CASENOTES

ARIZONA V. UNITED STATES: UNSTITCHING THE PATCHWORK OF REACTIONARY STATE-ENACTED IMMIGRATION LEGISLATION THROUGH FEDERAL PREEMPTION

I. FACTS AND HOLDING

In 2010, Arizona enacted the "Support Our Law Enforcement and Safe Neighborhoods Act" (S.B. 1070) to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."[1] The act mandated unprecedented levels of action by state law enforcement agencies, created new state law misdemeanors based on federal immigration statutes and regulations, and imposed criminal penalties on unauthorized aliens for the act of seeking work within the state of Arizona.[2] This created a firestorm of controversy—both in Arizona and across the nation—and prompted the federal government to take the drastic act of filing suit to enjoin the enforcement of the act.[3]

Concerned that S.B. 1070 would conflict with federal immigration policy, the Federal Government filed suit against the State of Arizona on July 6, 2010, in the United States District Court for the District of Arizona and moved for a preliminary injunction to preclude the enforcement of the act.[4] The district court concluded that the U.S. had a likelihood of success in its federal preemption claims with respect to four provisions of the

1. S.B. 1070, 49th Leg., 2d Sess. at 1 (Ariz. 2010).

2. *See generally id.*

3. United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010*)*, *aff'd*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (2011), *aff'd in part*, *rev'd in part*, 132 S. Ct. 2492 (2012), *aff'd in part*, *rev'd in part*, No. 10-16645, 2012 WL 3205612 (9th Cir. Aug. 8, 2012).

4. Brief for Appellant at 5, United States v. Arizona, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645), 2010 WL 5162518.

act and granted the injunction as to those provisions.[5] The State of Arizona then appealed to the Ninth Circuit.[6]

The enjoined provisions were:

- **Section 2(B)**, the so-called "show me your papers" provision, which mandates that law enforcement officers conduct inquiries into the immigration status of individuals stopped for independent offenses "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States."[7]
- **Section 3**, which creates a new state law misdemeanor for "willful failure to complete or carry an alien registration document."[8]
- **Section 5**, which creates a new state law misdemeanor which makes it illegal for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in [Arizona]."[9]
- **Section 6**, which authorizes warrantless arrests when law enforcement officers have probable cause to believe that an individual has committed "any public offense that makes the person removable from the United States."[10]

The Ninth Circuit unanimously affirmed the district court's ruling with respect to the criminal provisions (§§ 3 and 5), while affirming with respect to the two remaining provisions (§§ 2(B) and 6) by a split vote. [11]

5. Brief for Appellant at 5, United States v. Arizona, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645), 2010 WL 5162518.

6. *Id.*

7. *See* ARIZ. REV. STAT. ANN. § 11–1051(B) (West 2012) (requiring law enforcement officers to perform some form of immigration check during a stop "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States" and apparently mandating status checks for "[a]ny person who is arrested").

8. *See id.* § 13–1509(A), (H) (carrying a maximum fine of $100 and up to 20 days in prison for a first violation).

9. *See id.* § 13–2928(C), (F).

10. *See id.* §13-3883(A)(5).

11. United States v. Arizona, 689 F.3d 1132 (9th Cir. 2012). The court determined that § 3 was prohibited under Hines v. Davidowitz, 312 U.S. 52 (1941), and that § 5 conflicted with federal law. The court affirmed with respect to § 2(B) and § 6 by a divided vote under preemption principles.

Thereafter, the Supreme Court granted writ of certiorari "to resolve important questions concerning the interaction of state and federal power with respect to the law of immigration and alien status."[12] The Court held that §§ 3, 5(C), and 6 of S.B. 1070 were preempted by federal law but § 2(B), the "show me your papers" provision, survived because it was not yet possible to show that its enforcement conflicted with federal immigration law and objectives.[13]

This note will analyze the Court's decision and provide an explanation of many of the underlying immigration policy concerns factored therein. A proper understanding of the Court's holding requires knowledge of the historical development of the nation's immigration policy as well as pertinent Supreme Court jurisprudence in this area of law.

To this end, Part II establishes the legal context of the Court's holding, including relevant constitutional provisions, concepts of federal preemption, and pertinent case law. Part III details the Court's rationale and includes a brief discussion of the dissenting opinions. Finally, Part IV expounds on the holding and argues that, despite reaching the correct result, the Court failed to address several pressing issues that are likely to re-appear in the form of future legal challenges and which are certain to have a significant impact on the ultimate direction of our nation's immigration policy.

II. BACKGROUND

This section will provide the background information necessary to understand the Court's holding within the context of this area of law. Beginning with an explanation of the relevant constitutional provisions, this section will provide an overview of the concept of federal preemption before addressing specific Court rulings leading up to the decision. Finally, this section includes a discussion of relevant federal immigration statutes.

A. THE SUPREMACY CLAUSE

The Supremacy Clause of the United States Constitution provides that federal law overrides state law if the two conflict.[14]

12. Arizona v. United States, 132 S. Ct. 2492, 2498 (2012).
13. *Id.* at 2495-96.
14. U.S. CONST. art. VI, § 2.

This concept, known as federal preemption, is triggered under three circumstances: (1) where Congress explicitly provides that federal law preempts state law (express preemption); (2) where the pervasiveness of the federal scheme suggests that Congress intended to occupy the field (field preemption); or (3) where the need for uniformity, or the danger of conflict between the enforcement of state laws and the administration of federal programs "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" (conflict preemption).[15] As to federal preemption, the Supreme Court has applied a case-by-case approach to determine whether the manifest intent of Congress is to displace state law in a particular area.[16] Determining congressional intent with respect to the interaction of federal and state law is an intricate undertaking and makes predicting the result of federal preemption cases particularly challenging.

Although the Constitution does not explicitly address the allocation of authority between the states and the federal government over immigration issues, traditional authority for the regulation of immigration has rested with the federal government.[17] The Supreme Court has recognized that the federal government's power to regulate immigration derives from its constitutional authority "to control and conduct relations with foreign nations."[18]

That the extent of the federal government's authority over the regulation of immigration has yet to be explicitly staked out is attributable to the government's relative inaction in the field through the late nineteenth century.[19] In the nation's formative

15. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 378 (7th ed. 2004) (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)).

16. *Id.* at 375, 378.

17. *See generally* M. Isabel Medina, *Symposium on Federalism at Work: State Criminal Law, Noncitizens and Immigration Related Activity - An Introduction*, 12 LOY. J. PUB. INT. L. 265, 265 (2011).

18. U.S. CONST. art. I, § 8, cl. 4 (providing the power to "establish an Uniform Rule of Naturalization"); Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) (citing Toll v. Moreno, 458 U.S. 1, 10 (1982)).

19. This is not to say that the states did not participate in some degree of immigration regulation during this time, but merely that the federal government did not exercise the full extent of its power in the field. *See*, *e.g.*, Bill Ong Hing, *Reason Over Hysteria*, 12 LOY. J. PUB. INT. L. 275, 277 (2011) (discussing the states' early roles in enacting legislation aimed at curbing immigration of, among others: free blacks, Chinese immigrants, Catholics, etc.).

years, the settlement of newly-acquired territory was a national priority that tended to favor immigration—providing little opportunity for the sort of conflict that would prompt scrutiny of the precise demarcation between federal and state authority in the field.[20] Beginning in the mid-twentieth century, however, states and the federal government embarked on a series of encounters that set the stage for the current conflict.

B. SUPREME COURT PRECEDENT

In *Hines v. Davidowitz*, a 1941 decision, the Supreme Court determined that the authority to regulate the registration of aliens rested exclusively with the federal government.[21] In so determining, the Court found that Congress's intent in enacting the Alien Registration Act of 1940 was to provide "a standard for alien registration in a single integrated and all-embracing system," and as such, Congress left no room for concurrent regulation by the states.[22] Thereafter, in 1952, Congress enacted the Immigration and Nationality Act (INA) in an effort to consolidate and codify the nation's immigration statutes, which were previously scattered throughout a number of legislative instruments.[23]

In 1976, however, the line between federal and state authority in the immigration field started to blur as a result of

20. For example, in 1802, shortly after the Louisiana Purchase, Thomas Jefferson revised the Naturalization Act of 1798 to reduce the residency requirement for naturalization from fourteen to five years. Additionally, in 1849, the California Gold Rush "spur[red] immigration from China and extensive internal migration." *See Immigration to the United States, 1789-1930: Key Dates and Landmarks in the United States Immigration History*, HARVARD UNIV. LIBRARY OPEN COLLECTIONS PROGRAM (Sept. 1, 2012), *available at* http://ocp.hul.harvard.edu/immigration/timeline.html.

21. *See* Hines v. Davidowitz, 312 U.S. 52, 74 (1941). The case arose when Pennsylvania citizens sued to enjoin enforcement of the state's Alien Registration Act, passed in 1939. *Id.* at 59. The state statute created a state alien registration system, which required registration with the State Department of Labor and Industry in addition to the payment of an annual fee. *Id.* The statute also imposed state criminal penalties for failure to comply with the system's registration requirements. *Id.* at 59-60.

22. *Id.* at 74.

