

# Journal of Civil Rights and Economic Development

---

Volume 26  
Issue 2 *Volume 26, Winter 2012, Issue 2*

Article 13

---

January 2012

## Immigration and the Failure of Federalism

David Thau

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

---

### Recommended Citation

David Thau (2012) "Immigration and the Failure of Federalism," *Journal of Civil Rights and Economic Development*: Vol. 26 : Iss. 2 , Article 13.

Available at: <https://scholarship.law.stjohns.edu/jcred/vol26/iss2/13>

This Notes and Comments is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# IMMIGRATION AND THE FAILURE OF FEDERALISM

DAVID THAU\*

*“[I]t is now abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reforms our country needs.”<sup>1</sup>*

## INTRODUCTION

A statute’s title can provide great insight into the reasoning and purpose for its enactment. The “Support Our Law Enforcement and Safe Neighborhoods Act”<sup>2</sup> (“S.B. 1070”) is a not so subtle critique of the federal government’s failures to deliver comprehensive immigration legislation and protect the United States’ southern border with Mexico. However, implicit in Arizona’s criticism of the federal government is the existence of the thorny legal question currently being litigated in the federal court system: whether Arizona’s law is constitutionally invalid due to preemption.

While the preemption component of the immigration issue is important, S.B. 1070 touches the surface of an equally compelling question, seemingly ignored by both parties regarding states’ rights in the absence of federal action of a constitutionally enumerated or plenary power.<sup>3</sup> Both parties focus solely in their respective court documents on immigration’s jurisdictional issues: the United States, represented by the Department of Justice (“DOJ”), argues that in our constitutional system, the federal

\* J.D. Candidate, St. John’s University of Law.

<sup>1</sup> David S. Broder, *Arizona’s Border Burden*, WASHINGTON POST, Jul. 8, 2007, at B07, available at [http://www.washingtonpost.com/wp-dyn/content/article/2007/07/06/AR2007070601929\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/07/06/AR2007070601929_pf.html) (quoting Former Arizona Democratic Governor and Current Obama Administration’s Department of Homeland Security Secretary).

<sup>2</sup> Sen. 1070, 49 Leg., 2d Reg. Sess. (Ariz. 2010).

<sup>3</sup> See *Brewer Ready For War: The Government Has ‘Failed’ Arizona and the American People*, FOXNEWS.COM, Feb. 11, 2011, <http://nation.foxnews.com/arizona-immigration-law/2011/02/11/brewer-ready-war-government-has-failed-arizona-and-american-peopl> [hereinafter *Ready for War*] (documenting that Arizona filed a counter-suit claiming the federal government has not enforced immigration laws. At the time this note was originally written, Arizona had not made this a central claim of their suit); see also *United States. v. State*, 2011 WL 4469941 (N.D. Ala. 2011).

government has preeminent authority to regulate immigration matters, and S.B. 1070 will conflict and undermine the federal government's careful balance of immigration enforcement priorities and objectives.<sup>4</sup> Arizona argues that the statute merely seeks to assist with the enforcement of existing federal immigration laws in a constitutional manner.<sup>5</sup> Essentially, both sides acknowledge immigration is a federal issue, however, the DOJ argues S.B. 1070 is preempted because the federal government has sole jurisdiction, while Arizona argues there is concurrent jurisdiction. However, the issue seemingly ignored by both parties is the fact that the federal government's failure to effectively and comprehensively address immigration led to Arizona's decision that "enough is enough"<sup>6</sup> and choice to tackle the immigration issue themselves.<sup>7</sup>

Accordingly, this note will address both the constitutional issue and the federal government's lack of actions. Section II of this note will provide a brief analysis of constitutional law regarding the delegation of authority between the federal and state governments. Section III will provide a brief overview of federal immigration law. Section IV will examine the background and the reasoning behind the passage of S.B. 1070 including: a brief description of Arizona's unique immigration problem, a history of prior legislative attempts by Arizona to address the immigration issue, briefly documenting the federal government's failure to enforce immigration law and to deliver comprehensive immigration reform, and developments that compelled the Arizona legislature to adopt S.B. 1070. Section V will argue that the federal government's immigration powers should not be considered absolute by: examining the current state of immigration law, comparing immigration to other congressional powers to illustrate why preemption law, as it has been historically interpreted and applied, should be changed to reflect the realities of the federal government's failures. Section VI will conclude and recommend that the Tenth Amendment be interpreted to grant states the rights that are forfeited by the federal government; federal powers should be considered a responsibility that if neglected, can be forfeited and given to the states.

