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11-14-2013

## Federal Immigration Detainers After *Arizona v. United States*

Christopher N. Lasch

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## FEDERAL IMMIGRATION DETAINERS AFTER *ARIZONA V. UNITED STATES*

*Christopher N. Lasch\**

*In Arizona v. United States, the Supreme Court held that three of the four challenged provisions to Arizona's "Support Our Law Enforcement and Safe Neighborhoods Act" were preempted. The Court reached this conclusion by focusing on the federal government's supremacy in immigration enforcement. Ironically, the Court's focus on federal supremacy undermines the executive branch's central enforcement measure for obtaining custody of suspected immigration violators: immigration detainees.*

*The executive branch issues over a quarter million immigration detainees each year to state and local law officials. These detainees command state and local officials to hold a prisoner, who would otherwise be released, in custody awaiting pickup by federal immigration officials. This Article examines the immigration detainer program under the analytical framework provided by the Court's Arizona decision. This Article proceeds by first describing the Arizona decision and its underlying analytical framework. It then analyzes immigration detainees within this framework, concluding that the federal immigration detainer regulation is ultra vires and raises substantial constitutional questions. Ultimately, this Article shows that the Arizona decision will have significant impact on immigration enforcement beyond the question of allocation of enforcement authority between the federal government and state and local governments.*

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\* Assistant Professor, University of Denver Sturm College of Law; J.D., Yale Law School; A.B., Columbia College. My thanks go to the editors for inviting me to participate in this Supreme Court review. I am also indebted to the following people who provided helpful suggestions and insights along the way, though of course any problems that remain are my own: Deborah Bergman, Patience Crowder, Annie Lai, Nantiya Ruan, Paromita Shah, Giovanna Shay, Robin Walker Sterling, and Michael J. Wishnie. The Article also benefitted from a workshop held at the University of Utah S.J. Quinney College of Law as part of the Rocky Mountain Junior Scholars Forum, and I am grateful to the University of Denver for sending me to participate in the Forum. Finally, I wish to thank John Galligan for his helpful research assistance and Christopher Linas for his masterful editing.

## TABLE OF CONTENTS

I. INTRODUCTION .....	632
II. S.B. 1070 AND THE <i>ARIZONA</i> DECISION .....	636
A. Immigration and Immigration Detainers as Civil Rights Issues .....	636
B. The Passage of S.B. 1070 and Ensuing Litigation.....	640
C. The Decision in <i>Arizona v. United States</i> .....	646
1. The Court’s Preemption Analysis.....	648
a. Section 3—criminalizing noncompliance with federal registration laws—held subject to field preemption .....	649
b. Section 5(C)—criminalizing the unauthorized seeking of work—held subject to obstacle preemption .....	654
c. Section 6—permitting Arizona officers to effect civil immigration arrests—held subject to obstacle preemption .....	660
d. Section 2(B)—“Show Me Your Papers”—held not facially preempted .....	663
2. Fourth Amendment Concerns with Prolonged Detention to Investigate Immigration Status .....	666
3. Justice Scalia’s Inherent Authority Argument.....	668
III. THE LESSON OF <i>ARIZONA</i> : THE EXECUTIVE BRANCH LACKS THE POWER TO ISSUE IMMIGRATION DETAINERS.....	673
A. The Centrality of Detainers to Federal Immigration Enforcement.....	675
B. “Not the System Congress Created”: The Detainer Regulation Is Ultra Vires .....	681
1. “Not The System Congress Created” .....	683
2. The Detainer System Congress <i>Did</i> Authorize .....	690
3. Conclusion: The Immigration Detainer Is Nothing More than a Request for Information .....	695
C. The Detainer Regulation Is Invalid Because It Raises Substantial Constitutional Problems .....	695
1. The Detainer Regulation Raises Substantial Fourth Amendment Problems .....	696
2. The Detainer Regulation Raises Substantial Tenth	

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Winter 2013]	<i>ARIZONA V. UNITED STATES</i>	631
	Amendment Problems .....	698
IV. CONCLUSION .....		700

*“This is not the system Congress created.”*<sup>1</sup>

## I. INTRODUCTION

Immigration law always implicates civil rights,<sup>2</sup> and the past twenty years have seen an increasing importance for immigration as a major civil rights battleground.<sup>3</sup> A perceived immigration crisis<sup>4</sup> intensified the heat of pro-immigrant and anti-immigrant sentiment and brought immigration federalism issues from a simmer to a full boil. Those seeking more vigorous immigration enforcement and those seeking an expansion of immigrant rights alike attacked federal immigration policy as a failed endeavor.<sup>5</sup> Both groups sought change at the state and local levels, but through radically different programs. Anti-immigrant groups persuaded some state and local governments to pass measures supplementing federal immigration enforcement efforts<sup>6</sup>—purportedly grounded in the “inherent authority” of state sovereign governments to regulate immigration. Meanwhile immigrants’ rights advocates, decrying federal enforcement measures tainted by racial profiling and constitutionally suspect home and workplace raids, lobbied local governments to disentangle

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1. *Arizona v. United States*, 132 S. Ct. 2492, 2506 (2012).

2. See KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS 1 (2004) (“[T]he U.S. government’s treatment of immigrants is inextricably linked to the efforts of domestic minorities to secure civil rights.”).

3. See Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 638 (2012) (“Immigration is one of the dominant civil rights issues of the twenty-first century. The recent spate of state and local efforts seeking to regulate immigration demonstrate this basic truth.”).

4. See, e.g., Linda Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1047 (1994) (“Rising American concern over a perceived immigration crisis makes it a virtual certainty that courts will once again grapple with questions concerning the meaning and significance of alienage as a legal status category.”); María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1373–74 (2005) (“Census 2000 highlighted the reality of the increased number of noncitizens in the country, particularly Latinos, and has precipitated a renewal of nationwide concern over an ‘immigration crisis.’”) (citations omitted).

5. Johnson, *supra* note 3, at 615–17.

6. See *infra* notes 43–44 and accompanying text (discussing local anti-immigrant measures such as those passed in Hazleton, Pennsylvania); *infra* note 46 (discussing state legislative measures).

state and local law enforcement from federal immigration enforcement,<sup>7</sup> resist cooperation, and create “sanctuary cities.”<sup>8</sup>

The Court’s June 25, 2012, decision in *Arizona v. United States*<sup>9</sup> marked, in part,<sup>10</sup> the end of the story of one such local effort: Arizona’s “Support Our Law Enforcement and Safe Neighborhoods Act,” colloquially known simply as “S.B. 1070,”<sup>11</sup> enacted at the behest of anti-immigration lobbyists frustrated by what they believed to be the federal government’s failure to sufficiently enforce the Nation’s immigration laws. Hailed as a landmark decision of historic proportions,<sup>12</sup> *Arizona* struck down three of the four challenged sections of S.B. 1070.<sup>13</sup> Two of the three provisions struck down created state crimes to punish immigrants for not carrying federally required registration documents<sup>14</sup> and for seeking work without authorization;<sup>15</sup> the third provision expanded state arrest authority to allow police to arrest suspected immigration violators.<sup>16</sup> The Court

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7. *See infra* notes 274–286 and accompanying text (discussing state and local resistance to federal immigration enforcement).

8. A sanctuary city may be characterized as one in which local law “limit[s] government employees, particularly local police officers, from inquiring or disseminating information about the immigration status of immigrants whom they encounter.” Rose Cuison Villazor, *What Is a ‘Sanctuary’?*, 61 SMU L. REV. 133, 148 (2008). San Francisco describes its “City and County of Refuge” ordinance in similar terms, connecting its ordinance to both the faith-based sanctuary movement of the 1980s and the post-9/11 “New Sanctuary Movement.” *Sanctuary Ordinance*, CITY & COUNTY OF S.F., <http://sfgsa.org/index.aspx?page=1067> (last visited Oct. 12, 2012); *see also* Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1382–91 (2006) (discussing the sanctuary movement of the 1980s and the post-9/11 sanctuary resurgence).

9. 132 S. Ct. 2492 (2012).

10. Because the Court only addressed a facial challenge to Section 2(B) of S.B. 1070, and expressly reserved the possibility of future “as applied” challenges, *see infra* notes 197–201, continued litigation over S.B. 1070 is likely. *See infra* notes 246, 374–376 and accompanying text.

11. S.B. 1070, 49th Leg., 2d Reg. Sess., 2010 Ariz. Legis. Serv. Ch. 113 (West) [hereinafter S.B. 1070].

12. *E.g.*, *How the Supreme Court Ruled on SB 1070 and What It Means for Other States*, AM. IMMIGR. COUNCIL (July 25, 2012), <http://www.americanimmigrationcouncil.org/newsroom/release/how-supreme-court-ruled-sb-1070-and-what-it-means-other-states>; *John King, USA*, CNN (June 25, 2012), <http://transcripts.cnn.com/TRANSCRIPTS/120625/jkusa.01.html> (CNN commentator John King describing the *Arizona* decision as a “landmark decision”).

13. *Arizona*, 132 S. Ct. at 2494–97.

14. S.B. 1070 § 3; ARIZ. REV. STAT. ANN. § 13-1509(A) (2010) (discussed below, *see infra* Part II.C.1.a).

15. S.B. 1070 § 5(C); ARIZ. REV. STAT. ANN. § 13-2928(C) (discussed below, *see infra* Part II.C.1.b).

16. S.B. 1070 § 2(E); ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (discussed below, *see infra* Part II.C.1.c).

held that these legislative efforts were preempted by comprehensive federal regulation of immigration enforcement.<sup>17</sup> The Court additionally left open the possibility that the fourth challenged provision, requiring Arizona police officers to run immigration status checks on suspected immigration violators,<sup>18</sup> might be held unconstitutional or preempted, depending on how the law is actually applied.<sup>19</sup>

The failure of Arizona's S.B. 1070, and the particular way it failed, has dramatically important consequences for the future of immigration enforcement. *Arizona* certainly tipped the balance in favor of federal enforcement and away from state and local enforcement. But this Article explores a less obvious consequence of *Arizona*: its implications for the continuing viability of a critical *federal* enforcement mechanism, the immigration detainer.

An immigration detainer is a piece of paper issued by immigration officials that purports to command other law enforcement officials to hold a prisoner, who otherwise would be released, in custody and deliver that person to federal immigration officials.<sup>20</sup> State and local officials regularly comply with immigration detainers by continuing to hold prisoners whom they would otherwise release.<sup>21</sup> Federal enforcement programs like the highly controversial Secure Communities<sup>22</sup> depend on the immigration detainer as their key enforcement mechanism. The *Arizona* decision saps the vitality out of this mechanism and exposes it as far exceeding any congressional grant of authority and as conflicting with the Fourth Amendment principles discussed in the Court's opinion.<sup>23</sup>

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17. *Arizona*, 132 S. Ct. at 2510.

18. S.B. 1070 § 2(B); ARIZ. REV. STAT. ANN. § 11-1051(B) (discussed below, *see infra* Part II.C.1.d).

19. Because the Court permitted Section 2(B) of S.B. 1070 to stand, the story of S.B. 1070 is not entirely over.

20. The federal immigration detainer is discussed more fully below. *See infra* Part III.A.

21. Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 173–74 (2008). Since I wrote in 2008, a wave of localities has begun to resist immigration detainers, as I discuss below. *See infra* notes 41–42 and accompanying text.

22. This program is discussed below. *See infra* notes 262–273 and accompanying text.

23. This Article focuses only on the impact of *Arizona* upon the validity of the federal immigration detainer regulation. Discussion of the impact of *Arizona* on state and local enforcement of immigration detainers is outside the scope of this Article. But *Arizona* suggests

I begin in Part II with a discussion of the context in which S.B. 1070 was passed, a brief history of the litigation over S.B. 1070, and the *Arizona* decision. The ongoing civil rights battle over immigration brought to the fore issues of racial profiling and the debate over whether states possess “inherent authority” to enforce immigration laws. *Arizona* failed to put these issues to rest, and the Court’s silence ensures ongoing controversy and litigation. Digesting the *Arizona* opinion, I address in turn (1) the majority’s preemption analysis (and its failure to address the civil rights issues) with respect to the four challenged provisions of S.B. 1070; (2) the Fourth Amendment discussion among the Justices, attendant to the question of whether state officials may subject suspected immigration violators to prolonged detention; and (3) the omission by the Justices—except for Justice Scalia—of any discussion of a state’s “inherent authority” or police power with respect to immigration enforcement.

The remainder of the Article assesses the effect *Arizona* will have on the federal government’s use of immigration detainees to obtain custody over prisoners held by other law enforcement agencies. Ironically, while *Arizona* trumpets the supremacy of the federal government in the field of immigration, the opinion has negative implications for the federal government’s central enforcement mechanism for obtaining custody of suspected immigration violators. The legality of the immigration detainer system put in place by the executive branch can be analyzed through the same doctrinal frames seen in *Arizona*—preemption and the Fourth Amendment concerns with prolonged detention.

I proceed to that analysis in Part III, addressing *Arizona*’s impact on federal authority to issue immigration detainees requiring other law enforcement officials to prolong the detention of their prisoners. I conclude that the detainer regulation purporting to allow this is *ultra vires* for the same reason the *Arizona* Court held parts of S.B. 1070 preempted—the executive branch’s detainer regulation is flatly inconsistent with the comprehensive enforcement regime established

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that absent any federal authority for detaining suspected immigration violators, state and local officials may lack the authority to detain. Indeed, the states may lack any police power whatsoever regarding immigration, and alternatively, what police power the states do possess may have been preempted by comprehensive federal immigration control.



by Congress. Additionally, there are substantial Fourth Amendment problems with the immigration detainer regulation that *Arizona's* Fourth Amendment discussion illuminates. The regulation is invalid because of these substantial constitutional questions.<sup>24</sup>

## II. S.B. 1070 AND THE *ARIZONA* DECISION

In this part, I briefly discuss the divergent solutions local communities adopted in response to perceived immigration crises since the 1990s and the criticism of the federal government's enforcement programs by both pro- and anti-immigrant advocacy groups. I then discuss Arizona's adoption of S.B. 1070 and "copycat" legislation passed elsewhere. Next, I summarize briefly the course of the litigation over S.B. 1070 and conclude with a discussion of the Supreme Court's June 25, 2012, decision in *Arizona v. United States*.

### A. *Immigration and Immigration Detainers as Civil Rights Issues*

Recent disappointment with the federal government's handling of immigration enforcement<sup>25</sup> dates back at least to the 1980s,<sup>26</sup> when the government's continued deportations of Guatemalan and Salvadoran refugees spawned the "sanctuary movement." The "sanctuary movement" saw private and religious organizations come forward in opposition to federal policy to provide sanctuary to refugees.<sup>27</sup> In turn, the movement spurred some localities to pass

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24. As discussed briefly below, *see infra* Part III.C.2, although the Tenth Amendment was not discussed in the *Arizona* decision, there are substantial Tenth Amendment concerns raised by the detainer regulation.

25. State and local desire to outpace federal immigration enforcement is of course not a new phenomenon. *E.g.*, Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-"Alien" Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905, 911-14 (2011) (discussing state and local legislation in 1870s and 1880s California aimed at repelling the "invasion of the subjects of the Mongolian empire"). Indeed, the *Arizona* Court relied extensively on *Hines v. Davidowitz*, 312 U.S. 52 (1941), which arose after Pennsylvania enacted alien registration statutes that went further than their federal counterparts.

26. While I hope to provide useful examples to demonstrate the civil rights battle that has been ongoing in recent decades, a complete historical survey is far beyond the scope of this Article. For a recounting of the history I only briefly allude to here, see Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1773-98 (2011).

27. Christopher Carlberg, *Cooperative Noncooperation: A Proposal for an Effective Uniform Noncooperation Immigration Policy for Local Governments*, 77 GEO. WASH. L. REV. 740, 743-45 (2009).

legislation disentangling local from federal immigration policy. Ultimately, four states and twenty-three localities passed some form of sanctuary resolution or law in the 1980s.<sup>28</sup>

An opposite prevailing sentiment was exemplified by the story of Proposition 187. In 1994 California voters responded to a plunging economy by focusing on undocumented immigrants from Mexico. Proposition 187 barred illegal immigrants from receiving government benefits and required California officials to report them to federal immigration officials.<sup>29</sup> Proposition 187 was intended to “send a message” to a federal government Californians felt had failed adequately to address immigration.<sup>30</sup> The rhetoric of the Proposition 187 campaign was replete with anti-Mexican invective that raised obvious civil rights concerns.<sup>31</sup> A federal court ultimately struck down the initiative as preempted.<sup>32</sup>

Following the terrorist attacks of 9/11, the federal government actively sought to enlist state and local cooperation in immigration enforcement. In 2002, a memorandum from the Department of Justice’s Office of Legal Counsel (OLC) opined that “the authority to arrest for violation of federal law inheres in the States, subject only to preemption by federal law.”<sup>33</sup> The “inherent authority” trumpeted by the 2002 OLC memo derived from the “States’ status as sovereign entities.”<sup>34</sup> For state officers to arrest a person for a claimed violation of federal law (even civil immigration law) was, according to the logic of the 2002 OLC memo, an exercise of sovereign power akin to that exercised by Canadian Mounties arresting a fugitive from U.S.

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28. *Id.*; Pham, *supra* note 8, at 1383. The federal government responded by enacting federal legislation prohibiting states and localities from preventing communication between their employees and federal immigration officials. *Id.* at 1384–85.

29. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 763 (C.D. Cal. 1995).

30. Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 633 (1995); *see also League of United Latin Am. Citizens*, 908 F. Supp. at 786 (“The California voters’ overwhelming approval of Proposition 187 reflects their justifiable frustration with the federal government’s inability to enforce the immigration laws effectively.”).

31. Johnson, *supra* note 30, at 654–58, 660–61.

32. *League of United Latin Am. Citizens*, 908 F. Supp. at 786. Kevin Johnson had accurately predicted that “a much-debated aspect of the passage of Proposition 187—that it is nativistic and racist—in all probability will never be decided by the courts.” Johnson, *supra* note 30, at 672.

33. Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, to John Ashcroft, U.S. Att’y Gen. 1 (Apr. 3, 2002) [hereinafter 2002 OLC Memorandum], *available at* <http://www.aclu.org/files/FilesPDFs/ACF27DA.pdf>.

34. *Id.* at 2.

justice.<sup>35</sup> Police in both cases exercised “inherent authority,” not delegated authority.<sup>36</sup>

Those on both sides of the immigration civil rights divide were entrenched on the issue of “inherent authority.” Critics believed state and local participation in enforcement would lead to racial profiling and would force immigrants into the shadows, discouraging immigrants from availing themselves of police and other social services.<sup>37</sup> Some other concerns include perceived excesses of the federal antiterrorism effort<sup>38</sup> and community outrage at immigration enforcement tactics and constitutional violations attendant to workplace and home raids.<sup>39</sup> The result has been a resurgence of the sanctuary movement,<sup>40</sup> on both the local level (where “sanctuary cities” like New Haven, Connecticut, and San Francisco, California, have enacted local ordinances that prohibit police from inquiring into immigration status)<sup>41</sup> and the state level.<sup>42</sup>

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35. *Id.* at 3.

36. *Id.*

37. *E.g.*, Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1085–88 (2004). For a more complete list of scholars who criticized the 2002 OLC memo and the “inherent authority” argument, see López, *supra* note 26, at 1785 n.196.

38. *See* Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1250–61 (2004).

39. *See, e.g.*, Stella Burch Elias, “Good Reason to Believe”: *Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 WIS. L. REV. 1109, 1126–40 (arguing constitutional violations attendant to immigration enforcement had become “both geographically widespread—ranging widely across geographical boundaries—and institutionally widespread—the result of behavior by law-enforcement officers operating at the federal, state and local levels”); Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307 (2009) (discussing workplace raids).

40. Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Policy*, 2 U.C. IRVINE L. REV. 247, 306 (2012); Pham, *supra* note 8, at 1387–91 (detailing post-9/11 “sanctuary” enactments).

41. *See generally* Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1475–78 (2006) (exploring various rationales behind local sanctuary laws); Cristina Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 600–05 (2008) (discussing local sanctuary laws). Both New Haven and San Francisco have adopted municipal identification card programs that allow participation without regard for immigration status. Jeff Holtz, *This Summer’s Surprise Hit: An Elm City ID*, N.Y. TIMES, Sept. 16, 2007, at O6; Jennifer Medina, *New Haven Approves Program to Issue Illegal Immigrants IDs*, N.Y. TIMES, June 5, 2007, at B6; Javier Erik Olvera, *S.F. to Issue ID Cards to Illegal Immigrants: City Becomes Only the Second in Nation after New Haven, Conn.*, SAN JOSE MERCURY NEWS (Nov. 21, 2007), [http://www.mercurynews.com/politics/ci\\_7522078?nclick\\_check=1](http://www.mercurynews.com/politics/ci_7522078?nclick_check=1).

42. Oregon, for example, enacted legislation attempting to disentangle the state from federal immigration enforcement:

But not all post-9/11 measures have been aimed at reducing state and local involvement in immigration. Advocates of local enforcement, expressing dissatisfaction with the federal government's failure to enforce immigration law more vigorously, succeeded in passing a host of local measures enlisting local officials in enforcement. Among the most notorious were those adopted in Hazleton, Pennsylvania; Escondido, California; Riverside, New Jersey; and Farmers Branch, Texas.<sup>43</sup> These ordinances generally seek to prevent undocumented immigrants from obtaining employment or housing in a community, as well as to punish citizens for harboring the undocumented.<sup>44</sup> On the statewide level, as will be discussed in detail below,<sup>45</sup> Arizona led the way with S.B. 1070, authored by the most prominent advocate of the inherent authority argument.<sup>46</sup>

Civil rights issues pervade not only the discussion about federal, state, and local enforcement but also the debate over federal immigration detainers. Detainers, discussed more fully below,<sup>47</sup> are a mechanism for transferring the custody of state and local prisoners suspected of immigration violations to federal immigration authorities. In the last few years, compliance with immigration detainers has emerged as one litmus test for assessing where a locality stands in the immigration civil rights debate.<sup>48</sup>

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No law enforcement agency of the State of Oregon or of any political subdivision of the state shall use agency moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws.

OR. REV. STAT. § 181.850(1) (2012).

43. Daniel Eduardo Guzmán, "There Be No Shelter Here": *Anti-Immigrant Housing Ordinances and Comprehensive Reform*, 20 CORNELL J.L. & PUB. POL'Y 399, 405–13 (2010) (discussing these ordinances and the litigation challenging them).