23. *See Immigration and Nationality Act*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextchannel=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextoid=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD (last visited July 14, 2012).

the Supreme Court's holding in *DeCanas v. Bica*.[24] In *DeCanas*, the Court determined that, although the "[p]ower to regulate immigration is unquestionably exclusively a federal power,"[25] such a condition did not per se preempt "every state enactment which in any way [dealt] with aliens."[26] The Court failed to find any specific indication in the INA of Congress's intent "to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular."[27] For the *DeCanas* Court, this meant that it fell within a state's police power to prohibit the employment of unauthorized aliens when such employment would have an adverse effect on lawful workers.[28]

A decade later, Congress enacted the Immigration Reform and Control Act of 1986 (IRCA).[29] IRCA expressly preempted states from imposing criminal or civil penalties on employers hiring unauthorized aliens.[30] This act was aimed, in part, at restoring order amidst the "patchwork" of state sanctions enacted in the wake of the *DeCanas* ruling.[31] Significantly though, IRCA's savings clause explicitly preserves the authority of the states to impose sanctions for the employment of unauthorized aliens provided that they do so "through licensing and similar laws."[32]

C. STATE STATUTES

In 2008, Arizona became the first state to test the licensing exception loophole when it enacted the Legal Arizona Workers

24. *See* DeCanas v. Bica, 424 U.S. 351, 352-53 (1976). The case arose when a group of migrant farm workers sued farm labor contractors alleging that they had been denied employment because of a labor surplus that resulted from the contractors' knowing hiring of unlawful aliens in violation of a California statute.

25. *Id.* at 354.

26. *Id.* at 355.

27. *Id.* at 358.

28. *Id.* at 356-57.

29. The act's purpose was, in part, to "stipulate legalization of undocumented aliens who had been continuously unlawfully present since 1982, legalization of certain agricultural workers, sanctions for employers who knowingly hire undocumented workers, and increased enforcement at U.S. borders." *See* U.S. CITIZENSHIP AND IMMIGRATION SERVS., *supra* note 23.

30. *See* Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1977 (2011) (discussing IRCA's preemptive stature and its supersedence of *DeCanas*).

31. *Id.* at 1987 (Sotomayor, J., dissenting).

32. *Id.* at 1975.

Act (LAWA)—an act mandating use of the federal E-Verify pilot program by the state's employers and providing for the revocation of business licenses (colloquially the "business death penalty") for those employers found to be hiring unauthorized aliens.[33] The U.S. Chamber of Commerce and various business and civil rights organizations challenged this act, but the Supreme Court, in *Chamber of Commerce v. Whiting*, held that LAWA fell within the protection of the licensing exception in IRCA's savings clause.[34]

With the passage of S.B. 1070 in 2010, Arizona became the first state to require immigrants to meet federal requirements for carrying documentation of their immigration status. The act was recognized by critics and proponents alike as "the broadest immigration measure in generations," and it represented a considerable expansion of the circumstances under which a removable alien could be arrested.[35] Under federal law, such arrests generally require either the authorization of the Attorney General or that federal law enforcement officers be responding to an emergency situation.[36] Panned by critics as an invitation to discriminate against Hispanic residents, the act prompted the rarity of the President weighing in on matters of state legislation.[37] *Arizona v. United States* followed on the heels of *Whiting* as the conflict between state sovereignty and federal immigration policy came to a prominent head in the national political arena.

III. THE COURT'S DECISION

Justice Kennedy authored the Supreme Court's 5-3 decision in *Arizona*.[38] The opinion began by establishing the background

33. Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1973 (2011). E-Verify is an internet-based pilot program allowing employers to check the eligibility of prospective employees to work in the U.S. The program remains voluntary under federal law, but the Legal Arizona Workers Act made its use mandatory among the state's employers. See *E-Verify*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=75bce2e261405110VgnVCM1000004718190aRCRD&vgnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD (last visited July 14, 2012).

34. *See Whiting*, 131 S. Ct. at 1973.

35. Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, April 23, 2010, http://www.nytimes.com/2010/04/24/us/politics/24immig.html?_r=0.

36. *See infra*, notes 75-81 and accompanying text.

37. Archibold, *supra* note 35.

38. Justice Kagan recused herself given her prior tenure as Solicitor General for

of federal immigration regulation—noting, in particular, the extensiveness and complexity of the field.[39] Specifically, the Court addressed the tendency for immigration issues to overlap with foreign and diplomatic relations.[40] The Court emphasized the fundamental importance for foreign sovereigns to be able to interact with a single central authority in matters concerning the status of their nationals abroad.[41] Also, the Court addressed the careful congressional considerations underlying the nation's immigration policy by noting the broad discretion afforded to federal agencies with regard to immigration enforcement in light of the distinct human considerations inherent in immigration policy.[42]

The Court proceeded to contrast the broad authority and discretion of the federal government to enforce immigration policy with the more limited role traditionally played by the states.[43] However, the Court acknowledged that, because the effects of unlawful immigration are most immediately experienced at the state level, states do have a legitimate interest in the nation's immigration policies, despite their limited authority in the field.[44] The Court explicitly noted that the unauthorized alien population in Arizona might comprise up to 6% of the total state population and that such aliens could account for up to 21.8% of felonies in one particular county.[45]

---

the Obama Administration during the time that the case was pending in the lower courts. The majority opinion was signed by Justices Roberts, Kennedy, Ginsburg, Breyer, and Sotomayor. *See* Justin Sink, *Kagan Recuses Herself from Arizona Case*, THE HILL'S BLOG BRIEFING ROOM (December 12, 2011), http://thehill.com/blogs/blog-briefing-room/news/198749-kagan-to-recuse-herself-from-arizona-immigration-challenge/.

39. Arizona v. United States, 132 S. Ct. 2492, 2500 (2012).

40. *Id.* at 2498.

41. *Id.* at 2498-99 (citing Hines v. Davidowitz, 312 U.S. 52, 52, 64, 61 (1941)) ("One of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country's own nationals when those nationals are in another country.").

42. *See id.* at 2499 ("Discretion in the enforcement of immigration law embraces immediate human concerns."). Matters of concern include an alien's ties to the community; possibility of U.S.-born children; military service; economic and political conditions in the country of origin, etc. *Id.*

43. *See generally id.* at 2499. ("Federal governance of immigration and alien status is extensive and complex" whereas States may "deny noncitizens a range of public benefits.").

44. *Arizona*, 132 S. Ct. at 2500.

45. *Id.* (citing Jeffrey Passel & D'Vera Cohn, *U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade*, PEW HISPANIC CTR. (Sept. 1, 2010),

Finally, the Court turned to the topic of federal preemption. After setting forth the preemption principles central to the issue presented for review, the Court began its analysis with the three provisions of the bill that would ultimately be deemed preempted (§§ 3, 5(C), and 6) and then gave extensive treatment to the bill's sole surviving provision: § 2(B).[46]

A. MISDEMEANOR OFFENSES FOR FAILURE TO COMPLY WITH FEDERAL ALIEN REGISTRATION STANDARDS

Section 3 created a new state law misdemeanor arising out of failure to comply with federal alien registration standards.[47] The punishment for this misdemeanor included a maximum fine of one hundred dollars and jail time of up to twenty days on a first conviction.[48]

Relying on *Hines v. Davidowitz* for the proposition that Congress had created a "single integrated and all-embracing" system for alien registration, the Court determined that Section 3 was preempted under principles of field preemption.[49] The Court noted that, although the federal registration scheme had developed in certain respects since the *Hines* decision, nothing suggested that the comprehensiveness of the scheme had been mitigated or that it was no longer Congress's intent to occupy the field.[50] The Court acknowledged that, in certain instances, states are entitled to impose additional penalties for violations of federal law.[51] Such additional state-law penalties are not available,

http://www.pewhispanic.org/2010/09/01/us-unauthorized-immigration-flows-are-down-sharply-since-mid-decade/; Steven A. Camarota & Jessica Vaughan, *Immigration and Crime: Assessing a Conflicted Issue*, CTR. FOR IMMIGRATION STUD. (Nov. 2009), http://www.cis.org/ImmigrantCrime).

46. Section 3 created a state law misdemeanor arising out of failure to comply with federal alien registration standards. Section 5 created a state misdemeanor for unlawful aliens applying for work. Section 6 authorized warrantless arrests when law enforcement officers had probable cause to believe that an individual had committed a "removable offense." Section 2(B), the "show me your papers" provision, requires law enforcement officers to check the immigration status of individuals stopped for independent offenses under specific circumstances.

47. Arizona v. United States, 132 S. Ct. 2492, 2497 (2012).

48. *See* ARIZ. REV. STAT. ANN. § 13–1509(H) (West Supp. 2011).

49. *Arizona*, 132 S. Ct. at 2501 (quoting Hines v. Davidowitz, 312 U.S. 52, 74, 61 (1941)).

50. *Id.* at 2502.

51. *Id.*

however, where Congress's intent is to occupy the entire field.[52]

The Court explicitly rebutted Arizona's contention that Section 3 could survive preemption on the basis that it adhered to, and incorporated, federal substantive standards.[53] Arizona argued that, because the state misdemeanor did not create any additional requirements—in that it was based entirely on a violation of federal registration requirements—it was consistent with the federal statutory scheme.[54] The Court found that such a contention ignored the fundamental principle of field preemption: that the states have no authority to enter an occupied field.[55] The Court proceeded to explain that, even absent field preemption, Section 3 stood as an obstacle to federal immigration policy because it would allow states to bring charges in situations where the federal government determined that doing so would frustrate federal objectives.[56] Finally, the Court explained that the Arizona law omitted the variety of remedies, such as probation and pardon, which are available under federal immigration statutes.[57] Therefore, the limited scope of remedies available under the Arizona law presented an additional, significant risk of conflicting with federal immigration objectives.[58]

B. CRIMINAL PENALTIES FOR SEEKING OR SOLICITING WORK AS AN UNAUTHORIZED ALIEN

Section 5(C) created a new state misdemeanor imposing criminal penalties on unauthorized aliens who either engage in or seek employment in Arizona.[59] The Court determined that Section 5(C) was preempted because it stood as an obstacle to the

52. Arizona v. United States, 132 S. Ct. 2492, 2502 (2012) ("Even if a State may make violation of federal law a crime in some instances, it cannot do so in a field (like the field of alien registration) that has been occupied by federal law.").

