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# PAPERS, PLEASE: DOES THE CONSTITUTION PERMIT THE STATES A ROLE IN IMMIGRATION ENFORCEMENT?

JOHN C. EASTMAN\*

Arizona kicked up quite a dust storm in 2010 when it enacted Senate Bill 1070 (S.B. 1070).<sup>1</sup> Proponents hoped the law would help Arizona control the burgeoning illegal immigration into the state and its attendant costs—costs that affect the financial stability of the state, the safety of its residents, and the very rule of law itself. The legal professoriate almost uniformly derided Arizona’s new law as an unconstitutional usurpation of immigration policy—an area that the Constitution assigns exclusively to the federal government.<sup>2</sup> In particular, commentators targeted Section 2 of the law, which requires police officers to verify the immigration status of anyone who is lawfully detained, contending that it is patently unconstitutional under *Hines v. Davidowitz*<sup>3</sup> and would require racial profiling.<sup>4</sup>

Critics similarly derided Alabama’s new immigration law, particularly Section 28 of the Taxpayer and Citizen Protection

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1. Arizona Governor Janice Brewer signed S.B. 1070 into law on April 23, 2010. S.B. 1070, 49th Gen. Assemb., 2d Reg. Sess. (Ariz. 2010). On April 30, Governor Brewer signed H.B. 2162, which amended S.B. 1070 but retained the intent and core components of that law, and was intended to take effect on July 29, 2010. H.B. 2162, 49th Gen. Assemb., 2d Reg. Sess. (Ariz. 2010); *see also* ARIZ. CONST. art. 4, pt. 1, § 1(3).

2. *See* U.S. CONST. art. I, § 8, cl. 4.

3. 312 U.S. 52 (1941).

4. *See, e.g.*, Robert F. Castro, *XENOMORPH!!: Indians, Latina/os, and Alien Morphology of Arizona Senate Bill 1070*, 46 HARV. C.R.-C.L. L. REV. 1 (2011); Andrea Christina Nill, *Latinos and S.B. 1070: Demonization, Dehumanization, and Disenfranchisement*, 14 HARV. LATINO L. REV. 35 (2011).

Act,<sup>5</sup> which requires every public elementary and secondary school in the state to determine if an enrolling student is lawfully present in the United States.<sup>6</sup> Critics contended that the law ran afoul of the 1982 case of *Plyler v. Doe*,<sup>7</sup> in which the Supreme Court held that denying free public school education to illegal immigrants violates the Fourteenth Amendment's requirement of equal protection.<sup>8</sup>

This Essay explores the legal challenges to the two statutes, addresses how the Department of Justice (DOJ) fundamentally misunderstands the nature of state sovereignty and federalism, and concludes that, with the possible exception of one provision of the Arizona law, the states are acting well within their authority to protect the health, safety, and welfare of their residents without intruding on the plenary power over immigration and naturalization that the U.S. Constitution vests in Congress.

### I. ARIZONA'S S.B. 1070

"In response to a serious problem of unauthorized immigration along the Arizona-Mexico border, the State of Arizona enacted its own immigration law enforcement policy" in April 2010, making "attrition through enforcement the public policy of all state and local government agencies in Arizona."<sup>9</sup> Thus begins the Ninth Circuit's opinion addressing the constitutional challenges to the Arizona law, and although that court affirmed the district court's preliminary injunction of portions of the law,<sup>10</sup> the description of Arizona's purpose is almost entirely correct. Arizona does have a serious problem with illegal immigration. As the district court more emphatically described the situation, the Arizona legislature adopted S.B. 1070 "[a]gainst a backdrop of rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns."<sup>11</sup>

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5. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011).

6. *Id.* § 28(a)(1).

7. 457 U.S. 202 (1982).

8. *See id.* at 240.

9. *United States v. Arizona*, 641 F.3d 339, 343–44 (9th Cir. 2011).

10. *Id.* at 344.

11. *United States v. Arizona*, 703 F. Supp. 2d 980, 985 (D. Ariz. 2010).

Additionally, S.B. 1070 explicitly describes its purpose as “attrition through enforcement”<sup>12</sup> and sets out Arizona’s policy for how state law enforcement deals with issues related to illegal immigration in the state.

Although one might quite properly take issue with the Ninth Circuit’s substitution of the word “unauthorized” for “illegal” as a ratification of the Orwellian effort by many in the pro-illegal immigration movement to use more innocuous words like “undocumented” or “unauthorized” to minimize the illegality of illegal immigration, that semantic fight is a sideshow that does not really affect the merits of the legal challenge. More relevant to the substance of the challenge, and more in dispute, is the loaded use of the word “own.” Whether Arizona has embarked upon its “own” immigration policy or simply directed its law enforcement officials to help with the enforcement of federal immigration law, is, of course, the crux of the dispute. The same preamble that contains the “attrition through enforcement” language also mentions the legislature’s finding that the state has “a compelling interest in the cooperative enforcement of *federal* immigration laws . . . .”<sup>13</sup> Moreover, the Act expressly provides that the terms of the statute “shall be construed to have the meanings given to them under federal immigration law”<sup>14</sup> and that the “act shall be implemented in a manner consistent with federal laws regulating immigration . . . .”<sup>15</sup> This language rebuts the notion that Arizona has somehow embarked upon a maverick course to develop its own rules regarding immigration into the state.

The Arizona statute, officially called the “Support Our Law Enforcement and Safe Neighborhoods Act,”<sup>16</sup> contains ten operative sections. Section 2, which in turn is broken down into ten subparts, prohibits Arizona officials, agencies, and political subdivisions from limiting enforcement of federal immigration laws; requires that they work with federal officials regarding unlawfully present aliens; and authorizes suits by lawful Arizona residents against any Arizona official, agency, or political

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12. S.B. 1070, 49th Gen. Assemb., 2d Reg. Sess., § 1 (Ariz. 2010).

13. Ariz. S.B. 1070 § 11 (emphasis added).

14. *Id.* § 11.

15. *Id.* §§ 2(K), 12(C).

