”).

189. The absence of this brand of states’ rights arguments here is telling, in an historical moment when states have been defying Congress in other arenas that involve national Commerce Clause and Tax and Spend authority, especially health care.

190. Anna Gorman, *Arizona’s Immigration Law Isn’t the Only One*, L.A. TIMES, July 16, 2010, available at <http://articles.latimes.com/2010/jul/16/nation/la-na-immigration-states-20100717/3>.

191. Nobody doubts that this is the intention of Arizona or of other states that have introduced or passed bills dealing with illegal immigration. As Professor Kobach asserts: “It is undeniable that the urge to reduce illegal immigration has become a powerful force in state legislatures across the country.” Kobach, *supra* note 142, at 459. There are signs, as of this writing, that the federal beast is awakening: President Obama ordered 1,200 National Guard troops to the US/Mexico border on May 25, 2010, and Governor Jan Brewer immediately described the move as a welcome sign that Arizona’s law had begun to have its intended effect.

grows weaker—politically if not constitutionally. It no longer will be an enigmatic silence that courts must interpret to determine congressional will; the silence will become, Arizona surely will argue, a deafening one in the face of legislation that is explicit and notorious. If other states follow Arizona's suit, and Congress still remains silent, then this argument will grow even stronger. Courts can more easily construe this federal silence as approval of state action by inaction and a "clear and manifest purpose" to occupy the field will be much harder to infer. Of course, the strongest evidence to date that the government will not remain idle is the filing of the action seeking to enjoin S.B. 1070.

How the executive branch responds to S.B. 1070 is also relevant to ultimate determinations of its constitutionality. The federal government now has taken the formal position in litigation that S.B. 1070 interferes with federal authority and is preempted in whole or part.¹⁹² There are other positions the federal government could take as well. It could, for example, ask Arizona authorities to contact federal immigration or prosecution agencies before initiating any state prosecution based on federal law, so that the federal government, in the spirit of cooperative federalism, could decide whether federal, state, or no action was appropriate in each case. Theoretically, the federal government could determine that 8 U.S.C. § 1373(c), which requires the federal government to share immigration information with state and local agencies "for any purpose authorized by law," does not apply to enforcement of state laws like this, because they are preempted.

Still another complexity, one that is downplayed by the federal government in *United States v. Arizona*, is that federal immigration law does not cover only "pure" immigration law in the sense of admission and naturalization decisions. Rather, it has extended to other arenas once associated more traditionally with state police powers.¹⁹³ As Professor Juliet Stumpf has noted in an historical review of state and local power over immigration, "[s]hifting federal immigration law into areas considered strongholds of state power is bound to influence whether courts will associate a challenged state action with acceptable exercises of state power or forbidden meddling in foreign affairs."¹⁹⁴ However, she also warns that courts should be wary of states' rights arguments here that mask "invidious purposes."¹⁹⁵ Characterizing the new immigration laws—especially ones with criminal sanctions—as garden-variety state regulation over domestic concerns blinks the reality that the subjects of these laws are exclusively non-citizens, and thus a politically powerless population that historically has been subject to harsh and nativist

192. *United States v. Arizona*, *supra* note 2.

193. See Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1583–96 (2008) (discussing the transformation of federal immigration policy to extend beyond border-focused foreign policy into areas of domestic concern).

194. *Id.* at 1605.

195. *Id.* at 1614.

measures.

As the earlier discussion of “racial profiling” shows, the modern measures aimed at deterring illegal immigration have inevitable spillover effects on legal aliens and citizens from particular countries—especially “Salvadorans, Guatemalans, and Mexicans.”¹⁹⁶ As such, “[t]he proliferation of subnational criminal statutes affecting noncitizens and the troubling motives that may underlie them counsel against permitting states to join the plenary power of the federal government with their own criminal police powers.”¹⁹⁷

In sum, the determination of implied preemption requires a nuanced judgment about the purposes and scope of both the relevant federal and state law, and how the two will interact. It also requires close attention to the consequences of allowing states to intervene in this area of federal power—even where the states have quite credible claims that immigration issues intersect with traditional matters of local and state concern.