53. *Id.* at 2502-03.

54. *Id.* at 2502 ("Arizona contends that § 3 can survive preemption because the provision has the same aim as federal law and adopts its substantive standards."); *see* ARIZ. REV. STAT. ANN. § 13–1509(A) (West Supp. 2011) ("In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code § 1304(e) or 1306(a).").

55. *Arizona*, 132 S. Ct. at 2502.

56. *Id.* at 2503.

57. *Id.*; *see* ARIZ. REV. STAT. ANN. § 13–1509(D) (West Supp. 2011) ("A person who is sentenced pursuant to this section is not eligible for suspension of sentence, probation, pardon, commutation of sentence, or release from confinement . . . .").

58. *Arizona*, 132 S. Ct. at 2503.

59. *Id.* at 2497-98.

enforcement of federal immigration policy.[60]

The Court began its discussion of Section 5(C) by noting that—unlike Section 3, which effectively mirrored federal immigration standards—Section 5(C) created a new state law offense where no federal counterpart existed.[61] Although *DeCanas* had afforded broad immigration authority to the states to regulate the employment of unauthorized entrants,[62] the Court found that Congress enacted IRCA "as a comprehensive framework 'for combating the employment of illegal aliens.'"[63]

IRCA specifically imposes criminal penalties on employers of unauthorized aliens without imposing similar penalties on employees.[64] The Court analyzed IRCA's legislative history to determine that the absence of criminal penalties for employees was the result of a conscious decision by Congress.[65] The Court further determined that while IRCA's express-preemption provision does not explicitly prohibit the imposition of additional state-law penalties on employees, this absence does not bar or render more difficult the application of general preemption principles.[66] As a result, the Court was free to scrutinize the provision within the traditional framework of conflict preemption.[67]

Finally, the Court noted that although Section 5(C) attempts to accomplish one of the same objectives as federal law—deterrence of unlawful employment—the difference between the parties affected by the state and federal laws presented an obstacle to the achievement of Congress's immigration

60. Arizona v. United States, 132 S. Ct. 2492, 2505 (2012).

61. *Id.* at 2503.

62. *Id.*

63. *Id.* at 2504 (quoting Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 147 (2002)).

64. *Id.* (citing 8 U.S.C. §§ 1324a(a)(1)(A), (a)(2)(2012)).

65. *Id.* ("The legislative background of IRCA underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment. A commission established by Congress to study immigration policy and to make recommendations concluded these penalties would be "unnecessary and unworkable.")

66. The Court characterized the preemption provision as precluding the imposition of state penalties on employers of unauthorized aliens under most circumstances while remaining silent on the issue of "whether additional penalties may be imposed on the employees themselves." *Arizona*, 132 S. Ct. at 2504-05.

67. *Arizona*, 132 S. Ct. at 2504-05.

objectives.[68] The Court determined that the difference between penalizing employees and penalizing employers amounted to a significant difference in technique and that a "[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy."[69]

C. WARRANTLESS ARRESTS FOR SUSPICION OF REMOVABILITY

Section 6 provided for warrantless arrests of individuals by state officers when the officers have "probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States."[70] The Court held that Section 6 was preempted because it was in conflict with federal law.[71]

Beginning with the general rule that it is not a criminal offense merely for a removable alien to remain in the U.S., the Court set forth the framework for removal procedures under federal immigration law.[72] When an alien is suspected of being removable, the appropriate action is for a federal official to issue a "Notice to Appear."[73] This notice does not authorize an arrest and only serves to inform the alien of a pending removal hearing.[74]

Federal law sets forth limited circumstances when it is

68. Arizona v. United States, 132 S. Ct. 2492, 2505 (2012).

69. *Id*. (citing Motor Coach Employees v. Lockridge, 403 U.S. 274, 287 (1971)).

70. *Id.* (quoting ARIZ. REV. STAT. ANN. § 13–3883(A)(5) (West Supp. 2011)); *see also* 8 U.S.C. § 1227 (2008) (establishing classes of removable aliens, including: inadmissible aliens; those present in violation of law; those who violated nonimmigrant status or condition of entry; those whose conditional permanent residence status has been terminated; those convicted of smuggling; those who committed marriage fraud; those convicted of crimes of moral turpitude, multiple criminal offenses, aggravated felonies, high speed flight, or failure to register as a sex offender; those convicted of certain drug offenses; those convicted of certain firearm offenses; those convicted of crimes related to espionage; those convicted of crimes of domestic violence; those convicted of trafficking; those who fail to register and falsify documents; those who commit document fraud; those who falsely claim citizenship; those engaged in terrorist activities; those whose presence poses potentially serious foreign policy consequences; those who have become public charges under certain circumstances; those who have voted unlawfully, etc.).

71. *Arizona*, 132 S. Ct. at 2507.

72. *Id.* at 2505-06.

73. *Id.* at 2505.

74. *Id.*

appropriate to arrest a removable alien.[75] The Court explained, for example, that arrest is appropriate: (1) with authorization of the Attorney General or (2) by federal officers in emergency situations.[76] The Court further explained that the Attorney General has the discretion to issue an arrest warrant for an alien in the event that a removal decision is pending.[77] Furthermore, if an alien is ordered removed after a hearing, the Attorney General will issue such a warrant for the alien's removal.[78] The Court noted that in both scenarios, the warrant itself is executed by federal officers with specialized training in the enforcement of immigration law.[79] Moreover, the Court explained that federal officers may only make warrantless arrests on their own initiative in very limited circumstances.[80] For example, federal officers are authorized to arrest "an alien for being 'in the United States in violation of any [immigration] law or regulation,' . . . but only where the alien 'is likely to escape before a warrant can be obtained.'"[81]

The Court contrasted the limited authority provided for arrests under federal law with the broad grant of arrest authority provided in Section 6 and held that the Arizona law would give more authority to state law enforcement officers than Congress saw fit to bestow upon "trained federal immigration officers."[82] This would provide Arizona officers with the authority to conduct an arrest on the basis of possible removability without any input from the Federal Government—even when federal authorities determined that arrest was not warranted.[83] The Court held that this could result in unnecessary harassment of some aliens and would effectively amount to Arizona "achiev[ing] its own immigration policy."[84] Furthermore, the Court determined that the decision of whether to allow an alien to remain in the country is a matter bearing on foreign relations, and, as such, is beyond the purview of state authority.[85]

75. Arizona v. United States, 132 S. Ct. 2492, 2505-06 (2012).
76. *Id.*
77. *Id.* at 2505.
78. *Id.* at 2506.
79. *Id.*
80. *Id.*
81. *Arizona*, 132 S. Ct. at 2506 (quoting 8 U.S.C. § 1357(a)(2)(2006)).
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 2506-07.

Finally, the Court addressed Arizona's argument that the provision was permitted under federal rules providing for cooperation between state and federal law enforcement agencies.[86] Arizona referred to a federal statute allowing "state officers to 'cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.'"[87] The Court found that, although some ambiguity might exist with respect to what amounts to "cooperation" under the federal law, no interpretation was possible that would authorize "the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government."[88] The Court held that Congress has put in place a system providing only limited authority for the warrantless arrest of aliens based on possible removability.[89] Because Section 6 exceeded the bounds of these limitations, it conflicted with federal law and was preempted.[90]

D. MANDATED IMMIGRATION STATUS VERIFICATION

Section 2(B) "requires state officers to make a 'reasonable attempt . . . to determine the immigration status' of any person they stop, detain, or arrest on some other legitimate basis if 'reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.'"[91] The Court held that it was improper to enjoin enforcement of this provision given the possibility that state courts could interpret it consistently with federal law.[92]

The Court began by noting three limitations incorporated into the provision:

86. Arizona v. United States, 132 S. Ct. 2492, 2507 (2012).

87. *Id.* (quoting 8 U.S.C. § 1357(g)(10)(B)(2006)).

88. *Id.* (citing DEP'T OF HOMELAND SECURITY, GUIDANCE ON STATE AND LOCAL GOVERNMENTS' ASSISTANCE IN IMMIGRATION ENFORCEMENT AND RELATED MATTERS 13-14 (2011), *available at* http://www.dhs.gov/files/resources/guidance-state-local-assistance-immigration-enforcement.shtm) (providing examples of federal-state "cooperation," which might include "situations where States participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities").

89. *Arizona*, 132 S. Ct. at 2507.

90. *Id.*

91. *Id.* (quoting ARIZ. REV. STAT. ANN. § 11–1051(B) (West 2012)).

92. *Id.* at 2510.