<sup>4</sup> Brief of Respondent at 3, *United States v. Arizona*, No. CV 10-1413-PHX-SRB (9th Cir. 2010).

<sup>5</sup> Response at 3, *United States v. Arizona*, No. CV 10-1413-PHX-SRB (9th Cir. 2010).

<sup>6</sup> See *Ariz. Lawmakers Pass Controversial Illegal Immigration Bill*, KPHO (April 20, 2010), <http://www.kpho.com/story/14782517/ariz-lawmakers-pass-controversial-illegal-immigration-bill-4-16-2010> (noting that Republican State Senator Russell Pearce of Mesa, who sponsored the bill, said it will take handcuffs off police and put them on violent criminals); see also Julianne Hing, *Arizona Sues Feds for Not Being Tough Enough on Immigration*, COLORLINES (Feb. 11, 2011), [http://colorlines.com/archives/2011/02/arizona\\_sues\\_federal\\_government\\_for\\_not\\_being\\_tough\\_enough\\_on\\_immigration.html](http://colorlines.com/archives/2011/02/arizona_sues_federal_government_for_not_being_tough_enough_on_immigration.html).

<sup>7</sup> See Ready for War, *supra* note 3; see also Hing, *supra* note 6.

## I. FEDERALISM, STATES' RIGHTS AND THE SUPREMACY CLAUSE

### A. *The Constitutional Background*

The United States Constitution divides power vertically between the federal and state governments in a system known as federalism.<sup>8</sup> The Constitution grants Congress enumerated powers.<sup>9</sup> Congress may exercise only those powers that are granted to it by the Constitution.<sup>10</sup> However, the Constitution dramatically expands Congress's power via the Necessary and Proper Clause.<sup>11</sup> Conversely, the Tenth Amendment<sup>12</sup> implies that Congress can act only if there is clear authority, with all other governance left to the states.<sup>13</sup>

There has been great debate throughout American history as to whether the Tenth Amendment reserves a zone of authority exclusively to the states, and whether the judiciary should invalidate laws that infringe on that zone.<sup>14</sup> Historically, Congress has used the Necessary and Proper Clause in conjunction with the Commerce Clause to expand its power. Early in the 20<sup>th</sup> century, the Court aggressively used the Tenth Amendment as a limit on Congress's power by striking down various pieces of legislation, reasoning that the Constitution via the Commerce Clause did not grant Congress the necessary authority and therefore such legislation violated the rights of the states.<sup>15</sup> However, after 1937, the Court rejected this view and

<sup>8</sup> See Rex E. Lee, *The Dilemma of American Federalism: Power to the People, The States or the Federal Government?: Federalism, Separation of Powers, & the Legacy of Garcia*, 1996 B.Y.U. L. REV. 329 (1996) (discussing how federalism divides power vertically); see also Austin T. Fragomen, Jr., *Work Verification Obligations & Compliance With Rules Governing Employment of Foreign Nationals*, IMMIGR. L. & BUS. § 24:4 (2011).

<sup>9</sup> See generally U.S. CONST. art. I, § 8.

<sup>10</sup> U.S. CONST. art. I, § 8, cl. 1–17 (granting Congress the power to lay and collect taxes, power to coin money, provide for defense of the country, borrow money on credit, regulate commerce with foreign nations and among several states (also known as the 'Commerce Clause'), regulate immigration and bankruptcy, establish post offices, control issuance of patents and copyrights, declare war, power to raise army and navy, and pass laws for Washington D.C. and military enclaves).

<sup>11</sup> U.S. CONST. art. I, § 8, cl. 18 (giving Congress the power to "make all necessary and proper laws to carry out other powers of the Constitution").