44. *Id.*

45. *See infra* Part II.B.

46. *See* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181–83 (2006); López, *supra* note 26, at 1811 (identifying Kobach as the "S.B. 1070's architect").

47. *See infra* Part III.A.

48. *See* Adam Sorensen, *Obama's Next Immigration Battle: Local, Federal Authorities on Collision Course over Detention*, TIME: SWAMPLAND (July 16, 2012), <http://swampland.time.com/2012/07/16/obamas-next-immigration-battle-local-federal-authorities-on-collision-course-over-detention-requests/#ixzz283daq9sC>.

Detainers implicate civil rights concerns in several ways. People arrested for minor offenses, including traffic violations, have become the targets of immigration detainers—in turn raising a concern that the detainer “tail” will wag the street-level enforcement “dog” and encourage racial profiling by police.<sup>49</sup> Additionally, a lack of investigation and reliance on flawed databases has reportedly led to U.S. citizens being held pursuant to detainers.<sup>50</sup> And numerous lawsuits have been brought alleging “overdetention” of prisoners based on immigration detainers.<sup>51</sup>

Various “sanctuary” ordinances have been passed aiming to reduce compliance with detainers. As is discussed in further detail below, one state and numerous counties and cities have enacted antidetainer legislation.<sup>52</sup>

### *B. The Passage of S.B. 1070 and Ensuing Litigation*

At the state level, Arizona was determined to lead the way by enacting legislation that would engage state law enforcement fully in the immigration enforcement effort. In April 2010, Arizona’s

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49. See Trevor Gardener II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, THE CHIEF JUST. EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY POLICY BRIEF, Sept. 2009, at 1, available at [http://www.law.berkeley.edu/files/policybrief\\_irving\\_FINAL.pdf](http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf) (observing correlation between issuance of detainers and profiling of Latinos in Irving, Texas).

50. See Molly F. Franck, *Unlawful Arrests and Over-Detention of America’s Immigrants: What the Federal Government Can Do to Eliminate State and Local Abuse of Immigration Detainers*, 9 HASTINGS RACE & POVERTY L.J. 55, 65 (2011) (reporting 5 percent of individuals targeted for immigration enforcement through the “Secure Communities” program between October 2008 and October 2009 were U.S. citizens); Julia Preston, *Immigration Crackdown Also Snares Americans*, N.Y. TIMES, Dec. 13, 2011, at A20. See also *Henry v. Chertoff*, 317 F. App’x 178, 179 (3d Cir. 2009) (discussing habeas petition alleging prisoner subject to immigration detainer was a U.S. citizen); Complaint, *Vohra v. United States*, No. SA CV 04-00972 DSF (RZ) (C.D. Cal. Aug. 19, 2004) (alleging plaintiff was a U.S. citizen held pursuant to immigration detainer); Brian Bennett, *Fingerprinting Program Ensnarers U.S. Citizen; He’s Suing the FBI and Homeland Security After Being Flagged as an Illegal Immigrant and Held in Prison*, L.A. TIMES, July 6, 2012, at A9 (describing U.S. citizen’s claim that he was wrongfully detained for two months due to database error).

51. See NAT’L IMMIGRATION FORUM, QUICK INFORMATION ON IMMIGRATION DETAINERS (Mar. 2011), available at <http://immigrationforum.org/images/uploads/2010/DetainersBackgrounder.pdf> (detailing cases of overdetention); see also Franck, *supra* note 50, at 79 (characterizing overdetention as not infrequent); *Feds Pay \$50k Settlement to ACLU Client*, ACLU COLO. (May 3, 2011), <http://aclu-co.org/news/feds-pay-50k-settlement-to-aclu-client> (detailing a 47-day overdetention incident).

52. See *infra* notes 274–286 and accompanying text.

governor signed into law the now infamous S.B. 1070.<sup>53</sup> The law essentially deputized Arizona police in the enforcement of federal immigration law. The intent of the legislation was overtly exclusionary:

The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona. The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.<sup>54</sup>

Among the provisions of S.B. 1070 were those ultimately challenged in *Arizona v. United States*:

- 1) Section 2(B) requires Arizona officers who stop or detain a person to investigate immigration status “where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.”<sup>55</sup> Section 2(B) requires the officer to make a “reasonable attempt” to ascertain the person’s immigration status. If an arrest is made, the officer “shall have the person’s immigration status determined before the person is released.”<sup>56</sup>
- 2) Section 3 makes “willful failure to complete or carry an alien registration document” in violation of federal law a state misdemeanor.<sup>57</sup> The sentencing court may not suspend or probate the jail sentence imposed for this offense.<sup>58</sup>
- 3) Section 5(C) makes it a state misdemeanor “for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work

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53. See ‘Show Your Papers’ Arizona Immigration Provision Survives As Court Rejects Bid to Have It Blocked, HUFFINGTON POST, (Sept. 25, 2012, 7:56 PM), [http://www.huffingtonpost.com/2012/09/26/show-your-papers-arizona\\_n\\_1914678.html](http://www.huffingtonpost.com/2012/09/26/show-your-papers-arizona_n_1914678.html).

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

55. ARIZ. REV. STAT. ANN. § 11-1051(B) (2011).

56. *Id.*

57. *Id.* § 13-1509.

58. *Id.*

in a public place or perform work as an employee or independent contractor in [Arizona].”<sup>59</sup>

- 4) Section 6 authorizes Arizona police officers to make a warrantless arrest of any person “if the officer has probable cause to believe [the person] has committed any public offense that makes the person removable from the United States.”<sup>60</sup>

After the passage of S.B. 1070, copycat legislation proliferated the following year,<sup>61</sup> with states vying with one another to be the toughest on immigrants.<sup>62</sup>

Advocacy groups responded immediately to S.B. 1070’s enactment by filing five separate lawsuits in April and May 2010.<sup>63</sup> These lawsuits generally alleged that S.B. 1070 was motivated by racial bias and would result in racial profiling.<sup>64</sup> Meanwhile, regular

59. *Id.* § 13-2928(C).

60. *Id.* § 13-3883(A)(5).

61. For a summary of legislative measures and how they fared, see *National Copycat Landscape*, MISS. IMMIGRANTS RIGHTS ALLIANCE (July 5, 2011), <http://www.yourmira.org/2011/07/05/national-copycat-landscape>, and *SB 1070 Copycats: Arizona-Related Legislative Developments*, NAT’L COUNCIL LA RAZA, [http://www.nclr.org/index.php/issues\\_and\\_programs/immigration/state\\_local\\_immigration\\_initiatives/arizona-related\\_legislative\\_developments/](http://www.nclr.org/index.php/issues_and_programs/immigration/state_local_immigration_initiatives/arizona-related_legislative_developments/) (last visited Oct. 14, 2009) (indicating which states rejected or passed Arizona-copycat bills in the 2010 and 2011 legislative session).

62. Robbie Brown, *Georgia Gives Police Added Power to Seek Out Illegal Immigrants*, N.Y. TIMES, May 13, 2011, at A12 (describing Georgia’s new law as “one of the nation’s toughest immigration measures”); Richard Fausset, *Alabama Enacts Strict Immigration Law*, L.A. TIMES, June 10, 2011, at A8.

63. See *Complaint, Friendly House v. Whiting*, 846 F. Supp. 2d 1053 (D. Ariz. 2012) (No. 2:10-CV-01061-MEA), available at [http://www.aclu.org/files/assets/az\\_sb1070\\_complaint\\_20100517.pdf](http://www.aclu.org/files/assets/az_sb1070_complaint_20100517.pdf); *Complaint, Escobar v. Brewer*, No. 4:10-CV-00249-DCB (D. Ariz. Apr. 29, 2010), available at <http://www.scribd.com/doc/30717024/Escobar-v-Brewer>; *Complaint, Nat’l Coal. of Latino Clergy & Christian Leaders v. Arizona*, No. 2:10-CV-00943 (D. Ariz. Apr. 29, 2010), available at <http://docs.justia.com/cases/federal/district-courts/arizona/azdce/2:2010cv00943/519056/1/>; *Complaint, Salgado v. Brewer*, No. 2:10-CV-00951-SRB (D. Ariz. Apr. 29, 2010), available at <http://www.scribd.com/doc/34428984/Salgado-v-Brewer-A-Cop-s-Lawsuit-Against-Arizona-s-New-Immigration-Law>; *Complaint, Frisancho v. Brewer*, No. 2:10-CV-00926-MEA (D. Ariz. Apr. 27, 2010), available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/Frisancho-v-Brewer-complaint.pdf>.

64. See *Complaint, Escobar*, *supra* note 63, ¶ 31 (alleging S.B. 1070 compels Arizona police “to actively engage in racial profiling to detain, question and require every Hispanic found within the limits of the City of Tucson to prove their legal status in the United States”); *id.* ¶¶ 38–40 (alleging S.B. 1070 “was enacted by the Legislature of the State of Arizona and signed into law by Defendant Brewer as a result of racial bias and anti-Hispanic beliefs and sentiments” and “is the product of racial bias aimed specifically at Hispanics”); see also *Complaint, Salgado*, *supra* note 63, ¶ 31 (alleging that S.B. 1070 will require the plaintiff, an Arizona police officer, “to use race as a primary factor in enforcing the various provisions of the Act”); *Complaint, Frisancho*,

and well-attended protests took place throughout the spring and summer.<sup>65</sup> In June, the federal government expressed its disinclination toward Arizona's brand of "cooperative enforcement of federal immigration laws" by suing to enjoin S.B. 1070, on preemption grounds, before it went into effect.<sup>66</sup> On July 28, 2010, United States District Judge Susan Bolton granted the federal government's request for a preliminary injunction against enforcement of the four provisions of S.B. 1070 detailed above.<sup>67</sup>

In the United States Court of Appeals for the Ninth Circuit, the United States argued that Arizona's law would hamper federal immigration enforcement, impede U.S. foreign policy, and "prevent[] true cooperation by state and local officials with the

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*supra* note 63, ¶¶ 43–48 (alleging S.B. 1070 was adopted "because of, not merely in spite of, its adverse effect upon a discrete and insular minority—Hispanics").

65. *E.g.*, Parker Leavitt & Nathan Gonzalez, *2,500 Protest Law at State Capitol*, ARIZ. REPUBLIC, Apr. 26, 2010, at B1; Brady McCombs, *Immigration Bill Prompts Protests in Tucson*, PHOENIX, ARIZ. DAILY STAR (Apr. 20, 2010), [http://azstarnet.com/news/local/border/article\\_7f8be9a8-4cb2-11df-906c-001cc4c002e0.html](http://azstarnet.com/news/local/border/article_7f8be9a8-4cb2-11df-906c-001cc4c002e0.html); Jim Nintzel, *May Day Protest: Thousands Assemble Downtown To Protest SB 1070*, TUCSON WEEKLY (May 2, 2010), <http://www.tucsonweekly.com/TheRange/archives/2010/05/02/may-day-protest-thousands-assemble-downtown-to-protest-sb-1070>; *Thousands in Phoenix Protest Against SB 1070*, THOUSANDS OF SB 1070 SUPPORTERS RALLY IN TEMPE, KVOA (May 30, 2010), <http://www.kvoa.com/news/thousands-in-phoenix-protest-against-sb-1070-thousands-of-sb-1070-supporters-rally-in-tempe/>.

66. *United States v. Arizona*, 703 F. Supp. 2d 980, 988 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *aff'd in part, rev'd in part and remanded*, 132 S. Ct. 2492 (2012) (enjoining enforcement of most provisions of the bill). Federal judges in Georgia, Indiana, and Utah similarly granted preliminary injunctions blocking immigration legislation in those States. *Ga. Latino Alliance For Human Rights v. Deal*, 793 F. Supp. 2d 1317 (N.D. Ga. 2011); *Buquer v. City of Indianapolis*, 797 F. Supp. 2 905 (S.D. Ind. 2011); *Order Granting Temporary Restraining Order at 1*, *Utah Coal. of La Raza v. Herbert*, No. 2:11-CV-401 CW (D. Utah filed May 11, 2011), 2011 WL 7143098, at \*1. A lawsuit was also filed in Alabama to block legislation there. *Complaint at 1*, *Hispanic Interest Coal. of Ala. v. Bentley*, No. 5:11-CV-02484-SLB, (N.D. Ala. filed July 8, 2011).

67. *Arizona*, 703 F. Supp. 2d at 980.



federal officials responsible for enforcing federal law.”<sup>68</sup> The Ninth Circuit affirmed Judge Bolton’s issuance of the injunction.<sup>69</sup>

The Ninth Circuit’s opinion struck a blow to the “inherent authority” argument that proponents of state and local enforcement had advanced in the wake of the 2002 OLC memorandum.<sup>70</sup> The Ninth Circuit explicitly held that Arizona officers have no inherent authority to enforce federal civil immigration law.<sup>71</sup> In so doing, the court issued a scathing rejection of the 2002 OLC memo, criticizing its logic and noting that the 2002 OLC memo (written during the administration of President George W. Bush) reached a conclusion opposite from the one the OLC had reached in 1996 (during the administration of President Clinton),<sup>72</sup> which in turn was different from the conclusion the OLC had reached in 1989 (under President George H.W. Bush).<sup>73</sup> This flip-flopping, the Ninth Circuit found, demonstrated why “[i]t is an axiomatic separation of powers principle that legal opinions of Executive lawyers are not binding on federal courts.”<sup>74</sup>

Finding no “inherent authority” for states to enforce federal immigration laws, the Ninth Circuit looked unsuccessfully for evidence that the federal government had delegated to state officers the general authority to make civil immigration arrests as authorized in Section 6 of S.B. 1070.<sup>75</sup> The court instead found that Section 6 conflicted with the federal statutory structure, holding that federal law permitting state and local officials to arrest *certain* immigration

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68. Brief for Appellee at 25–26, *Arizona*, 641 F.3d 339 (No. 10-16645), 2010 WL 5162512, at \*25–26. A coalition of cities and local governments argued Arizona’s laws, if permitted, would send a message that “will reverberate not just in Arizona but in every state across the country, making immigrants—whether they are naturalized citizens, lawful permanent residents, visa holders, or undocumented individuals—deeply distrustful of local governments and law enforcement officials” and “will have serious, long-term deleterious effects on the ability of local governments nationwide to protect the health and safety of all residents within their jurisdictions.” Brief of Amici Curiae the County of Santa Clara et al. at 2–3, *Arizona*, 641 F.3d 339 (No. 10-16645), 2010 WL 5162525, at \*2–3.

69. *Arizona*, 641 F.3d at 344.

70. See *supra* notes 34–37 and accompanying text.

71. *Arizona*, 641 F.3d at 362.

72. The 1996 OLC memorandum found that state officers had no inherent authority to enforce federal immigration laws. 2002 OLC Memorandum, *supra* note 33, at 1–2, 5.

73. See *id.* at 7.

74. *Arizona*, 641 F.3d at 365 n.24.

75. *Id.* at 362.

violators<sup>76</sup> preempted the portion of S.B. 1070 that broadly permitted Arizona law enforcement officials to arrest *any* suspected immigration violator.<sup>77</sup>

While the Ninth Circuit’s express rejection of the “inherent authority” argument was limited to Section 6 of S.B. 1070, the court also found that other sections of S.B. 1070 sought to legislate in areas where states have not traditionally legislated.<sup>78</sup> Section 2(B), which required state officers to identify immigration violators, was not legislation in an area of traditional state concern.<sup>79</sup> Similarly, punishing unauthorized immigrants for their failure to comply with federal registration laws, under Section 3 of S.B. 1070, was not held to be within the state’s traditionally exercised power.<sup>80</sup>

The Ninth Circuit did uphold Arizona’s authority in one instance. With respect to Section 5(C) of S.B. 1070, which made it a state crime for an unauthorized immigrant to seek employment, the court noted that “the power to regulate the employment of unauthorized aliens remains within the states’ historic police powers.”<sup>81</sup> The court relied for this proposition on its opinion in *Chicanos Por La Causa, Inc. v. Napolitano*,<sup>82</sup> which in turn relied on the Supreme Court’s 1976 decision in *DeCanas v. Bica*,<sup>83</sup> where the Ninth Circuit held that “the authority to regulate the employment of unauthorized workers is ‘within the mainstream’ of the state’s police powers.”<sup>84</sup> The Ninth Circuit in *Chicanos Por La Causa* rejected the suggestion that the holding of *DeCanas* had been weakened by the

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76. 8 U.S.C. § 1252c (2006) (permitting state and local officers, “to the extent permitted by relevant State and local law,” to arrest and detain an alien illegally present who “has previously been convicted of a felony in the United States and deported or left the United States after such conviction, *but only after* the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual.” (emphasis added)).

77. *Arizona*, 641 F.3d at 361–66.

78. *Arizona*, 641 F.3d at 348 (citing *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009)) (explaining that had “Congress . . . legislated . . . in a field which the States have traditionally occupied,” a presumption against federal preemption would have applied).

79. *Id.* at 348.

80. *Id.* at 355.

81. *Id.* at 357.

82. 558 F.3d 856 (9th Cir. 2009).

83. 424 U.S. 351 (1976).

84. *Chicanos Por La Causa, Inc.*, 558 F.3d at 864 (citing *DeCanas*, 424 U.S. at 356, 365).

subsequent passage of extensive federal legislation governing the employment of unauthorized immigrants.<sup>85</sup>

After the Ninth Circuit's *Arizona* decision, *Chicanos Por La Causa* made its way to the Supreme Court. Under the name of *Chamber of Commerce of the United States v. Whiting*,<sup>86</sup> the Court held that another Arizona law concerning immigrants, which imposed licensing restrictions on businesses employing undocumented workers and required businesses to use the federal "E-Verify" system, was not preempted by federal control over immigration.<sup>87</sup> As the Ninth Circuit had done previously in *Chicanos Por La Causa* and *Arizona*, the Court noted (relying on *DeCanas*) that state regulation of immigrants' employment is within a field of legislation traditionally occupied by the states.<sup>88</sup>

The stage was now set for the United States Supreme Court to decide the fate of S.B. 1070. It was a case that some might have believed promised resolution of important questions of civil rights and inherent state authority concerning immigration,<sup>89</sup> but no resolution would be forthcoming.

### C. The Decision in *Arizona v. United States*<sup>90</sup>

In a 5–3 decision,<sup>91</sup> the Court struck down three of the four provisions of S.B. 1070 that were at issue.<sup>92</sup> The Court did so on

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85. *Id.* at 864–65.

86. 131 S. Ct. 1968 (2011).

87. *Id.* at 1974. "[P]rohibit[ing] the knowing employment . . . of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of [the State's] police power." *Id.* (quoting *DeCanas*, 424 U.S. at 356); see also *DeCanas*, 424 U.S. at 356 ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State."). See generally Marisa S. Cianciarulo, *The "Arizonification" of Immigration Law: Implications of Chamber of Commerce v. Whiting for State and Local Immigration Legislation*, 15 HARV. LATINO L. REV. 85, 89 (2012) (predicting the Supreme Court would affirm the Ninth Circuit's ruling striking down S.B. 1070 despite the Court's holding in *Whiting* that Arizona was not preempted in its efforts to regulate the employment of unauthorized aliens).

88. *Whiting*, 131 S. Ct. at 1973–75.

89. *But see* Johnson, *supra* note 3, at 629–32 (suggesting the "civil rights implications for communities of color" would remain unaddressed due to the procedural posture of the case).

90. 132 S. Ct. 2492 (2012).

91. The majority opinion was authored by Justice Kennedy, and joined by Chief Justice Roberts and Justices Breyer, Sotomayor, and Ginsburg. Justice Kagan took no part in the decision, having recused herself presumably because of her work for the Obama administration as solicitor general. Justices Scalia and Thomas filed opinions concurring in part and dissenting in

preemption grounds.<sup>93</sup> The single provision left intact—Section 2(B), colloquially known as the “show me your papers”<sup>94</sup> or “papers, please”<sup>95</sup> provision—was held not preempted, but only because the Court found the provision could *conceivably* be implemented in a manner consistent with federal law.<sup>96</sup> The Court reserved for the future the possibility that the law as implemented would be subject to a preemption or other constitutional challenge.<sup>97</sup> Much of the Court’s discussion concerned potential Fourth Amendment problems that may attend the implementation of the provision.<sup>98</sup>

The Court’s opinion is notable for its struthious avoidance of two issues that might have been expected to dominate the discussion: “inherent authority” and civil rights. Expected to be a major factor in the Court’s decision, the “inherent authority” of state and local law enforcement officers to enforce immigration laws was prominently absent from the opinions, except in Justice Scalia’s bilious dissent, which broadly asserted the police power of the states to engage in immigration enforcement.<sup>99</sup> Similarly, the civil rights issue that had long been at the core of the debate over S.B. 1070—racial profiling—was generally missing, briefly mentioned only in Justice Alito’s opinion concerning Section 2(B).<sup>100</sup>

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part—both Justices would have upheld S.B. 1070 in its entirety. *Id.* at 2511–22 (Scalia, J., concurring in part and dissenting in part); *id.* at 2522–24 (Thomas, J., concurring in part and dissenting in part). Justice Alito filed an opinion concurring in part and dissenting in part, in which he agreed that the majority correctly struck down Section 3 as preempted, and expressed his view that the remaining sections of S.B. 1070 were unobjectionable. *Id.* at 2524–25 (Alito, J., concurring in part and dissenting in part).

92. *Arizona*, 132 S. Ct. at 2503, 2505, 2507 (holding sections 3, 5(C), and 6 preempted).

93. *Id.*

94. See Bill Keller, *Show Me Your Papers*, N.Y. TIMES, July 2, 2012, at A15. Section 2(B) requires Arizona officers to make reasonable attempts to ascertain the immigration status of those stopped, detained, or arrested. ARIZ. REV. STAT. ANN. § 11-1051(B) (2011).

95. See Peter Spiro, *SB 1070 Argument Recap: “Papers, Please” Likely to Stick, Other Provisions Not So Clear*, OPINIO JURIS (Apr. 25, 2012), <http://opiniojuris.org/2012/04/25/sb-1070-argument-recap-papers-please-likely-to-stick-other-provisions-not-so-clear/> (using “papers, please” but cautioning that the label is “not entirely accurate, insofar as [under S.B. 1070] an officer first requires some other reason to stop, detain, or arrest an individual—suspected undocumented status by itself isn’t enough to initiate the process”).

96. *Arizona*, 132 S. Ct. at 2509–10.