16. *Id.* § 13.

subdivision that adopts a policy of restricting enforcement of federal immigration laws.<sup>17</sup> Subsection (K) specifically provides that the Section “shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.”<sup>18</sup>

The remaining subdivision of Section 2 has generated most of the controversy. With the amendments adopted seven days after passage of the original bill, H.B. 2162 Subsection (B) provides in full:<sup>19</sup>

For any lawful ~~contact~~ STOP, DETENTION OR ARREST made by a law enforcement official or a law enforcement agency of this state or a law enforcement official or a law enforcement agency of a county, city, town or other political subdivision of this state IN THE ENFORCEMENT OF ANY OTHER LAW OR ORDINANCE OF A COUNTY, CITY OR TOWN OR THIS STATE where reasonable suspicion exists that the person is an alien ~~who~~ AND is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person’s immigration status determined before the person is released. The person’s immigration status shall be verified with the federal government pursuant to 8 United States code section 1373(c). A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not ~~solely~~ consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution. A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:

1. A valid Arizona driver license.
2. A valid Arizona nonoperating identification license.

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17. See *id.* § 2. These provisions, which might collectively be called the anti-sanctuary city provisions, are codified at *Arizona Revised Statutes* § 11-1051(A), (C)–(K). See *id.*

18. Ariz. S.B. 1070 § 2(K) (codified at ARIZ. REV. STAT. ANN. § 11-1051(L)).

19. Deletions are noted in strikeout, additions are noted in capital letters.

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

4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.<sup>20</sup>

Another provision of S.B. 1070, Section 3, creates a new state crime for conduct that is already a crime under federal law: failure to carry immigration papers.<sup>21</sup> The provision imposes the identical punishment provided by federal law,<sup>22</sup> and expressly “does not apply to a person who maintains authorization from the federal government to remain in the United States.”<sup>23</sup>

Section 4 amends the existing Arizona law targeting human smuggling (already broadly defined to include knowingly facilitating the transportation of persons not lawfully in the United States or who have attempted to enter, entered, or remained in the United States in violation of federal law)<sup>24</sup> “for profit or commercial purpose,” by allowing a peace officer to lawfully stop anyone operating a motor vehicle if the officer has reasonable suspicion to believe the person is in violation of any civil traffic law.<sup>25</sup>

Section 5 makes it illegal to hire workers from a motor vehicle (or to be so hired) if the motor vehicle blocks or impedes the normal flow of traffic;<sup>26</sup> to seek employment as an unauthorized alien (as defined by federal law);<sup>27</sup> and to transport, conceal or harbor illegal aliens in furtherance of the illegal presence of the alien in the United States (with vehicles used for the purpose subject to impoundment, per Section 10 of the Act).<sup>28</sup> As amended, this Section expressly provides that law enforce-

20. H.B. 2162, 49th Gen. Assemb., 2d Reg. Sess. (Ariz. 2010).

21. See Ariz. S.B. 1070 § 3 (codified at ARIZ. REV. STAT. ANN. § 13-1509).

22. The original version of S.B. 1070 mandated a minimum fine of \$500 and jail time as required for other Class 1 misdemeanors, but the H.B. 2162 amendments reduced the punishment to a \$100 fine and up to thirty days in jail, the same as in federal law. Compare Ariz. S.B. 1070 § 3, with Ariz. H.B. 2162, and 8 U.S.C. § 1304(e) (2006).

23. Ariz. S.B. 1070 § 3 (codified at ARIZ. REV. STAT. ANN. § 13-1509(F)).

24. *Id.* § 4 (codified at ARIZ. REV. STAT. ANN. § 13-2319(F)(3)).

25. *Id.* § 4 (codified at ARIZ. REV. STAT. ANN. § 13-2319(A), (E)).

26. *Id.* § 5 (codified at ARIZ. REV. STAT. ANN. § 13-2928(A)–(B)).

27. *Id.* (codified at ARIZ. REV. STAT. ANN. § 13-2928(C), (E)(2)).

28. *Id.* (codified at ARIZ. REV. STAT. ANN. §§ 13-2928, 13-2929); *id.* § 10 (codified at ARIZ. REV. STAT. ANN. § 28-3511(A)(4)–(5)).

ment officials “may not consider race, color or national origin in the enforcement of [Section 5] except to the extent permitted by the United States or Arizona Constitution.”<sup>29</sup>

In the remaining sections, Section 6 allows law enforcement officers to make a warrantless arrest if they have probable cause to believe the person has committed a public offense that makes that person removable (deportable) from the United States.<sup>30</sup> Sections 7 and 8 add an entrapment affirmative defense to the Arizona law revoking the business licenses of businesses knowingly hiring illegal immigrants,<sup>31</sup> a law that the Supreme Court upheld against a federal preemption challenge in *Chamber of Commerce v. Whiting*.<sup>32</sup> Section 9 adds a record-keeping requirement to the existing E-Verify employment eligibility provisions of Arizona law.<sup>33</sup> Section 10 adds the transportation and harboring of illegal aliens to the list of grounds for motor vehicle impoundment,<sup>34</sup> and Section 11 creates the Gang and Immigration Intelligence Team Enforcement Mission Fund, for gang and immigration enforcement and to reimburse county jails for incarceration costs related to illegal immigration.<sup>35</sup>

In response to a lawsuit the DOJ filed against Arizona, the United States District Court for the District of Arizona preliminarily enjoined four provisions of the law before it went into effect,<sup>36</sup> rejected DOJ’s request to enjoin two other provisions that, on the District Court’s own reasoning, seemed equally problematic,<sup>37</sup> and rejected DOJ’s broader request to enjoin enforcement of the entire act beyond the six specific provisions that it had challenged.<sup>38</sup> On appeal by Arizona,<sup>39</sup> the United States Court of

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29. Ariz. S.B. 1070 § 5 (codified at ARIZ. REV. STAT. ANN. § 13-2928(D)).

30. *Id.* § 6 (codified at ARIZ. REV. STAT. ANN. § 13-3883(A)(5)).

31. *Id.* § 7 (codified at ARIZ. REV. STAT. ANN. § 23-212(K)); *id.* § 8 (codified at ARIZ. REV. STAT. ANN. § 23-212.01(K)).

32. 131 S. Ct. 1968 (2011).

33. Ariz. S.B. 1070 § 9 (codified at ARIZ. REV. STAT. ANN. § 23-214(A)).

34. *Id.* § 10 (codified at ARIZ. REV. STAT. ANN. § 28-3511(4)–(5)).