<sup>12</sup> U.S. CONST. amend. X (stating "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

<sup>13</sup> See U.S. CONST. art. I, § 8, cl. 1–17; see also U.S. CONST. art. I, § 10 cl. 1 (prohibiting states from entering into a treaty, alliance or confederation; grant Letters of Marque and Reprisal; coin money, emit bills of credit, pass Bills of Attainder, ex post facto law, or law impairing the obligations of contracts or grant title of nobility).

<sup>14</sup> See generally Jess Bravin, *Justices Weigh 10<sup>th</sup> Amendment*, WALL ST. J. (Feb. 23, 2011), <http://online.wsj.com/article/SB10001424052748704071304576160763576641114.html> (quoting the Court as describing the 10<sup>th</sup> amendment as "truism"); see also Katherine A. Connolly, *Who's Left Standing for State Sovereignty?: Private Party Standing to Raise Tenth Amendment Claims*, 51 B.C. L. REV. 1539, 1540 (2010).

<sup>15</sup> See e.g., *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342, 357 (1914) (preventing

no longer used the Tenth Amendment as a basis for declaring federal laws unconstitutional.<sup>16</sup> Subsequently, Congress was permitted to regulate a much wider range of issues including goods intended to move into interstate commerce<sup>17</sup> and extremely small intrastate activities.<sup>18</sup> The Court later held that Congress can protect other interests through the Commerce Clause such as civil rights<sup>19</sup> and the environment.<sup>20</sup> Accordingly, since 1937 the Tenth Amendment has in effect become an obsolete provision, incapable of checking the federal government's power and authority.<sup>21</sup>

The Constitution addresses the potential problems of federalism and conflicting laws between the states and the federal government via the Supremacy Clause. The Supremacy Clause states that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the

Congress from regulating activity that affects only intrastate commerce); *see also* *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (precluding Congress from legislating child labor in factories because manufacturing was not considered commerce); *Carter v. Carter Coal Co.*, 298 U.S. 238, 309 (1936) (holding that the Commerce Clause did not authorize Congress's attempts to fix the wages of mine-workers because it did not constitute a direct effect on commerce).

<sup>16</sup> *See* *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (abandoning its prior rulings and declaring that "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control"); *see also* *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) ("[N]o form of state activity may thwart the regulatory power granted by the commerce clause" and that the commerce clause's power reaches to "those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.>").

<sup>17</sup> *See* *United States v. Darby Lumber Co.*, 312 U.S. 100, 121 (1941) (upholding the Fair Labor Standards Act of 1938 reasoning that Congress had the power under the Commerce Clause to regulate employment conditions); *see also* *Maryland v. Waltz*, 392 U.S. 183, 191 (1968) (reasoning that labor disputes and strikes disrupt businesses involved in interstate commerce).

<sup>18</sup> *See* *Wickard v. Filburn*, 317 U.S. 111, 137 (1942) (dramatically increasing the power of Congress to regulate economic activity by upholding quotas and limits on wheat production on acreage owned by a farmer. Despite acknowledging that *Filburn* was producing the excess wheat entirely for his own use and had no intention of selling, the Court upheld the Act because *Filburn's* wheat growing activities reduced the amount of wheat he would buy on the open market, creating a national cumulative effect); *see also* *Gonzales v. Raich*, 545 U.S. 1, 18 (2005) (holding that homegrown medical marijuana intended only for personal home consumption could be regulated via the commerce clause).

<sup>19</sup> *See* *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 253 (1964) (ruling that Congress had the constitutional authority under the Commerce Clause to pass the Civil Rights Act of 1964 which forced a motel to rent rooms to black patrons); *see also* *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964) (forbidding racial discrimination in restaurants).

<sup>20</sup> *See* *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268 (1981) (upholding Congress's law that forced strip miners to have to put in top soil so crops can be made after finishing mining); *see also* *J. Blanding Holman IV, After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L.J. 139, 144 (1995) (discussing the role of *Hodel v. Va. Surface Mining & Reclamation Ass'n* in the development of federal regulatory jurisprudence).

