AMERICAN CONSTITUTIONALISM
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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Citizenship/Illegal Aliens

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Arizona v. United States, 567 U.S. ____ (2012)

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*Arizona was one of many states that began debating legislation curbing illegal immigration after efforts by President George W. Bush to pass comprehensive immigration reform during his second term were foiled in 2007 when conservative Republicans objected to processes that would legalize an estimated 12 million illegal immigrants and create a temporary worker program. Arizona, which had an estimated 460,000 illegal immigrants within its borders in 2010, almost immediately considered adopting state restrictions. With the help of the American Legislative Exchange Council—an organization that drafts model legislation designed to promote free-market and conservative ideas—Arizona Republicans in early 2010 passed "S.B. 1070," also known as the "Support Our Law Enforcement and Safe Neighborhoods Act**." Section 3 of the act made failing to comply with federal alien-registration requirements a state crime; §5(C)** *made criminalized efforts by unauthorized aliens to seek or engage in work in the state; §6 authorized state and local officers to arrest without a warrant any person "the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States"; and §2(B) required officers conducting a stop, detention, or arrest to make efforts, in some circumstances, to verify the person's immigration status with the federal government.*

S.B. 1070 became a political lightning rod across the country. Tens of thousands of people demonstrated against that law in seventy U.S. cities; in Los Angeles alone a protest rally attracted almost 60,000 people. Boycotts of Arizona were organized by both private organizations and local governments. The law was criticized by President Barack Obama, Secretary of Homeland Security (and former Arizona governor) Janet Napolitano, and U.S. Attorney General Eric Holder, as well as Republican leaders from heavily Hispanic states, such as former Florida governor Jeb Bush and Florida U.S. Senate candidate Marco Rubio. However, even some elected representatives in Arizona who opposed the law, such as Democratic congresswoman Gabrielle Giffords, claimed that people in the state were "sick and tired" of the federal government's failures to stop illegal crossings into Arizona. They argued that the legislation was a "clear calling that the federal government needs to do a better job."

A few months after passage, the U.S. Department of Justice filed a lawsuit claiming that the law interfered with the federal government's "exclusive" power over immigration policy. An injunction against enforcement of the law was granted by the U.S. District Court and was later upheld by a three-judge panel of the Court of Appeals for the Ninth Circuit. Arizona appealed to the U.S. Supreme Court. That appeal raised issues that had been the subject of constitutional debate since the early nineteenth century, including the nature of state "sovereignty" and the circumstances under which states were free to pass their regulatory schemes in policy areas where the federal government had constitutional authority. Specifically, the Supreme Court had to address whether state regulation was precluded or "preempted" by the passage of comprehensive federal regulations, or whether the states retained their own "sovereign" authority to prevent illegal immigration across their borders. With recently appointed Justice Elena Kagan not participating (having been earlier involved in the litigation while a member of the Obama administration), the Supreme Court determined by a 5–3 majority that three of the four key sections of law were preempted by a pervasive framework of federal regulation. A fourth section, allowing Arizona state police to investigate the immigration status of an individual who was detained for other reasons, was allowed to stay in force on the grounds that the state might interpret the law in a way that avoided conflicts with federal law.

One feature of Justice Scalia's dissenting opinion is worth a special note. Shortly before the Court handed down Arizona v. United States *the Obama administration announced that, in order to focus resources on the deportation of high-priority undocumented immigrants, government officials were temporarily suspending efforts to deport some young illegal immigrants, including successful students and military veterans, who met certain requirements The requirements mimicked some provisions of the "Development, Relief, and Education for Alien*

Minors Act," aka, the DREAM Act, that passed the House in 2010 but was defeated by a Republican filibuster in the Senate. Although the president's announcement was not part of the official record of the case, Justice Scalia referenced the new policy to underscore his point that Arizona should be free to enact immigration policy when "the President declines to enforce" the law. Does the question of whether states are preempted by federal authority depend on assessments of the efficacy of federal policy or enforcement efforts? Reports in the fall of 2011 indicated that the Obama administration deported a record number of illegal immigrants for the third straight year, with a priority on those with criminal records. Should that fact impact the constitutional analysis?

JUSTICE KENNEDY delivered the opinion of the Court.