97. *Id.* at 2510.

98. *Id.* at 2527–29 (Alito, J., concurring in part and dissenting in part).

99. See *id.* at 2518 (Scalia, J., concurring in part and dissenting in part).

100. See *id.* at 2529 (Alito, J., concurring in part and dissenting in part).

How the case was presented provides one possible explanation for the lack of attention to racial profiling. Various groups had sued to enjoin S.B. 1070 on the basis that it violated equal protection guarantees because it was “enacted with the purpose and intent to discriminate against racial and national origin minorities, including Latinos, on the basis of race and national origin” and would cause “widespread racial profiling and will subject many persons of color . . . to unlawful interrogations, searches, seizures and arrests.”<sup>101</sup> But only the case filed by the United States, which relied on preemption and not profiling, was taken up by the Supreme Court.<sup>102</sup> Nonetheless, several of the amicus briefs raised the profiling issue, giving the Court the opportunity to do so as well<sup>103</sup>—an opportunity the Court rebuffed.

### 1. The Court’s Preemption Analysis

In addressing the four provisions of S.B. 1070 at stake, the Court employed both “field preemption” and “obstacle preemption” analysis.

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101. Andrea Christina Nill, *Latinos and S.B. 1070: Demonization, Dehumanization, and Disenfranchisement*, 14 HARV. LATINO L. REV. 35, 49–52 (2011) (quoting Complaint, Friendly House v. Whiting, No. CV10-1061, at 6 (D. Ariz. dismissed Sept. 16, 2010)).

102. See Johnson, *supra* note 3, at 631–32 (suggesting the preemption arguments are “easier for the U.S. government to prevail upon than rights-based claims, while also avoiding the charge that the Administration is playing the proverbial ‘race card’”); see also Johnson, *supra* note 30, at 673 (observing, in discussing California’s Proposition 187, that there are “many explanations why courts will avoid even asking, much less deciding, whether race, color, and ethnicity impermissibly motivated” state anti-immigrant legislation). Gerald P. López juxtaposes the fact that the Obama administration had proved indifferent to claims of racial profiling in its “Secure Communities” immigration enforcement initiative with a description of how the administration “[s]idestep[ped] substantial evidence of racial profiling and anti-immigrant hysteria [and] relied upon traditionally influential preemption arguments” in its attack on S.B. 1070. López, *supra* note 26, at 1804–05.

103. *E.g.*, Brief of Argentina et al. at 28–35, *Arizona*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 1114006, at \*28–35; Brief of Amici Curiae Arizona Attorneys for Criminal Justice et al. at 21–23, *Arizona*, 132 S. Ct. 2492 (2012) (No. 11-182), WL 1044364, at \*21–23; Brief of Former Arizona Attorneys General Terry Goddard and Grant Woods et al. at 14–20, *Arizona*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 1044358, at \*14–20. The brief for the United States also alluded to civil rights issues pertaining to Section 5(C) of S.B. 1070—making it a crime for an unauthorized alien to seek employment. In describing Congress’s statutory scheme governing unauthorized employment—which the United States described as a “comprehensive scheme prohibiting the employment of illegal aliens in the United States” that “leaves no room for the imposition of state criminal liability on individual aliens”—the United States noted the “civil rights” provisions of the statutory scheme, which prohibit discrimination against job applicants on the basis of national origin or citizenship. Brief for United States at 34–37 & n.22, *Arizona*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 939048, at \*34–37 (citing 8 U.S.C. § 1324b).

Field preemption, the Court explained, can occur in two ways. Congress may indicate its intent to displace state law entirely by implementing a “framework of regulation ‘so pervasive . . . that Congress [leaves] no room for the States to supplement it.’”<sup>104</sup> Alternatively, field preemption occurs 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.”<sup>105</sup>

“Obstacle preemption” involves a detailed comparison of the state and federal statutes to determine whether state and federal law conflict. Obstacle preemption occurs “where the challenged state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”<sup>106</sup>

*a. Section 3—criminalizing noncompliance  
with federal registration laws—held subject to field preemption*

First, the Court struck down Section 3 of S.B. 1070. Section 3 created a new state misdemeanor for failing to obey federal laws requiring the carrying of an “alien registration document.”<sup>107</sup> The Court rejected the “mirror” theory of preemption advocated by Arizona and its supporters,<sup>108</sup> which holds that so long as state laws punish only what is punishable under corresponding federal laws there can be no preemption because there is no conflict between the state and federal laws.<sup>109</sup> The Court held the “comprehensive” scheme of federal regulation of alien registration occupied the field.<sup>110</sup>

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104. *Arizona*, 132 S. Ct. at 2501 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)).

105. *Id.*

106. *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000)).

107. *Id.*

108. See Margaret M. Stock, *Online Symposium: The Court Throws Arizona a Tough Bone to Chew*, SCOTUSBLOG (June 27, 2012), <http://www.scotusblog.com/?p=147811> (“For legal scholars, the most critical point is that the Supreme Court rejected the “mirror image” theory of preemption, which had been put forth by Kris Kobach, who was Mitt Romney’s immigration advisor during the *Republican primary campaign*. The “mirror image” theory—which argues that state immigration laws are constitutional if they “mirror” federal laws—was soundly rejected by five Justices of the Supreme Court, including Chief Justice John Roberts.”).

109. See *id.*

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

Six Justices agreed that Section 3 was subject to field preemption, with Justice Alito joining the five-member majority opinion.<sup>111</sup> These six Justices grounded their holding in the Court's 1941 decision in *Hines v. Davidowitz*.<sup>112</sup> A brief discussion of *Hines* is in order.

In *Hines*, the Court held Pennsylvania's alien registration system, adopted in 1939, had been preempted by Congress's 1940 enactment of a comprehensive registration system, the Alien Registration Act.<sup>113</sup> Both the Pennsylvania and federal enactments required aliens to register and notify authorities of any change in address.<sup>114</sup> In addition, the Pennsylvania law required an alien over eighteen years old to

receive an alien identification card and carry it at all times; show the card whenever it may be demanded by any police officer or any agent of the Department of Labor and Industry; and exhibit the card as a condition precedent to registering a motor vehicle in his name or obtaining a license to operate one.<sup>115</sup>

The Court's opinion in *Hines* engaged two entwined narratives, and partly because of these two distinct narratives, *Hines* can be read as an instance either of field preemption or of obstacle preemption. The first narrative is one of the federal government's plenary power over foreign affairs, and its more sweeping language suggests a field preemption analysis. Laws imposing burdens upon aliens, wrote the *Hines* majority, cannot be considered purely local exercises of state police power.<sup>116</sup> "[E]ven though [such laws] may be immediately associated with the accomplishment of a local purpose, they provoke questions in the field of international affairs."<sup>117</sup> That field being "the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national

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111. *Id.* at 2524–25 (Alito, J., concurring in part and dissenting in part). Justices Scalia and Thomas dissented, and would have upheld Section 3 against the preemption challenge. *Id.* at 2511 (Scalia, J., concurring in part and dissenting in part); *Id.* at 2522 (Thomas, J., concurring in part and dissenting in part).

112. 312 U.S. 52 (1941).

113. *Id.* at 72–74.

114. Alien Registration Act, Pub. L. No. 76-670, 54 Stat. 673–76 (1940).

115. *Hines*, 312 U.S. at 59.

116. *See id.* at 66.

117. *Id.*

authority,” wrote the Court, “[a]ny concurrent state power that may exist is restricted to the narrowest of limits.”<sup>118</sup> It was not difficult for the Court to reach the conclusion that there is no “equal and continuously existing concurrent power of state and nation” when it comes to immigration, and that Pennsylvania’s law must, by virtue of the Supremacy Clause, yield.<sup>119</sup>

The second narrative in *Hines* emphasized alien registration as a civil liberties issue. The Court suggested that civil liberties factored into the preemption analysis as much as the foreign affairs concern did, finding it “also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings.”<sup>120</sup>

The *Hines* Court began its discussion of the civil liberties issue by noting the hostility historically attendant to any suggestion that an alien be required to carry some form of registration on his or her person.<sup>121</sup> The Court quoted opposition to an 1892 registration law that compared the requirement to measures implemented for convicts and for slaves:

[The Chinese covered by the Act] are here ticket-of-leave men. Precisely as, under the Australian law, a convict is allowed to go at large upon a ticket-of-leave, these people are to be allowed to go at large and earn their livelihood, but they must have their tickets-of-leave in their possession . . . . This inaugurates in our system of government a new departure; one, I believe never before practiced, although it was suggested in conference that some such rules had been adopted in slavery times to secure the peace of society.<sup>122</sup>

According to this narrative, Congress’s decision to omit any requirement that an alien carry registration from the Alien Registration Act of 1940 was a deliberate act intended to preserve

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118. *Id.* at 68.

119. *Id.*; *see also id.* at 66 & n.17 (“[T]he regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, ‘the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.’”).

120. *Id.* at 67–68.

121. *Id.* at 68.

122. *Id.* at 71 (alterations in the original).



valued civil liberties. Congress “tr[ied] to steer a middle path” by enacting a registration requirement but

in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against.<sup>123</sup>

The *Hines* opinion thus cast the federal government into the role of protector/enforcer not just with respect to foreign affairs but also with respect to civil liberties. The Court’s analysis with respect to the civil liberties issue in *Hines* focused on a specific difference between the Pennsylvania and federal statutes and suggested an “obstacle preemption” analysis.<sup>124</sup>

The way the *Arizona* majority treats *Hines* is interesting because of its characterization of *Hines* as a field preemption case and its preference for the foreign affairs narrative over the civil rights narrative.<sup>125</sup> The Court’s citations in support of reading *Hines* as a field preemption case speak to the ascendance of the national interest and remoteness of the states’ interests in matters touching on foreign affairs.<sup>126</sup> This analysis is hard to confine to the discrete area of alien

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123. *Id.* at 73–74. A decade after *Hines*, Congress enacted a statute requiring every alien eighteen years of age or older to “at all times carry with him and have in his personal possession” his registration certificate or card. Willful violation of this statute was punishable by a fine of \$100, imprisonment not to exceed thirty days, or both. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 224 (codified as amended at 8 U.S.C. § 1304 (1996)). The registration carrying requirement did not appear to spark controversy in 1952. *See Developments in the Law Immigration and Nationality*, 66 HARV. L. REV. 643, 679–80 (1953). More recently, following 9/11, the federal government again initiated controversial registration rules. The civil rights implications were noted this time. *See Wishnie, supra* note 37, at 1102–03 (noting racial profiling concerns raised by the federal government’s attempt to enlist state and local law enforcement officials to police the NSEERS program).

124. *See Hines*, 312 U.S. at 69–74.

125. *See Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012); *see also id.* at 2529 (Alito, J., concurring in part and dissenting in part) (“Although there is some ambiguity in *Hines*, the Court largely spoke in the language of field pre-emption.”).

126. One opinion cited by the *Arizona* majority characterized *Hines* as a field preemption case in these terms:

If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had,

registration, as opposed to immigration more generally. Indeed the emphasis on the importance of the nation speaking with one voice on immigration echoes throughout the Court's opinion.<sup>127</sup>

On the other hand, the *Arizona* Court's preference for the foreign affairs narrative nearly completely obscured the civil rights aspect of *Hines*.<sup>128</sup> The Court missed a clear opportunity, for Section 3 of S.B. 1070, like the Pennsylvania statute at issue in *Hines*, could be characterized as a state's effort to outpace federal immigration enforcement during times of perceived crisis. In *Hines*, the state sought to add a provision that required immigrants to carry their registration—a provision deliberately left out of the federal legislation.<sup>129</sup> In *Arizona*, the state added a “no probation” provision to the state-law registration crime it created to parallel the federal crime.<sup>130</sup> This, along with the possibility that Arizona would enforce its registration crime more zealously than the federal government

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without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 419 n.11 (2003) (citing *Hines* 312 U.S. at 63); *Arizona*, 132 S. Ct. at 2502 (citing *Garamendi*, 539 U.S. at 419 n.11). *See also* *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (characterizing *Hines* as a case in which state regulation “touch[ed] a field in which the federal interest is so dominant that the federal system (must) be assumed to preclude enforcement of state laws on the same subject”); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2098–99, 2107 (2000) (arguing that “*Hines* may be better understood as a field preemption case because the opinion relied on the uniquely national nature of regulating aliens to hold that state laws on the same subject are displaced”).

127. *E.g.*, *Arizona*, 132 S. Ct. at 2498 (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. . . . 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.” (citations omitted)); *id.* at 2506–07 (“A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice.”).

128. The Court noted that in *Hines*, “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.” *Id.* at 2501. But the Court's inclusion of these facts hardly paints *Hines* as a case involving civil liberties—these details are supplied to demonstrate that Congress made deliberate choices in crafting a “single integrated and all-embracing system.” *Id.* (quoting *Hines*, 312 U.S. at 74). Justice Alito did note the Court's conclusion in *Hines* that Congress's intent was “to protect the personal liberties of law-abiding aliens through one uniform national registration system.” *Id.* at 2529–30 (Alito, J., concurring in part and dissenting in part) (quoting *Hines* 312 U.S. at 74). This was not much more than a passing comment, however. No effort was made to link the civil rights tone of *Hines* to current civil rights issues.

129. *Hines*, 312 U.S. at 59–60.

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

would enforce its own registration crime, was noted by the Court as a way in which Arizona's scheme conflicted with Congress's.<sup>131</sup> But whereas the *Hines* Court saw the conflict created by Pennsylvania's anti-immigrant law as implicating the federal government's role as protector of civil liberties, the *Arizona* Court tepidly noted that the conflicts "simply underscore the reason for field preemption."<sup>132</sup> Rather than focusing on the civil rights concern presented by the state's attempt to outpace federal enforcement, the *Arizona* Court consistently returned the conversation to the potential interference with the federal government's power over foreign affairs.<sup>133</sup>

The avoidance of a civil rights narrative was consistent with the *Arizona* opinion as a whole. The Court, throughout its opinion, declined to reach the civil rights issues that many saw as being at the heart of the case, preferring instead a relatively sanitized preemption analysis focusing on "fields" and "obstacles."<sup>134</sup> Given the centrality of civil rights issues to the debate over the role of state and local governments in immigration enforcement and the presence of civil rights concerns as a basis for the *Hines* Court's holding, the absence of any discussion of these issues in *Arizona* was glaring.

*b. Section 5(C)—criminalizing  
the unauthorized seeking of work—  
held subject to obstacle preemption*

Section 5(C) of S.B. 1070 creates a state criminal prohibition on undocumented immigrants who seek employment where no federal counterpart exists.<sup>135</sup>

Just as the *Arizona* Court used *Hines* to show that it was not drawing on a blank slate with regard to state criminal laws concerning alien registration, the Court used precedent to color its analysis for Section 5(C)'s regulation of the employment of undocumented immigrants. In its 1976 decision in *DeCanas v.*

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131. *Id.* at 2502–03.

132. *Id.* at 2503.

133. *Id.* at 2497–98 (“The Federal Government’s broad, undoubted power over immigration and alien status rests . . . on its inherent sovereign power to control and conduct foreign relations . . .”).

134. *Id.* at 2501.

135. *Id.* at 2503.

*Bica*,<sup>136</sup> the Court upheld a California law imposing sanctions on those who “knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.”<sup>137</sup> The Court rejected the conclusion of the California Court of Appeal that the statute was subject to field preemption.<sup>138</sup>

While affirming the notion that the “[p]ower to regulate immigration is unquestionably exclusively a federal power,” the *DeCanas* Court cautioned that not every state law dealing with immigrants is preempted as a “regulation of immigration.”<sup>139</sup> The Court characterized California’s law as within the state’s “broad authority under [its] police powers to regulate the employment relationship to protect workers within the State” and as “focuse[d] directly upon . . . essentially local problems.”<sup>140</sup> Congress, on the other hand, had shown no more than a “peripheral” interest in regulating the employment of the undocumented.<sup>141</sup> And that subject matter was not necessarily encompassed within the broad framework of “immigration”<sup>142</sup>: “The comprehensiveness of the INA scheme for regulation of immigration and naturalization, without more, cannot be said to draw in the employment of illegal aliens . . . .”<sup>143</sup> Thus *DeCanas* permitted state laws in service of protecting state workers to stand, given Congress’s apparent lack of activity with respect to undocumented workers.

The *Arizona* majority was quick to point out, however, that the “peripheral” interest of Congress in employment of the

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136. 424 U.S. 351 (1976).

137. *Id.* at 352–53.

138. The court of appeal held that “in the area of immigration and naturalization, congressional power is exclusive,” and construed Congress’s failure to include employer sanctions in the INA as a deliberate and intentional aspect of its comprehensive scheme governing immigration. *Id.* at 353–54 (citing *DeCanas v. Bica*, 40 Cal. App. 3d 976, 979 (1974)).

139. *Id.* at 354–55.

140. *Id.* at 356–57.

141. *Id.* at 360.

142. *Id.* at 360 n.8 (“Little aid can be derived from the vague and illusory but often repeated formula that Congress ‘by occupying the field’ has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution. To discover the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history.” (quoting *Hines v. Davidowitz*, 312 U.S. 52, 78–79 (1941) (Stone, J., dissenting))).

143. *Id.* at 359.

undocumented had attained central significance in 1986, when Congress passed the Immigration Reform and Control Act of 1986 (“IRCA”). IRCA, described by the Court as “a comprehensive framework for ‘combating the employment of illegal aliens,’”<sup>144</sup> imposes criminal and civil penalties on employers of unauthorized workers, and civil (but not criminal) penalties on the workers themselves.<sup>145</sup> Given this complete scheme, the Court found that “Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment.”<sup>146</sup>

Given the Court’s description of IRCA as providing a “comprehensive framework” concerning employment of undocumented workers, and given the connection between this subject and the foreign affairs power, it is something of a mystery that the Court did not hold that Section 5(C) was, like Section 3, subject to field preemption.<sup>147</sup> This is especially so given that the Court’s obstacle preemption analysis tracks essentially the same conflict the Court observed with respect to Section 3. “[C]onflict is imminent whenever two separate remedies are brought to bear on the same activity,”<sup>148</sup> wrote the Court in reference to the unavailability of probation as a possible sentence for alien registration crimes under Section 3 of S.B. 1070 despite its availability for the same crimes under federal law. Similarly, even though the Court determined Section 5(C) was an “attempt to achieve one of the same goals as federal law—the deterrence of unlawful employment”—it nonetheless conflicted with federal law because of “a conflict in the method of enforcement.”<sup>149</sup>

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144. *Arizona v. United States*, 132 S. Ct. 2492, 2504 (2012) (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002)).

145. *Id.* IRCA does impose criminal penalties on unauthorized workers who obtain employment by fraud. *Id.*

146. *Id.*

147. The United States argued that Section 5(C) was subject to field preemption and alternatively subject to obstacle preemption. Brief for the United States at 36, *Arizona*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 939048 at \*20 (arguing that IRCA “leaves no room for the imposition of state criminal liability on individual aliens”); *Id.* at 39 (arguing that “[e]ven if IRCA left room for supplemental state measures” Section 5 “conflict[s] with the careful balance Congress struck [in IRCA]”); Oral Argument at 71, *Arizona*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 1425227, at \*71 (“[W]e’re making both a field and a conflict preemption argument here . . .”).

148. *Arizona*, 132 S. Ct. at 2503 (quoting *Wisconsin Dep’t of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986)).

149. *Id.* at 2505.

Yet whereas the Court found that this enforcement conflict “simply underscore[d] the reason for field preemption” of Section 3, the Court eschewed field preemption and relied exclusively on the enforcement conflict to find Section 5(C) subject to obstacle preemption.<sup>150</sup>

While the Court reached opposite results using a similar analysis on Sections 3 and 5(C), the Court was consistent in its avoidance of any discussion of the civil rights implications of both sections. Just as the Court failed in its discussion of Section 3 even to note the civil rights concerns raised by alien registration provisions, and the possibility of their enforcement by anti-immigrant local authorities, the Court turned a blind eye to the civil rights implications of employer and employee sanctions in its discussion of Section 5(C). The Court did give a nod to the humanitarian concerns that prompted Congress to adopt principally employer sanctions in IRCA, noting that Congress’s judgment not to punish unauthorized workers was in part because they “already face[d] the possibility of employer exploitation because of their removable status.”<sup>151</sup> But the Court ignored entirely the civil rights concerns raised by the federal government in its brief.

Prior to IRCA, federal law provided no penalty for an employer of unauthorized workers.<sup>152</sup> During the process of appraising employer sanctions, Congress considered argument and testimony that employer sanctions would lead to employer discrimination against job applicants perceived to be foreign.<sup>153</sup> As a result, IRCA

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150. Some possible reasons the Court did not embrace a field preemption theory with respect to Section 5 are as follows: the Court attempted to temper its holding of field preemption with respect to Section 3, and preserve some area in which the states can legislate; the Court gave some deference to the *DeCanas* precedent; the Court was inhibited from pursuing field preemption due to the presence of an express preemption provision which explicitly permits some state involvement in the field of employment regulation, *see, e.g.*, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1977–81 (2011) (holding Arizona law, providing for suspension or revocation of various licenses of an employer of unauthorized workers, was within the saving clause of IRCA’s express preemption provision); and the Court was reluctant to embrace the field preemption argument of the United States given that the United States failed to argue field preemption in *Whiting*, *see* Brief for the United States as Amicus Curiae Supporting Petitioners, *Whiting*, 131 S. Ct. 1968 (No. 09-115), 2010 WL 3501180 (arguing only express and obstacle preemption).

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

152. *See id.* at 2519–20 (Scalia, J., concurring in part and dissenting in part).