(1) That a detainee is presumed not to be an unauthorized alien upon presentation of a valid Arizona driver's license or similar identification.[93]

(2) That officers "may not consider race, color or national origin . . . except to the extent permitted by the United States [and] Arizona Constitution[s]."[94]

(3) That the "provisions must be 'implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.'"[95]

The solicitor general asserted two bases for considering the provision an obstacle to the congressional immigration framework: (1) the mandatory nature of the checks, and (2) the possibility of prolonged detention resulting from the checks.[96]

1. MANDATORY STATUS CHECKS

The Court explained that communication between state and federal authorities is an important function of the immigration system. U.S. Immigrations and Customs Enforcement (ICE) is under an obligation to respond to any state request seeking to ascertain the immigration status of an individual, and, as a result, ICE operates the Law Enforcement Support Center (LESC) 24-hours per day, year-round.[97] Also, Congress has notably required that "no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [ICE] information regarding the immigration status, lawful or unlawful, of an alien in the United States."[98]

Given the emphasis placed on federal-state communication under federal immigration law, the Court found that there was no support for the government's contention that a policy mandating state inquiries to ICE would serve as an obstacle to the

93. Arizona v. United States, 132 S. Ct. 2492, 2508 (2012).

94. *Id.*

95. *Id.* (quoting § 11-1051(L) (West 2012)).

96. *Id.*

97. *Id.* (citing *Fact Sheet: Law Enforcement Support Center*, ICE (May 29, 2012), http://www.ice.gov/news/library/factsheets/lesc.htm).

98. 8 U.S.C. §1644 (1996).

Congressional framework.[99]

2. POSSIBILITY OF EXTENDED DETENTION

The Court noted that one of the principle objections raised by opponents of Section 2(B) was the possibility that it might result in extended detentions while immigration status checks are undertaken.[100] The Court acknowledged that, if state law enforcement officers detained individuals solely for purposes of verifying immigration status, such practice would raise constitutional concerns.[101] The Court found, however, that § 2(B) can be read to avoid these concerns.[102] The Court made use of two examples to illustrate how § 2(B) might function consistently with federal law.

The first example assumed that an individual had been stopped for jaywalking in an Arizona city but was unable to produce identification.[103] Under § 2(B), the officers must "make a 'reasonable' attempt to verify [the individual's] immigration status with ICE if there is reasonable suspicion that [the individual's] presence in the United States is unlawful."[104] The Court opined that state courts could determine that the reasonableness element would not permit officers to prolong a detention for purposes of performing an immigration check—unless the person continues to be suspected of some crime that would authorize his detention.[105] The Court cited Arizona's brief for the proposition that § 2(B) does not require that the immigration status check be completed during the stop or detention if doing so would not be reasonable or practicable.[106]

The second hypothetical involved an individual arrested for driving under the influence of alcohol.[107] In such a scenario, because the individual would actually be arrested, § 2(B) would appear to categorically require an immigration status check

99. Arizona v. United States, 132 S. Ct. 2492, 2508 (2012).

100. *Id*. at 2509.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Arizona*, 132 S. Ct. at 2509 (citing Brief for Petitioners at 12, n.4, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182)).

106. *Id.* (citing Brief for Petitioners at 12, n.4, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182)).

107. *Id.*

before the individual could be released.[108] The Court determined that state courts could interpret this as a command to initiate a status check every time someone is arrested rather than to detain the person until the check is complete.[109] However, the Court reasoned that even if the provision is read to require that the check be completed as a pre-condition to release, it would not be possible to determine that such a condition would necessarily result in prolonged detentions.[110]

The Court determined that:

> [I]f § 2(B) only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision likely would survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives.[111]

Finally, the Court expressly declined to address whether reasonable suspicion of unlawful entry into the U.S. could serve as a legitimate basis for prolonging detention.[112] Because the requirements of § 2(B) could be interpreted consistently with federal law, and because state courts have not yet been afforded the opportunity to construe the law, the Court determined that it would be premature to enjoin its enforcement.[113]

E. DISSENTING OPINIONS

Justices Scalia, Thomas, and Alito each submitted opinions concurring in part and dissenting in part.[114] While Justices Scalia and Thomas argued that none of the contested provisions were preempted under federal law, Justice Alito disagreed and found that § 3 was field preempted, consistent with the Court's decision in *Hines*.[115]

Justice Scalia wrote at length to discuss principles of state sovereignty and to specifically refute the majority's premise that

108. Arizona v. United States, 132 S. Ct. 2492, 2509 (2012).
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 2510.
114. *Arizona*, 132 S. Ct. at 2511-35.
115. *Id*. at 2524 (Alito, J., dissenting).

Hines stood for the proposition of field preemption in immigration regulation.[116] Further, Justice Scalia contended that, under *Hines*, § 3 should survive because—by mirroring federal registration requirements—it did not create any "additional or auxiliary" penalties.[117]

IV. ANALYSIS

Arizona v. United States appears to return immigration jurisprudence to the path it had been following before the slight deviation that occurred after *Whiting*.[118] Although the impact of the survival of § 2B remains debatable, the decision appears to reject state intervention in most immigration matters.

After IRCA supplanted the *DeCanas* holding, the nation seemed firmly set on a course of federal preeminence in immigration regulation. The Court's broad interpretation of IRCA's savings clause in *Whiting*, therefore, appeared to be a retrenchment in position—potentially re-opening the Pandora's Box of patchwork-state-legislation in the field of immigration.

Arizona, however, eschewed the strict construction employed in *Whiting* in order to impose further limits on the ability of states to regulate immigration. The result is that, while the states have limited authority to regulate immigration where it overlaps with employment—for example, by imposing additional licensing sanctions on employers—they lack the authority to regulate aliens and general immigration policies. For this reason, *Arizona* may be construed as a reaction to *Whiting* and an effort to promote consistency in the field of immigration law.

This section will first address why central authority over the regulation of immigration, vested in the federal government, represents sound national policy. Next it will offer and rebut state counter-arguments while also contrasting the approach

116. Arizona v. United States, 132 S. Ct. 2492, 2511-14, 2517 (2012) (Scalia, J., dissenting).

117. *Id.* at 2517, stating:

> But § 3 does not establish additional or auxiliary registration requirements. It merely makes a violation of state law the *very same* failure to register and failure to carry evidence of registration that are violations of federal law. *Hines* does not prevent the State from relying on the federal registration system as "an available aid in the enforcement of a number of statutes of the state applicable to aliens whose constitutional validity has not been questioned."

(internal citations omitted).

118. Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968 (2011).

taken by Arizona with those of other states. And, finally, it will detail several policy considerations that underpin the Court's decision but did not feature prominently in its opinion.

A. THE IMPORTANCE OF A CENTRAL AUTHORITY IN IMMIGRATION REGULATION

The policy rationale for maintaining a single, central authority for regulating immigration is fundamental and bears discussion. It has long been recognized that one of the essential functions of the federal system is to avoid issues that would arise if the states were allowed to freely enact reactionary legislation in areas that have effects on a national scale. In 1787, John Jay expressed concern that "bordering States . . . will be those, who, under the impulse of sudden irritation, and a quick sense of apparent interest or injury" are most likely to provoke acts of war or conflict with foreign nations.[119] Jay proceeded to note that "nothing can so effectually obviate that danger as a national government, whose wisdom and prudence will not be diminished by the passions which actuate the parties immediately interested."[120] The fundamental importance of a central authority in issues that affect the entire nation and foreign relations—such as immigration—is present throughout the *Arizona* opinion.

B. REAL AND PUTATIVE POLICY BASES FOR STATE IMMIGRATION REGULATION

While some states arguably experience the impact of unauthorized immigration most acutely, the actual nature of this impact—considered in light of the tenor of anti-immigrant sentiment in such states—is hardly intuitive. Popular sentiment would appear to attribute increased crime, decreased employment opportunities for lawful residents, and strains on social service infrastructure to the rise in immigration in recent years.[121] Social science, however, paints a more complicated picture.

In Pennsylvania, one community that had been experiencing

119. THE FEDERALIST NO. 3, at 23 (John Jay) (M. Walter Dunne 1901).

120. *Id.*

121. *See, e.g.* Randal C. Archibold and Megan Thee-Brennan, *Poll Shows Most in U.S. Want Overhaul of Immigration Laws*, N.Y. TIMES, May 3, 2010, http://www.nytimes.com/2010/05/04/us/04poll.html ("Three quarters said that, over all, illegal immigrants were a drain on the economy because they did not pay all taxes but used public services like hospitals and schools.")

population shrinkage and economic decline for years suddenly found itself revitalized largely coincident with a precipitous influx of Hispanic residents.[122] Between 2000 and 2006, the community of Hazleton grew from a population of 22,000 to about 33,000 as a result of increased immigration.[123] During this time, the city experienced a reduction in crime; an increase in the opening of businesses in its downtown area; and record-high property values.[124] Notwithstanding these positive economic indicators, Hazleton responded by attempting to enact harsh anti-immigrant legislation, which was ultimately discarded following extended litigation.[125]

Although Arizona experiences a more significant proportion of unauthorized immigration than Pennsylvania—a putative basis for its harsh immigration policy—it has not experienced anywhere near the levels of immigration seen in states like California. Despite having the nation's highest-estimated unlawful alien population, California, compared with Arizona, has reacted leniently in the treatment of its unlawful alien population.[126] A 2011 study from the Office of Immigration Statistics estimated that California's unauthorized immigrant population totaled roughly 2.8 million—representing a 12% increase from 2000.[127] Arizona, on the other hand, had only the

122. *See* Hing, *supra* note 19, at 279-80.