To address pressing issues related to the large number of aliens within its borders who do not have a lawful right to be in this country, the State of Arizona in 2010 enacted a statute called the Support Our Law Enforcement and Safe Neighborhoods Act. The law is often referred to as S. B. 1070, the version introduced in the state senate. . . . Its stated purpose is to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." . . .The law's provisions establish an official state policy of "attrition through enforcement." . . . The question before the Court is whether federal law preempts and renders invalid four separate provisions of the state law.

. . .

The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. . . .This authority rests, in part, on the National Government's constitutional power to "establish an uniform Rule of Naturalization," U. S. Const., Art. I, §8, cl. 4, and its inherent power as sovereign to control and conduct relations with foreign nations. . .. The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. . . .Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad. . . .

It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States. . . .

Federal governance of immigration and alien status is extensive and complex. Congress has specified categories of aliens who may not be admitted to the United States. Unlawful entry and unlawful reentry into the country are federal offenses. Once here, aliens are required to register with the Federal Government and to carry proof of status on their person. . . . Federal law also authorizes States to deny noncitizens a range of public benefits . . ., and it imposes sanctions on employers who hire unauthorized workers.

Congress has specified which aliens may be removed from the United States and the procedures for doing so. . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal. . . .

Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

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The pervasiveness of federal regulation does not diminish the importance of immigration policy to the States. Arizona bears many of the consequences of unlawful immigration. . . .

. . . Accounts in the record suggest there is an "epidemic of crime, safety risks, serious property damage, and environmental problems" associated with the influx of illegal migration across private land near the Mexican border. . . . The problems posed to the State by illegal immigration must not be underestimated.

These concerns are the background for the formal legal analysis that follows. The issue is whether, under pre-emption principles, federal law permits Arizona to implement the state-law provisions in dispute.

. . .

Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect. . . . From the existence of two sovereigns follows the possibility that laws can be in conflict or at cross-purposes. The Supremacy Clause provides a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. Under this principle, Congress has the power to preempt state law. . . . There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision. . . .

State law must also give way to federal law in at least two other circumstances. First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. . . . The intent to displace state law altogether can be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." . . .

Second, state laws are preempted when they conflict with federal law. . . . In preemption analysis, courts should assume that "the historic police powers of the States" are not superseded "unless that was the clear and manifest purpose of Congress." . . .

The four challenged provisions of the state law each must be examined under these preemption principles.

. . .

Section 3 of S. B. 1070 creates a new state misdemeanor. It forbids the "willful failure to complete or carry an alien registration document . . ." In effect, §3 adds a state-law penalty for conduct proscribed by federal law. The United States contends that this state enforcement mechanism intrudes on the field of alien registration, a field in which Congress has left no room for States to regulate. . . .

The Court discussed federal alien-registration requirements in *Hines v. Davidowitz* (1941). . . . In 1940, as international conflict spread, Congress added to federal immigration law a "complete system for alien registration." The new federal law struck a careful balance. It punished an alien's willful failure to register but did not require aliens to carry identification cards. There were also limits on the sharing of registration records and fingerprints. The Court found that Congress intended the federal plan for registration to be a "single integrated and all-embracing system." Because this "complete scheme . . . for the registration of aliens" touched on foreign relations, it did not allow the States to "curtail or complement" federal law or to "enforce additional or auxiliary regulations." As a consequence, the Court ruled that Pennsylvania could not enforce its own alien-registration program.

The present regime of federal regulation is not identical to the statutory framework considered in *Hines*, but it remains comprehensive. . . .

The framework enacted by Congress leads to the conclusion here, as it did in *Hines*, that the Federal Government has occupied the field of alien registration. . . .Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible. . . .

. . . Were §3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.

. . . Even where federal authorities believe prosecution is appropriate, there is an inconsistency between §3 and federal law with respect to penalties. . . .

. . . Section 3 is preempted by federal law.

. . .

Unlike §3, which replicates federal statutory requirements, §5(C) enacts a state criminal prohibition where no federal counterpart exists. The provision makes it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona. . . .The United States contends that the provision upsets the balance struck by the Immigration Reform and Control Act of 1986 (IRCA) and must be preempted as an obstacle to the federal plan of regulation and control.