35. *Id.* § 11 (codified at ARIZ. REV. STAT. ANN. § 41-1724).

36. *See* United States v. Arizona, 703 F. Supp. 2d 980, 987 (D. Ariz. 2010).

37. *Id.*

38. *Id.* at 986.

39. The DOJ did not appeal the denial of its request to enjoin two of the provisions or, more broadly, the entire statute. *See* United States v. Arizona, 641 F.3d 339, 344 (9th Cir. 2011).

Appeals for the Ninth Circuit affirmed the district court's preliminary injunction.<sup>40</sup> The Supreme Court granted the State's petition for writ of certiorari in December 2011.<sup>41</sup>

Those in the legal academy and at DOJ who contend that S.B. 1070 is an unconstitutional intrusion upon Congress's plenary authority over immigration rely most heavily on the Supreme Court's 1941 decision *Hines v. Davidowitz*. Pennsylvania passed an alien registration law in 1939, requiring all aliens over the age of eighteen to register annually with the state, pay a one-dollar annual registration fee, and carry their registration card with them at all times.<sup>42</sup> A three-judge district court enjoined the law as unconstitutional, holding that the law denied aliens the equal protection of the laws and encroached upon legislative powers constitutionally vested in the federal government.<sup>43</sup> But before the Supreme Court could hear the State's appeal, Congress adopted its own alien registration act, requiring that all aliens over the age of fourteen register a single time (rather than annually) with federal immigration officials.<sup>44</sup> In addition to requiring less-frequent filing, the federal law did not require aliens to carry a registration card, and only *willful* failure to register (as opposed to *any* failure under Pennsylvania law) to register was made a criminal offense.<sup>45</sup> Federal penalties, however, were more stringent. Violation of the federal statute was punishable by a fine of up to \$1000, imprisonment of not more than six months, or both, while violation of the Pennsylvania law was punishable by a fine of up to \$100, or sixty days in jail, or both.<sup>46</sup>

Although those challenging the Pennsylvania law argued that it was unconstitutional even before Congress adopted the federal incarnation, the Supreme Court declined to rule on the claims challenging the state law, "expressly leaving open" the contentions rooted in the state of affairs before the federal law

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40. *Id.*

41. *Arizona v. United States*, No. 11-182, 2011 WL 3556224 (U.S. Dec. 12, 2011), at \*1.

42. *Hines v. Davidowitz*, 312 U.S. 52, 59 (1941).

43. *Id.* at 60.

44. *Id.*

45. *Id.* at 60–61.

46. *Id.* at 59–61.



was adopted, “including the argument that the federal power in this field, whether exercised or unexercised, is exclusive.”<sup>47</sup> Instead, the Supreme Court held that:

[w]hen the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. *No state can add to or take from the force and effect of such treaty or statute . . .*<sup>48</sup>

After explaining the importance of leaving federal power in fields affecting foreign affairs “entirely free from local interference,” lest the actions of one state create international repercussions that affect the entire nation,<sup>49</sup> the Court elaborated that:

where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.<sup>50</sup>

Given the comprehensive nature of federal immigration law, *Hines* would seem to provide solid precedent for the claim that Arizona’s statute is preempted. But there is another relevant Supreme Court case, decided thirty-five years after *Hines*, in which the Court took a more nuanced view and recognized that the States are not without authority to exercise core state police powers even in matters that touch federal immigration policy. In *De Canas v. Bica*,<sup>51</sup> the Court confronted a challenge to a state statute prohibiting employers from knowingly hiring unlawful aliens on the grounds that it amounted to state regulation of immigration and thus was preempted by federal law.<sup>52</sup> The Court held that federal immigration law did not prevent the States from regulating the employment of illegal aliens because States possess broad authority under their police powers to regulate employment and protect workers within their borders.<sup>53</sup>

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47. *Id.* at 62.

48. *Id.* at 62–63 (emphasis added).

49. *See id.* at 63.

50. *Id.* at 66–67.

51. 424 U.S. 351 (1976).

52. *Id.* at 352–53.

53. *See id.* at 356–58.

“[T]he fact that aliens are the subject of a state statute does not [alone] render it a regulation of immigration,”<sup>54</sup> the Court held. The Court’s decision apparently rejected the challenge left unaddressed in *Hines*, namely, whether “the federal power in this field, whether exercised or unexercised, is exclusive.”<sup>55</sup>

The principle established in *De Canas* was most recently applied in *Chamber of Commerce v. Whiting*, in which the Court upheld the Legal Arizona Workers Act against challenges based on federal law preemption, with the Court relying on principles of state police power.<sup>56</sup> The Court held that the state law, which penalized employers of illegal aliens by withdrawing permission to do business in the state—a penalty much harsher than the fines imposed under federal immigration law—was not expressly preempted under 8 U.S.C. § 1324a(h)(2), nor was it preempted by implication.<sup>57</sup> On the contrary, the express preemption clause of the federal statute had an explicit exemption for state licensing laws, and the Court rejected the argument that the exemption should be read narrowly, in part because the state was operating in an area of traditional state concern.<sup>58</sup>

As these and other cases demonstrate, the States retain significant power to police their internal affairs to protect their citizens and lawful residents. Arizona’s S.B. 1070 was adopted expressly to protect the residents of Arizona from violent attacks and other harms caused by unlawfully present aliens, and it did so by authorizing its own law enforcement officials to assist with the enforcement of *federal* immigration law.

The district court correctly upheld a number of the provisions of S.B. 1070 that clearly fit within this police-power authority of the States, including subsections A and C through L of Section 2,<sup>59</sup> parts of Section 5;<sup>60</sup> Section 4;<sup>61</sup> and Sections 7 through 13.<sup>62</sup> The district court’s analysis in support of its deci-

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54. *Id.* at 355.

55. *Hines*, 312 U.S. at 62.

56. 131 S. Ct. 1968, 1979–81 (2011).

57. *Id.* at 1981, 1985.

58. *Id.* at 1984–85.

59. *United States v. Arizona*, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010).