153. *See* H.R. REP. NO. 99-682(I), at 68 (1986), *reprinted in* 1986 U.S.C.A.N. 5649, 5672; Darcy M. Pottle, *Federal Employer Sanctions as Immigration Federalism*, 16 MICH. J. RACE & L.

contained antidiscrimination provisions “because of the concern . . . that people of ‘foreign’ appearance might be made more vulnerable by the imposition of sanctions . . . [and] that some employers may decide not to hire ‘foreign’ appearing individuals to avoid sanctions.”<sup>154</sup> IRCA’s antidiscrimination provisions made it unlawful to engage in employment discrimination on the basis of national origin or citizenship status, required the President to appoint a “Special Counsel for Immigration-Related Unfair Employment Practices” to investigate and bring complaints, and provided for hearings before administrative judges to be assigned by the attorney general.<sup>155</sup> IRCA also required the General Accounting Office to conduct three annual studies to determine whether widespread discrimination was occurring as a result of employer sanctions.<sup>156</sup> The antidiscrimination provisions of IRCA were augmented in 1990<sup>157</sup> and again in 1996.<sup>158</sup>

In its brief, the United States referred to these antidiscrimination provisions in describing Congress’s “comprehensive federal scheme governing the employment of aliens.”<sup>159</sup> The United States argued that Section 5(C) of S.B. 1070, which criminalizes an unauthorized worker’s mere act of applying for or soliciting work, conflicted with Congress’s antidiscrimination laws that forbid any pre-hiring inquiry into a worker’s employment authorization in order to prevent

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99, 136–37 (2010); see generally Steven M. Kaplan, *The Employer Sanctions Provision of IRCA: Deterrence or Discrimination?*, 6 GEO. IMMIGR. L.J. 545, 549–50 (1992) (concluding that IRCA resulted in widespread discrimination); Sarah M. Kendall, *America’s Minorities Are Shown the “Back Door” . . . Again: The Discriminatory Impact of the Immigration Reform and Control Act*, 18 HOUS. J. INT’L L. 899, 904–06 (1996) (indicating a pattern of widespread discrimination against persons perceived as alien as a direct result of IRCA’s implementation).

154. H.R. REP. NO. 99-1000, at 87 (1986) (Conf. Rep.), reprinted in 1986 U.S.C.C.A.N. 5840, 5842.

155. Act of Nov. 6, 1986, Pub. L. No. 99-603, § 102(a), 100 Stat. 3374, 3375–76.

156. *Id.* § 101(a)(1), 100 Stat. at 3369–70.

157. Immigration Act of 1990, Pub. L. No. 101-649, § 531, 104 Stat. 5054; see Kaplan, *supra* note 153, at 550–52.

158. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, § 404(d)(4)(B), 110 Stat. 3009-664 (8 U.S.C. § 1324a note), cited in Brief for the United States at 41, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 939048, at \*41.

159. Brief for the United States at 34, 37 n.22, 40–41, *Arizona*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 939048 at \*34, \*37 n.22, \*40–41.

discrimination in hiring.<sup>160</sup> Yet the *Arizona* Court did not note these or any other civil rights concerns with Section 5(C).<sup>161</sup> Instead, the Court merely found that Arizona's employee sanctions conflicted with Congress's deliberate omission of criminal employee sanctions from its comprehensive scheme.

Just as the Court in its discussion of Section 3 avoided readily available avenues for engaging the civil rights narrative, so did it remain reticent even though similar opportunities were presented to the Court with respect to Section 5(C). The Court completely ignored Congress's concern for civil liberties when it crafted its comprehensive statutory scheme governing unauthorized employment. But congressional concern for protecting civil liberties was not irrelevant in *Hines* and should not have been in *Arizona* either. Here again the Court missed the forest for the fields and obstacles.

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160. *Id.* at 40–41. While the congressional scheme was aimed at preventing discrimination, there is strong evidence that the anti-discrimination provisions were not effective. *See* Kaplan, *supra* note 153, at 554–55 (1992) (concluding the IRCA employer sanctions caused “widespread” discrimination); Kendall, *supra* note 153.

161. There are, of course, other arguments not made by the United States that Section 5(C) would result in civil rights violations. While “applying for work” may occur in a private place, Section 5(C) also makes it a crime for an unauthorized worker to “solicit work in a public place or perform work as an employee or independent contractor in this state.” Enforcement of these criminal provisions raises racial profiling, selective enforcement, and First Amendment concerns, particularly for day laborers. *See* Kristina M. Campbell, *The High Cost of Free Speech: Anti-Solicitation Ordinances, Day Laborers, and the Impact of “Backdoor” Local Immigration Regulations*, 25 GEO. IMMIGR. L.J. 1, 1 (2010) (“While many day laborers are lawfully present or have authorization to work in the United States, some people assume day laborers to be ‘illegal aliens’ due to the high-profile nature of their job search—which usually involves waiting on corners in front of ‘big-box’ stores or in nearby labor centers for a potential employer to offer them work . . . . As such, day laborers are a visible and vulnerable population, subject to discriminatory treatment on the basis of real or perceived immigration status on a daily basis.”); *id.* at 3–22 (analyzing cases addressing day laborers’ First Amendment right to solicit employment); *Id.* at 26–30 (discussing racial profiling of day laborers); Wishnie, *supra* note 37, at 1104 (“Even before the September 11 attacks, INS regularly engaged in racial profiling and selective enforcement based on ethnic appearance. . . . [Especially in] worksite raids, federal agents [continue to] single out worksites . . . based on the presence of ‘Spanish music’ or workers of ‘Hispanic appearance,’ and target individual Latinos—from amidst ethnically diverse workforces—for questioning, arrest, and prosecution.”).



*c. Section 6—permitting Arizona officers  
to effect civil immigration arrests—  
held subject to obstacle preemption*

Section 6 of S.B. 1070 purported to expand state arrest power to include arrests based on “probable cause to believe [a person] has committed any public offense that makes [him or her] removable from the United States.”<sup>162</sup>

Five Justices agreed Section 6 was subject to “obstacle” preemption.<sup>163</sup> At its core, the question presented by Section 6 was whether state officials can make *civil* immigration arrests.<sup>164</sup>

The majority first focused on the statutory structure that Congress put in place for the arrest of suspected civil immigration violators.<sup>165</sup> Three threads run through this analysis of Congress’s statutory structure. First, Congress has directed with specificity the narrow circumstances under which immigration arrests may occur.<sup>166</sup> Second, Congress has expressed through its legislative enactments a concern for the competence of nonfederal officials to enforce federal immigration law.<sup>167</sup> Third, the statutory structure of the Immigration and Nationality Act reflects a determination that immigration enforcement requires the Nation to speak “with one voice”—the voice of the federal government.<sup>168</sup>

The majority first noted that Congress’s “statutory structure instructs when it is appropriate to arrest an alien during the removal process.”<sup>169</sup> Congressional enactments limit the arrest power of immigration officials to two circumstances.<sup>170</sup> First, immigration officials may execute administrative arrest warrants issued at the discretion of the attorney general.<sup>171</sup> Second, immigration officials

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162. ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2011).

163. *Arizona*, 132 S. Ct. at 2497, 2507.

164. *Id.* at 2498.

165. *Id.* at 2505–07.

166. *Id.*

167. *Id.*

168. *Id.* at 2507 (citing *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 348 (2005)).

169. *Id.* at 2505.

170. *Id.* at 2505–06.

171. *Id.* (citing 8 U.S.C. § 1226(a) (2006)). The administrative arrest warrants authorized by INA § 236 are not the equivalent of criminal arrest warrants. The statute sets forth no standard for the issuance of such warrants. 8 U.S.C. § 1226(a) (“On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed

may make warrantless arrests for civil immigration violations, but only where the person is “likely to escape before a warrant can be obtained.”<sup>172</sup>

Contrasting Section 6 of S.B. 1070 with the statutory structure of the Immigration and Nationality Act, the Court found Arizona’s statute to be in conflict. “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,” the majority wrote, noting that Section 6 imported neither the warrant requirement nor the likelihood of flight requirement for warrantless arrests.<sup>173</sup> “This is not the system Congress created,” concluded the majority.<sup>174</sup>

The Court next observed that Congress’s statutory structure carved a specific niche for state law enforcement out of its overall immigration enforcement scheme. Most notably, Congress allowed for formal agreements—known as 287(g) agreements because of their statutory source<sup>175</sup>—between the executive branch and state or local law-enforcement agencies, effectively deputizing those agencies’ officers to enforce federal immigration law.<sup>176</sup> Here the

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from the United States.”). There is no requirement that such warrants be based upon sworn testimony, or issued by a neutral magistrate. *See* *El Badrawi v. United States*, 787 F. Supp. 2d 204, 230 & n.17 (D. Conn. 2011) (granting summary judgment on false arrest claim to plaintiff who had been subject of administrative warrant); *El Badrawi v. Dept. of Homeland Sec.*, 579 F. Supp. 2d 249, 275–76 (D. Conn. 2008) (treating arrest pursuant to administrative warrant as warrantless arrest under Connecticut tort law and federal constitutional law for purposes of false arrest claim).

172. *Arizona*, 132 S. Ct. at 2506 (quoting 8 U.S.C. § 1357(a)(2) (2006)). The Court did not explicitly note the other important requirement of § 1357—that an immigration official making a warrantless arrest have “reason to believe” the arrestee has violated federal immigration law. Courts have construed the “reason to believe” requirement as importing a probable cause requirement in order to satisfy the Fourth Amendment’s prohibition against unreasonable seizures. Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1608 & n.229 (2010).

173. *Arizona*, 132 S. Ct. at 2506.

174. *Id.* In its discussion, the Court noted that immigration officials executing warrants are required to have “received training in the enforcement of immigration law.” *Id.* Section 6 of course did not include this requirement, and also did not require consultation between state and federal officials. The majority expressed concern that Section 6 allowed state officers to make immigration arrests “without any input from the Federal Government about whether an arrest is warranted in a particular case. This would allow [Arizona] to achieve its own immigration policy.” *Id.*

175. Immigration and Nationality Act, § 287(g), 66 Stat. 233 (1952) (codified as amended 8 U.S.C. § 1357(g) (2006)).

176. *Arizona*, 132 S. Ct. at 2506.

Court paid special attention to the competency concerns evident in Congress's statutory structure, noting that 287(g) agreements not only require nonfederal officers to be adequately trained to carry out immigration duties, but also mandate that those officers be subject to the federal government's "direction and supervision."<sup>177</sup>

After noting the need for immigration decisions to be "vested solely in the Federal Government,"<sup>178</sup> the Court discussed a statutory provision relied on by Arizona permitting state and local law enforcement to "cooperate with the Attorney General in the identification, apprehension, detention or removal" of immigration violators.<sup>179</sup> No "coherent" understanding of this provision, wrote the Court, would encompass the "unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government."<sup>180</sup> The Court endorsed examples of "cooperation" such as a joint state-federal task force or the provision by state officers of "operational support in executing a warrant."<sup>181</sup> Section 6, vesting broad unilateral arrest authority in Arizona officials, could not be justified as state-federal "cooperation" as envisioned by Congress and delineated in its statutory structure.

Here again the Court's opinion dodged the civil rights implications of the debate. Following the passage of S.B. 1070, commentators assailed the statute, and Section 6 in particular, as likely to promote racial profiling in Arizona.<sup>182</sup> But the Court paid no

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177. *Id.* (citing 8 U.S.C.A. § 1357(g)(2)–(3)).

178. *Id.* at 2507.

179. 8 U.S.C. § 1357(g)(10).

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

181. *Id.* In discussing what might constitute "cooperation" under 8 U.S.C. § 1357(g)(10), the majority explicitly mentioned immigration detainers. The Court's citation to immigration detainers as an example of state officers assisting federal immigration officials is discussed below. *See infra* notes 339–343 and accompanying text.

182. *E.g.*, Kristina M. Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, 14 HARV. LATINO L. REV. 1, 2 (2011); Robert F. Castro, *Xenomorph!! Indians, Latina/os, and the Alien Morphology of Arizona Senate Bill 1070*, 46 HARV. C.R.-C.L. L. REV. 1, 3–4 (2011); Andrea Christina Nill, *Latinos and S.B. 1070: Demonization, Dehumanization, and Disenfranchisement*, 14 HARV. LATINO L. REV. 35, 49 (2011).

attention to the issue, despite it being presented in several of the amicus briefs filed in the *Arizona* case.<sup>183</sup>

Justices Scalia, Thomas, and Alito dissented from the Court's decision striking down Section 6. Each believed that local arrests were justifiable as "cooperation" with the federal government.<sup>184</sup>

*d. Section 2(B)—“Show Me Your Papers”  
—held not facially preempted*

Section 2(B) of S.B. 1070 requires Arizona officers to make reasonable attempts to ascertain the immigration status of those stopped, detained, or arrested, and in the case of arrested persons, requires immigration status to be determined before release of the arrestee.<sup>185</sup> The Court held Section 2(B) not facially preempted.

The Court's discussion of Section 2(B) began by noting some "limits" to the requirements of Section 2(B), two of which involved civil rights. The first "limit" forbids Arizona officers from considering "race, color or national origin," except to the extent permitted by the United States or Arizona Constitutions.<sup>186</sup> The second "limit" directs Arizona officers to implement S.B. 1070 so as to "protect[] the civil rights of all persons and respect[] the privileges and immunities of United States citizens."<sup>187</sup>

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183. *E.g.*, Brief of Argentina, et al. at 28–35, *Arizona*, 132 S. Ct. 2492 (No. 11-182); Brief of Amici Curiae Arizona Attorneys for Criminal Justice et al., at 21–23, *Arizona*, 132 S. Ct. 2492 (No. 11-182); Brief of Former Arizona Attorneys General Terry Goddard and Grant Woods, et al. at 14–20, *Arizona*, 132 S. Ct. 2492 (No. 11-182). In part, this was due to the strategy of the United States. The United States omitted racial profiling from its brief and disclaimed the issue at oral argument. *See* Transcript of Oral Argument at 33, 45, *Arizona*, 132 S. Ct. 2492 (No. 11-182). Nonetheless, Solicitor General Verrilli brought in the profiling argument through a discussion of *Hines v. Davidowitz*, 312 U.S. 52 (1941), and the concern the *Hines* Court had for "harassment." Transcript of Oral Argument at 45–47, *Hines*, 312 U.S. 52 (No. 22). Of course, as we have seen, the Court overlooked the civil rights aspects of *Hines*. *See supra* notes 129–132 and accompanying text.

184. *Arizona*, 132 S. Ct. at 2525 (Alito, J., concurring in part and dissenting in part); *id.* at 2512 (Scalia, J., concurring in part and dissenting in part); *id.* at 2522 (Thomas, J., concurring in part and dissenting in part). The dissenters offered additional reasons for their disagreement as to Section 6. For Justice Scalia, whose dissent will be discussed in greater detail below, *see infra* Part II.C.3, the "most important point is that . . . 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." *Id.* at 2516–17 (Scalia, J., concurring in part and dissenting in part).

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

186. *Arizona*, 132 S. Ct. at 2508 (majority opinion) (citing ARIZ. REV. STAT. ANN. § 11-1051(B)).

187. *Id.* (citing ARIZ. REV. STAT. ANN. § 11-1051(L)).

The reference to the “limits” of S.B. 1070 was as far as the *Arizona* Court went in addressing the civil rights concerns raised by S.B. 1070 and its opponents.<sup>188</sup> The Court did not engage in a discussion of racial profiling but instead merely quoted the supposed safeguards embedded in S.B. 1070—safeguards amounting to nothing more than a directive to Arizona officers to follow the United States and Arizona Constitutions.<sup>189</sup> That the Court quoted these arguably empty safeguards<sup>190</sup> in its discussion of the only provision of S.B. 1070 it upheld against constitutional challenge signaled the Court’s overall lack of concern for the civil rights issues presented in this case.<sup>191</sup>

The Court upheld Section 2(B) principally because it viewed the statutory provision as requiring nothing more than communication between state and federal officials.<sup>192</sup> “Consultation between federal and state officials is an important feature of the immigration system,” the Court wrote, and then catalogued statutes it believed indicated Congress’s encouragement of state reporting of suspected immigration violators.<sup>193</sup> Despite the argument of the United States that Section 2(B) might interfere with the executive branch’s enforcement priorities,<sup>194</sup> the Court held that the statutory scheme

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188. *Id.* at 2507–08.

189. *Id.* at 2508.

190. *See, e.g.*, Jennifer R. Phillips, *Arizona’s S.B. 1070 and Federal Preemption of State and Local Immigration Laws: A Case for a More Cooperative and Streamlined Approach to Judicial Review of Subnational Immigration Laws*, 85 S. CAL. L. REV. 955, 996 (2012) (arguing that section 11-1051(L) “amounts to mere rhetoric that does little to effectively combat the dangers of racial profiling and enforcement of the law based on arbitrary judgments of race and national origin”); David A. Selden, Julie A. Pace & Heidi Nunn-Gilman, *Placing S.B. 1070 and Racial Profiling into Context, and What S.B. 1070 Reveals About the Legislative Process in Arizona*, 43 ARIZ. ST. L.J. 523, 525–43 (2011) (tracing the history of the provision of S.B. 1070 relating to racial profiling, noting its roots in segregationist rhetoric, and arguing the “anti-racial profiling” provision is “deliberately murky”).

191. *Arizona*, 132 S. Ct. at 2507–10.

192. *Id.* at 2508.

193. *Id.* (citing 8 U.S.C. § 1357(g)(10)(A) (2006); 8 U.S.C. § 1644).

194. *Id.*; Brief for the United States at 16, *Arizona*, 132 S. Ct. 2492 (No. 11-182), 2012 WL 939048, at \*13 (“By insisting indiscriminately on enforcement in all cases, and requiring state and local officers (whenever practicable) to verify the immigration status of everyone they stop or arrest if there is reasonable suspicion that the person is unlawfully present, Section 2 forbids officers—on pain of civil penalties—from looking to the lead of federal officials and adhering to the enforcement judgments and discretion of the federal Executive Branch.”).

“leaves room for a policy requiring state officials to contact ICE as a routine matter.”<sup>195</sup>

The Court next addressed the argument that Section 2(B) might result in the prolonged detention of persons “for no reason other than to verify their immigration status.”<sup>196</sup> The majority acknowledged this would be a constitutional “concern.”<sup>197</sup> But, applying a narrowing construction, the Court held that Section 2(B) “could be read to avoid these concerns.”<sup>198</sup> If Section 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 Court wrote, it would survive preemption, because of the Court’s prior conclusion that the communication required by Section 2(B) was not inconsistent with the statutory structure of the INA.<sup>199</sup>

The Court thus upheld a narrowly construed Section 2(B), holding the status check requirement valid, provided that it does not result in prolonged detention.<sup>200</sup>

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195. *Arizona*, 132 S. Ct. at 2508.

196. *Id.* at 2509.

197. *Id.* The Fourth Amendment issue raised by prolonged detention is discussed below. *See infra* Part III.C.1.

198. *Arizona*, 132 S. Ct. at 2509.

199. *Id.* Because it avoided the prolonged detention issue, the Court explicitly acknowledged that its opinion “does not foreclose other preemption and constitutional challenges to the law *as interpreted and applied* after it goes into effect.” *Id.* at 2510 (emphasis added).

200. One possibility raised by this holding is that state officials would seek to ground prolonged detention in reasonable suspicion that a detainee has committed a federal immigration *crime*. This in turn raises the question of whether state officials have the authority to enforce criminal immigration laws. Here as elsewhere, the Court’s opinion as to “inherent authority” was ambiguous, leaving the issue undecided: “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.” *Id.* at 2509 (citing *United States v. Di Re*, 332 U.S. 581, 589 (1948); *Gonzales v. Peoria*, 722 F.2d 468, 475–76 (9th Cir. 1983), *overruled on other grounds in* *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999)).

There is no way to know whether with this sentence the Court left two questions unanswered or one question with two alternative answers. By its citations to two cases suggesting the authority of state officers to arrest for federal crimes, *Di Re* and *Gonzales*, one might reasonably imply the only question remaining open is whether states’ inherent authority to prolong detention based on reasonable suspicion of a federal immigration *crime* has been preempted by Congress. But another possible reading is that the *Arizona* majority leaves open the antecedent question of whether the states actually possess *any* inherent authority to enforce federal immigration crimes.

These questions, however, including the question of the correct reading of this sentence from the majority opinion, are beyond the scope of this Article.

## 2. Fourth Amendment Concerns with Prolonged Detention to Investigate Immigration Status

Much of the Court's opinion with respect to Section 2(B), which was held not preempted, was devoted to the possible Fourth Amendment issues attendant to Arizona's "show me your papers" law. The implications of that discussion will be far reaching.<sup>201</sup>

As noted above, the possibility presented by Section 2(B)—that state officers would subject individuals to prolonged detention "for no reason other than to verify their immigration status"<sup>202</sup>—was not sufficiently demonstrated by the record for the majority to conclude that prolonged detention would in fact occur and would constitute an obstacle to Congress's immigration enforcement scheme. The majority was quick to note, however, that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns."<sup>203</sup> The cases cited indicate that the Fourth Amendment was the source of these "constitutional concerns."<sup>204</sup> And the majority's suggestion that Arizona could avoid such concerns by not prolonging detention to pursue the immigration status verification required by Section 2(B), as well as the concluding note that the *Arizona* decision "does not foreclose other preemption and constitutional challenges to the law as interpreted and applied,"<sup>205</sup> reveals the depth of the majority's concern that prolonged detention would violate the Fourth Amendment.

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201. *See supra* Section II.C.1.d.

202. *Arizona*, 132 S. Ct. at 2509.

203. *Id.* (citing *Arizona v. Johnson*, 555 U.S. 323, 333 (2009); *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)).

204. The portion of *Arizona v. Johnson* presumably referenced by the majority states:

A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.

*Johnson*, 555 U.S. at 333 (citations omitted). The majority likewise quoted *Caballes* for the proposition that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Caballes*, 543 U.S. at 407.

205. *Arizona*, 132 S. Ct. at 2510.

Of the dissenters, Justices Alito and Scalia both recognized that prolonged detention would raise Fourth Amendment concerns,<sup>206</sup> with Justice Alito addressing the issue by means of an extended hypothetical. Justice Alito’s opinion supposes that a police officer, during a traffic stop for a speeding violation, “acquires reasonable suspicion to believe that the driver entered the country illegally”—a federal crime.<sup>207</sup> While acknowledging that absent the acquisition of reasonable suspicion, the traffic stop might “become unlawful if . . . prolonged beyond the time reasonably required to complete that mission,” Justice Alito opined that the officer’s acquisition of reasonable suspicion “that [the driver] committed a different crime” would justify extending the detention “for a reasonable time to verify or dispel that suspicion.”<sup>208</sup> The “length and nature” of this additional investigation must remain reasonable under the Fourth Amendment, Justice Alito cautioned, for “[a]n investigative stop, if prolonged, can become an arrest and thus require probable cause.”<sup>209</sup>

Given his conclusion that state officers could, consistent with the Fourth Amendment, reasonably prolong detention upon acquiring reasonable suspicion or probable cause of criminal immigration violations,<sup>210</sup> Justice Alito concluded that “[i]f properly implemented, § 2(B) should not lead to federal constitutional violations, but there is no denying that enforcement of § 2(B) will multiply the occasions on which sensitive Fourth Amendment issues

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206. Justice Scalia, while dismissing the Fourth Amendment discussion as dicta “hav[ing] nothing to do with this case,” nonetheless acknowledged that “[o]f course, any investigatory detention, including one under § 2(B), may become an ‘unreasonable . . . seizur[e],’ if it lasts too long.” *Id.* at 2516 (Scalia, J., concurring in part and dissenting in part) (quoting U.S. CONST. amend. IV) (citing *Caballes*, 543 U.S. at 407). Justice Thomas did not address the Fourth Amendment issue in his discussion of Section 2(B). *See id.* at 2522–23 (Thomas, J., concurring in part and dissenting in part).