When there was no comprehensive federal program regulating the employment of unauthorized aliens, this Court found that a State had authority to pass its own laws on the subject. . . .

. . . [However,] Congress enacted IRCA as a comprehensive framework for "combating the employment of illegal aliens." . . .

. . .

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." . . . In the end, IRCA's framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives. . . .

. . .

The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Under §5(C) of S. B. 1070, Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens. . . . Section 5(C) is preempted by federal law.

. . .

Section 6 of S. B. 1070 provides that a state officer, "without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States." . . . The United States argues that arrests authorized by this statute would be an obstacle to the removal system Congress created.

As a general rule, it is not a crime for a removable alien to remain present in the United States. . . . If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent. When an alien is suspected of being removable, a federal official issues an administrative document called a Notice to Appear. . . . The form does not authorize an arrest. Instead, it gives the alien information about the proceedings, including the time and date of the removal hearing. If an alien fails to appear, an in absentia order may direct removal. . . .

The federal statutory structure instructs when it is appropriate to arrest an alien during the removal process. For example, the Attorney General can exercise discretion to issue a warrant for an alien's arrest and detention "pending a decision on whether the alien is to be removed from the United States." . . . [Federal officers] may arrest an alien for being "in the United States in violation of any [immigration] law or regulation," for example, but only where the alien "is likely to escape before a warrant can be obtained."

Section 6 attempts to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers. Under state law, officers who believe an alien is removable by reason of some "public offense" would have the power to conduct an arrest on that basis regardless of whether a federal warrant has issued or the alien is likely to escape. This state authority could be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case. This would allow the State to achieve its own immigration policy. The result could be unnecessary harassment of some aliens (for instance, a veteran,

college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed.

This is not the system Congress created. . . .

By authorizing state officers to decide whether an alien should be detained for being removable, §6 violates the principle that the removal process is entrusted to the discretion of the Federal Government. . . .

. . .

Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances. By nonetheless authorizing state and local officers to engage in these enforcement activities as a general matter, §6 creates an obstacle to the full purposes and objectives of Congress. Section 6 is preempted by federal law.

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Section 2(B) of S. B. 1070 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." . . . The law also provides that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released." The accepted way to perform these status checks is to contact ICE, which maintains a database of immigration records.

Three limits are built into the state provision. First, a detainee is presumed not to be an alien unlawfully present in the United States if he or she provides a valid Arizona driver's license or similar identification. Second, officers "may not consider race, color or national origin . . . except to the extent permitted by the United States [and] Arizona Constitution[s]." Third, 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." . . .

. . .

The United States argues that making status verification mandatory interferes with the federal immigration scheme. It is true that §2(B) does not allow state officers to consider federal enforcement priorities in deciding whether to contact ICE about someone they have detained. . . .

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. . . . A federal statute regulating the public benefits provided to qualified aliens in fact instructs 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." . . .

. . .

Some who support the challenge to §2(B) argue that, in practice, state officers will be required to delay the release of some detainees for no reason other than to verify their immigration status. . . . Detaining individuals solely to verify their immigration status would raise constitutional concerns. . . . And it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision. . . . The program put in place by Congress does not allow state or local officers to adopt this enforcement mechanism.

But §2(B) could be read to avoid these concerns. To take one example, a person might be stopped for jaywalking in Tucson and be unable to produce identification. The first sentence of §2(B) instructs officers to make a "reasonable" attempt to verify his immigration status with ICE if there is reasonable suspicion that his presence in the United States is unlawful. The state courts may conclude that, unless the person continues to be suspected of some crime for which he may be detained by state officers, it would not be reasonable to prolong the stop for the immigration inquiry. . . .

. . . 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 pre-emption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives. There is no need in this case to address whether reasonable

suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonging a detention, or whether this too would be preempted by federal law. . . .

The nature and timing of this case counsel caution in evaluating the validity of §2(B). The Federal Government has brought suit against a sovereign State to challenge the provision even before the law has gone into effect. There is a basic uncertainty about what the law means and how it will be enforced. At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume §2(B) will be construed in a way that creates a conflict with federal law. . . . This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.

. . .

The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.

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JUSTICE SCALIA, concurring in part and dissenting in part.