60. *Id.*

61. *Id.*

62. *Id.*

sion preliminarily enjoining the remaining provisions of S.B. 1070,<sup>63</sup> however, was both sophomoric and fundamentally flawed in its understanding of federalism. Those provisions—subsection B of Section 2 (requiring local law enforcement to verify immigration status upon reasonable suspicion), Section 3 (creating a state-law crime for failure to carry immigration papers as required by federal law), part of Section 5 (making it illegal for an illegal immigrant to solicit, apply for, or perform work), and Section 6 (authorizing warrantless arrest where there is probable cause to believe the alien has committed a removable offense)—also involve an exercise of the state’s police powers to deal with the collateral health, safety, and welfare impacts of illegal immigration in the state, and do so in ways that are virtually indistinguishable from the police power authority that undergirds the provisions that were upheld. The district court enjoined Section 5(C), for example, which prohibited illegal immigrants from seeking work,<sup>64</sup> even though the Supreme Court in *Whiting* already upheld parallel provisions of Arizona state law that prohibit employers from hiring illegal immigrants.<sup>65</sup> And the district court enjoined Section 3, making it a state-law crime for non-naturalized immigrants to fail to carry the immigration papers that federal law requires them to carry,<sup>66</sup> while declining DOJ’s specific request to enjoin Section 4, making it a state-law crime to transport or harbor illegal immigrants,<sup>67</sup> and DOJ’s generalized request to enjoin Section 5(A) and (B), making it a state-law crime to hire or be hired from a vehicle that, in stopping, impedes traffic.<sup>68</sup>

More significantly, Judge Bolton, who presided over the case in the district court, made several factual and legal errors in her decision to grant preliminary injunctions of Sections 2(B), 3, 5(C), and 6 of the Act. For example, two sentences in the middle of Section 2(B), when read in isolation, seem to require submission of an overwhelming volume of immigration status requests to the federal government: “Any person who is ar-

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63. *Id.*

64. *Id.* at 1000–02.

65. 131 S. Ct. 1968, 1987 (2011).

66. *Arizona*, 703 F. Supp. 2d at 998–99.

67. *Id.* at 999–1000.

68. *Id.* at 986, 1008.

rested shall have the person's immigration status determined before the person is released. The person's immigration status shall be verified with the federal government pursuant to 8 United States Code § 1373(c)."<sup>69</sup> Judge Bolton relied on the contention that the requirement would impose undue burdens on lawful residents, as well as overwhelm federal resources, to invalidate the provision.<sup>70</sup> But in doing so, she refused to credit a narrowing construction of the provision, derived from its context, that was definitively provided by authorized representatives of the State. Immediately before the relevant sentences, for example, is the requirement that law enforcement shall make a "reasonable attempt . . . when practicable, to determine the immigration status" of any person with whom lawful contact (later amended to clarify "stop, detention or arrest") by law enforcement is made "where *reasonable suspicion* exists that the person is an alien . . ."<sup>71</sup> Immediately after the offending sentences, Section 2(B) sets out four ways in which an alien is "presumed to not be an alien who is unlawfully present in the United States"—by providing a valid Arizona driver's license or any other government-issued identification that required proof of lawful presence in the United States before issuance.<sup>72</sup> Not unreasonably, the state argued that the two sentences should be read in reference to the paragraph as a whole, such that the reasonableness caveat in the preceding sentences, or the presumptions in the following sentences, or both, would modify, and therefore limit, the volume of requests that would be transmitted to the federal government,<sup>73</sup> thereby alleviating the concern that led Judge Bolton to enjoin enforcement of the law. Accepting such a narrowed construction by the State, when the language is "fairly susceptible" to the proffered construction, not only is the norm but also is compelled by the constitutional avoidance doctrine: "[t]he elementary rule . . . that every reasonable construction must be resorted to, in order to save a statute from unconsti-

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69. S.B. 1070, 49th Gen. Assemb., 2d Reg. Sess., § 2(B) (Ariz. 2010) (codified at ARIZ. REV. STAT. ANN. § 11-1051(B)).

70. *Arizona*, 703 F. Supp. at 993–96.

71. Ariz. S.B. 1070 § 2(B) (codified at ARIZ. REV. STAT. ANN. § 11-1051(B)) (emphases added).

72. *Id.*

73. Defendants' Response to Plaintiff's Motion for Preliminary Injunction at 10, *Arizona*, 703 F. Supp. 2d 980 (No. 210CV01413).

tutionality.”<sup>74</sup> That rule, stemming from Chief Justice John Marshall’s 1804 opinion in *The Charming Betsy*<sup>75</sup> applies not just to cases involving federal statutes but to those interpreting state statutes as well. “So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions,” the Supreme Court noted nearly a century ago in *Fox v. Washington*, “they should be so construed; and it is to be presumed that state laws will be construed in that way by the state courts.”<sup>76</sup>

In yet another example of legal error, after erroneously failing to credit Arizona’s narrowing construction of Section 2(B), Judge Bolton used the resulting burden on the federal government that the DOJ claimed would flow from the increased number of immigration status inquiries mandated by the section to hold, without citation to any authority, that the burden created an “inference of preemption.”<sup>77</sup> The law, of course, is generally the opposite. There is a presumption *against* preemption, not an inference in favor of it. As the Court stated in *De Canas v. Bica*:

[W]e will not presume that Congress, in enacting the [Immigration and Nationality Act], intended to oust state authority to regulate . . . in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power—including state power to promulgate laws not in

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74. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

75. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

76. 236 U.S. 273, 277 (1915) (citing *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 407–08 (1909)).

77. *United States v. Arizona*, 703 F. Supp. 2d 980, 998 (D. Ariz. 2010). Judge Bolton acknowledged, and apparently did not have any concern about, the fact that law enforcement officials in Arizona already had the *discretion* to direct immigration status inquiries to the federal government, or that the federal government, by law, has an “obligation” to respond to such inquiries. See 8 U.S.C. § 1373(c) (“Obligation to respond to inquiries”: “The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.”). Just how a decision by the state to define in advance how its own state officials should exercise that discretion alters the legal calculus so much that a different preemption presumption should prevail, Judge Bolton did not say.

conflict with federal laws—was “the clear and manifest purpose of Congress” would justify that conclusion.<sup>78</sup>

Moreover, the Supreme Court’s recent preemption decisions demonstrate an increasing suspicion of implied preemption claims. As the Court noted just last year in *Whiting*, “[i]mplied preemption analysis does not justify a ‘freewheeling judicial inquiry into whether a state statute is in tension with federal objectives’; such an endeavor ‘would undercut the principle that it is Congress rather than the courts that preempts state law.’”<sup>79</sup>