207. *Id.* at 2528 (Alito, J., concurring in part and dissenting in part) (citing 8 U.S.C. § 1325(a) (2006)).

208. *Id.* at 2528–29 (citing *Caballes*, 543 U.S. at 407; *Muehler v. Mena*, 544 U.S. 93, 101 (2005)).

209. *Id.* at 2529 (citing *Caballes*, 543 U.S. at 407). Justice Alito noted that moving the suspect from the site of the traffic stop, or “forcibly remov[ing] a person from his home or other place in which he is entitled to be and transport[ing] him to the police station” would transform the investigative stop into an arrest, requiring probable cause. *Id.* (quoting *Hayes v. Florida*, 470 U.S. 811, 816 (1985)).

210. This conclusion, of course, depends on whether state officers have authority to detain suspects for federal crimes—a threshold question Justice Alito acknowledged and answered in the affirmative. *See id.*



will crop up.”<sup>211</sup> To avoid such occasions, Justice Alito recommended that both the federal and state governments issue guidance to officers, and that officers be provided with a “nonexclusive list containing forms of identification sufficient . . . to dispel any suspicion of unlawful presence.”<sup>212</sup>

### 3. Justice Scalia’s Inherent Authority Argument

During the litigation over Arizona’s S.B. 1070, discussed above, the Ninth Circuit addressed whether permitting State officers to effect warrantless arrests based on probable cause for a civil immigration violation was preempted by federal law. The first step in the court’s inquiry was determining whether “arresting immigrants for civil immigration violations” is “a field which the states have traditionally occupied.”<sup>213</sup> The court found it was not<sup>214</sup> and went on to hold explicitly that states have no inherent authority to enforce the civil provisions of federal immigration law.<sup>215</sup> By contrast, the Tenth Circuit had upheld an arrest by local police based solely on immigration status, holding that federal immigration law did not preempt any “preexisting state or local authority to arrest individuals violating federal immigration laws.”<sup>216</sup>

“Inherent authority,” then, was expected to be a major part of the Court’s decision. Yet, despite the issue having been fairly joined in the parties’ briefing,<sup>217</sup> the majority opinion barely touched the

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211. *Id.*

212. *See id.* Here, Justice Alito appears to have conflated “unlawful presence” with criminal activity. *Cf. id.* at 2505 (majority opinion) (“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.”) (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)).

213. *United States v. Arizona*, 641 F.3d 339, 348 (9th Cir. 2011), *aff’d in part, rev’d in part and remanded*, 132 S. Ct. 2492 (2012).

214. *Id.* at 361.

215. *Id.* at 362. The court emphasized the federal statutes which authorize state and local officers to enforce immigration laws and found that Congress had permitted limited state and local involvement but preempted the remainder of the field. *Id.* at 361–66.

216. *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999). It does not appear that the issue of whether such local arrests exceeded Oklahoma’s police power was raised—indeed, the only issue addressed in the opinion is whether Federal law preempted State authority. *Id.*

217. Arizona argued throughout that state officers have inherent authority to enforce both criminal and civil immigration laws. In response, the United States argued that “Arizona has no inherent power to impose criminal punishment for violation of a duty owed to the federal government” and that whatever inherent authority the states have with respect to immigration is

issue. The majority opinion did say that “[t]he problems posed to [Arizona] by illegal immigration must not be underestimated.”<sup>218</sup> Yet the majority opinion scrupulously avoided any reference to inherent authority and never referred to Arizona as a sovereign government.<sup>219</sup> Justice Scalia, in his dissent, discussed inherent authority.<sup>220</sup>

Justice Scalia’s dissent began and ended with the proposition that each state, as an independent sovereign, has its own “inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress.”<sup>221</sup> The opinion caused immediate outrage among commentators who seized upon this passage from Justice Scalia’s dissent:

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,

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limited to cooperation with federal enforcement. Brief for the United States at 27–31, 55 n.33, *Arizona*, 132 S. Ct. 2492 (No. 11-182), 2012 WL 939048, at \*17–18, \*29. At oral argument, Paul Clement (arguing for Arizona) never uttered the phrase “inherent authority,” or even “police power.” Solicitor General Verrilli, true to the brief for the United States, argued that Section three was preempted in part because “there is no state police power interest in that Federal registration relationship.” Oral Argument at 58, *Arizona*, 132 S. Ct. 2492 (No. 11-182).

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

219. *Cf. id.* at 2498 (finding federal government’s authority to control immigration stems in part from its “inherent power as sovereign to control and conduct relations with foreign nations”). The majority opinion only referred to state “police power” in a general way at the outset of its preemption analysis, *id.* at 2501, and one other time when citing its precedent in *De Canas v. Bica*, 424 U.S. 351 (1976), as recognizing that “States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.” *Arizona*, 132 S. Ct. at 2501, 2503. The latter reference, of course, was a far cry from a declaration that states have inherent authority to enforce federal immigration laws.

While the majority opinion failed to address “inherent authority” directly, it seems at least true to say the *Arizona* majority did not share the vision of inherent authority expressed in the 2002 OLC memorandum, of the states as sovereign entities akin to foreign nations. After all, the United States is not capable of “preempting” the police power of Canada. The *Arizona* majority, however, had no difficulty concluding that *whatever* authority Arizona has over civil immigration violations is subordinate to federal authority in that realm and must not conflict with or pose an obstacle to federal authority. The *Arizona* opinion did not go so far, however, as the Ninth Circuit had when it explicitly rejected the notion that Arizona possessed any inherent authority to enforce civil immigration laws. *United States v. Arizona*, 641 F.3d 339, 362 (9th Cir. 2011), *aff’d in part, rev’d in part and remanded*, 132 S. Ct. 2492 (2012).

220. *Arizona*, 132 S. Ct. at 2511 (Scalia, J., concurring in part and dissenting in part).

221. *Id.*

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.<sup>222</sup>

But Justice Scalia's reliance on slavery-era precedent did not stop with a single reference to southern states excluding free African Americans. His dissent was rife with "authorities" tracing whatever validity they once had to the institution of slavery.<sup>223</sup> Justice Scalia began with, ended with, and entirely depended upon a vision of the Constitution that is, quite simply, the proslavery Constitution of the antebellum Republic. The crux of the problem is that the authorities relied upon by Justice Scalia cannot be disentangled from their proslavery roots; they cannot be said to support an "immigration" power in the states, since their purpose was partly to broker and perpetuate the compromise between the slaveholding and free states in the first century of the Nation's existence.

Justice Scalia first held the power to control immigration arises as an inherent aspect of state sovereignty: "[The] power to exclude has long been recognized as inherent in sovereignty."<sup>224</sup> Justice Scalia then pointed to several provisions of the Constitution he argued were put in place to protect this sovereign "immigration" power of the states.<sup>225</sup> For example, Justice Scalia cited the

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222. *Id.* at 2512 (citing Neuman, *The Lost Century of American Immigration (1776–1875)*, 93 COLUM. L. REV. 1833, 1835, 1841–80 (1993)); *see also* Ian Millhiser, *Justice Scalia Cites Pro-Slavery Laws Excluding 'Freed Blacks' To Justify His Anti-Immigrant Opinion*, THINKPROGRESS (June 26, 2012), <http://thinkprogress.org/justice/2012/06/26/506191/justice-scalia-cites-pro-slavery-laws-excluding-freed-blacks-to-justify-his-anti-immigrant-opinion/> (criticizing the cited passage in Justice Scalia's dissent); Adam Serwer, *Scalia Cites Slavery-Era Laws in Immigration Dissent*, MOTHER JONES (June 25, 2012), <http://www.motherjones.com/mojo/2012/06/immigration-law-dissent-scalia-reference-slavery-era-laws> (describing the cited passage in Justice Scalia's dissent as one that "stood out from the rest"); Jeffrey Toobin, *That's Just Nino: Scalia's Arizona Dissent*, NEW YORKER (June 26, 2012), <http://www.newyorker.com/online/blogs/comment/2012/06/antonin-scalia-dissent-immigration-arizona.html> (noting that the cited passage's "invocation of that ugly chapter in American history suggests at a minimum, a loss of perspective"). "Harkening back to the 'good old days' of the law of slavery impeaches his position," commented Professor Gabriel Chin. Ethan Bronner, *A Dissent by Scalia Is Criticized as Political*, N.Y. TIMES (June 27, 2012), <http://www.nytimes.com/2012/06/28/us/scalias-immigration-dissent-is-criticized-as-political.html>.

223. *Cf. Arizona*, 132 S. Ct. at 2511–22 (Scalia, J., concurring in part and dissenting in part).

224. *Id.* at 2511.

225. *Id.* at 2511–12.

Privileges and Immunities Clause<sup>226</sup> as promoting the power of the states to exclude.<sup>227</sup> Whereas under the Articles of Confederation all “inhabitants” of the states enjoyed the privileges and immunities of the “free citizens in the several States,” under the Constitution the privileges and immunities were reserved for *citizens* of the states.<sup>228</sup> Of course, the reality is that this state “immigration” power was used to regulate the African American population in the states. State citizenship was unavailable to African Americans in the slave states and ultimately, after *Dred Scott*,<sup>229</sup> even to free African Americans in the free states.<sup>230</sup> The “immigration” power embodied in the Privileges and Immunities Clause was required, after the Civil War, to be undone with the passage of the Civil Rights Act of 1866 and the Fourteenth Amendment, which established a national citizenship to which African Americans were granted access, and placed in the national government the responsibility to protect the privileges and immunities pertaining to that national citizenship.<sup>231</sup>

Justice Scalia also cited the Export Clause of the Constitution<sup>232</sup> as “an acknowledgment of the States’ sovereign interest in protecting their borders.”<sup>233</sup> “[T]he States could exclude . . . dangerous or unwholesome goods,” he wrote.<sup>234</sup> But the importance of the Export Clause was not in this power—for which the relationship to immigration is uncertain and not clarified by Justice Scalia—but in its identity as one provision among many in the great compromise between the slaveholding and free states.<sup>235</sup>

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226. U.S. CONST. art. IV, § 2, cl. 1.

227. *Arizona*, 132 S. Ct. at 2511–12 (Scalia, J., concurring in part and dissenting in part).

228. *Id.* at 2512.

229. *Scott v. Sandford* (*Dred Scott*), 60 U.S. 393 (1856).

230. GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 36 (1996).

231. ROBERT J. KACZOROWSKI, *THE NATIONALIZATION OF CIVIL RIGHTS: CONSTITUTIONAL THEORY AND PRACTICE IN A RACIST SOCIETY 1886–1883* 101–10 (Harold Hyman & Stuart Bruchey eds., 1987); Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693, 729 n.178 (2012).

232. U.S. CONST. art. I, § 10, cl. 2 (“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s inspection Laws.”).

233. *Arizona*, 132 S. Ct. at 2512 (Scalia, J., concurring in part and dissenting in part).

234. *Id.*

235. See Erik M. Jensen, *The Export Clause*, 6 FLA. TAX REV. 1, 3 (2003) (arguing that “[w]ithout the protection the Export Clause provided to exporting states, particularly in the South, the Constitutional Convention would have imploded.”); *id.* at 10–14 (detailing the connection

Perhaps most appalling of all was Justice Scalia's reference to Article I, Section 9 of the Constitution. In this provision, Justice Scalia found acknowledgment of an immigration power in both the federal government and the states (subject to federal restriction): "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . . ." <sup>236</sup> Justice Scalia did not refer to this constitutional provision by its common appellation and did not discuss the importance of this clause—the Slave Trade Clause—in brokering the constitutional compromise between slaveholding and free states. <sup>237</sup>

After setting forth his general argument that the immigration power is inherent in state sovereignty, resting upon the historical authorities discussed above, Justice Scalia considered the four sections of S.B. 1070 in turn, finding each provision to be a legitimate exercise of Arizona's sovereign "power to exclude" not preempted by federal legislation. <sup>238</sup>

Justice Scalia concluded with a vitriolic diatribe against the federal immigration enforcement effort. The last decade saw an "increasing tide of illegal border crossings into Arizona," which Justice Scalia suggested was the result of "unwise" targeting of funds for immigration enforcement. <sup>239</sup> Justice Scalia then railed against the Obama administration's recently announced plan to grant deferred action to so-called "Dreamers"—noncitizens brought to the United States before they turned sixteen who qualify for the program by demonstrating, *inter alia*, participation in school or employment and

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between slavery and the opposition of southern states in the Constitutional Convention to export taxes); see also Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93, 121–22 (1989) (discussing the Export Clause in terms of the North-South slavery compromise, while noting that Southern delegates were concerned that exports produced by slave states would be taxed as a means of "in effect tax[ing] slavery"); *id.* at 126 (arguing the "Framers of the Constitution . . . actively protected Southern interests in slavery by their adoption of the 1808 clause, the fugitive slave clause, and the export tax clauses, and . . . intended to protect slavery passively through the three-fifths clause").

236. *Arizona*, 132 S. Ct. at 2514 (Scalia, J., concurring in part and dissenting in part).

237. See PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 22–26 (1981).

238. *Arizona*, 132 S. Ct. at 2511–22 (Scalia, J., concurring in part and dissenting in part).

239. *Id.* at 2520–21.

the absence of a criminal record<sup>240</sup>—questioning President Obama’s statement that it was “the right thing to do.”<sup>241</sup>

“[T]here has come to pass, and is with us today,” Justice Scalia concluded,

the specter that Arizona and the States that support it predicted: A Federal Government that does not want to enforce the immigration laws as written, and leaves the States’ borders unprotected against immigrants whom those laws would exclude. So the issue is a stark one. Are the sovereign States at the mercy of the Federal Executive’s refusal to enforce the Nation’s immigration laws?<sup>242</sup>

Justice Scalia’s final rhetorical question brought the argument full circle. “Would the States conceivably have entered into the Union if the Constitution itself contained the Court’s holding?”<sup>243</sup> The answer to this question may well be “no.” But that may owe less to the Framers’ insistence on reserving an immigration power to the states than to the constitutional compromises that were brokered between the states on the issue of slavery.<sup>244</sup>

### III. THE LESSON OF ARIZONA: THE EXECUTIVE BRANCH LACKS THE POWER TO ISSUE IMMIGRATION DETAINERS

What consequences will the *Arizona* decision have for the future of immigration enforcement? One might assume *Arizona* will signal

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240. Press Release, U.S. Dep’t of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>.

241. *Arizona*, 132 S. Ct. at 2521 (Scalia, J., concurring in part and dissenting in part). The remarks criticizing President Obama drew vast media attention. *E.g.*, Ethan Bronner, *A Dissent by Scalia is Criticized as Political*, NY TIMES, June 28, 2012 at A18; Jonathan Easley, *Justice Scalia Rips Obama’s Deportation Directive in Dissent on Arizona Case*, HILL (June 25, 2012, 12:49PM), <http://thehill.com/blogs/blog-briefing-room/news/234571-justice-scalia-blasts-obamas-deportation-directive>. One columnist called for Justice Scalia to “free himself to pursue his true vocation” (politics) by resigning. E.J. Dionne, Jr., *Scalia Must Resign*, WASH. POST (June 27, 2012), [http://www.washingtonpost.com/opinions/ej-dionne-jr-justice-scalia-should-resign/2012/06/27/gJQApkO06V\\_story.html](http://www.washingtonpost.com/opinions/ej-dionne-jr-justice-scalia-should-resign/2012/06/27/gJQApkO06V_story.html).

242. *Arizona*, 132 S. Ct. at 2521 (Scalia, J., concurring in part and dissenting in part).

243. *Id.* at 2522.

244. *See generally* FINKELMAN, *supra* note 237, at 22–34 (noting that the issue of slavery affected decisions on representation, taxation, commercial regulation, domestic tranquility, state sovereignty, and interstate relations).

the withdrawal of the states from immigration enforcement, though the Court's reliance on obstacle rather than field preemption may send states back to the drawing board in an attempt to craft un-preempted immigration laws.<sup>245</sup> But *Arizona*'s effects are not limited to state efforts at immigration enforcement. In the rest of this Article, I consider the implications of *Arizona* for one key *federal* enforcement mechanism—the immigration detainer.

This part demonstrates that the executive branch lacks the power it has asserted in its immigration detainer regulation. I first briefly discuss the importance of detainers to the federal immigration enforcement effort.<sup>246</sup> The United States issues approximately 250,000 immigration detainers each year,<sup>247</sup> and detainers are perhaps the single key enforcement mechanism driving the record numbers of deportations seen in recent years.

I then demonstrate that the *Arizona* Court's analysis of S.B. 1070 shows that the immigration detainer system currently in use is invalid for two reasons.

First, *Arizona* held that Section 6 of S.B. 1070 was preempted because it authorized state officers to make immigration arrests under circumstances where federal immigration officers were not so empowered by Congress.<sup>248</sup> Section 6, held the Court, was inconsistent with "the system Congress created."<sup>249</sup> The detainer regulation put in place by the executive branch suffers from that

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245. Kevin Johnson, for example, has written,

the Supreme Court has cracked open the door to new state legislation, new claims of racial discrimination, and new lawsuits. States are likely to test the boundaries of *Arizona v. United States* with new, if not improved, immigration enforcement legislation. Litigation over the constitutionality of the laws is likely to continue. The lasting solution to the proliferation of state immigration enforcement laws, which is beyond the power of the Supreme Court, is for Congress to enact comprehensive immigration reform that has the support of the public. Perhaps the publicity over *Arizona v. United States* will prod Congress to act. Until it does, we can expect the status quo to continue.

Kevin Johnson, *The Debate over Immigration Reform Is Not Over Until It's Over*, SCOTUSBLOG (June 25, 2012), <http://www.scotusblog.com/2012/06/online-symposium-the-debate-over-immigration-reform-is-not-over-until-its-over/>.

246. See *infra* Part II.A.

247. In fiscal year 2009, ICE's Criminal Alien Program issued 234,939 detainers nationwide, or approximately 20,000 per month. U.S. DEP'T OF HOMELAND SEC., FY11 BUDGET IN BRIEF 63, available at <http://www.deportationnation.org/library/>.

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

249. *Id.* at 2506.

same defect—it requires state officers to make immigration arrests in circumstances well beyond the limited arrest authority Congress granted to federal immigration officers. Because it exceeds the “system Congress created,” the regulation is *ultra vires*.<sup>250</sup>

Second, while the Court upheld Section 2(B) of S.B. 1070, it did so by finding Section 2(B) to govern only communication. The Court explicitly noted that prolonged detention to investigate immigration status would raise constitutional concerns. Because the detainer regulation goes beyond communication, and requires prolonged detention, the Fourth Amendment issues the Justices avoided by construing Section 2(B) as involving only communication are present in the detainer regulation. The regulation is invalid to the extent it raises these substantial constitutional issues.<sup>251</sup>

#### A. *The Centrality of Detainers to Federal Immigration Enforcement*

The immigration detainer is the principle mechanism for Immigration and Customs Enforcement (“ICE”), the immigration enforcement arm of the Department of Homeland Security (“DHS”), to obtain custody over suspected immigration violators in the custody of state or local law enforcement officials. When ICE learns that a suspected immigration violator is in a state prison or local jail, ICE lodges a detainer, or “Form I-247.”<sup>252</sup>

Federal immigration officials have long used immigration detainers in cases where suspected immigration violators are in the custody of local, state, or federal officials.<sup>253</sup> Before 1987, an immigration detainer served merely to notify jail or prison officials of federal immigration officials’ interest in a prisoner and to request

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250. See *infra* Part III.B.

251. See *infra* Part III.B.

252. The form detainer has been in existence since at least 1983. Immigration Forms, 54 Fed. Reg. 39336-02, 39337 (Sept. 26, 1989) (to be codified at 8 C.F.R. pt. 299) (referring to Form I-247 with date of Mar. 1, 1983); Form I-247 (March 1, 1983) (on file with the author). Historically, federal immigration officials would also lodge a copy of the immigration charging documents with jail or prison officials, and these documents would be considered the equivalent of a detainer. *E.g.*, *Fernandez-Collado v. INS*, 644 F. Supp. 741, 742 (D. Conn. 1986); see Jonathan E. Stempel, *Custody Battle: The Force of U.S. Immigration and Naturalization Service Detainers over Imprisoned Aliens*, 14 *FORDHAM INT’L L.J.* 741, 742 n.11 (1990–1991).

253. See generally Lasch, *supra* note 21, at 182–85 (“In cases as far back as 1950, the subjects of INS detainers have raised questions concerning this restraint on liberty.”).



jail or prison officials to notify federal immigration officials before releasing the targeted prisoner.<sup>254</sup> In 1987, the executive branch enacted federal regulations that required state and local law-enforcement agencies receiving an immigration detainer for a prisoner to maintain custody of the prisoner for up to forty-eight hours after his or her release date, in order to allow time for immigration officials to arrive and take custody.<sup>255</sup> Due to the enactment of these regulations, the immigration detainer form no longer requests only notice of a prisoner's impending release;<sup>256</sup> it now purports to command state or local officials to maintain in their custody a prisoner who otherwise would be released to freedom,<sup>257</sup> and to deliver up that person to federal immigration officials.<sup>258</sup> State and local officials regularly comply with immigration detainers by continuing to hold prisoners who would otherwise be released.<sup>259</sup>

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254. See Form I-247 (Mar. 1, 1983) (on file with the author) ("IT IS REQUESTED THAT YOU: . . . Notify this office of the time of release at least 30 days prior to release or as much in advance of release as possible."); see also *Fernandez-Collado*, 644 F. Supp. at 743 n.1 (describing immigration detainer as "merely a method of advising the prison officials to notify the I.N.S. of the petitioner's release or transfer").