The United States is an indivisible "Union of sovereign States." . . . Today's opinion . . . deprives States of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there. Neither the Constitution itself nor even any law passed by Congress supports this result. I dissent.

. . .

As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress. . . .

There is no doubt that "before the adoption of the constitution of the United States" each State had the authority to "prevent [itself] from being burdened by an influx of persons." And the Constitution did not strip the States of that authority. . . . [I]f one State had particularly lax citizenship standards, it might still serve as a gateway for the entry of "obnoxious aliens" into other States. This problem was solved "by authorizing the general government to establish a uniform rule of naturalization throughout the United States." . . . In other words, the naturalization power was given to Congress not to abrogate States' power to exclude those they did not want, but to vindicate it.

. . .

Notwithstanding "[t]he myth of an era of unrestricted immigration" in the first 100 years of the Republic, the States enacted numerous laws restricting the immigration of certain classes of aliens, including convicted criminals, indigents, persons with contagious diseases, and (in Southern States) freed blacks. State laws not only provided for the removal of unwanted immigrants but also imposed penalties on unlawfully present aliens and those who aided their immigration.

In fact, the controversy surrounding the Alien and Sedition Acts involved a debate over whether, under the Constitution, the States had exclusive authority to enact such immigration laws. . . . [O]ne of the Alien Acts [indicated] ". . . That it shall be lawful for the President of the United States at any time during the continuance of this act, to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States . . . ."

The Kentucky and Virginia Resolutions, written in denunciation of these Acts, insisted that the power to exclude unwanted aliens rested solely in the States. Jefferson's Kentucky Resolutions insisted "that alien friends are under the jurisdiction and protection of the laws of the state wherein they are [and] that no power over them has been delegated to the United States, nor prohibited to the individual states, distinct

from their power over citizens." . . . Madison's Virginia Resolutions likewise contended that the Alien Act purported to give the President "a power nowhere delegated to the federal government." . . .

In *Mayor of New York v. Miln* (1837), this Court considered a New York statute that required the commander of any ship arriving in New York from abroad to disclose "the name, place of birth, and last legal settlement, age and occupation . . . of all passengers . . . with the intention of proceeding to the said city." . . . [T]he Court said:

> The power . . . of New York to pass this law having undeniably existed at the formation of the constitution, the simply inquiry is, whether by that instrument it was taken from the states, and granted to congress; for if it were not, it yet remains with them.

And the Court held that it remains.

. . .

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. I accept as a given that State regulation is excluded by the Constitution when (1) it has been prohibited by a valid federal law, or (2) it conflicts with federal regulation—when, for example, it admits those whom federal regulation would exclude, or excludes those whom federal regulation would admit.

Possibility (1) need not be considered here: there is no federal law prohibiting the States' sovereign power to exclude (assuming federal authority to enact such a law). The mere existence of federal action in the immigration area—and the so-called field preemption arising from that action, upon which the Court's opinion so heavily relies—cannot be regarded as such a prohibition. . . . Like elimination of the States' other inherent sovereign power, immunity from suit, elimination of the States' sovereign power to exclude requires that "Congress . . . unequivocally expres[s] its intent to abrogate," *Seminole Tribe of Fla. v. Florida* (1996). Implicit "field preemption" will not do.

Nor can federal power over illegal immigration be deemed exclusive because of what the Court's opinion solicitously calls "foreign countries['] concern[s] about the status, safety, and security of their nationals in the United States". The Constitution gives all those on our shores the protections of the Bill of Rights—but just as those rights are not expanded for foreign nationals because of their countries' views (some countries, for example, have recently discovered the death penalty to be barbaric), neither are the fundamental sovereign powers of the States abridged to accommodate foreign countries' views. Even in its international relations, the Federal Government must live with the inconvenient fact that it is a Union of independent States, who have their own sovereign powers. . . . Though it may upset foreign powers—and even when the Federal Government desperately wants to avoid upsetting foreign powers—the States have the right to protect their borders against foreign nationals, just as they have the right to execute foreign nationals for murder.

What this case comes down to, then, is whether the Arizona law conflicts with federal immigration law—whether it excludes those whom federal law would admit, or admits those whom federal law would exclude. It does not purport to do so. It applies only to aliens who neither possess a privilege to be present under federal law nor have been removed pursuant to the Federal Government's inherent authority. . . .