To provide an example of factual error: Judge Bolton also found that the first sentence of subsection 2(B)—the requirement to ascertain immigration status during any stop or arrest upon reasonable suspicion—likely was unconstitutional, accepting DOJ’s claim that “the federal government has long rejected a system by which aliens’ papers are routinely demanded and checked.”<sup>80</sup> That claim is manifestly untrue. Federal law, which Judge Bolton herself quotes later in the opinion when discussing a different provision of S.B. 1070, is quite explicit: “Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to subsection (d) of this section.”<sup>81</sup> Failure to comply is a misdemeanor, subjecting the offender to a fine of up to \$100, imprisonment of up to thirty days, or both.<sup>82</sup> Failure to apply for the required registration card in the first place carries a fine of up to \$1000, imprisonment of up to six months, or both.<sup>83</sup>

Judge Bolton’s struggle with the law and facts did not improve when she turned to Section 3, the provision making it a state law crime to fail to carry immigration papers, which federal law requires be carried at all times.<sup>84</sup> Judge Bolton held that the

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78. 424 U.S. 351, 357 (1976) (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963)).

79. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment)).

80. *Arizona*, 703 F. Supp. 2d at 997.

81. 8 U.S.C. § 1304(e) (2006).

82. *Id.*

83. 8 U.S.C. § 1306(a).

84. *See* 8 U.S.C. § 1304(e).

provision was “an impermissible attempt by Arizona to regulate alien registration” because “[a]lthough the alien registration requirements remain uniform,”<sup>85</sup> the Section *alters the penalties* established by Congress under the federal registration scheme” and for that reason “stands as an obstacle to the uniform, federal registration scheme . . . .”<sup>86</sup> The penalty for violating the federal law is up to \$100 fine and up to sixty days imprisonment.<sup>87</sup> The penalty for violating Section 3 is a maximum fine of \$100 and a maximum of twenty days in jail for a first violation and up to thirty days in jail for any subsequent violation.<sup>88</sup> The two penalty provisions are virtually identical; the only difference is that Arizona capped the discretionary imprisonment for first offenders at twenty days rather than at thirty, a modification that does not alter congressionally mandated penalties because it is encompassed within the federal “up to 30 days” language.<sup>89</sup>

It is hard to fathom how such a minor difference qualifies as an “obstacle to the uniform, federal registration scheme,” yet, by her material exaggeration, Judge Bolton avoided the more difficult inquiry that actually makes the validity of Section 3 a close call. As anyone old enough to remember the 1992 race riots in Los Angeles that followed the state-court acquittal of the police officers charged in the beating of Rodney King, Sgt. Stacey Koon and his fellow police officers were subsequently prosecuted in federal court and convicted.<sup>90</sup> The second prosecution did not violate the Double Jeopardy Clause of the Fifth Amendment because of the controversial doctrine of dual sov-

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85. *Arizona*, 703 F. Supp. 2d at 999. This point could not be contested, because Arizona’s provision incorporates by reference the federal requirement. S.B. 1070, 49th Gen. Assemb., 2d Reg. Sess, § 3 (Ariz. 2010) (codified at ARIZ. REV. STAT. ANN. § 13-1509(A)).

86. *Arizona*, 703 F. Supp. 2d at 999 (emphasis added).

87. 8 U.S.C. § 1304(e).

88. Ariz. S.B. 1070 § 3 (codified at ARIZ. REV. STAT. ANN. § 13-1509(H)).

89. Judge Bolton descriptively noted that “Section 3 also limits violators’ eligibility for suspension of sentence, probation, pardon, and commutation of a sentence and requires violators to pay jail costs.” *Arizona*, 703 F. Supp. 2d at 998 (citing Ariz. S.B. 1070 § 3 (codified at ARIZ. REV. STAT. ANN. § 13-1509(D), (E))). But she did not address whether those provisions differ from federal law, or if they do, how limiting a priori the sentencing discretion available to any judge could stand as an obstacle to the uniform federal registration scheme.

90. Seth Mydans, *Verdict in Los Angeles: 2 of 4 Officers Found Guilty in Los Angeles Beating*, N.Y. TIMES, Apr. 18, 1993, at A1.

ereignty, in which a second prosecution brought by a different sovereign (state followed by federal, or federal followed by state), though based on the same conduct, is permitted.<sup>91</sup>

By creating a separate state crime, Arizona could be exposing illegal aliens to double prosecution, with the possibility of double convictions (and double the penalties), or conviction after an acquittal, or at the very least the burden of defending against two separate court actions. That would certainly provide a more serious challenge to Section 3 under a *Hines v. Davidowitz* analysis than the specious grounds Judge Bolton relied upon. Even that is an open question, one for which the State would not be without significant defenses. Does the doctrine of dual sovereignty even apply when both the state and federal crimes are defined by reference to the same federal statute, for example? The so-called *Bartkus* exception to the dual sovereignty doctrine, though limited, seems close to point. Relying on dicta in *Bartkus v. Illinois*,<sup>92</sup> a number of circuit courts have recognized that the dual sovereignty doctrine does not apply, and the Double Jeopardy Clause can be violated despite single prosecutions by separate sovereigns, when one prosecuting sovereign can be said to be acting as a tool of the other, or where the second prosecution is merely pursued as a sham on behalf of the first sovereign.<sup>93</sup> Even if the dual sovereignty doctrine might apply, should that possibility invalidate the state statute *ab initio*, on a facial challenge, or simply be grounds for subsequent “as applied” consideration in the event a second prosecution is ever brought? Section 3 is the provision of S.B. 1070 that is most susceptible to challenge under the *Hines* analysis: its constitutionality is an open question, certainly much closer than Judge Bolton credited.

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91. See Paul Hoffman, *Double Jeopardy Wars: The Cause for a Civil Rights “Exception,”* 41 UCLA L. REV. 649, 652–53 (1994); see also *Bartkus v. Illinois*, 359 U.S. 121, 132–33 (1959).

92. 359 U.S. at 123–24.