123. *Id.*

124. *Id.*

125. The ordinance was part of the city's Illegal Immigration Relief Act, and was ultimately struck down by a federal district court. *See* Julia Preston, *Judge Voids Ordinance on Illegal Immigrants*, N.Y. TIMES, Jul. 27, 2007, http://www.nytimes.com/2007/07/27/us/27hazelton.html. Communities in California and Texas have also previously waged similar unsuccessful battles against their unlawful alien populations. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 205 (1982) ("In May 1975, the Texas Legislature revised its education laws to withhold from local school districts any state funds for the education of children who were not 'legally admitted' into the United States."); League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 763 (C.D. Cal. 1995) (stating that California's Proposition 187's

> provisions require law enforcement, social services, health care and public education personnel to (i) verify the immigration status of persons with whom they come in contact; (ii) notify certain defined persons of their immigration status; (iii) report those persons to state and federal officials; and (iv) deny those persons social services, health care, and education.).

126. Shortly before the decision in Arizona, California had begun work to pass legislation known as the TRUST Act, which was widely perceived as a counter-response to S.B. 1070. *See, e.g.*, *California's Trust Act*, N.Y. TIMES, Jun. 21, 2012, http://www.nytimes.com/2012/06/22/opinion/californias-trust-act.html.

127. MICHAEL HOEFER, ET AL., OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION

ninth highest national population of unauthorized immigrants at 360,000—a 9% increase from 2000.[128] The necessity of the harshness of Arizona's response to its unauthorized immigrant population is, therefore, brought into question when compared with data from other states. This, in conjunction with economic analysis of the impact of Arizona's immigrant population, seems to belie the notion that Arizona's native population is in some way threatened by the presence of unauthorized immigrants within the state.

Data suggests that Arizona has realized significant economic benefit resulting from the size of its immigrant population. One study, which analyzed both the net costs and benefits of the presence of immigrants in the state, concluded that, in 2004, the fiscal cost of immigrants was an estimated $1.4 billion, while immigrants contributed tax benefits of approximately $2.4 billion.[129] The result was a net fiscal gain of $940 million to the state.[130] Additionally, the non-citizen immigrant population commanded roughly $4.4 billion in spending power.[131]

The study also found that immigrants account for a larger share of specific types of worker (in both low and high-skilled jobs) than citizens.[132] This means that eliminating a large

RESIDING IN THE UNITED STATES: JANUARY 2011 (2012), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf; *see also* LAURA E. HILL & HANS P. JOHNSON, PUB. POLICY INST OF CAL., UNAUTHORIZED IMMIGRANTS IN CALIFORNIA: ESTIMATES FOR COUNTIES 2 (2011), *available at* http://www.ppic.org/content/pubs/report/R_711LHR.pdf (stating that California's unauthorized immigrants "make up 7 percent of the total California population and 9 percent of the state's labor force").

128. *See* HOEFER, *supra* note 127.

129. *See* JUDITH GANS, UDALL CTR. FOR PUB. POLICY, THE UNIV. OF ARIZ., IMMIGRANTS IN ARIZONA: FISCAL AND ECONOMIC IMPACTS 57-8 (2008), *available at* http://udallcenter.arizona.edu/immigration/publications/impactofimmigrants08.pdf (focusing on calendar year 2004); *see also* HANS JOHNSON & LAURA HILL, PUB. POLICY INST. OF CAL., AT ISSUE - ILLEGAL IMMIGRATION 10 (2011), *available at* http://www.ppic.org/content/pubs/atissue/AI_711HJAI.pdf (explaining that some studies show that "[m]any illegal immigrants pay Social Security and other taxes but do not collect benefits").

130. *See* GANS, *supra* note 129, at 57-58.

131. *Id.* at 62.

132. *Id.* at 51-52, 61-62:

> The 2000 U.S. Census was used to identify those industries in Arizona whose workforce is significantly made up of non-citizen immigrants. We focused on non-citizen workers because they are the most recent additions to Arizona's workforce, a significant number are low skilled, and a significant number are unauthorized. The number of employees in the selected industries was reduced in the IMPLAN® model by the percentage comprising mostly non-citizen

portion of the state's immigrant population—for example, by enacting legislation targeting non-citizen employees—would have a disproportionate impact on specific industry sectors, which in turn, would have negative consequences for the entire state economy.[133] These negative consequences result from the fact that immigrants tend to fill specific gaps in the U.S. labor force where the skills and education of the native-born population diverge from those of the immigrant population.[134] At least one study suggests that there is little support for the common perception that U.S. citizens would merely fill vacant positions created in the absence of unauthorized immigrant laborers.[135] The study determined that there is relatively little overlap between immigrants and Arizona natives in terms of educational attainment and work skills. Immigrants, therefore, tend to fill both low and high skilled jobs for which there are not necessarily

> workers to allow for some replacement of immigrants by native-born workers. The IMPLAN® model then calculated the resulting reduction in employment, output, incomes, and tax revenues for Arizona. These simulations should be understood as a series of "what ifs" that quantify the magnitude of the reductions in output, employment, income, and taxes consequent upon a specific reduction in employment.

See GANS, *supra* note 129, at 51-52.

> Immigrants fill specific gaps in the labor force. They comprise over half of those lacking a high-school education, and thus are an important source of low-skilled workers. These workers are employed primarily in construction, agriculture, manufacturing, leisure, and service industries. Among high-skilled workers in Arizona, immigrants are 15 percent of those with professional degrees and 17 percent of those with Ph.D.s.

Id. at 61.

133. *See* GANS, *supra* note 129, at 51-54. The study found, for example, that immigrants made up approximately 59% of the agricultural workforce; 27% for overall construction; 46% in textile-related manufacturing; and 51% in landscaping. *See id.* at 4-5.

134. *Id.* at 51:

> Our analysis to this point has focused on measuring the portion of Arizona's economic activity attributable to immigrants in its workforce. This raises the following question: would the jobs filled by immigrants be taken instead by native-born workers if immigrants were not part of the labor force in Arizona? The answer to this question is complex but largely depends on the availability of native-born workers with skills similar to immigrants. Educational attainment data, both for Arizona and for the United States, indicate that immigrants and native-born workers tend to have different skills, with immigrants filling specific gaps in the native-born workforce by providing needed low-skilled and high-skilled workers. Immigrants in Arizona are an important source of low-skilled labor and of specific high-skilled labor that is relatively scarce in the native-born population and thus are vital to the total output of the industries that employ them. It is difficult to make the case that all or even most jobs filled by immigrants would, instead, be filled by native-born workers if immigrant workers were not available.

135. *Id.* at 51.

comparably qualified Arizonans waiting in the wings.[136]

While Arizona has experienced significant economic distress in recent years, much of this is attributable to the mortgage foreclosure crisis that has plagued the nation, not to immigration.[137] Indeed, Arizona has suffered more acutely than other areas of the country in this respect.[138] One study found that, in September 2010, the statewide foreclosure rate was 4.4%—slightly higher than the national rate of 3.13%.[139] Certain metropolitan areas like Phoenix, however, experienced foreclosure rates as high as 12.5%.[140] This collapse is largely attributable to the bursting of the subprime mortgage bubble that developed through the early 2000s and is unrelated to the state's immigrant population.[141] Ironically, in June 2012, the Arizona housing market appeared to be turning around, but new home construction was tempered by a conspicuous shortage of skilled construction labor.[142] Evidently, a large portion of the state's immigrant population—which comprises a high proportion of the state's skilled construction labor force—left in the wake of the housing collapse and was reluctant to return given the recent

136. *See* GANS, *supra* note 129, at 51.

137. *See 2010 Foreclosure Activity Down in Hardest Hit Markets But Increases in 72 Percent of Major Metros*, REALTY TRAC (Jan. 26, 2011), http://www.realtytrac.com/content/press-releases/2010-year-end-us-metro-foreclosure-report-6317. While there is significant data linking Arizona's economic trouble to the collapse of its housing market, there is little to no support for the proposition that negative economic consequences have resulted from the presence of immigrants in the state. To the contrary, studies suggest that immigrants are actually responsible for positive net contributions to the state economy. *See* GANS, *supra* note 129, at 51.

138. *See id.* ("The Phoenix-Mesa-Scottsdale metro area reported 55,372 bank repossessions (REO) in 2010, the most of any metro area and up 17 percent from 2009.").

139. *See CoreLogic: Foreclosure Rate Up a Smidge*, PHX. BUS. J., Sep. 28, 2010, http://www.bizjournals.com/phoenix/stories/2010/09/27/daily35.html?surround=lfn.

140. *Id.*

141. *See* Louise Story, *Microcosm of Housing Crisis on an Arizona Street*, N.Y. TIMES, Mar. 22, 2010, http://www.nytimes.com/2010/03/23/business/23lend.html:

> Then the boom went bust. Home prices in the Phoenix area have collapsed by 50 percent since mid-2006, leaving many owners with mortgages that are higher than their property values. One in 10 homes in [a Cave Creek development] have moved through foreclosure since 2008, according to Netvaluecentral, a real estate tracking company in Glendale, Ariz. Half of the homes [there] are owned by banks or are being sold for less than the value of their mortgages.

142. *See* Preshant Gopal, *Arizona's New Housing Crisis: No Workers*, BLOOMBERG BUS. WK., Jun. 28, 2012, http://www.businessweek.com/articles/2012-06-28/arizonas-new-housing-crisis-no-workers.

anti-immigrant climate in the state.[143] The restricted growth of the housing construction market in this period would therefore appear to further rebut the presumption that the native population is positioned to fill gaps in the workforce created by the absence of unauthorized immigrant workers.[144]

Finally, the notion that economic considerations justify anti-immigrant legislation is nowhere more subverted than by the costs that such legislation ultimately represents for the states. In Hazleton, for example, the city was required to pay nearly $5 million for its own legal fees and those incurred by its opponents in litigating the disputed ordinance.[145] Arizona, on the other hand, has largely funded the defense of S.B. 1070 by raising a private legal defense fund of over $3.8 million.[146] The sustainability of such an approach—not to mention the propriety of defending legislation ostensibly supported by the public through private donations—remains dubious at best.[147] The unfortunate conclusion is that the real motivator for state anti-immigrant legislation is political platforming that feeds off of fallow economic periods and unspoken xenophobic proclivities.[148] In light of the foregoing, the importance of minimizing the national impact of reactionary state legislation in a field as ubiquitous and complex as immigration is quite apparent.