. . .

The Government has conceded that "even before Section 2 was enacted, state and local officers had state-law authority to inquire of DHS [the Department of Homeland Security] about a suspect's unlawful status and otherwise cooperate with federal immigration officers." That concession, in my view, obviates the need for further inquiry. . . .§2(B) merely tells state officials that they are authorized to do something that they were, by the Government's concession, already authorized to do.

. . . Of course, any investigatory detention, including one under §2(B), may become an "unreasonable . . . seizur[e]," U. S. Const., Amdt. IV, if it lasts too long. But that has nothing to do with this case, in which the Government claims that §2(B) is pre-empted by federal immigration law, not that anyone's Fourth Amendment rights have been violated. . . .

§6 . . . expands the statutory list of offenses for which an Arizona police officer may make an arrest without a warrant. . . . The Government's primary contention is that §6 is pre-empted by federal immigration law because it allows state officials to make arrests "without regard to federal priorities." . . .

. . . It is consistent with the Arizona statute, and with the "cooperat[ive]" system that Congress has created, for state officials to arrest a removable alien, contact federal immigration authorities, and follow their lead on what to do next. And it is an assault on logic to say that identifying a removable alien and holding him for federal determination of whether he should be removed "violates the principle that the removal process is entrusted to the discretion of the Federal Government." The State's detention does not represent commencement of the removal process unless the Federal Government makes it so.

But that is not the most important point. The most important point is that, as we have discussed, Arizona is entitled to have "its own immigration policy"—including a more rigorous enforcement policy—so long as that does not conflict with federal law. The Court says, as though the point is utterly dispositive, that "it is not a crime for a removable alien to remain present in the United States." It is not a federal crime, to be sure. But there is no reason Arizona cannot make it a state crime for a removable alien (or any illegal alien, for that matter) to remain present in Arizona. . . .

. . . And it makes no difference that federal officials might "determine [that some unlawfully present aliens] should not be removed". They may well determine not to remove from the United States aliens who have no right to be here; but unless and until these aliens have been given the right to remain, Arizona is entitled to arrest them and at least bring them to federal officials' attention, which is all that §6 necessarily entails. (In my view, the State can go further than this, and punish them for their unlawful entry and presence in Arizona.)

The Government complains that state officials might not heed "federal priorities." Indeed they might not, particularly if those priorities include willful blindness or deliberate inattention to the presence of removable aliens in Arizona. The State's whole complaint—the reason this law was passed and this case has arisen—is that the citizens of Arizona believe federal priorities are too lax. The State has the sovereign power to protect its borders more rigorously if it wishes, absent any valid federal prohibition. The Executive's policy choice of lax federal enforcement does not constitute such a prohibition.

. . .[As for §3, it] is beyond question that a State may make violation of federal law a violation of state law as well. . . .

. . .

In some areas of uniquely federal concern—e.g., fraud in a federal administrative process . . . or perjury in violation of a federally required oath. . .—this Court has held that a State has no legitimate interest in enforcing a federal scheme. But the federal alien registration system is certainly not of uniquely federal interest. States, private entities, and individuals rely on the federal registration system (including the E-Verify program) on a regular basis. Arizona's legitimate interest in protecting (among other things) its unemployment-benefits system is an entirely adequate basis for making the violation of federal registration and carry requirements a violation of state law as well.

The Court points out, however, that in some respects the state law exceeds the punishments prescribed by federal law: It rules out probation and pardon, which are available under federal law. The answer is that it makes no difference. Illegal immigrants who violate §3 violate Arizona law. It is one thing to say that the Supremacy Clause prevents Arizona law from excluding those whom federal law admits. It is quite something else to say that a violation of Arizona law cannot be punished more severely than a violation of federal law. . . .

. . .

[Regarding §5(C), the Court notes] "that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." But that is not the same as a deliberate choice to prohibit the States from imposing criminal penalties. . . .