93. See, e.g., *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 494 (2d Cir. 1995) (citing *United States v. Certain Real Prop. & Premises Known as 38 Whalers Cove Drive, Babylon, N.Y.*, 954 F.2d 29, 38 (2d Cir. 1992)); *In re Kunstler*, 914 F.2d 505, 517 (4th Cir. 1990); *United States v. Guy*, 903 F.2d 1240, 1242 (9th Cir. 1990); *United States v. Moore*, 822 F.2d 35, 38 (8th Cir. 1987); *United States v. Aleman*, 609 F.2d 298, 309 (7th Cir. 1979); *United States v. Liddy*, 542 F.2d 76, 79–80 (D.C. Cir. 1976).



The Ninth Circuit's decision affirming the district court's issuance of a preliminary injunction repeats the district court's errors and adds some new ones. Had the Ninth Circuit accepted Arizona's narrowing interpretation of its own statute (Section 2(B)) it would have avoided the constitutional problem; instead the court adopted an interpretation that created a constitutional problem.<sup>94</sup> It refused to read sentences in Section 2(B) in context with the rest of the provision (although it later insisted on doing so with respect to a federal statute that might otherwise have suffered a similar interpretative error).<sup>95</sup> The court made the nonsensical point that Arizona's decision to assist with the enforcement of federal immigration law would somehow "interfere[] with the federal government's authority to implement its priorities . . ."<sup>96</sup> One would have thought that securing additional resources for its enforcement efforts, the federal government would be better able to implement its own priorities, not less. The Ninth Circuit also contended that "*the record* unmistakably demonstrates that S.B. 1070 has had a deleterious effect on the United States' foreign relations,"<sup>97</sup> even though there was no evidentiary "record"<sup>98</sup> and the injunction was issued before S.B. 1070 even took effect.<sup>99</sup>

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94. *United States v. Arizona*, 641 F.3d 339, 347–48 (9th Cir. 2011).

95. *Id.* at 351 ("Because our task is to interpret the meaning of many INA provisions as a whole, not § 1373(c) and § 1357(g)(10) at the expense of all others, we are not persuaded by the dissent's argument, which considers these provisions in stark isolation from the rest of the statute."). In contrast, when interpreting Arizona's Section 2(B), the Ninth Circuit (following the district court), read two sentences in stark isolation from the other sentences in the same paragraph of the same section. *See id.* at 347–48.

96. *Id.* at 351.

97. *Id.* at 352 (emphasis added).

98. As with most preliminary injunction decisions, the district court issued a injunction before any evidence was taken.

99. The Ninth Circuit had the benefit of briefing by the United Mexican States, the nation from which the largest number of illegal immigrants to the United States hail. In the brief, Mexico intimated that U.S. officials secretly made "commitments" to give a low priority to enforcement of U.S. immigration laws, *see* Brief of Amicus Curiae United Mexican States in support of Plaintiff-Appellee, *Arizona*, 641 F.3d at 339, at 2, and conclusorily claimed, parroting the position of the DOJ, "that SB 1070 encourages an unacceptable risk of unfair and disproportionate targeting of Latinos," *id.* at 15, without the law even having gone into effect.

By far the most glaring error is a broad conceptual one. The Ninth Circuit appears to have adopted the view that the States not only are bound by prohibitions in the U.S. Constitution but exclusively derive their positive authority from that document as well. For example, it noted early in the opinion that “Congress has instructed under what conditions state officials are permitted to assist the Executive in the enforcement of immigration laws.”<sup>100</sup> Later, it held that “Subsection (g)(10) [of 8 U.S.C. § 1357] does not operate as a broad alternative grant of authority for state officers to systematically enforce the [Immigration and Nationality Act] outside of the restrictions set forth in subsections (g)(1)–(9).”<sup>101</sup> The Court also contended that its restrictive interpretation of the derivation of state authority is bolstered by 8 U.S.C. § 1103(a)(10), which authorizes the Attorney General to deputize state and local law enforcement officers “[i]n the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response . . . .”<sup>102</sup> “If subsection (g)(10) meant that state and local officers could routinely perform the functions of [Department of Homeland Security] officers outside the supervision of the Attorney General,” the court asserted, “there would be no need for Congress to give the Attorney General the ability, in § 1103(a)(10), to declare an ‘actual or imminent mass influx of aliens,’ and to authorize ‘any State or local law enforcement officer’ to perform the functions of a DHS officer.”<sup>103</sup>

These statements belie a fundamental conceptual misunderstanding of federalism. States do not derive their authority to act from the Federal Constitution, nor do they require the approval of federal officials or an Act of Congress to exercise police powers in their own states. The Federal Constitution serves only to limit state authority where specified.<sup>104</sup> Conversely, the federal

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100. *Arizona*, 641 F.3d 339 at 348.

101. *Id.* at 349.

102. *Id.* at 350 n.9 (quoting 8 U.S.C. § 1103(a)(10)).

103. *Id.*

104. As originally written, the Constitution’s restrictions on state authority are found in Article I, Section 10. The list of restrictions was broadened rather dramatically with the Civil War amendments and the subsequent incorporation of

government both derives its authority from the Federal Constitution and is limited by it. It is no surprise, then, that in each of the statutes that the Ninth Circuit cited dealing with federal-state enforcement cooperation, authorization is given to federal officials to enter into such agreements.<sup>105</sup> No such authorization is given to the States, because none is needed. Indeed, quite the opposite is true. For example, as 8 U.S.C. § 1103(a)(10) makes clear, the Attorney General's ability to enlist state officials in *federal* enforcement efforts is contingent on "the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving . . ."<sup>106</sup> To hold otherwise, as the Ninth Circuit did, is to answer the question left open by the Supreme Court in *Hines* in the negative and to repudiate the Supreme Court's holding in *De Canas*. Suffice it to say, it is unlikely that the Supreme Court granted Arizona's petition for a writ of certiorari to ratify that proposition.

But lest there be any doubt, a lengthy discussion from the high Court's recent *Chamber of Commerce v. Whiting* decision seems fairly telling. Granted, the Court decided *Whiting* on rather technical preemption and statutory interpretation grounds, but the reasoning seems to put a heavy thumb on Arizona's side of the scale in the current case:

And here Arizona went the extra mile in ensuring that its law closely tracks [the Immigration Reform and Control Act's] provisions in all material respects. The Arizona law begins by adopting the federal definition of who qualifies as an "unauthorized alien." Compare 8 U.S.C. § 1324a(h)(3) (an "unauthorized alien" is an alien not "lawfully admitted for permanent residence" or not otherwise authorized by federal law to be employed) with Ariz. Rev. Stat. Ann. § 23-211(11) (adopting the federal definition of "unauthorized alien"); see *De Canas*, 424 U.S., at 363, 96 S. Ct. 933 (finding no preemption of state law that operates "only with respect to individuals whom the Federal Government has already declared cannot work in this country").