C. THE MAJORITY'S REASONING

Despite the public uproar preceding and surrounding the Court's decision in *Arizona*, the case and its result are surprisingly straightforward. The Court's determinations with

143. Gopal, *supra* note 142.

144. *See* GANS, *supra* note 129 and accompanying text.

145. Hing, *supra* note 19, at 279.

146. *See* Alia Beard Rau, *SB 1070 Legal Defense Supported by Private Funds*, AZCENTRAL.COM, June 25, 2012, http://www.azcentral.com/news/politics/articles/2012/06/21/20120621sb1070-legal-defense-private-funds.html.

147. *See id.* (stating

> "If the reason for passing the statute were reasons that were important to almost all of the people in the state, you would think the state would pick up the cost of defending it," [Arizona State University's Sandra Day O'Connor College of Law Professor Paul] Bender said. "When the state starts getting outside contributions to defend the statute, the suggestion is that it's a statute that outside people want."

148. *See* Hing, *supra* note 19, at 285 (discussing the "Institutionalized Racism" component of immigration legislation).

respect to § 3 and § 6 (the documentation and warrantless arrest provisions, respectively) were the most predictable because of these sections' blatant inconsistency with previous Supreme Court decisions. Section 5 required a slight degree of judicial dexterity, and § 2(B), although fairly predictable in the result, remains the only surviving provision—leaving room for speculation as to its anticipated future effect and longevity. However, the holding in *Arizona* omits many of the historically significant policy justifications present in the cases upon which it relies—a fact which does not assist in allaying the political controversy surrounding the case. Familiarity with the facts and policies relied upon in these earlier decisions is, however, essential to an understanding of the soundness of the result reached. This section will proceed through the contested provisions of the Arizona bill, providing explanations of the relevant case law and policy considerations either expressed or implied in the Court's opinion.

1. MISDEMEANOR OFFENSES FOR FAILURE TO COMPLY WITH FEDERAL ALIEN REGISTRATION STANDARDS (SECTION 3)

Section 3 is notable if for nothing more than the eminent predictability of its preemption. In 1941, the Supreme Court provided a historical perspective on alien registration laws in the U.S. in *Hines*.[149] The Court specifically noted that prior to Congress's adoption of the Alien Registration Act of 1940, numerous attempts had been made to enact some form of national alien registration legislation.[150] The repeated failures of such measures, according to the Court, were evidence of the idea that "any registration requirement was a departure from our traditional policy of not treating aliens as a thing apart."[151] When Congress finally succeeded, the inference was that the bill was carefully crafted to avoid concerns over "practices . . . that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against."[152]

At that time, the national registration act did not include

149. Hines v. Davidowitz, 312 U.S. 52, 69-70 (1941).

150. *Id.* at 70-71.

151. *Id.* at 73.

152. *Id.* at 74.

any requirement to carry registration documents.[153] Instead, it only imposed penalties for willful failure to register.[154] In light of Congress's careful balance in passing the legislation, there was no room for a state to enact its own state registration system and corresponding sanctions.

As the *Arizona* Court points out, the only notable development in the nation's alien registration laws is that now they have been enhanced to include penalties for failure to carry registration papers.[155] Nothing in this congressional action would appear to suggest that suddenly room had appeared for the states to enter the field of registration. Even if—for purposes of argument—*Hines* merely determined the preemption of state registration under conflict, rather than field preemption principles, there is no suggestion that an increase in the technical requirements of the federal registration system after *Hines* would somehow have eliminated the obstacle presented by concurrent state registration requirements today.

For these reasons, the Court's decision with respect to § 3 should have been entirely predictable to Arizona. The state's decision to enact such blatantly conflicting legislation must be interpreted as a conscious act of insubordination in the face of federal authority and reflects the state's intense disagreement with current federal immigration enforcement policies.

2. WARRANTLESS ARRESTS FOR SUSPICION OF REMOVABILITY (SECTION 6)

The Court's decision to hold § 6 preempted by federal law represents a conscious reflection of the policy of entrusting delicate matters of national concern to the federal government rather than to the states. While the Court acknowledged the overlap between matters of foreign relations and the nation's immigration policy, it omitted some of the most compelling arguments that supported the ultimate determination. The Court made a point of highlighting the broad discretion entrusted to the federal government in enforcing immigration policy as a reason for finding that the Arizona law stood as an obstacle to the congressional framework.[156] While this is legally sufficient in

153. *See* Arizona v. United States, 132 S. Ct. 2492, 2501-02 (2012).

154. *Id.*

155. *Id.* at 2503.

156. *Id.* at 2499 ("A principal feature of the removal system is the broad discretion

light of pertinent case precedent, it is worth discussing the reason such discretion exists in the first place in order to understand why the result is consistent with sound national policy and not merely pretextual.

The foreign relations considerations inherent in the nation's immigration policy are considerable. They range from concerns over reciprocal treatment of U.S. citizens abroad to the ability to account for rapidly changing social and political climates in foreign countries. At oral argument, the solicitor general explained situations warranting the exercise of federal discretion.[157] These include instances in which an individual—though technically unlawfully present—is in the process of seeking political asylum, or where removal to his country of origin is undesirable because of recent natural disasters, social unrest, or the risk of political or religious persecution.[158] Furthermore, in its brief, the government argued that, within the constraints of federal funding, it is necessary for enforcement agencies such as ICE to develop prioritization systems to target particular classes of removable aliens.[159] These priorities, in turn, demand enforcement discretion for federal authorities. The government argued:

> For example, vigorously enforcing certain provisions of the INA, such as the criminal prohibitions on alien smuggling, will frequently require the Executive Branch to exercise its discretion to secure cooperation from witnesses, who may themselves be unlawfully present and potentially subject to removal or prosecution. Congress has recognized the importance of securing the cooperation and availability of alien victims and other witnesses and has explicitly given the Executive Branch additional discretion in this regard.[160]

Consistent with this position, the federal government might need to exercise its discretion to refrain from prosecuting a removable alien in return for testimony required to appropriately

exercised by immigration officials.").

157. Oral Argument at 57:49 - 59:21, Arizona v. United States, 132 S. Ct. 2492 (No. 11-182), *available at* http://oyez.org/cases/2010-2019/2011/2011_11_182.

158. *Id.*

159. Brief for Respondent at 21, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182) (noting that DHS only receives sufficient funding for the removal of approximately 400,000 aliens per year—whereas the estimated total unlawful alien population nears 10.8 million).

160. *Id.*

address a federal enforcement priority such as a human trafficking cartel. The concurrent ability of Arizona officers to conduct unilateral arrests based on speculative immigration violations would present a serious obstacle to the ability of the federal government to achieve enforcement priorities and to thereby accomplish Congress's intent.

The myriad considerations influencing a determination of whether to pursue prosecution or removal of aliens require the federal government to be able to react to rapidly developing contingencies around the world. A rapid federal response may only be effectively accomplished when authority over such matters is concentrated within a limited and centralized body. This is the basis for the oft-cited, but rarely elaborated, discretion afforded to the federal government in such matters.

As such, the Court's determination that § 6 represented an obstacle to the congressional framework—which provides broad and essential discretion to the federal government in immigration enforcement—is entirely supported by the policy mandating such discretion in the first place and is consistent with Congressional intent.

3. CRIMINAL PENALTIES FOR SEEKING OR SOLICITING WORK AS AN UNAUTHORIZED ALIEN (SECTION 5)

The § 5 preemption analysis forced the Court, somewhat uncomfortably, to confront the consequences of its recent ruling in *Whiting*.[161] In *Whiting*, the Court determined that IRCA's savings clause expressly permitted states to impose sanctions on employers within the state for hiring unauthorized immigrants—so long as the sanctions only made use of state licensing and similar laws.[162] Along a similar line of thought, Arizona argued that IRCA's restrictions on the authority of the states to punish employers did not reveal any further intent by Congress to prohibit state punishment of employees under the law.[163]

Ultimately, the Court ducked *Whiting*'s strict construction of IRCA's savings clause to determine that the provision could be analyzed under traditional conflict preemption principles.[164]

161. Arizona v. United States, 132 S. Ct. 2492, 2504 (2012).

162. Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1973 (2011).

163. *Arizona*, 132 S. Ct. at 2504.

164. *Id.* at 2504-05 (stating that

Reviewing the legislative history, which revealed that Congress had—on multiple occasions—debated the desirability of imposing criminal sanctions on aliens seeking or engaging in unauthorized employment, the Court concluded that the decision not to do so represented conscious action by Congress.[165] Thus, any state action purporting to criminalize such behavior stood as an obstacle to the congressional framework and was preempted.

The Court's decision in *Arizona* is most interesting because of the way that it gingerly sidestepped *Whiting*. Before *Arizona*, *Whiting* could have been perceived to carve out a niche for state authority in immigration within the context of employment. *Arizona* revealed, however, that IRCA's savings clause would be strictly construed and would only allow regulation that it expressly permitted.[166] Taken out of context, therefore, IRCA's savings clause appears as something of an anomaly—granting somewhat inconsequential authority to the states in a field largely under the authority of the federal government. A closer look at IRCA's savings clause, however, provides both support for the Court's ruling in *Arizona* and criticism for the result of *Whiting*.