255. 8 C.F.R. § 287.7 (2012); see generally Lasch, *supra* note 21, at 182–85 (describing the history of the current regulatory regime).

256. See 8 C.F.R. § 287.7.

257. See Form I-247 (June 2011) (on file with the author) ("IT IS REQUESTED THAT YOU: Maintain custody of the subject . . . beyond the time when the subject would otherwise have been released from your custody to allow [the Department of Homeland Security] to take custody of the subject.").

258. See Form I-247 (Dec. 2012) (on file with the author) ("IT IS REQUESTED THAT YOU: Maintain custody of the subject for a period NOT TO EXCEED 48 HOURS, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody to allow DHS to take custody of the subject. This request derives from federal regulation 8 C.F.R. § 287.7."); Form I-247 (Dec. 2011) (on file with the author) ("IT IS REQUESTED THAT YOU: Maintain custody of the subject for a period NOT TO EXCEED 48 HOURS, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody to allow DHS to take custody of the subject. This request flows from federal regulation 8 C.F.R. § 287.7, which provides that a law enforcement agency 'shall maintain custody of an alien' once a detainer has been issued by DHS."); Form I-247 (Aug. 2010) (on file with the author) ("Under Federal regulation 8 C.F.R. § 287.7, DHS requests that you maintain custody of this individual for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for DHS to assume custody of the alien."); Form I-247 (Apr. 1, 1997) (on file with the author) ("Federal regulations (8 C.F.R. § 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for INS to assume custody of the alien.").

259. Lasch, *supra* note 21, at 173–74.

Detainers have thus long been a key mechanism in the immigration enforcement scheme.<sup>260</sup> But the importance of detainers to federal immigration enforcement was dramatically amplified in March 2008, when the federal government launched an immigration enforcement program called “Secure Communities.”<sup>261</sup> The stated purpose of the program is to focus on the deportation of immigrants who commit serious crimes.<sup>262</sup> The program targets prisoners who are awaiting trial or serving sentences for local, state, or federal crimes.<sup>263</sup>

The “cornerstone” of the “Secure Communities” program is “interoperability”—the linking of federal crime, immigration, and fingerprint databases.<sup>264</sup> Routinely, local law enforcement officials submit booking fingerprints to the FBI for criminal background checks.<sup>265</sup> Under “Secure Communities,” the FBI transmits these fingerprints to DHS.<sup>266</sup> DHS then determines which prisoners to target for immigration enforcement<sup>267</sup> and attempts to gain custody over those prisoners through the use of immigration detainers—the central enforcement tool for the “Secure Communities” program.<sup>268</sup> “Secure Communities” vastly increased the use of immigration detainers as an enforcement tool.<sup>269</sup> With this increased use of detainers, the number of deportations spiked.<sup>270</sup>

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260. *Id.* at 174–77.

261. Press Release, U.S. Immigration and Customs Enforcement, ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails Nationwide (Mar. 28, 2008), <http://www.ice.gov/news/releases/0804/080414washington.htm>.

262. *Id.*

263. *Id.*

264. Press Release, U.S. Immigration and Customs Enforcement, Buncombe, Henderson, and Gaston Sheriffs' Offices in North Carolina Receive Full Interoperability Technology to Help Identify Criminal Aliens, ICE (Nov. 18, 2008), <http://www.ice.gov/news/releases/0811/081118charlotte.htm>.

265. David J. Venturella, *Secure Communities: Identifying and Removing Criminal Aliens*, 77 POLICE CHIEF, Sept. 2010, at 40, 43, available at [http://www.nxtbook.com/nxtbooks/naylor/C\\_PIM0910/index.php](http://www.nxtbook.com/nxtbooks/naylor/C_PIM0910/index.php).

266. *Id.*

267. *Id.* at 43–44.

268. *ICE Detainers: Frequently Asked Questions*, ICE, <http://www.ice.gov/news/library/factsheets/detainer-faqs.htm> (last visited Nov. 4, 2012) (“Detainers are critical for ICE to be able to identify and ultimately remove criminal aliens who are currently in federal, state or local custody.”).

269. Venturella, *supra* note 265, at 44.

270. In fiscal year 2011, “interoperability” was deployed in 937 new jurisdictions, resulting in an increase of over 100,000 “matches” and nearly 30,000 additional deportations. SECURE

Immigration detainees have not been immune from the broader civil rights debates over immigration.<sup>271</sup> Since its inception in March 2008, “Secure Communities” has come under fire from opponents and has emerged as a major battleground in the civil-rights war being waged over immigration. As opponents of state and local enforcement of immigration laws have done, opponents of “Secure Communities” argue that the enforcement program encourages racial profiling, diverts local resources from crime control, and makes communities less safe by discouraging immigrants from reporting crimes or cooperating with police.<sup>272</sup>

Echoing these criticisms, some localities in recent years have urged the disentanglement of local law enforcement from federal immigration enforcement<sup>273</sup> and have enacted measures to resist immigration rendition by declining to subject prisoners to prolonged detention pursuant to detainees.<sup>274</sup> In Santa Clara County, California, for example, the board of supervisors passed a resolution in June 2010 indicating a clear concern for the civil rights of immigrants.<sup>275</sup> The resolution lauded the county as “home to a diverse and vibrant community of people representing many races, ethnicities, and nationalities, including immigrants from all over the world” and opined that “laws like Arizona’s SB 1070 . . . subject individuals to racial profiling.”<sup>276</sup> The resolution affirmed the county’s

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COMMUNITIES: IDENT/IAFIS INTEROPERABILITY REPORT, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT 1–2 (2011), available at [http://www.ice.gov/doclib/foia/sc-stats/nationwide\\_interoperability\\_stats-fy2011-to-date.pdf](http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf).

271. See *supra* Part II.A.

272. E.g., Violeta R. Chapin, *¡Silencio! Undocumented Immigrant Witnesses and the Right to Silence*, 17 MICH. J. RACE & L. 119, 152–54 (2011); *Secure Communities*, NAT’L IMMIGR. FORUM (2009), [http://www.immigrationforum.org/images/uploads/Secure\\_Communities.pdf](http://www.immigrationforum.org/images/uploads/Secure_Communities.pdf); *More Questions than Answers About Secure Communities*, NAT’L IMMIGR. L. CTR. (Mar. 2009), <http://v2011.nilc.org/immlawpolicy/LocalLaw/secure-communities-2009-03-23.pdf>.

273. Santa Clara County Bd. of Supervisors Res. No. 2010-316 (adopted June 22, 2010) [hereinafter Santa Clara 2010-316], available at [http://media.sjbeez.org/files/2011/10/Board-Resolution-2010-316\(6-22-2010\).pdf](http://media.sjbeez.org/files/2011/10/Board-Resolution-2010-316(6-22-2010).pdf).

274. Some activity has occurred at the state level as well, with legislation limiting detainer compliance enacted in both Connecticut and California. 2013 Conn. Acts 13-155 (Reg. Sess.), available at <http://www.cga.ct.gov/2013/act/pa/pdf/2013PA-00155-R00HB-06659-PA.pdf> (concerning civil immigration detainees); Patrick McGreevy, *Signing Trust Act Is Another Illegal-Immigration Milestone for Brown*, L.A. TIMES, Oct. 5, 2013, <http://www.latimes.com/local/la-me-brown-immigration-20131006,0,5441798.story>.

275. Santa Clara 2010-316.

276. *Id.*

commitment to protect all of its residents from “discrimination, abuse, violence, and exploitation.”<sup>277</sup> Ultimately, after extended unsuccessful efforts by Santa Clara County to “opt out” of the “Secure Communities” program,<sup>278</sup> the board of supervisors passed a measure ending Santa Clara’s routine compliance with detainees.<sup>279</sup>

In Cook County, Illinois, an ordinance was enacted requiring the sheriff to “decline ICE detainer requests unless there is a written agreement with the federal government by which all costs incurred by Cook County in complying with the ICE detainer shall be reimbursed.”<sup>280</sup> When the ordinance drew a proposal from the federal government to pay the costs of detention,<sup>281</sup> the civil rights issues underlying the ordinance became ascendant, with the Cook County Board president declaring, “[e]qual justice before the law is more important to me than the budgetary considerations.”<sup>282</sup>

Similar resistance to immigration detainees, grounded in civil rights concerns, was seen in other urban centers. In Chicago, Mayor Rahm Emanuel introduced his “Welcoming City” antidetainer ordinance,<sup>283</sup> claiming it would “prevent law abiding Chicagoans

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277. *Id.*

278. Memorandum from Miguel Marquez, Cnty. Counsel, on U.S. Immigration and Customs Enforcement’s Secure Communities Program to Public Safety and Justice Committee (Dec. 2, 2010), available at <http://media.sjbeez.org/files/2011/10/9-PSJC-memo-12-2-10.PDF>.

279. Santa Clara County Bd. of Supervisors Res. No. 2011-504 (adopted Oct. 18, 2011) (resolving to decline compliance with immigration detainees unless the federal government agreed to pay the costs of detention, and then only if the prisoner was convicted of a serious crime and in no case would Santa Clara County comply with a detainer request for a juvenile).

280. COOK COUNTY, ILL., CODE § 46-37 (2011) (enacted by Ordinance No. 11-O-73 (Sept. 7, 2011)).

281. Antonio Olivo, *Feds Seek Compromise on Cook County Immigration Ordinance: Immigration and Customs Enforcement Director Offers To Pay For Detainer of Suspected Illegal Immigrants Who’ve Posted Bail*, CHI. TRIB. (Feb. 29, 2012), [http://articles.chicagotribune.com/2012-02-29/news/ct-met-cook-county-immigration-ordinance-0229-20120229\\_1\\_illegal-immigrants-ice-detainers-immigration-enforcement-agency](http://articles.chicagotribune.com/2012-02-29/news/ct-met-cook-county-immigration-ordinance-0229-20120229_1_illegal-immigrants-ice-detainers-immigration-enforcement-agency).

282. Hal Dardick, *Preckwinkle Ices ICE proposal: Rejects Call For Working Group to Resolve Issues*, CHI. TRIB. (Apr. 10, 2012), [http://articles.chicagotribune.com/2012-04-10/news/ct-met-toni-preckwinkle-0411-20120411\\_1\\_preckwinkle-detainers-immigration-status](http://articles.chicagotribune.com/2012-04-10/news/ct-met-toni-preckwinkle-0411-20120411_1_preckwinkle-detainers-immigration-status).

283. The ordinance bars compliance with detainees except in cases involving major crimes, outstanding criminal warrants, or gang members. CHI., IL., MUN. CODE ch 2-173 (2012), available at <http://www.immigrationpolicy.org/sites/default/files/docs/SO2012-4984.pdf>.

from being unfairly detained and deported.”<sup>284</sup> Other jurisdictions have adopted similar legislation or policies.<sup>285</sup>

Litigation has sprouted as well, challenging the validity of detainer practices.<sup>286</sup>

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284. John Presta, *Mayor Emanuel Introduces Ordinance to Make Chicago an Immigrant-Friendly City*, EXAMINER.COM (July 11, 2012), <http://www.examiner.com/article/mayor-emanuel-introduces-ordinance-to-make-chicago-an-immigrant-friendly-city>.

285. On the local level, these jurisdictions include Alameda County (California), Milwaukee County (Wisconsin), and the cities of Berkeley (California), New York (New York), New Orleans (Louisiana), Newark (New Jersey), San Francisco (California), and the District of Columbia. Letter from Richard Valle, Supervisor, Dist. 2, Cnty. of Alameda, Cal., to the Bd. of Supervisors, Cnty. of Alameda, Cal. (Apr. 17, 2013), available at [http://www.acgov.org/board/bos\\_calendar/documents/DocsAgendaReg\\_04\\_23\\_13/BOARDS%20COMMISSION/Set%20Matter%20Calendar/BOS\\_Approve\\_a\\_resolution\\_regarding\\_ICE\\_Civil\\_Detainer\\_Requests.pdf](http://www.acgov.org/board/bos_calendar/documents/DocsAgendaReg_04_23_13/BOARDS%20COMMISSION/Set%20Matter%20Calendar/BOS_Approve_a_resolution_regarding_ICE_Civil_Detainer_Requests.pdf) (seeking approval of Alameda County Board of Supervisors, Resolution No. R-2013-142, File No. 28853); Milwaukee County Board of Supervisors, *A Resolution Establishing Milwaukee County Policy with Respect to Honoring Detainer Requests from U.S. Department of Homeland Security—Immigration and Customs Enforcement*, MILWAUKEE COUNTY LEGISLATIVE INFORMATION CENTER (June 4, 2012), <https://milwaukeecounty.legistar.com/LegislationDetail.aspx?ID=1124069&GUID=3D583485-4F01-4B43-B892-D6FFE5D327BF&Options=&Search=>; Berkeley City Council, *Regular Meeting Annotated Agenda*, CITY OF BERKELEY (Oct. 30, 2012), [http://www.ci.berkeley.ca.us/Clerk/City\\_Council/2012/10Oct/City\\_Council\\_\\_10-30-2012\\_%E2%80%93Regular\\_Meeting\\_Annotated\\_Agenda.aspx](http://www.ci.berkeley.ca.us/Clerk/City_Council/2012/10Oct/City_Council__10-30-2012_%E2%80%93Regular_Meeting_Annotated_Agenda.aspx); Mirela Iverac, *City Limits Cooperation with Federal Immigration Officials at Rikers*, WNYC NEWS BLOG (Nov. 22, 2011), <http://www.wnyc.org/blogs/wnyc-news-blog/2011/nov/22/city-limits-cooperation-ice-rikers/>; Campbell Robertson, *New Orleans and U.S. in Standoff on Detentions*, N.Y. TIMES, Aug. 12, 2013, [http://www.nytimes.com/2013/08/13/us/new-orleans-and-us-in-standoff-on-detentions.html?\\_r=0](http://www.nytimes.com/2013/08/13/us/new-orleans-and-us-in-standoff-on-detentions.html?_r=0) (detailing New Orleans policy limiting detainer compliance that “came about for a variety of reasons, including a lawsuit filed in federal court in 2011 by two men who had spent months in Orleans Parish Prison on expired detention requests”); James Queally, *Newark Police First in N.J. to Refuse to Detain Undocumented Immigrants Accused of Minor Crimes*, NJ.COM (Aug. 15, 2013), [http://www.nj.com/essex/index.ssf/2013/08/newark\\_police\\_first\\_in\\_nj\\_to\\_refuse\\_to\\_detain\\_illegal\\_immigrants\\_accused\\_of\\_minor\\_crimes.html](http://www.nj.com/essex/index.ssf/2013/08/newark_police_first_in_nj_to_refuse_to_detain_illegal_immigrants_accused_of_minor_crimes.html); Brent Begin, *San Francisco County Jail Won’t Hold Inmates for ICE*, S.F. EXAMINER, May 6, 2011, <http://www.sfexaminer.com/sanfrancisco/san-francisco-county-jail-wont-hold-inmates-for-ice/Content?oid=2174504> (describing policy adopted by San Francisco Sheriff Michael Hennessey); PHIL MENDELSON, COUNCIL OF THE D.C. COMM. ON THE JUDICIARY, REPORT ON BILL 19-585, “IMMIGRATION DETAINER COMPLIANCE AMENDMENT ACT OF 2012” (May 8, 2012), available at <http://dcclims1.dccouncil.us/images/00001/20120604161227.pdf>. State-level resistance has occurred in Connecticut, Ct. Public Act 13-155 (June 6, 2013), available at <http://openstates.org/ct/bills/2013/HB6659/>, and has been proposed in California, Florida, and Massachusetts, Assemb. B. 4, 2013–2014 Leg., Reg. Sess. (Cal. 2013), available at <http://openstates.org/ca/bills/20132014/AB4/>; S.B. 730, 2013 Reg. Sess. (Fla. 2013), available at <http://openstates.org/fl/bills/2013/S730/documents/FLD00015779/>; H.B. 1613, 188th Leg. (Mass. 2013), available at <http://openstates.org/fl/bills/2013/S730/documents/FLD00015779/>.

B. “Not the System Congress Created”:  
*The Detainer Regulation Is Ultra Vires*

This part details the inconsistencies between the federal detainer regulation that the executive branch created in the late 1980s and the comprehensive immigration enforcement system that “Congress created.”

It may seem odd that a “preemption” case like *Arizona*, which is ostensibly focused on the conflict between federal and state law, should have any bearing on the legality of immigration detainers. An immigration detainer is, after all, an explicit request by the federal government for state or local help in immigration enforcement.<sup>287</sup> How could preemption analysis have any bearing on the legality of detainers, when detainers are issued by federal authorities?

The answer is that there is an area of correspondence between the question of whether state law is preempted by federal law and the question of whether regulations implemented by the executive branch are *ultra vires* of a congressional grant of authority. The analysis of both issues focuses, in the first instance, on congressional intent and a consideration of the clarity with which Congress has announced its intent.

Both field and obstacle preemption analyses begin with a consideration of the intent of Congress. Field preemption asks whether Congress “inten[ded] to displace state law altogether.”<sup>288</sup> Obstacle preemption requires “examining the federal statute as a whole” to determine Congress’s “purpose and intended effects.”<sup>289</sup> In both types of preemption analysis, courts are cautioned against finding state laws preempted ““unless that was the clear and manifest purpose of Congress.””<sup>290</sup>

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286. *E.g.*, *Comm. for Immigrant Rights of Sonoma Cnty. v. Cnty. of Sonoma*, 644 F. Supp. 2d 1177 (N.D. Cal. 2009); *Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, Brizuela v. Feliciano*, No. 3:12-cv-00226-JBA (D. Conn. filed Feb. 13, 2012); *Reply Brief in Support of Defendants’ Motion to Dismiss, Moreno v. Napolitano*, No. 1:11-cv-05452 (N.D. Ill. filed Jan. 25, 2012).

287. *ICE Detainers: Frequently Asked Questions*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/detainer-faqs.htm> (last visited Nov. 11, 2012).

288. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012).

289. *Id.* (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000)).

290. *Id.* (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

Similarly, in considering whether executive regulation is *ultra vires* of statutory authority, the first step of the familiar *Chevron* analysis is to ask “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>291</sup>

The preemption analysis of the *Arizona* Court thus involved ascertaining, through an examination of Congress’s enactments in the field of immigration enforcement, the direction and magnitude of congressional intent. This analysis can equally function as the first step in the *Chevron* analysis, as applied to the detainer regulation: Has Congress<sup>292</sup> “directly spoken to the precise question at issue”? As is shown below, Congress has spoken directly to the question of immigration arrests and has carefully delineated federal, state, and local power in this regard. Congress has also directly legislated with respect to immigration detainees.

The *Arizona* decision discussed and delineated “the system Congress created.” Just as Congress held that Section 6 of S.B. 1070 conflicted with this statutory system, equally so does the immigration detainer regulation conflict with Congress’s system.<sup>293</sup> Whereas the preemption analysis employed by the Court examines whether the states have exercised more authority than is consistent with the

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291. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). The Administrative Procedure Act allows a challenge to agency regulations that are “in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C. § 706(2)(C) (2006).

292. Executive branch regulations are sometimes considered in the preemption analysis. One way that regulations may be considered is as evidence of Congress’s intent. *See, e.g.*, *R.J. Reynolds Tobacco Co. v. Durham Cnty., N.C.*, 479 U.S. 130, 149 (1986) (“[A]s part of the preemption analysis we must consider whether the regulations evidence a desire to occupy a field completely.”). Because the *Arizona* decision focused almost exclusively on Congress’s statutory enactments in determining the preemption issue, the complex issues surrounding “agency preemption” are not at play. *See, e.g., Arizona*, 132 S. Ct. at 2527 (Alito, J., concurring in part and dissenting in part) (citing *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 330 (1994)); Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 526 n.14 (2012) (and authorities cited therein). Indeed, the *Arizona* opinion demonstrates some hostility to “agency preemption”—making clear that the executive does not set immigration policy. In its analysis of Section 2(B) the Court looked to Congress’s statutory scheme in determining that “the federal scheme thus leaves room for a policy requiring state officials to contact ICE as a routine matter,” dispensing with the argument of the United States that such routine contact would undermine federal immigration policy (as set by the executive branch). *Arizona*, 132 S. Ct. at 2508.

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

congressional statutory scheme, the question in the *Chevron* analysis is whether the *executive branch* has exercised excessive authority.<sup>294</sup>

### 1. “Not The System Congress Created”

As noted above, until the 1980s, immigration detainers were nothing more than a request for advance notification before the release of a prisoner.<sup>295</sup> Beginning in 1987,<sup>296</sup> the executive branch implemented regulations requiring officials receiving an immigration detainer to maintain custody of a prisoner who would otherwise be released.<sup>297</sup> The current version of the regulation provides:

Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.<sup>298</sup>

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294. See *Chevron*, 467 U.S. at 843.

295. See *supra* note 254 and accompanying text.

296. See *supra* note 255 and accompanying text.

297. Whether an immigration detainer operates to *require* officials to maintain custody over a prisoner who would otherwise be released, or only to *request* that officials maintain custody, has been a matter of some confusion. See KATE M. MANUEL, CONG. RES. SERVICE, IMMIGRATION DETAINERS: LEGAL ISSUES 11–14 (Aug. 31, 2012) (detailing authorities supporting the position that the detainer is a request and authorities supporting the position that the detainer is a command). Some language in the detainer regulation itself seems to suggest that the detainer is only a request for advance notification of a prisoner’s upcoming release. See 8 C.F.R. § 287.7(a) (2012) (“A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.”). However, the language of 8 C.F.R. § 287.7(d) is clear and unmistakable in requiring that officials prolong custody of a prisoner subject to an immigration detainer. See C.F.R. § 287.7(d); *Rios-Quiroz v. Williamson Cnty.*, No. 3-11-1168, slip op. at 7 (M.D. Tenn. Sept. 10, 2012) (holding that use of “shall” in 8 CFR § 287.7(d) renders the regulation mandatory upon state officials).

298. 8 C.F.R. § 287.7(d). The regulation in its entirety provides:

§ 287.7 DETAINER PROVISIONS UNDER SECTION 287(D)(3) OF THE ACT.

(a) Detainers in general. Detainers are issued pursuant to sections 236 and 287 of the Act and this chapter 1. Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the



The detainer regulation indicates no prerequisites to the issuance of a detainer<sup>299</sup> and authorizes issuance of a detainer “at any time.”<sup>300</sup>

The regulation runs headlong into the statutory “system Congress created” in two ways. First, the regulation permits federal immigration officials, through the use of a detainer issued to other “criminal justice” officials, to effectuate arrests in circumstances beyond the statutory arrest authority Congress bestowed on those federal immigration officials. In doing so, the executive branch has exceeded Congress’s grant of authority, according to the Court’s logic in *Arizona*.<sup>301</sup>

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Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.