<sup>21</sup> *See* *Bravin*, *supra* note 14 (reporting the justices are currently debating the scope and protections of the 10<sup>th</sup> amendment); *see also* Jack N. Rakove, *Fidelity in Constitutional Theory: Fidelity through History: Fidelity through History*, 65 *FORDHAM L. REV.* 1587, 1592 (1997) (referring to the Tenth Amendment as an obsolete Constitutional provision discussed only in arguments forced by 'avowed originalists').

Land.”<sup>22</sup> This provision sets up a hierarchical relationship between the federal government and the states.<sup>23</sup> It is under the Supremacy Clause where the issue of preemption arises and a state or local law may be invalidated if it conflicts with a federal statute passed under a permissible exercise of congressional power.

There are two major contexts where preemption is found.<sup>24</sup> First, express preemption occurs where the federal statute contains explicit preemptive language.<sup>25</sup> Second, there is implied preemption.<sup>26</sup> The Court has identified two types of implied preemption: (1) field preemption;<sup>27</sup> and (2) conflict preemption.<sup>28</sup> Conflict preemption typically occurs in one of the following two scenarios: (1) in the rare case where it is impossible to comply with both the federal and state statute;<sup>29</sup> or (2) in the more prevalent situation where the state law impedes the achievement of the congressional objective.<sup>30</sup>

While preemption is presented in distinct categories, these categories are not considered “rigidly distinct”<sup>31</sup> and accordingly in practice they often

<sup>22</sup> U.S. CONST. art VI, cl. 2.

<sup>23</sup> See Lee, *supra* note 8; see also Garrick B. Pursley, *Polyphonic Federalism*, 89 TEX. L. REV. 1365, 1384 (2011) (reviewing ROBERT A. SHAPIRO, POLYPHONIC FEDERALISM (2009)).

<sup>24</sup> Gade v. Nat’l Solid Waste Mgmt. Ass’n, 505 U.S. 88, 96 (1992) (quoting *Hillsborough County v. Automated Medical Laboratories Inc.*, 471 U.S. 707, 715 (1985)).

<sup>25</sup> Geier v. Am. Honda Motor Co., 529 U.S. 861, 884 (2000); see e.g., 29 U.S.C. §1144(a) (2006) (stating “the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.”).

<sup>26</sup> *Geier*, 529 U.S. at 884; *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

<sup>27</sup> See *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (explaining state law is preempted, in the absence of explicit statutory language, where it regulates conduct in a field that the Federal Government was intended to occupy exclusively); see also *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 230 (1947) (“The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it[] [o]r the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”).

<sup>28</sup> See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) (holding even if federal law does not expressly preempt state law, preemption will be found where “compliance with both federal and state regulations is a physical impossibility.”).

<sup>29</sup> See *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 281 (1987) (explaining where Congress has not completely displaced a state regulation, federal law may still preempt state law if compliance with both regulations is impossible); see e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (holding a state law requiring judicial determination of certain claims was preempted by a federal law requiring arbitration of those claims).

<sup>30</sup> See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (ruling, even if federal and state law are not mutually exclusive, and even if there is no congressional expression of a desire to preempt state law, preemption will be found if the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”); see also *California Fed. Sav. & Loan Ass’n*, 479 U.S. at 281 (noting that if a state law stands as an obstacle to the accomplishment of the purposes of Congress, a federal law may preempt a state law).

<sup>31</sup> See *English*, 496 U.S. at 79 n.5 (explaining the Court does not mean that the categories are “rigidly distinct” and indeed, field preemption may be understood as a species of conflict preemption).

overlap, leaving courts to base their decisions on *congressional intent*.<sup>32</sup> However, Congress's intent concerning preemption is frequently unclear.<sup>33</sup> It is within this area of law that concurrent jurisdiction arises where both the states and the federal government have regulatory authority. Accordingly, due to the growth of federal legislative authority via the interpretation of the Commerce Clause since 1937, preemption issues arise in literally every area of federal law and federal regulation.<sup>34</sup>