In *Whiting*, Justice Breyer wrote in dissent to explain the origins of IRCA's licensing exception.[167] Justice Breyer asked, "Why would Congress, after deliberately limiting ordinary penalties to the range of a few thousand dollars per illegal worker, want to permit far more drastic state penalties that would directly and mandatorily destroy entire businesses?"[168]

> IRCA's express preemption provision, which in most instances bars States from imposing penalties on employers of unauthorized aliens, is silent about whether additional penalties may be imposed against the employees themselves. But the existence of an "express pre-emption provisio[n] does *not* bar the ordinary working of conflict pre-emption principles" or impose a "special burden" that would make it more difficult to establish the preemption of laws falling outside the clause.)

(internal citations omitted).

165. Arizona v. United States, 132 S. Ct. 2492, 2504-05 (2012) (citing U.S. POLICY AND THE NATIONAL INTEREST: THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY WITH SUPPLEMENTAL VIEWS BY COMMISSIONERS 65-66 (1981)).

166. This is because the Court in *Arizona* prohibited legislation that the clause does not mention when it found § 5 preempted.

167. Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1987 (2011) (Breyer, J., dissenting).

168. *Id.* at 1992.

The answer, according to Breyer, was that Congress did not.[169]

Beginning in 1964, the Federal Government administered a federal scheme governing agricultural labor contracting firms.[170] These organizations "specialize in recruiting agricultural workers and referring them to farmers for a fee."[171] Given the pronounced risk that such firms would engage in disfavored practices such as hiring unlawful aliens or maintaining illegal or exploitative working conditions, the federal scheme authorized the federal Secretary of Labor to impose monetary and registration sanctions on offending firms.[172] Most significantly, however, before the 1986 enactment of IRCA, these federal regulations did not preempt state regulations and were meant merely to supplement state law.[173] In the *Whiting* dissent's opinion, IRCA's savings clause was enacted in an effort to preserve state authority to penalize particularly those "firms in the business of recruiting or referring workers for employment"—not to provide broad state authority to penalize the general employment of aliens across all industries.[174]

Viewed in this context, the savings clause stands as much less of an anomaly and can be understood to operate consistently with Congress's objectives in enacting IRCA. For this reason, there is a strong argument to be made that the majority opinion in *Whiting*—in eschewing an analysis of the relevant legislative history—arrived at a result that is difficult to reconcile with the Court's holding in *Arizona*. The *Arizona* Court was placed in the uncomfortable position, therefore, of attempting to strike down § 5, without overruling the recent *Whiting* decision, or admitting to the fundamental inadequacies of its interpretation of IRCA's savings clause. Ultimately, the Court evaded the controversy by

169. Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1993 (2011) (Breyer, J., dissenting). Breyer argued that IRCA's licensing exception was only intended to cover a narrow class of licensing provision and wrote:

> I would therefore read the words "licensing and similar laws" as covering state licensing systems applicable primarily to the licensing of firms in the business of recruiting or referring workers for employment, such as the state agricultural labor contractor licensing schemes in existence when the federal Act was created. This reading is consistent with the provision's history and language, and it minimizes the risk of harm of the kind just described.

170. *Id.*

171. *Id.*

172. *Id.* at 1994.

173. *Id.*

174. *Id.* at 1993.

deciding the case along traditional conflict preemption lines after finding that IRCA's savings clause was not applicable and turning instead to legislative history. Given that *Whiting* was something of a deviation from the path of federal supremacy in the regulation of immigration (and was largely hailed by proponents of immigration control as a victory), the pronounced inadequacies of the reasoning in that decision are placed in stark relief by the Court's ruling in *Arizona*.[175]

4. MANDATED IMMIGRATION STATUS VERIFICATION (SECTION 2(B))

As the sole surviving disputed provision, § 2(B) prompted disparate responses from across the political landscape—all sides claimed victory.[176] While it is certainly difficult to see how the Court's overall decision could be touted as a victory by S.B. 1070's supporters, the one thing that is certain is that § 2(B)'s survival means that the political and legal fight over immigration regulation is not over.

The Court appears fully conscious of this fact and explicitly alludes to potential future challenges to the provision.[177] Such challenges are likely to come in one of two forms: (1) as-applied challenges alleging interference with federal immigration law or (2) constitutional challenges asserting Fourth Amendment violations, both of which are discussed below. From a speculative standpoint, the Court would appear to prefer to entertain the latter—possibly in the hope of ducking immigration issues for the foreseeable near future.

Opponents of the bill, however, would likely prefer to see the provision challenged under the auspices of federal immigration law. This would perhaps more effectively deter states from

175. *Whiting* may also be seen as a deviation from traditional federal jurisprudence in the immigration field given previous unsuccessful attempts by states to regulate the employment and education of immigrants. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982); League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995).

176. *See*, *e.g.*, Katrina Schaefer, *Arizona Governor Brewer, Romney, Others React to SB 1070 Decision*, ABC 15, June 25, 2012, http://www.abc15.com/dpp/news/state/arizona-governor-brewer-others-react-to-sb-1070-decision.

177. Arizona v. United States, 132 S. Ct. 2492, 2510 (2012) ("This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.").

attempting to pass similar provisions given the federal government's ability to sue for preliminary injunctions—as it did in *Arizona*—and would provide a somewhat higher degree of stability in the system. Fourth Amendment challenges on the other hand are often conducted ex-post and tend to be highly fact-intensive.

a. AS-APPLIED IMMIGRATION CHALLENGES

The Court appears to suggest that as-applied challenges grounded in immigration law will be difficult.[178] This is due to the fact that, for immigration law purposes, the Court effectively hung § 2(B)'s permissibility on the congressional mandate prohibiting interference with state and federal communication regarding immigration.[179] Absent congressional action to amend this requirement—which is itself exceedingly unlikely in the current political climate—it is difficult to imagine what sort of implementation of the law would present an obstacle to the congressional framework. A potential route might be for ICE to demonstrate that the increase in information requests and contact from *Arizona* impedes the agency's ability to accomplish its objectives, thereby interfering with Congress's intent. However, balanced against the Congressional mandate protecting such communication, this type of challenge is unlikely to be successful.

b. FOURTH AMENDMENT CHALLENGES

The more likely attack on § 2(B)—and the one that the Court appears to be hinting might be successful—is a challenge under the Fourth Amendment.[180] The Fourth Amendment provides, in

178. *See, e.g.*, Arizona v. United States, 132 S. Ct. 2508 (2012) ("Congress has done nothing to suggest it is inappropriate to communicate with ICE in these situations, however. Indeed, it has encouraged the sharing of information about possible immigration violations.").

179. *Id.* at 2508 (quoting 8 U.S.C. § 1644)(1996)).

180. The Court repeatedly notes that the record before it does not provide sufficient support for the notion that enforcement of the law would violate Fourth Amendment protections. In so doing, however, the Court highlights precisely the sort of factual predicate that might lead to a successful challenge in the future. See *e.g.*, *id*. at 2509-10:

> However the law is interpreted, if § 2(B) only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision likely would survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives . . . . At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to

pertinent part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."[181] Although Fourth Amendment jurisprudence is complex and extensive, one area of Fourth Amendment jurisprudence focuses particularly on the acceptable duration of a stop or detention for purposes of effecting a search or seizure.[182] A challenge to the duration of a stop or arrest effected for purposes of ascertaining immigration status under § 2(B), therefore, may provide the basis for future challenges to the law.

Under this approach, Arizona law enforcement would need to be given the opportunity to begin enforcing the law. Thereafter, an individual could bring a challenge to the duration of his detention, alleging that § 2(B)'s requirements caused a stop or arrest to exceed the limits of a Fourth Amendment detention. However, the Court has been reluctant to adopt anything resembling a bright-line rule for defining the acceptable duration of a stop under the Fourth Amendment, making it difficult to predict how a ruling might ultimately issue.[183] One indication might come from *United States v. Sharpe*, wherein the Court examined the appropriate duration for a detention that was necessary for "law enforcement officers to conduct a limited investigation of the suspected criminal activity."[184] In *Sharpe*, the Court stated:

> In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.
>
> . . . .

assume § 2(B) will be construed in a way that creates a conflict with federal law.

181. U.S. CONST. amend. IV.

182. *See, e.g.*, Terry v. Ohio, 88 U.S. 1 (1968).

183. See United States v. Sharpe, 470 U.S. 675, 686 (1985) (quoting United States v. Place, 462 U.S. 696, 709 n.10 (1983)), explaining that:

> We understand the desirability of providing law enforcement authorities with a clear rule to guide their conduct. Nevertheless, we question the wisdom of a rigid time limitation. Such a limit would undermine the equally important need to allow authorities to graduate their responses to the demands of any particular situation.

184. *Id.* at 677.

> The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.[185]

Thus, a future successful challenge to § 2(B) would likely require Arizona state courts to interpret the provision to require start-to-finish immigration status checks for all or most arrests or stops—not merely those that would ordinarily involve relatively extended detentions. In other words, under the Court's jaywalking hypothetical, it would likely need to be determined that Arizona officers are required to initiate and wait for a response to an immigration status check from the LESC before releasing the jaywalker.[186] Under these circumstances, such challenges would appear to have a high probability of success, given statements made by the solicitor general at oral argument, but left conspicuously absent from the Court's opinion.