(b) Authority to issue detainers. The following officers are authorized to issue detainers:

- (1) Border patrol agents, including aircraft pilots;
- (2) Special agents;
- (3) Deportation officers;
- (4) Immigration inspectors;
- (5) Adjudications officers;
- (6) Immigration enforcement agents;
- (7) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and
- (8) Immigration officers who need the authority to issue detainers under section 287(d)(3) of the Act in order to effectively accomplish their individual missions and who are designated individually or as a class, by the Commissioner of CBP, the Assistant Secretary for ICE, or the Director of the BCIS.

(c) Availability of records. In order for the Department to accurately determine the propriety of issuing a detainer, serving a notice to appear, or taking custody of an alien in accordance with this section, the criminal justice agency requesting such action or informing the Department of a conviction or act that renders an alien inadmissible or removable under any provision of law shall provide the Department with all documentary records and information available from the agency that reasonably relates to the alien’s status in the United States, or that may have an impact on conditions of release.

(d) Temporary detention at Department request. Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.

(e) Financial responsibility for detention. No detainer issued as a result of a determination made under this chapter I shall incur any fiscal obligation on the part of the Department, until actual assumption of custody by the Department, except as provided in paragraph (d) of this section.

§ 287.7.

299. See § 287.7(a)–(e).

300. § 287.7(a).

301. See *Arizona v. United States*, 132 S. Ct. 2492, 2505–10 (2012).

From the Court’s discussion of Section 2(B), it is clear that prolonged detention, such as that explicitly required by the detainer regulation, operates as an arrest. The Court was clear that “[d]etaining individuals solely to verify their immigration status would raise constitutional concerns.”<sup>302</sup> In the Court’s view, Section 2(B) avoided those constitutional concerns because the status check was presumed to take place “during the course of an authorized, lawful detention or after a detainee has been released.”<sup>303</sup> Section 2(B) was thus deemed to be principally about communication, not detention.

The immigration detainer regulation, unlike Section 2(B), explicitly calls for prolonged detention—directing the criminal justice agency receiving a detainer to “maintain custody” of a prisoner who is “not otherwise detained.”<sup>304</sup> The immigration detainer’s forty-eight-hour holding period thus begins to run only once the criminal justice agency has lost all other justifications for holding the prisoner.<sup>305</sup>

That prolonged detention beyond the termination of an otherwise lawful detention would be a “seizure” within the meaning of the Fourth Amendment is clear from the *Arizona* opinions.<sup>306</sup> The majority opinion upheld Section 2(B) precisely because it was limited to involve only communication and not a prolonged detention. Justice Alito conceded that prolonged detention amounting to a new arrest would require probable cause of a new crime beyond that for which the prisoner was already in custody (and released).<sup>307</sup>

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302. *Id.* at 2509.

303. *Id.*

304. 8 C.F.R. § 287.7(d).

305. *See id.*

306. *See Arizona*, 132 S. Ct. at 2509; *id.* at 2528–29 (Alito, J., concurring in part and dissenting in part). Pending lawsuits have raised this claim that immigration detainers run afoul of the Fourth Amendment. Petition for Writ of Habeas Corpus and Complaint at 1, *Brizuela v. Feliciano*, No. 3:12-cv-00226-JBA (D. Conn. filed Feb. 13, 2012); Reply in Support of Defendants’ Motion to Dismiss at 3, *Moreno v. Napolitano*, No. 1:11-cv-05452 (N.D. Ill. filed Jan. 25, 2012).

307. *Arizona*, 132 S. Ct. at 2529 (Alito, J., concurring in part and dissenting in part) (citing *Hayes v. Florida*, 470 U.S. 811, 816 (1985) and describing *Hayes* as “holding that the line between detention and arrest is crossed ‘when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes’”). The continued jailing of a prisoner who is otherwise free to return home surely constitutes a seizure requiring probable cause. *See Hayes*, 470 U.S. at 816–17.

The issuance of immigration detainers is not restricted to circumstances under which immigration officials are entitled to make an arrest. Therefore, it is important that an immigration detainer acts as an arrest of a prisoner who would otherwise be released. As the Court pointed out in striking down Section 6, immigration officials may effect an immigration arrest either (1) pursuant to an immigration arrest warrant<sup>308</sup> or (2) in limited circumstances when

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308. One possible argument is that a detainer is a specific example of the “arrest warrant” authority Congress granted to the Attorney General in Section 236(a) of the Immigration and Nationality Act. In litigation, the United States has pointed to Section 236(a) as a possible source of authority for the detainer regulation. Federal Defendants’ Notice of Motion to Dismiss; Memorandum of Points and Authorities in Support Thereof at 13–16, Comm. for Immigrant Rights of Sonoma Cnty. v. County of Sonoma, No. 3:08-cv-04220-RS, (N.D. Cal. filed Jan. 28, 2009). But the use of detainers as arrest warrants would raise a serious constitutional concern. While the Court has upheld the authority of federal immigration officials to detain suspected immigration violators pending an adjudication of their status, *see Demore v. Kim*, 538 U.S. 510, 523–30 (2003) (distinguishing *Zadvydas v. Davis*, 533 U.S. 678 (2001) (involving “detention pending a determination of removability”)), the Court has not endorsed the use of arrest warrants to investigate a person’s immigration status. *Cf. Brown v. Illinois*, 422 U.S. 590, 605 (1975) (holding “[t]he impropriety of the arrest was obvious” where detectives admitted the arrest was for investigation). Arrests for investigation only would implicate Fourth Amendment concerns. Yet what evidence is available indicates detainers are often placed for no stated reason other than investigation. *See Lasch, supra* note 21, at 173–82. The INA provisions allowing warrantless arrests have been interpreted as requiring probable cause. *United States v. Cantu*, 519 F.2d 494, 496 (7th Cir. 1975) (“The words of the statute ‘reason to believe’ are properly taken to signify probable cause.”) (citing *Au Yi Lau v. U.S. Immigration and Naturalization Serv.*, 445 F.2d 217, 222 (D.C. Cir. 1971)); *Au Yi Lau*, 445 F.2d at 223 (“[S]ince aliens in this country are sheltered by the Fourth Amendment in common with citizens, such a reading of the Congressional mandate must be controlled by the constitutional standards governing similar detentions made by other law enforcement officials.”). Similarly, Section 236(a) should be read as imposing a probable cause requirement before issuance of an administrative arrest warrant. Since the detainer regulation involves no probable cause requirement, it cannot be characterized as an arrest warrant. Furthermore, such a characterization would be inconsistent with practice. Current regulations delineate a different set of immigration officials authorized to issue arrest warrants from the set authorized to issue detainers. *Compare* 8 C.F.R. § 287.5(e)(2) (2012) (discussing arrest warrant authority), *with* 8 C.F.R. § 287.7(b) (discussing detainer authority). It appears that some lower-level officials who lack the authority to issue arrest warrants are authorized to issue detainers. *Compare* 8 C.F.R. § 287.7(b)(2) (authorizing “special agents” to issue detainers), *with* 8 C.F.R. § 287.5(e)(2)(xxix)–(xxxiii) (authorizing only various types of “special agents in charge” to issue arrest warrants); *compare* 8 C.F.R. § 287.7(b)(3) (authorizing “deportation officers” to issue detainers), *with* 8 C.F.R. § 287.5(e)(2)(xxv) (only authorizing “supervisory deportation officers” to issue arrest warrants). Additionally, the Form I-247 detainer form indicates one reason a detainer may be issued is pursuant to an administrative arrest warrant, indicating the two are not synonymous. *See* Form I-247, October 2011 (on file with the author). Furthermore, had Congress intended detainers to be warrants, it would not have used both terms in the INA. *Compare* Immigration and Nationality Act § 236(a), 8 U.S.C. § 1226(a) (2006) (using “warrant”), *with* Immigration and Nationality Act § 287(d), 8 U.S.C. § 1357(d) (using “detainer”).

the person is “likely to escape before a warrant can be obtained.”<sup>309</sup> The detainer regulation requires neither of these prerequisites. Thus, detainers can be issued in circumstances well beyond those in which immigration officials can make an arrest. The detainer regulation, just like Section 6, goes beyond the statutory “system Congress created.”<sup>310</sup>

It might be argued that persons detained in the custody of a law enforcement agency should be presumed a flight risk, and therefore “likely to escape before a warrant can be obtained.”<sup>311</sup> While this argument might have force in a particular case, it sweeps too broadly to justify the detainer regulation, which does not preclude detainers being placed in circumstances where immigration officials clearly *can* obtain a warrant before the prisoner’s release.<sup>312</sup> Had Congress

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309. *Arizona*, 132 S. Ct. at 2506 (quoting 8 U.S.C. § 1357(a)(2)). The Court did not explicitly note the other important requirement of § 1357—that an immigration official making a warrantless arrest have “reason to believe” the arrestee has violated federal immigration law. *See id.* Courts have construed the “reason to believe” requirement as importing a probable cause requirement in order to satisfy the Fourth Amendment’s prohibition against unreasonable seizures. Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1608 & n.229 (2010).

The Court also ignored a statutory provision directing the Attorney General to take into custody certain aliens who are deportable or inadmissible by virtue of criminal convictions or acts of terrorism. 8 U.S.C. § 1226(c). This statutory provision (cited only in Justice Alito’s opinion, *see Arizona v. United States*, 132 S. Ct. at 2533–34 (Alito, J., concurring in part and dissenting in part)), requires more than probable cause, since it is only triggered in the case of an alien who *is* deportable or inadmissible. *Id.* The statute also requires the Attorney General to take custody of such a person “when the alien is released”—which courts have interpreted as a limitation on Congress’s command. *Saysana v. Gillen*, 590 F.3d 7, 14–16 (1st Cir. 2009) (holding that the “when released” provision limits the statute’s applicability to only those instances when the alien is released from detention on the crimes which render him or her deportable or inadmissible); *Thomas v. Hogan*, No. 1:08-CV-0417, 2008 WL 4793739, at \*5 (M.D. Pa. Oct. 31, 2008) (holding the same). The detainer regulation fails to track the specific requirements of this statutory provision and therefore is inconsistent with the “system Congress created” when considering this provision as well.

310. *Arizona*, 132 S. Ct. at 2496.

311. *Id.* (quoting 8 U.S.C. § 1357(a)(2)).

312. The case of John Henry demonstrates that immigration officials lodging an immigration detainer may well have ample time to obtain a warrant. *Henry v. Chertoff*, 317 Fed. App’x. 178, 179–80 (3d Cir. 2009). Mr. Henry was serving a 262-month sentence in federal prison when he sought to challenge an immigration detainer placed against him. *Id.* at 179. He filed his habeas petition in June 2008, alleging he was a United States citizen. *Id.* The district court dismissed Mr. Henry’s habeas petition on the grounds he was not “in custody” pursuant to the detainer for purposes of habeas jurisdiction. *Id.* After Mr. Henry filed his appellate brief, he was released from the custody of the Bureau of Prisons, on August 22, 2008. *Id.* at 179 n.2. Thus, Mr. Henry was in custody for approximately two months while the detainer was lodged. Surely immigration officials could have obtained a warrant for Mr. Henry’s arrest during that time. Given that there is

statutorily determined that prisoners are categorically to be considered flight risks, there might be something to this argument. For example, the no-bail provisions of the INA have been upheld on the ground that Congress reasonably concluded that persons convicted of certain enumerated crimes posed a flight risk and should therefore be detained during their removal proceedings.<sup>313</sup> But in the case of detainers, there is no requirement that the target of the detainer has been convicted of *any* crime. Nor is there a requirement that the target of the detainer be subject to removal proceedings.<sup>314</sup>

Second, to the extent the detainer regulation purports to authorize or compel state and local law enforcement to make such arrests, the regulation runs afoul of Congress's limited allocation of immigration enforcement power to state officials. As the Court discussed in finding Section 6 preempted, Congress has specifically granted immigration enforcement authority to state officials only in narrow circumstances—most notably when local officials participate in a so-called 287(g) agreement. Enforcement beyond those narrow circumstances is preempted. Because the detainer regulation calls for state and local officials to participate in civil immigration enforcement beyond those narrow circumstances, it is inconsistent with the “system Congress created.”<sup>315</sup>

However, the Court qualified its discussion of Section 6 by noting that Section 6 authorized the “unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government.”<sup>316</sup> The detainer regulation, one could argue, looks less like the unilateral state action of Section 6 found preempted in *Arizona* and more like what the *Arizona* Court found Section 6 not to be: “cooperat[ion] with the Attorney General in the identification, apprehension,

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nothing in the detainer regulation to limit the use of detainers to circumstances other than those like Mr. Henry's, there is no reason to believe a suspected immigration violator's current imprisonment makes the person “likely to escape before a warrant can be obtained.” Indeed, in many instances the person will be less likely to escape—as was true for Mr. Henry—because he or she is imprisoned.

313. *See Demore*, 538 U.S. at 518–22.

314. Even if the presence of a person in custody could suffice to meet *categorically* the “likely to escape” requirement for a warrantless arrest, the detainer regulation would still fail for lack of a probable cause requirement. *See Dardick*, *supra* note 282.

315. *Arizona*, 132 S. Ct. at 2506.

316. *Id.* at 2507.

detention or removal” of immigration violators.<sup>317</sup> Detainers are, after all, initiated by the federal government.

This argument would have more force if the immigration detainer regulation had been phrased in terms of cooperation. After all, as the Court pointed out, there is nothing inhibiting communication between law enforcement agencies and federal immigration officials; indeed, it is encouraged.<sup>318</sup> But while there has been much debate over whether immigration detainers are federal government requests for cooperation or commands for compliance,<sup>319</sup> it is hard to see how the mandatory language of the detainer regulation, which states that a criminal justice agency receiving an immigration detainer “shall maintain custody” over the prisoner,<sup>320</sup> is consistent with Congress’s limited allowance for state and local “cooperat[ion] with the Attorney General”<sup>321</sup> in immigration enforcement.<sup>322</sup>

Even if the regulation called only for cooperation, it is not clear from the *Arizona* opinion that the cooperation statutorily authorized by Congress would include making civil immigration arrests. The Court mentioned that such cooperation might include “operational support in executing a warrant,”<sup>323</sup> but the Court elsewhere took

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317. 8 U.S.C. § 1357(g)(10)(B) (2006).

318. *Arizona*, 132 S. Ct. at 2508 (citing 8 U.S.C. § 1357(g)(10)(A)). Congress has not only legislated to encourage such communication. Congress has made it unlawful to *prevent* such communication. *See* 8 U.S.C. § 1373(a) (“Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”); 8 U.S.C. § 1644 (“Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”).

319. *See* MANUEL, *supra* note 297, at 11–14 (2012) (detailing authorities in support of position that detainer is a request and authorities in support of position that detainer is a command).

320. 8 C.F.R. § 287.7(d) (2012).

321. 8 U.S.C. § 1357(g)(10).

322. *See* Rios-Quiroz v. Williamson Cnty., No. 3-11-1168, 2012 WL 3945354, at \*4 (M.D. Tenn. Sept. 10, 2012) (holding that use of “shall” in 8 C.F.R. § 287.7(d) renders the regulation mandatory upon state officials). Because the detainer purports to command state and local officials to act, it raises significant Tenth Amendment problems. *See infra* Part III.C.2.

323. *Arizona*, 132 S. Ct. at 2507 (citing DEP’T OF HOMELAND SEC., GUIDANCE ON STATE AND LOCAL GOVERNMENTS’ ASSISTANCE IN IMMIGRATION ENFORCEMENT AND RELATED MATTERS 13–14 (2011), available at <http://www.dhs.gov/xlibrary/assets/guidance-state-local->

pains to note that immigration warrants “are executed by federal officers who have received training in the enforcement of immigration law.”<sup>324</sup> The Court also specifically noted that state and local officials are required to receive such training when they enter into a 287(g) agreement with the federal government,<sup>325</sup> and it is reasonable to conclude from the Court’s discussion that state and local officials would be preempted from actually effectuating immigration arrests (as contrasted to providing “operational support”<sup>326</sup>) absent a 287(g) agreement and the training it requires.

The final argument in support of the detainer regulation involves a statute discussed only in passing in the *Arizona* decision—Section 287(d) of the Immigration and Nationality Act—which I consider in the next section.

## 2. The Detainer System Congress *Did* Authorize

The only use of the word “detainer” in the Immigration and Nationality Act (“INA”) is in Section 287(d), enacted as part of the Anti-Drug Abuse Act of 1986.<sup>327</sup> The statutory provision allows

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assistance-immigration-enforcement.pdf). In discussing what might constitute “cooperation” under 8 U.S.C. § 1357(g)(10), the majority explicitly mentioned immigration detainers. The Court’s citation to immigration detainers as an example of state officers assisting federal immigration officials is discussed below. *See infra* notes 339–342 and accompanying text.

324. *Arizona*, 132 S. Ct. at 2506 (citing 8 C.F.R. § 241.2(b); 8 C.F.R. § 287.5(e)(3)).

325. *Id.* (citing 8 U.S.C. § 1357(g)(2); 8 C.F.R. § 287.5(c)).

326. The *Arizona* majority cited a DHS publication to support the notion that “provid[ing] operational support in executing a warrant” would be an example of state-federal “cooperation” under INA § 287(g)(10). *Id.* at 2507. But the examples of such “operational support” given in the DHS document are “providing tactical officers to join the federal officials during higher risk operations, or providing perimeter security for the operation (e.g., blocking off public streets)” — not making actual arrests. DEP’T OF HOMELAND SEC., *supra* note 323, at 13. The DHS document only envisions state and local officers actually seizing a person “[w]here independent state or local law grounds provide a basis for doing so” and then only “at the request of DHS immigration officers where the seizure or stop would aid an ongoing federal investigation into possible violations of federal immigration law.” DEP’T OF HOMELAND SEC., *supra* note 323, at 13.

327. Section 287(d) provides:

DETAINER OF ALIENS FOR VIOLATION OF CONTROLLED SUBSTANCES LAWS.

In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official)—

(1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,

(2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and

federal, state, and local law enforcement officials to request federal immigration officials “to determine promptly whether or not to issue a detainer to detain the alien.”<sup>328</sup> Because this statute does authorize some use of immigration detainers, it is important to examine Section 287(d) to determine whether it can support the executive branch’s detainer regulation.

Problems immediately arise given the limitations on the detainer authority that might be granted under Section 287(d). The statute is explicitly limited to cases involving controlled substance arrests.<sup>329</sup> Furthermore, the request for a detainer must be made by the arresting agency, and then only when there is “reason to believe” (a standard equating to probable cause)<sup>330</sup> the arrestee is an immigration violator.<sup>331</sup> The executive branch’s detainer regulation exceeds the narrow scope of INA Section 287(d), authorizing the issuance of a detainer by “[a]ny authorized immigration officer . . . at any time.”<sup>332</sup>

The federal government’s litigation position has been that its authority to issue detainers is neither generated nor constrained by Section 287(d);<sup>333</sup> rather, detainers stem from the federal

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(3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien, the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.

Immigration and Nationality Act § 287(d), 8 U.S.C. § 1357(d) (2006).

328. 8 U.S.C. § 1357(d)(3).

329. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 21 U.S.C.).

330. *United States v. Cantu*, 519 F.2d 494, 496 (7th Cir. 1975) (“The words of the statute ‘reason to believe’ are properly taken to signify probable cause.”) (citing *Au Yi Lau v. U.S. Immigration and Naturalization Serv.*, 445 F.2d 217, 222 (D.C. Cir. 1971)); *Au Yi Lau*, 445 F.2d at 223 (“[S]ince aliens in this country are sheltered by the Fourth Amendment in common with citizens, such a reading of the Congressional mandate must be controlled by the constitutional standards governing similar detentions made by other law enforcement officials.”).

331. For a more detailed argument on these points, see Lasch, *supra* note 21, at 173–82.

332. 8 C.F.R. § 287.7(a) (2012).

333. One federal district court has agreed with this interpretation. In *Comm. for Immigrant Rights of Sonoma Cnty. v. Cnty. of Sonoma*, 644 F. Supp. 2d 1177 (N.D. Cal. 2009), the district court concluded that the regulation was not *ultra vires* of its enabling legislation. *Id.* at 1198. The court first concluded that the detainer statute (INA § 287(d)) was not meant to limit the situations in which the federal government might issue a detainer—rather, the detainer statute was meant to impose additional requirements on the federal government in controlled substance cases (the statute requires federal immigration officials to “promptly determine whether or not to issue such a detainer” upon request in such cases). *Id.* (quoting 8 U.S.C. § 1357(d)). Legislative history not cited by the court or the parties supports the court’s conclusion. 132 CONG. REC. 22,981 (1986)



government's general authority to take immigration violators into custody. But the general authority relied on by the federal government has been circumscribed by Congress in ways inconsistent with the detainer regulation's sweeping language.<sup>334</sup> Section 287(d), with its own constraints, cannot save the regulation and its broad authority to detain from exceeding Congress's statutory authorization.

It might be argued that Congress *did* intend to grant civil arrest authority to state officials in narrow circumstances through the detainer provision it enacted in Section 287(d), just as Congress did later with Section 287(g). The specific description of a "detainer to detain the alien" implies that the detainer will actually serve to detain its target. Furthermore, the provision arguably avoids Fourth and Tenth Amendment issues by requiring initiation of the detainer process by the arresting law enforcement agency (rather than allowing federal immigration authorities to initiate the detainer process by commanding state or local agencies to hold a prisoner in custody) and only upon "reason to believe" that the prisoner is an immigration violator.<sup>335</sup>

Yet, even if Section 287(d) could be read as granting civil arrest authority to state and local officers, the executive branch's detainer regulation exceeds the scope of that statutory authority.

Furthermore, the better reading is that Congress meant the word "detainer" in Section 287(d) in the sense in which immigration

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(indicating the provision for detainers in INA § 287(d) was added in response to "local law enforcement complaints concerning the INS' inability to issue a judgment on a suspect's citizenship status fast enough to allow the authorities to continue to detain him," and was intended to mandate a faster response from federal immigration authorities to requests initiated by local law enforcement).