## II. OVERVIEW OF FEDERAL IMMIGRATION LAW

Federal regulation of immigration is a detailed statutory framework largely codified in the Immigration and Nationality Act ("INA").<sup>35</sup> INA empowers the Department of Homeland Security ("DHS") to administer and enforce federal immigration laws.<sup>36</sup> Some of INA's key provisions include: (1) setting the conditions under which a foreign national may be admitted to and remain in the United States;<sup>37</sup> (2) creating an alien registration system intended to monitor the entry and movement of aliens in the United States;<sup>38</sup> (3) identifying various actions that may subject an alien to removal from the United States;<sup>39</sup> (4) establishing alien smuggling laws;<sup>40</sup> and (5) sanctioning employers who knowingly employ aliens who are not authorized to work.<sup>41</sup>

The Immigration and Customs Enforcement agency ("ICE"), a subsidiary of DHS and the agency responsible for the interior

<sup>32</sup> See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("The purpose of Congress is the ultimate touchstone in every pre-emption case . . .").

<sup>33</sup> See *id.* at 486 (discussing Congress's intent must be discerned by using the statutory framework and the structure and purpose of the statute as a whole); see also *English*, 496 U.S. at 86 (stating that the Court was not surprised that there was no evidence of a clear congressional intent to preempt).

<sup>34</sup> See S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 829-30 (1992) (observing there has been a heightened number of preemption cases); see also S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U.L. REV. 685, 690-91 (1991) (asserting the substantive range of preempted state and local laws is continually expanding).

<sup>35</sup> See *United States v. Arizona*, 641 F.3d 339, 344 (9th Cir. 2011) (analyzing whether the immigration law enforcement provisions enacted by Arizona were preempted by the Immigration and Nationality Act).

<sup>36</sup> 8 U.S.C. § 1103 (2009).

<sup>37</sup> 8 U.S.C. §§ 1181-82, 1184 (2011).

<sup>38</sup> 8 U.S.C. §§ 1201(b), 1301-06 (2011).

<sup>39</sup> 8 U.S.C. §§ 1225, 1227, 1228, 1229, 1229c, 1231 (2011) (including entering the U.S. without inspection, presenting fraudulent documents at a port of entry, violating the conditions of admission, or engaging in certain other proscribed conduct).

<sup>40</sup> 8 U.S.C. §1324 (2011) (making it a crime to knowingly bring an unauthorized alien into the country, harbor an alien, or facilitate unlawful immigration).

<sup>41</sup> 8 U.S.C. §1324a(a)(1)-(2) (2011).

implementation of federal immigration laws,<sup>42</sup> faces considerable obstacles enforcing INA.<sup>43</sup> As a result, Congress envisions certain areas of cooperation among the federal, state, and local governments.<sup>44</sup> Both the executive and legislative branches have sought to increase cooperation. President Clinton issued a Memorandum in 1995 to assist in the collaborative efforts of the federal, state, and local governments.<sup>45</sup> Congress facilitated cooperative efforts through two amendments to the INA: (1) the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“The Welfare Reform Act”);<sup>46</sup> and (2) the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”).<sup>47</sup>

The Welfare Reform Act, codified at 8 U.S.C. § 1644, prohibits any restrictions between state and local governments and ICE from sending or receiving information regarding the immigrants status of lawful or unlawful aliens in the United States. Congress’s stated purpose for enacting this section was based on the belief that “immigration law enforcement, is as high a priority as to other aspects of Federal law enforcement and that illegal aliens do not have the right to remain in the United States undetected and unapprehended.”<sup>48</sup>

IIRIRA also envisions areas of cooperation among the federal, state, and local governments regarding enforcement of federal immigration. Cooperation is intended to be achieved through the following provisions which provide: (1) allowing DHS to enter into agreements whereby appropriately trained and supervised state and local officials can perform certain immigration responsibilities;<sup>49</sup> (2) prohibiting restrictions on communications between federal, state, and local law enforcement officers regarding an individuals’ immigration status and requiring ICE to respond

<sup>42</sup> Other DHS agencies charged with securing the nation’s border are the U.S. Customs and Border Protection, the Transportation Security Administration, and the U.S. Coast Guard.