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the Bill of Rights, but neither of those developments altered the fact that the States do not derive their authority to act from the Federal Constitution.

105. See *Arizona*, 641 F.3d at 348-50 & n.9.

106. *Id.* at 350 n.9.

Not only that, the Arizona law expressly provides that state investigators must verify the work authorization of an allegedly unauthorized alien with the Federal Government, and “shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States.” § 23–212(B). What is more, a state court “shall consider *only* the federal government’s determination” when deciding “whether an employee is an unauthorized alien.” § 23–212(H) (emphasis added). As a result, there can by definition be no conflict between state and federal law as to worker authorization, either at the investigatory or adjudicatory stage.

The federal determination on which the State must rely is provided under 8 U.S.C. § 1373(c) . . . . That provision requires the Federal Government to “verify or ascertain” an individual’s “citizenship or immigration status” in response to a state request

. . . .

From this basic starting point, the Arizona law continues to trace the federal law. Both the state and federal law prohibit “knowingly” employing an unauthorized alien. Compare 8 U.S.C. § 1324a(a)(1)(A) with Ariz. Rev. Stat. Ann. § 23–212(A). But the state law does not stop there in guarding against any conflict with the federal law. The Arizona law provides that “ ‘[k]nowingly employ an unauthorized alien’ means the actions described in 8 United States Code § 1324a,” and that the “term shall be interpreted consistently with 8 United States Code § 1324a and any applicable federal rules and regulations.” § 23–211(8).

The Arizona law provides employers with the same affirmative defense for good-faith compliance with the I–9 process as does the federal law. Compare 8 U.S.C. § 1324a(a)(3) (“A person or entity that establishes that it has complied in good faith with the [employment verification] requirements of [§ 1324a(b)] with respect to hiring .. an alien .. has established an affirmative defense that the person or entity has not violated” the law) with Ariz. Rev. Stat. Ann. § 23–212(J) (“an employer that establishes that it has complied in good faith with the requirements of 8 United States Code section 1324a(b) establishes an affirmative defense that the employer did not knowingly employ an unauthorized alien”). And both the federal and Arizona law accord employers a rebuttable presumption of compliance with the law when they use E–Verify to validate a

finding of employment eligibility. Compare IIRIRA § 402(b), 110 Stat. 3009–656 to 3009–657 with Ariz.Rev.Stat. Ann. § 23–212(I).<sup>107</sup>

S.B. 1070 bears similar indicia of conformity with federal law. Section 1 describes, for example, the State’s “compelling interest in the cooperative enforcement of *federal* immigration laws.”<sup>108</sup> Section 2(A) prohibits local government from “restrict[ing] the enforcement of *federal* immigration laws . . . .”<sup>109</sup> Section 2(B) requires that immigration status “be verified with the federal government pursuant to 8 United States code section 1373(c).”<sup>110</sup> Section 2(K) requires that Section 2 “be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.”<sup>111</sup> Section 3 defines the state-law crime of failure to carry alien registration documents by incorporating the federal criminal statutes.<sup>112</sup> Section 5(C)’s prohibition on unauthorized alien’s applying for work in the state incorporates, in subsection (F)(2), the federal statutory definition of “unauthorized alien.”<sup>113</sup> Sections 6 and 7 amend existing provisions of Arizona law dealing with employment of unauthorized aliens from the employer’s side, provisions which already incorporated determinations made pursuant to *federal* law.<sup>114</sup> Section 8 requires employers to participate in the *federal* E-Verify program.<sup>115</sup> Lest the point still be lost, Section 12(B) provides that “[t]he terms of this act regarding immigration shall be construed to have the meanings given to them under federal immigration law.”<sup>116</sup> Finally, Section 12(C) provides that “[t]his act shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil

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107. 131 S. Ct. 1968, 1981–83 (2011) (internal citations omitted).

108. S.B. 1070, 49th Gen. Assemb., 2d Reg. Sess, § 1 (Ariz. 2010).

109. *Id.* § 2(A) (codified at ARIZ. REV. STAT. ANN. § 11-1051(A)).

110. *Id.* § 4(B) (codified at ARIZ. REV. STAT. ANN. § 11-1051(B)).

111. *Id.* § 4(K) (codified at ARIZ. REV. STAT. ANN. § 11-1051(K)).

112. *Id.* § 3 (codified at ARIZ. REV. STAT. ANN. § 13-1509).

113. *Id.* § 5(E)(2) (codified at ARIZ. REV. STAT. ANN. § 13-2928).

114. *Id.* §§ 6, 7 (codified at ARIZ. REV. STAT. ANN. §§ 13-3883, 23-212).

115. *Id.* § 8 (codified at ARIZ. REV. STAT. ANN. § 23-212.01).

116. *Id.* § 12(B).

rights of all persons and respecting the privileges and immunities of United States citizens.”<sup>117</sup>

In sum, with the possible (and only *possible*) exception of Section 3, Arizona’s S.B. 1070 seems well within the bounds of state authority, as recognized by the Supreme Court in *De Canas* and as the tea leaves from *Whiting* suggest. As Judge Bolton herself recognized in rejecting DOJ’s alternative argument that Section 5 violated the dormant commerce clause, that provision of S.B. 1070 “does not attempt to prohibit entry into Arizona, but rather criminalizes specific conduct already prohibited by federal law.”<sup>118</sup> Further, it “creates parallel state statutory provisions for conduct already prohibited by federal law . . . .”<sup>119</sup> Yet the entire statute was designed to parallel, not supplement or detract from, existing federal law, a circumstance that seemed to weigh heavily in the high Court’s holding in *Whiting*. Perhaps if Judge Bolton had the benefit of *Whiting* before she issued her ruling, she might have applied this discussion from the dormant commerce clause portion of her opinion to the entirety of S.B. 1070 and reached a different conclusion.