The Court concludes that §5(C) "would interfere with the careful balance struck by Congress," . . . but that is easy to say and impossible to demonstrate. The Court relies primarily on the fact that "[p]roposals to make unauthorized work a criminal offense were debated and discussed during the long process of drafting [the Immigration Reform and Control Act of 1986 (IRCA)]," "[b]ut Congress rejected

them." There is no more reason to believe that this rejection was expressive of a desire that there be no sanctions on employees, than expressive of a desire that such sanctions be left to the States. To tell the truth, it was most likely expressive of what inaction ordinarily expresses: nothing at all. . . .

. . .

. . . Must Arizona's ability to protect its borders yield to the reality that Congress has provided inadequate funding for federal enforcement—or, even worse, to the Executive's unwise targeting of that funding?

But leave that aside. It has become clear that federal enforcement priorities—in the sense of priorities based on the need to allocate "scarce enforcement resources"—is not the problem here. 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. If an individual unlawfully present in the United States

> "• came to the United States under the age of sixteen;
> "• has continuously resided in the United States for at least five years . . . ,
> "• is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran . . . ,
> "• has not been convicted of a [serious crime]; and
> "• is not above the age of thirty,"

then U. S. immigration officials have been directed to "defe[r] action" against such individual "for a period of two years, subject to renewal." . . . The President said at a news conference that the new program is "the right thing to do" in light of Congress's failure to pass the Administration's proposed revision of the Immigration Act. Perhaps it is, though Arizona may not think so. But 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.

. . . Are the sovereign States at the mercy of the Federal Executive's refusal to enforce the Nation's immigration laws?

A good way of answering that question is to ask: Would the States conceivably have entered into the Union if the Constitution itself contained the Court's holding? Today's judgment surely fails that test. . . .

As is often the case, discussion of the dry legalities that are the proper object of our attention suppresses the very human realities that gave rise to the suit. Arizona bears the brunt of the country's illegal immigration problem. Its citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy. Federal officials have been unable to remedy the problem, and indeed have recently shown that they are unwilling to do so. Thousands of Arizona's estimated 400,000 illegal immigrants—including not just children but men and women under 30—are now assured immunity from enforcement, and will be able to compete openly with Arizona citizens for employment.

Arizona has moved to protect its sovereignty—not in contradiction of federal law, but in complete compliance with it. The laws under challenge here do not extend or revise federal immigration restrictions, but merely enforce those restrictions more effectively. If securing its territory in this fashion is not within the power of Arizona, we should cease referring to it as a sovereign State. I dissent.

JUSTICE THOMAS, concurring in part and dissenting in part.

I agree with Justice Scalia that federal immigration law does not pre-empt any of the challenged provisions of S. B. 1070. I reach that conclusion, however, for the simple reason that there is no conflict between the "ordinary meanin[g]" of the relevant federal laws and that of the four provisions of Arizona law at issue here. . . .

Despite the lack of any conflict between the ordinary meaning of the Arizona law and that of the federal laws at issue here, the Court holds that various provisions of the Arizona law are pre-empted because they "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." I have explained that the "purposes and objectives" theory of implied pre-emption is inconsistent with the Constitution because it invites courts to engage in freewheeling speculation about congressional purpose that roams well beyond statutory text. . . . Under the Supremacy Clause, pre-emptive effect is to be given to congressionally enacted laws, not to judicially divined legislative purposes. . . .Thus, even assuming the existence of some tension between Arizona's law and the supposed "purposes and objectives" of Congress, I would not hold that any of the provisions of the Arizona law at issue here are pre-empted on that basis.

JUSTICE ALITO, concurring in part and dissenting in part.

. . .

I agree with the Court that §2(B) is not pre-empted. . . .

I also agree with the Court that §3 is pre-empted [on the grounds] that Congress had enacted an "all-embracing system" of alien registration and that States cannot "enforce additional or auxiliary regulations". . . .

. . . I part ways on §5(C) and §6. The Court's holding on §5(C) is inconsistent with [prior cases holding] that employment regulation, even of aliens unlawfully present in the country, is an area of traditional state concern. Because state police powers are implicated here, our precedents require us to presume that federal law does not displace state law unless Congress' intent to do so is clear and manifest. I do not believe Congress has spoken with the requisite clarity to justify invalidation of §5(C). Nor do I believe that §6 is invalid. Like §2(B), §6 adds virtually nothing to the authority that Arizona law enforcement officers already exercise. And whatever little authority they have gained is consistent with federal law.

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