334. *See supra* Part III.A (noting that immigration officials are statutorily empowered to arrest only when they have a warrant, INA § 236(a), probable cause, INA § 287(a)(2), (4), (5), or certain knowledge of a person's deportability or inadmissibility, INA § 236(c)).

335. *See infra* Part III.C (discussing the Tenth Amendment and Fourth Amendment issues presented by the immigration detainer regulation). It seems odd, given Congress's low estimation of state and local officials' competency with respect to immigration, that Congress would have entrusted those officials, rather than federal immigration officials, with the probable cause determination. *See* 8 C.F.R. § 287.5(b) (requiring training and supervision as a prerequisite to a grant of immigration enforcement authority to state and local officials). A more likely explanation is that 8 U.S.C. § 1357(d) simply indicates the circumstances under which state and local officials should contact federal immigration officials for a detainer—not in every arrest involving controlled substances, but only the subset of controlled substance arrests in which there is reason to believe the arrestee may be present without authorization.

detainers had been used until that time—as a request for notice of impending release, not as a command for continued detention. The Form I-247 detainer in use prior to the enactment of Section 287(d) clearly announced that it was a request only for advance notice.

There are at least three reasons to interpret Section 287(d) as using the word “detainer” as it had been used in the immigration field prior to its enactment. First, this interpretation is consistent with available legislative history indicating Section 287(d) did not create any new detainer authority, but only created an obligation for federal immigration officials to respond to other law enforcement agencies’ requests for prompt action.<sup>336</sup> Second, as the federal government has argued, the language of Section 287(d) seems too obscure to have been intended as a grant of otherwise nonexistent arrest authority<sup>337</sup> and is better read as imposing special requirements on an already existing detainer authority. Third, the *Arizona* Court read Section 287(d) as authorizing communication—not arrest—by state and local officials.<sup>338</sup>

Indeed, the *Arizona* Court’s single reference to Section 287(d) is telling. In rejecting the argument that civil immigration arrests under Section 6 of S.B. 1070 should be upheld under the “cooperation” provision of Section 287(g), the Court cited Section 287(d) as an example of cooperation. The majority described Section 287(d) as allowing “State officials . . . [to] assist the Federal Government by responding to requests for information about when an alien will be released from their custody.”<sup>339</sup> Characterizing Section 287(d) as authorizing communication, rather than arrest, directly supports an interpretation of Section 287(d) as embodying the existing detainer practice, which had been nothing more than information sharing between the federal, state, and local agencies.

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336. 132 CONG. REC. 22,981 (1986). This legislative history also tends to undermine any argument that Congress crafted Section 287(d) to avoid Tenth Amendment concerns by requiring initiation of the detainer process by the arresting agency. The legislative history indicates 287(d) was meant to require the federal government to be responsive to state and local agencies—hence the language indicating initiation of the process at the arresting agency level.

337. *See Comm. for Immigrant Rights of Sonoma Cnty.*, 644 F. Supp. 2d at 1199 (“[T]he court reads the language of § 1357 as simply placing special requirements on officials issuing detainers for a violation of any law relating to controlled substances.”).

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

339. *Id.*

In characterizing immigration detainees as communication rather than arrests, the Court implicitly rejected the brief for the United States, which offered a broad characterization of state cooperation with respect to detainees. The United States suggested immigration detainees were an example of arrests made as part of “cooperative enforcement”:

Such broad and unilateral arrest authority also is not necessary to facilitate true cooperative enforcement. State and local officials (including in Arizona) have long made arrests at the request of federal immigration officials, and federal officials may place detainees on aliens who are wanted by DHS but who otherwise would be released from state or local custody.<sup>340</sup>

Tellingly, the United States cited the detainer *regulation* and not the statute.<sup>341</sup> The regulation clearly authorizes—indeed compels—prolonged detention amounting to an arrest by state or local officials. The statute is not clear, and the United States has argued elsewhere that it does not constrain or generate authority to detain.<sup>342</sup>

The *Arizona* majority failed to accept the characterization of detainees as arrests, instead viewing detainees as a “request[] for information about when an alien will be released from [state or local] custody.”<sup>343</sup> This view of detainees tracked precisely the historical use of detainees prior to the adoption of 8 C.F.R. § 287.7. Perhaps because the immigration detainer regulation flies directly in the face of the statutory system just delineated by the Court—the “system that Congress created”—the Court did not cite the regulation. Instead, it cited the detainer statute, endorsing the view that the statute simply authorizes the use of detainees for cooperative enforcement by allowing local officials not to arrest suspected immigration violators but to advise federal immigration officials of their impending release.

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340. Brief for the United States at 54, *Arizona*, 132 S. Ct. 2492 (No. 11-182), 2012 WL 939048 at \*54 (citing 8 C.F.R. § 287.7).

341. *Id.*

342. *See supra* note 332 and accompanying text.

343. *Arizona*, 132 S. Ct. at 2507 (citing 8 U.S.C. § 1357(d)).

3. Conclusion:  
The Immigration Detainer Is  
Nothing More than a Request for Information

The Supreme Court in *Arizona* held that Section 6 of S.B. 1070 was preempted because it created a system for immigration enforcement that was “not the system Congress created.”<sup>344</sup> The same is true of the executive branch’s detainer regulation, and the specific conflicts between it and Congress’s statutory scheme cause it equally to be an obstacle to Congress’s enforcement plan. The regulation must be held to be beyond Congress’s statutory authority. The statutory scheme that Congress *did* put in place for immigration detainees is consistent with historical practice—the detainer is issued by federal immigration officials and acts only as a request for notice before the prisoner, who is the target of the detainer, is released from custody. The detainer does not bind the receiving agency in any way.

*C. The Detainer Regulation  
Is Invalid Because It Raises  
Substantial Constitutional Problems*

Agency regulations cannot stand if they raise serious constitutional doubts.<sup>345</sup> Congress is assumed to legislate in light of constitutional limitations, and therefore Congress cannot be assumed to have intended an agency regulation that raises grave and uncertain constitutional questions.<sup>346</sup>

The executive branch’s detainer regulation raises substantial constitutional questions. The regulation raises Fourth Amendment questions because there is no requirement of probable cause prior to prolonged detention pursuant to a detainer. Additionally, there is no requirement that a person held pursuant to a detainer be taken before a neutral magistrate within forty-eight hours absent extraordinary

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344. *Id.* at 2496.

345. 5 U.S.C. § 706(2)(b) (permitting challenge to regulations that are “contrary to constitutional right”); see also Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1944 (2008) (citing SWANCC) (“Any regulation that raises constitutional doubts is invalid unless Congress clearly authorized that result.”); Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 244 & n.244 (2006) (citing *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172–73 (2001)).

346. *Rust v. Sullivan*, 500 U.S. 173, 190–91 (1991) (citations omitted).

circumstances. The regulation also raises a substantial Tenth Amendment question because the regulation purports to allow federal officials to command state and local officials to detain prisoners in violation of the anti-commandeering principle.

### 1. The Detainer Regulation Raises Substantial Fourth Amendment Problems

“I agree with the Court that individuals cannot be detained solely to verify their immigration status,” President Barack Obama said upon learning of the *Arizona* decision.<sup>347</sup> Yet, immigration detainers issued by federal immigration officials routinely do just that.

The detainer regulation commands state and local officials to maintain custody over a suspected immigration violator beyond the time normally authorized, raising the same “prolonged detention” concern presented by Section 2(B) of S.B. 1070 and discussed in the *Arizona* opinions. Because the regulation contains neither a warrant requirement<sup>348</sup> nor a probable cause requirement, the same Fourth Amendment concerns are present as were discussed in *Arizona*.

The absence of a probable cause requirement routinely appears to result in warrantless investigatory arrests pursuant to immigration detainers. ICE typically lodges a detainer against a suspected immigration violator by faxing the Form I-247 detainer to the prison or jail. The Form I-247 detainer has a set of boxes, which ICE officials can check to indicate ICE’s level of prior investigation and interest.<sup>349</sup> For years, the boxes were:

- ( ) Investigation has been initiated to determine whether this person is subject to removal from the United States.
- ( ) A Notice to Appear or other charging document initiating removal proceedings, a copy of which is attached, was served on \_\_\_(date)\_\_\_

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347. Press Release, The White House, Statement by the President on the Supreme Court’s Ruling on *Arizona v. United States* (June 25, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/25/statement-president-supreme-court-s-ruling-arizona-v-united-states>; see *Arizona*, 132 S. Ct. at 2509 (“Detaining individuals solely to verify their immigration status would raise constitutional concerns.”).

348. It cannot be argued that the detainer is equivalent to a warrant. See *supra* note 309 and accompanying text.

349. Form I-247, October 2011 (on file with the author).

( ) A warrant of arrest in removal proceedings, a copy of which is attached, was served on \_\_\_(date)\_\_\_

( ) Deportation or removal from the United States has been ordered.<sup>350</sup>

The available evidence suggests that many, if not most, detainers are issued based only on “investigation initiated” and not on the basis of a Notice to Appear, warrant, or prior order.<sup>351</sup> ICE has been criticized for “poor targeting of government removal efforts,”<sup>352</sup> suggesting that the amount of investigation prior to the issuance of a detainer may be minimal. Additionally, critics have suggested the databases on which ICE relies are of questionable accuracy.<sup>353</sup> Thus, the Fourth Amendment concerns behind a detainer issued based only on “investigation initiated” may be substantial.<sup>354</sup> Indeed, even if one

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350. *Id.* In December 2012, perhaps responding to the *Arizona* decision and Fourth Amendment concerns, DHS issued anew detainer guidance and a revised Form I-247. For a complete discussion of the December 2012 revisions, see Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under Arizona v. United States*, 3 WAKE FOREST J.L. & POL’Y 281, 302-05 (2013).

351. Lasch, *supra* note 21, at 173–82.

352. *ICE Seeks to Deport the Wrong People*, TRACIMMIGRATION (Nov. 9, 2010), <http://trac.syr.edu/immigration/reports/243/> (documenting DHS’s rising failure rate in immigration proceedings).

353. Ajmel Quereshi, *Hope for Change in Immigration Policy: Recommendations for the Obama Administration*, 16 NO. 3 HUM. RTS. BRIEF 19, 22–23 (2009).

354. See *Brown v. Illinois*, 422 U.S. 590, 601–05 (1975) (holding arrest for purposes of investigation violated Fourth Amendment). The December 2012 detainer guidance states that immigration officials “should” place a detainer only where there is “reason to believe” an individual is subject to removal and additional conditions are present. Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, and All Chief Counsel, *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems 2* (Dec. 21, 2012), <http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf>. But this guidance cannot eliminate this substantial Fourth Amendment concern. First, the guidance is expressed not as a legal position of DHS but as an enforcement priority. The guidance contains an express disclaimer stating the guidance does not “limit the legal authority of ICE or its personnel” and does not “create any right . . . enforceable at law by any party.” *Id.* at 3. The guidance also excludes U.S. Customs and Border Protection (CBP) from its ambit, further emphasizing the document’s function as an enforcement priority policy position as opposed to a legal position. The guidance also calls for a six-month review, whereupon “ICE will consider whether modifications, if any, are needed.” *Id.* There is no guarantee, in other words, that ICE will not return to its practice, prevailing over the thirty years prior to the revised guidance, of issuing detainers upon nothing more than an *initiated investigation* into whether an individual is subject to removal. The detainer regulation, after all, does not require “reason to believe” or any other level of suspicion prior to issuing a detainer. 8 C.F.R. § 287.7 (2012).

of the other three boxes on the detainer form is checked, probable cause may yet be lacking.<sup>355</sup>

An additional Fourth Amendment concern arises from the detainer regulation's command that the state or local agency with custody over the suspected immigration violator "shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department."<sup>356</sup> This command runs directly counter to the Court's declaration that the Fourth Amendment requires any person subjected to a warrantless arrest be brought before a neutral magistrate for a probable cause determination within forty-eight hours—including weekends and holidays—absent a showing of extraordinary circumstances.<sup>357</sup> The immigration detainer regulation thus violates the Fourth Amendment in two ways.<sup>358</sup> First, a prisoner may be detained for longer than forty-eight hours (indeed, up to five days on a holiday weekend) without appearing for a probable cause determination.<sup>359</sup> Second, the regulation includes no mandatory appearance before a neutral magistrate.<sup>360</sup>

## 2. The Detainer Regulation Raises Substantial Tenth Amendment Problems

Although questions of federal commandeering of state officials were not present with respect to S.B. 1070, such Tenth Amendment concerns do attend immigration detainers and are worthy of a brief discussion here. There has been considerable debate and confusion over whether immigration detainers act as a federal request or as a command to state or local officials.<sup>361</sup> The regulation itself purports

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355. Compare *supra* note 309 (discussing absence of probable cause requirement in INA § 236(a), the statute authorizing administrative arrest warrants in immigration proceedings), with Immigration and Nationality Act § 239(a)(1)(C), 8 U.S.C. § 1229 (indicating that the Notice to Appear must specify the "acts or conduct alleged to be in violation of law").

356. 8 C.F.R. § 287.7(d) (2012).

357. *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991).

358. See 8 C.F.R. § 287.7(d).

359. *Id.*

360. *Id.*

361. See MANUEL, *supra* note 297, at 11–14 (detailing authorities supporting the position that the detainer is a request and authorities supporting the position that the detainer is a command); *Rios-Quiroz v. Williamson Cnty.*, No. 3-11-1168, slip op. at 7 (M.D. Tenn. Sept. 10, 2012) (holding that use of "shall" in 8 C.F.R. § 287.7(d) renders the regulation mandatory upon state officials).

to command state and local law enforcement agencies receiving an immigration detainer to continue holding the target of the detainer in custody.<sup>362</sup> This raises the question of whether the claimed compulsion of state officials by the federal government violates the Tenth Amendment's reservation of powers to the States.

Modern jurisprudence suggests an affirmative answer to this question, for the Court has spoken with abundant clarity in *Printz v. United States*.<sup>363</sup> In *Printz*, the Court struck down, in no uncertain terms, a federal statute requiring local law-enforcement officers to submit prospective handgun-purchaser background-check requests to the federal government: "Today we hold that Congress cannot . . . conscript[] the States' officers directly. . . . [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty."<sup>364</sup>

In reaching this conclusion, the Court looked to history and recounted a particularly compelling analogue to today's detainer regulation. The First Congress enacted a law aimed at holding federal prisoners in state jails.<sup>365</sup> The Court found it significant that the statute "issued not a command to the States' executive, but a recommendation to their legislatures."<sup>366</sup> Rather than passing legislation compelling the states to house federal prisoners, Congress "'recommended to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their goals, to receive and safe keep therein all prisoners committed under the authority of the United States,' and offered to pay 50 cents per month for each prisoner."<sup>367</sup> When one state failed to comply, "Congress's only reaction was a law authorizing the marshal in any State that failed to

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362. 8 C.F.R. § 287.7(d) (2012).

363. 521 U.S. 898 (1997).

364. *Id.* at 935. In a separate article I trace the history of the Tenth Amendment across the issues of fugitive slave rendition and fugitive criminal rendition, demonstrating the persistence of Tenth Amendment issues in rendition and the use of the Tenth Amendment as a means of civil rights resistance to rendition. Christopher N. Lasch, *Rendition Resistance: Civil Rights Opposition to the Rendition of Fugitive Slaves, Interstate Criminals, and Suspected Immigration Violators*, Section III.B (Nov. 11, 2012) (unpublished manuscript) (on file with the *Loyola of Los Angeles Law Review*) (selected for presentation at the 2013 annual conference of the Association of American Law Schools (AALS) by the Immigration and Civil Rights sections of the AALS).

365. *Printz*, 521 U.S. at 909; Act of Sept. 23, 1789, ch. 27, 1 Stat. 96.

366. *Printz*, 521 U.S. at 909.

367. *Id.* (citing Act of Sept. 23, 1789, ch. 27, 1 Stat. 96 (1789)).



comply with the Recommendation of September 23, 1789, to rent a temporary jail until provision for a permanent one could be made.”<sup>368</sup>

As discussed above, Congress appears to have taken care to avoid Tenth Amendment issues in its crafting of the detainer statute. Either Section 287(d) ought to be read as not requiring prolonged detention at all, or it ought to be read as permitting federal officials to issue an immigration detainer to state and local officials only upon their request in the first instance.<sup>369</sup> Had Congress written INA § 287(d) to *require* (rather than permit) local law enforcement officials to report controlled substance arrestees suspected of being immigration violators and to *require* (rather than permit) those local officials to request immigration officials to “determine promptly whether or not to issue a detainer,”<sup>370</sup> the facts would be virtually indistinguishable from *Printz*.

But while Congress carefully crafted the detainer statute to avoid Tenth Amendment problems,<sup>371</sup> the same cannot be said of the immigration detainer regulation, which does purport to compel state officials to enforce its provisions.<sup>372</sup> The holding of *Printz* and the example cited by the Court showing the lack of federal power to compel state jailers to hold federal prisoners demonstrate that the detainer regulation exceeds federal authority to compel state officials to act.

#### IV. CONCLUSION

The Court proceeded cautiously in *Arizona*, nimbly sidestepping the hot-button issues that have dominated the political debate which gave birth to the case: racial profiling in violation of the Equal Protection Clause, prolonged detention in violation of the Fourth Amendment, and the question of whether the states have “inherent

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368. *Id.* at 910 (citing Resolution of Mar. 3, 1791, 1 Stat. 225).

369. *See supra* Part III.B; Immigration and Nationality Act, § 287(d)(3), 66 Stat. 233 (1952) (codified as amended 8 U.S.C. § 1357(d)(3) (2006)).

370. *Compare* Immigration and Nationality Act, § 287(d), 66 Stat. 233 (codified as amended 8 U.S.C. § 1357(d) (2006)) (permitting state officials to initiate action), *with* Pub. L. 103-159, 107 Stat. 1536 (Nov. 30, 1993) (portion of Brady Handgun Violence Prevention Act struck down in *Printz*) (requiring state officials to initiate action).

371. Congress left control in the hands of local law enforcement officials to decide for themselves when to bring a controlled substance arrestee to the attention of federal immigration officials, ensuring INA § 287(d) avoided any Tenth Amendment unfunded mandate problems.

372. 8 C.F.R. § 287.7(d) (2012).

authority” to police immigration. Nonetheless, the *Arizona* opinion represents a strong accretion of federal authority over immigration enforcement, striking down three of the contested provisions and leaving the fourth denuded of whatever new state police power Arizona had attempted to breathe into the provision.

The Court was clear in its pronouncement: the states may not enforce civil immigration law except as explicitly authorized by Congress—to do so would be “not the system Congress created.”<sup>373</sup> But while generally providing a ringing endorsement of federal power, *Arizona* also contains the seeds of a challenge to the unbridled power of the federal executive branch to pursue immigration enforcement objectives. The executive branch, like the states, has an obligation to implement “the system Congress created” and none other. The *Arizona* opinion leaves little doubt that the detainer regulation, by which immigration officials may issue a command to state officials to detain prisoners who would otherwise be freed, upon no basis other than that “investigation has been initiated,” is “not the system Congress created.” The detainer regulation also raises substantial constitutional questions, including the Fourth Amendment issue raised by prolonged detention—the precise concern raised by the Justices concerning implementation of the “show me your papers” provision of S.B. 1070. It is clear that detention, as envisioned by the detainer regulation, must comply with the Fourth Amendment; it must be supported by probable cause and meet the *Riverside* requirement of prompt neutral review.<sup>374</sup>

While beyond the scope of this Article, *Arizona* also poses questions for state and local law enforcement officials who might consider holding a prisoner pursuant to an immigration detainer. First is the question of whether state police power can justify such detention. If, as I suggest, the detainer cannot serve as legal authorization for prolonging detention, state and local officials must derive the authority elsewhere—the police power being the natural choice. *Arizona* leaves open the question of whether state officials

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373. *Arizona v. United States*, 132 S. Ct. 2492, 2506 (2012).

374. This Article has examined only the impact *Arizona* has upon the validity of the federal detainer regulation. An analysis of how state and local officials are impacted by *Arizona* is beyond the scope of the Article. But it is likely that given the absence of federal authority in support of detainers, state officials will be hard pressed to justify prolonged detention.

have any authority to pursue immigration enforcement—either civil or criminal—as a matter of the state police power. *Arizona* also leaves open the possibility that, in the case of criminal enforcement, whatever state police power exists to support detention may in fact be preempted by federal law.

A second question state and local officials must answer is whether prolonged detention can be accomplished consistently with the Fourth Amendment. *Arizona* makes clear that prolonged detention raises Fourth Amendment concerns, but does not answer any of the specific questions raised by the prolonged detention of a suspected immigration violator on the basis of what little information is contained in the standard immigration detainer form.

*Arizona* answers some questions clearly and leaves others unanswered. Given the Court's narrow focus and avoidance of the larger questions raised by the case, the decision likely will do little to stem the tide of state immigration enforcement measures and their accompanying legal challenges, as states seek to discover the limits of what the Court held to be their unpreempted power. Nor will *Arizona* end the civil rights debates that will continue to accompany immigration enforcement efforts on both the federal and state level.

The battles continue in Arizona. Just weeks after the Court declined to strike down Section 2(B), advocacy groups sought once again to enjoin Arizona from implementing that provision.<sup>375</sup> The district court held it was bound by *Arizona* to allow the provision to take effect,<sup>376</sup> and enforcement began on September 18, 2012. The Ninth Circuit declined to grant an emergency injunction halting enforcement, but Arizona's governor said she was under "no illusion" that an end to the litigation was foreseeable.<sup>377</sup>

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375. Mariano Castillo, *Civil Rights Groups Seek New Injunction Against Arizona Immigration Law*, CNN, (July 18, 2012), [http://articles.cnn.com/2012-07-18/us/us\\_arizona-immigration-challenge\\_1\\_omar-jadwat-immigration-law-local-arizona-police](http://articles.cnn.com/2012-07-18/us/us_arizona-immigration-challenge_1_omar-jadwat-immigration-law-local-arizona-police).

376. Fernanda Santos, *Arizona Immigration Law Survives Ruling*, N.Y. TIMES, Sept. 7, 2012, at A21.

377. "Show Your Papers" Arizona Immigration Provision Survives as Court Rejects Bid to Have It Blocked, HUFFINGTON POST, (Sept. 25, 2012, 7:56 PM), [http://www.huffingtonpost.com/2012/09/26/show-your-papers-arizona\\_n\\_1914678.html](http://www.huffingtonpost.com/2012/09/26/show-your-papers-arizona_n_1914678.html).