## II. ALABAMA’S TAXPAYER AND CITIZEN PROTECTION ACT<sup>120</sup>

Arizona’s SB 1070 is not the only state immigration reform attracting national attention as cash-strapped states attempt to address the growing costs of illegal immigration. Section 28 of Alabama’s new Taxpayer and Citizen Protection Act,<sup>121</sup> which requires every public elementary and secondary school in the state to determine if an enrolling student is lawfully present in

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117. *Id.* § 12(C).

118. *United States v. Arizona*, 703 F. Supp. 2d 980, 1004 n.19 (D. Ariz. 2010).

119. *Id.* at 1003.

120. The analysis in this section was first published in the “Room for Debate” online opinion section of the New York Times, in October, 2011. See John C. Eastman, *Should Schools Help Catch Illegal Immigrants? Alabama’s Immigration Law is Permissible and Sensible*, N.Y. TIMES, <http://www.nytimes.com/roomfordebate/2011/10/04/should-alabama-schools-help-catch-illegal-immigrants/alabamas-immigration-law-is-permissible-and-sensible> (last updated Nov. 14, 2011).

121. H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011).

the United States,<sup>122</sup> also has gained quite a bit of notoriety. It is said to run afoul of the 1982 case *Plyler v. Doe*, in which the Supreme Court held that denying free public school education to illegal immigrants violates the Fourteenth Amendment's requirement of equal protection.<sup>123</sup> The district court quite properly disagreed, as even a cursory reading of *Plyler* will confirm.

Alabama's law does not bar illegal immigrant children from its public schools, but rather identifies them, gathers statistics about the scope of the educational services provided to them and, most importantly, analyzes the impact of providing free educational services to illegal immigrants on the quality and cost of education being provided to U.S. citizens.<sup>124</sup>

Far from violating *Plyler*, this is the very information lacking in the record that supported the Court's ruling in that case. Acknowledging the district court's finding that Texas had "failed to offer any 'credible supporting evidence that a proportionately small diminution of the funds spent on each child [which might result from devoting some state funds to the education of the excluded group] will have a grave impact on the quality of education,'" the Supreme Court concluded that "the record in no way supports the claim that exclusion of undocumented children is likely to improve the overall quality of education in the State."<sup>125</sup>

Alabama's law seeks to collect the data necessary to conduct the analysis the Supreme Court found missing in *Plyler*. If the data show that providing free education to those who are unlawfully present in the United States has no significant effect on education or its costs, this provision of the Alabama law likely will not alter the status quo that has existed since *Plyler*. But if the data show that providing a free public education to illegal immigrants severely undermines the quality or drastically increases the cost of education for those who are lawful residents and citizens, the state will have met an important caveat in the *Plyler* decision itself.

*Plyler* was and remains an extremely controversial decision, issued by a bare majority of the Court over a strong and per-

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122. *Id.* § 28(a)(1).

123. 457 U.S. 202 (1982).

124. Ala. H.B. 56 § 2.

125. *Plyler*, 457 U.S. at 229.

suasive dissenting opinion by Chief Justice Warren Burger.<sup>126</sup> It has turned an incidental benefit of illegal immigration—Justice Brennan’s opinion for the court even noted that “few if any illegal immigrants come to this country, or presumably to the State of Texas, in order to avail themselves of a free education”<sup>127</sup>—into a primary attraction for illegal immigration.

In light of all that, Alabama’s effort to collect the data necessary for the analysis that Justice Brennan was unable to undertake in *Plyler* is not only permissible, but it also is eminently sensible. We should not let our public policy, much less our constitutional understanding, be developed behind the veil of ignorance that has heretofore prevailed on this subject.

Moreover, it is fair to say that the Court has shifted significantly toward the States in questions of federal-state balance since *Plyler* was decided in 1982 (and *Garcia v. San Antonio Metropolitan Transit Authority*<sup>128</sup> in 1985). Justice Anthony Kennedy replaced Justice Lewis Powell in 1988, and Justice Clarence Thomas replaced Justice Thurgood Marshall in 1991. Both have been more attentive to questions of federalism and of state authority (Justice Kennedy marginally so; Justice Thomas quite significantly) than their respective predecessors, both of whom were members of the *Plyler* majority.<sup>129</sup> The balance shifted back a bit in 1993 when Justice Ruth Bader Ginsburg replaced Justice Byron White, who had dissented in *Plyler*, but the pendulum had still swung enough to give us such pro-federalism decisions as *United States v. Lopez*<sup>130</sup> in 1995, *United States v. Morrison*<sup>131</sup> in 2000, and *Chamber of Commerce v. Whiting*<sup>132</sup> just last term. Given

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126. *Id.* at 242 (Burger, C.J., dissenting).

127. *Id.* at 228 (majority opinion).

128. 469 U.S. 528 (1985).

129. See, e.g., *New York v. United States*, 505 U.S. 144 (1992) (holding that a provision of the Low-Level Radioactive Waste Policy Act that required states to take ownership of waste and regulate its disposal according to Congressional instructions fell outside Congress’s constitutional authority and was inconsistent with the Tenth Amendment).

130. 514 U.S. 549 (1995).

131. 529 U.S. 598 (2000).

132. The movement has not been entirely in this direction, of course. Justice Kennedy sided with the *Plyler*-leaning members of the Court to reject the State’s position in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), and both he and Justice Scalia sided with federal preemption in the medical marijuana case out of California in 2005, *Gonzales v. Raich*, 545 U.S. 1 (2005).



that *Plyler* is still controversial thirty years after it was decided, that the balance on the Court appears to have shifted in an outcome-determinative way, and that the Alabama law seeks to collect the very information that the Court in *Plyler* specifically said Texas had failed to produce in that case, it is certainly not beyond the realm of possibility that the Alabama case will prove to be the vehicle for a reconsideration of *Plyler v. Doe*.

#### CONCLUSION

Responding, in part, to an era of financial dislocation and stretched budgets, Arizona and Alabama have attempted to reform their local approaches to immigration. Their solutions are consistent with federal immigration statutes, and, therefore violate neither Congress's statutory scheme for immigration nor any federal constitutional authority. Thus, during this age of austerity and rising illegal immigration, these states—and others—should be allowed to innovate free from DOJ lawsuits or interference from the courts.