As we have outlined, there are important divergences between federal immigration law and the new Arizona law. Although some of these divergences may have been unintentional, the primary thrust of the law is unequivocally an effort to prod the federal government into exercising its well accepted power to police immigration, and to demand a level of civil and criminal enforcement that the federal government heretofore has not deemed feasible or prudent.

Whether the several courts that now must address the issue will construe this as unconstitutional interference with federal exercise of its plenary power over immigration law policy remains to be seen.¹⁹⁸ In this Commentary, we have only sketched some of the complex interactions of federal law and S.B. 1070 that may raise preemption and Commerce Clause concerns.

CONCLUSION

S.B. 1070 raises a number of important legal questions about race, security, sovereignty, civil rights, state power, and foreign relations. We have endeavored to offer some preliminary thoughts on some of these questions; if we have helped to clarify the underlying facts and some of the key legal questions, then this Commentary has served its purpose.

This review of issues raised by S.B. 1070 has focused only the federal issues or questions of state and federal interaction. There are a host of state law questions raised by this statute that are fascinating as well. As just two examples, through its mandates to favor one kind of law enforcement activity (immigration) over others (general public safety), and to favor law enforcement over other kinds of local expenses (education, social services, transpor-

196. *Id.*

197. *Id.* at 1615.

198. Copies of the court papers in the many actions now pending are available here: <http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/arizona-legal-challenges>.

tation, development, parks and recreation, etc.), the state legislature is in effect dictating the allocation of local funds and policies. What, if any, are the limits of state control of city, county and other local budgets and policy priorities? Also in S.B. 1070, the legislature selected the Governor, not the Attorney General, to defend the statute. Both the Governor and Attorney General are Arizona constitutional officers, but it does appear that their responsibilities are set out by the legislature.

Also worth emphasizing is that the creation of S.B. 1070 and similar laws in other states have arisen in the context of a series of political and policy claims—claims that we have noted only to the extent that they are relevant to the resolution of legal issues. The most obvious is the claim by some people that the federal government fails to enforce federal immigration laws, and by others that it is indeed the federal government—but Congress, not the executive branch—that has failed to craft a wise and workable set of immigration policies. Another background issue turns on the assertions, not generally supported by research, that undocumented entrants pose a disproportionate threat to public safety.¹⁹⁹ Another related claim: Illegal immigrants are a significant net drain on public resources and social services. Finally, from a somewhat different perspective, some proponents of tougher immigration laws claim that illegal immigrants undermine wages and working conditions for legal workers.

Immigration law and policy has emerged from the pack of ongoing and contentious national issues to be, potentially, one of the defining political and social issues for the foreseeable future. The Arizona legislature and S.B. 1070 can be fairly credited with pushing immigration into this leading role. It seems unlikely that disputes over the legality of S.B. 1070 will be the mechanism that resolves the deep fissures and complex questions that swirl around immigration policy more generally. However, understanding with greater clarity the legal issues that S.B. 1070 does raise may contribute, in a small way, to a healthier political discourse.

In that spirit, we hope that this Commentary will help to inform a broader audience about the actual content and the legal issues raised by the bill. We hope to encourage a conversation among experts in constitutional law, immigration law, criminal law, criminal procedure, state and local law and other fields, so that these difficult and important legal questions will receive adequate attention. We also believe that more careful and illuminating discussion by lawyers of S.B. 1070 and similar laws and proposals in other states can contribute to the broader national debates over immigration policy and enforcement.

199. See, e.g., The Dark Side of Illegal Immigration, Impacts of Illegal Immigration: Crime Summary, http://www.usillegalaliens.com/impacts_of_illegal_immigration_crime_summary.html.