At oral argument, the government asserted that, although Arizona claimed the technical duration of an ICE request itself might be ten minutes, the size of request queues make it such that the total time of a call to ICE takes closer to seventy minutes.[187] The ostensible increase in requests to the agency following the implementation of § 2(B) could potentially serve to extend this waiting period. Given this reality—in the Court's jaywalking example—it would appear highly likely that a stop for seventy or more minutes might occur and thereafter be subject to challenge under the Fourth Amendment. Prediction of the ultimate outcome remains highly speculative, however, in light of the relatively large number of contingencies that would need to occur before the Court would ever be faced with ruling on such an issue in the first place.

c. UNEXPECTED RESULTS OF § 2(B)'S SURVIVAL

A final, and somewhat unexpected, effect of § 2(B)'s survival has been the response of some states seeking to distance themselves from Arizona's perceived harsh immigration stance. For example, weeks after the Court's ruling, California passed the TRUST Act—known commonly as the "Anti-Arizona" bill—

185. United States v. Sharpe, 470 U.S. 675, 686-87 (1985) (internal citations omitted).

186. *See*, *supra*, notes 103-06 and accompanying text.

187. Oral Argument at 66:25 - 66:42, Arizona v. United States, 132 S. Ct. 2492 (No. 11-182), *available at* http://oyez.org/cases/2010-2019/2011/2011_11_182.

moving precisely counter to provisions like § 2(B). The California act would restrict the amount of information about a person's immigration status that could be passed on to federal authorities—allowing such information to be shared only after a violent or serious felony.[188]

While the precise impact of § 2(B) is too remote to anticipate, what is certain is that the provision is likely to be the subject of future challenges. The precise nature of these challenges also remains speculative, but the Supreme Court appears to be hinting at a disposition that would prefer the challenges to focus on the Fourth Amendment.[189]

D. JUSTICE SCALIA'S DISSENT

Justice Scalia's dissent generated considerable controversy. He contended that none of the provisions were preempted under federal law and gave extensive treatment to the concept of state sovereignty. Having first concluded that—as attributes of their sovereignty—the states have the authority to adopt their own immigration policies, Justice Scalia proceeded to dispute that the provisions of the Arizona act conflicted with existing federal laws.[190]

The dissent's most controversial section—which sparked outcries from both the legal and lay communities—did so, however, not because of its legal premise, but because of its reference to political activity seemingly beyond the scope of the case. In rebutting the government's contention that part of the

188. *See* Amy Friedman, *Have Some Trust: California to Pass Anti-Arizona Immigration Bill*, TIME NEWSFEED, July 8, 2012, http://newsfeed.time.com/2012/07/08/have-some-trust-california-to-pass-anti-arizona-immigration-bill/. Furthermore, even before the *Arizona* ruling, some states had announced similar plans to restrict participation in federal programs such as ICE's Secure Communities initiative. *See*, *e.g.*, Christina Costantini & Elise Foley, *D.C. Passes Bill to Restrict Secure Communities Immigration Enforcement Program*, HUFFINGTON POST, July 10, 2012, http://www.huffingtonpost.com/2012/07/10/dc-immigration-law-secure-communities-ice_n_1663214.html.

189. *See* Arizona v. United States, 132 S. Ct. 2492, 2509 (2012) ("[I]t is not clear at this stage and on this record that the verification process would result in prolonged detention."). The Court's concern, therefore, appears to be over the potential extension of stops—a result that would give rise to Fourth Amendment challenges.

190. *Id.* at 2514 (Scalia, J., dissenting) ("In light of the predominance of federal immigration restrictions in modern times, it is easy to lose sight of the States' traditional role in regulating immigration—and to overlook their sovereign prerogative to do so.").

need for the Executive Branch's discretion in enforcing immigration policy arises from its concurrent need to allocate scarce resources, Justice Scalia made reference to an Obama Administration announcement that occurred well after the institution of the proceedings in the case.[191] In apparent reliance on the newly-announced policy, Justice Scalia argued that "to say, as the Court does, that Arizona contradicts federal law by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind."[192] The dissent's acknowledgment of an Executive Branch policy announced months after oral argument in the case certainly would not appear germane to any legally-oriented rebuttal of the government's arguments therein. Moreover, it suggested to some that Justice Scalia might have been improperly considering the political ramifications of the case while voting and drafting his opinion.[193] The apparent impropriety of such behavior prompted one notable jurist to write publicly in disapproval.[194] Finally, the dissent came at a time where public approval of the Supreme Court—which has traditionally been quite high—had been on a consistent decline as the Court began to appear to many to be voting merely along the lines of its jurists' political ideologies.[195]

191. Arizona v. United States, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., dissenting) ("After this case was argued and while it was under consideration, the Secretary of Homeland Security announced a program exempting from immigration enforcement some 1.4 million illegal immigrants under the age of 30."). The dissent referred to an announcement made by the Secretary of Homeland Security that certain young unlawful immigrants who were currently enrolled in school or had graduated school would not be prosecuted for immigration violations during a two-year period. *See, e.g.*, Tom Cohen, *Obama Administration to Stop Deporting Some Young Illegal Immigrants*, CNN (June 16, 2012), http://www.cnn.com/2012/06/15/politics/immigration/index.html.

192. *Arizona*, 132 S. Ct. at 2521 (Scalia, J., dissenting).

193. *See, e.g.*, Jeff Plungis, *Scalia Rebuffs Criticism of Dissent in Immigration Case*, BLOOMBERG BUSINESSWEEK, July 30, 2012, http://www.businessweek.com/news/2012-07-29/scalia-rejects-criticism-of-dissent-in-arizona-case ("[Justice Scalia] dismissed criticism by U.S. Circuit Judge Richard Posner, who said Scalia's dissent read like a campaign speech.").

194. *See* Richard A. Posner, *Supreme Court Year in Review, Entry 11: Justice Scalia is Upset About Immigration. But Where is His Evidence?*, SLATE (June 27, 2012), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/_supreme_court_year_in_review/supreme_court_year_in_review_justice_scalia_offers_no_evidence_to_back_up_his_claims_about_illegal_immigration_.html.

195. *See* Adam Liptak and Allison Kopicki, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES, June 27, 2012, http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-

VI. CONCLUSION

The state of immigration regulation in the nation is hardly settled in the wake of *Arizona v. United States*. However, the Supreme Court appears to be adopting an approach that will place such regulation squarely into the federal government's hands. Because the quagmire in which the nation will find itself if the states continue to be permitted to enact patchwork reactionary legislation is a highly undesirable result, the Court's approach is based on sound national policy. Ultimately, whatever influence the Court may have over the condition of national immigration regulation, conclusive action is going to be required of Congress. Given the pressing human and economic ramifications of the country's current dysfunctional framework, this is a national priority that demands prompt attention.

Immigration is a complex and far-reaching field, and the presence of immigrants—both lawful and unlawful—has a significant social and economic impact nationally. Many communities would find themselves economically devastated if large portions of their immigrant populations were to depart. There is an undeniable demand for the sort of labor provided by unauthorized immigrants that is completely disproportionate to the nation's current immigration quotas.[196] Moreover, the impetus for immigration is often the result of complex interactions between trade agreements and policies of globalization—inputs that will not be tempered merely by the state or federal governments cracking down through law enforcement on the aliens unlawfully present in the country.[197] For this reason, Congress will likely need to drastically overhaul the current system by eliminating the illicit status of many of the

supreme-court-in-new-poll.html?smid=pl-share ("Just 44 percent of Americans approve of the job the Supreme Court is doing and three-quarters say the justices' decisions are sometimes influenced by their personal or political views, according to a poll conducted by The New York Times and CBS News.").

196. *See* Keith Roberts, *Waymaker: An Interview with Justice Cruz Reynoso*, 51 JUDGES' J. 4, 5-6 (Summer 2012):

> Ninety percent of the farm workers in California are undocumented. Clearly, we need to bring more workers in here. But we have quotas that don't recognize our own needs. For example, many of the European countries don't fill their quotas, while the waiting list from other countries can be 10 years or more. If fixed properly, the current immigration system would take care of many of the problems we have here.

197. *See* Hing, *supra* note 19, at 289-90 (discussing the impact that NAFTA has had on the price of labor in South America and how this has contributed to the rise in emigration to the U.S.).

country's unauthorized workers in favor of expanded temporary work VISA programs and other initiatives that tie immigration status to employment status. Indeed, such measures appear already to be gaining traction.[198]

Furthermore, some of the economic forces driving current immigration trends are not directly-linked to immigration law per se, but are nonetheless under the control of the federal government. For example, some experts attribute federal subsidies for corn grown in the U.S., but sold in Mexico, to the disenfranchisement of approximately one million small Mexican corn farmers.[199] This type of economic policy drives many of the unfavorable economic conditions in Mexico and other South American countries that contribute to the desire to seek entry into the U.S. in order to obtain work. Given the extensiveness of the issues affecting immigration, it is clear that a policy allowing the states to compound the complexity of the situation by enacting disparate legislation is unacceptable. The federal government will need, therefore, to make use of the authority that the Supreme Court has recognized in it to lead reform of the nation's immigration system from the top down. Whatever the ultimate outcome for the nation's immigration policy, the Supreme Court appears to have made the right call in *Arizona v. United States.*

Patrick B. Reagin

198. *See* Cohen, *supra* note 191 and accompanying text.

199. *See* Roberts, *supra* note 196, at 5 ("Also, some of our policies are counterproductive. For instance, by subsidizing corn that we sell in Mexico, we drove about a million small corn farmers and their families off the land. Many came here.").