<sup>43</sup> Congress and DHS have devoted over five times more resources in terms of staff and budget on border enforcement. *See Defendants’ Response To Motion For Preliminary Injunction* at 9, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 10-CV-01413-PHX-SRB) (citing the Adams Decl. Tab 1); *see also City of New York v. United States*, 179 F.3d 29, 31 (2d Cir. 1999) (noting state and local governments have implemented policies that have discouraged or restricted law enforcement officers from assisting in the enforcement of federal immigration laws).

<sup>44</sup> *See* 8 U.S.C. § 1357(g)(1)–(9) (2011).

<sup>45</sup> *See Memorandum on Deterring Illegal Immigrations*, 60 Fed. Reg. 7885, 7888 (Feb. 7, 1995) (directing the DOJ to take “all necessary steps . . . to increase coordination and cooperative efforts with State and local law enforcement officers in identification of criminal aliens.”).

<sup>46</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–93, § 411A, 110 Stat. 2105 (1996).

<sup>47</sup> Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104–208, 110 Stat. 3009 (1996).

<sup>48</sup> *City of New York*, 179 F.3d at 32 (quoting H.R. Conf. Rep. No. 104-725, at 383 (1996), *reprinted* in 1996 U.S.C.C.A.N. 2649, 2771).

<sup>49</sup> 8 U.S.C. § 1357(g)(1) (2006).



to such inquiries;<sup>50</sup> and (3) authorizing state and local law enforcement officials to arrest aliens unlawfully present in the United States who have previously been convicted of a felony and deported.<sup>51</sup>

### III. ARIZONA'S UNIQUE IMMIGRATION TROUBLES AND STEPS TAKEN TO ADDRESS THESE PROBLEMS

#### A. *Illegal Immigration in the United States and Arizona*

Illegal immigration to the United States is a national epidemic. In October 2008, the illegal immigrant population stood at approximately 11.9 million, comprising a total of four percent of the total U.S. population.<sup>52</sup> Inflows of unauthorized immigrants from 2005 to 2008 are estimated to be 500,000 per year compared to approximately 800,000 per year in 2000.<sup>53</sup> Approximately 7.7 million illegal aliens were employed in U.S. jobs in 2008.<sup>54</sup> Studies have shown that the inflow of cheap labor of illegal immigrants has contributed to a significant decline in the wages among the poorest Americans.<sup>55</sup>

Arizona's illegal immigration problems are unique compared to other places in the country. Arizona has an estimated 460,000 illegal immigrants,<sup>56</sup> a number which has increased fivefold since 1990.<sup>57</sup>

<sup>50</sup> 8 U.S.C. § 1373(a) (2006).

<sup>51</sup> 8 U.S.C. § 1252c(a) (2006).

<sup>52</sup> Emily Bazar, *Study: Illegal Immigrant Population Stalls*, USA TODAY (Oct. 2, 2008), [http://www.usatoday.com/news/nation/2008-10-02-illegal-immigrant\\_N.htm](http://www.usatoday.com/news/nation/2008-10-02-illegal-immigrant_N.htm); Jeffrey Passel & D'Vera Cohn, *Trends in Unauthorized Immigration; Undocumented Inflow Now Trails Legal Inflow*, at i, PEW HISPANIC CENTER, Oct. 2, 2008, available at <http://pewhispanic.org/reports/report.php?ReportID=94>.

<sup>53</sup> Ginger Thompson, *Fewer People Entering U.S. Illegally, Report Says*, N.Y. TIMES, Oct. 3, 2008, at A17, available at <http://www.nytimes.com/2008/10/03/us/03immig.html>; Passel et al., *supra* note 52.

<sup>54</sup> Steven A. Camarota, *Wages Will Go Even Lower*, N.Y. TIMES (March 18, 2009), <http://roomfordebate.blogs.nytimes.com/2009/03/18/the-competition-for-low-wage-jobs; NUMBERS USA, PUTTING AMERICA BACK TO WORK?>, [http://www.numbersusa.com/content/files/pdf/Putting%20Americans%20Back%20to%20Work\(2\).pdf](http://www.numbersusa.com/content/files/pdf/Putting%20Americans%20Back%20to%20Work(2).pdf).

<sup>55</sup> See Camarota, *supra* note 54; see also Stephen Steinlight, *Ignoring Problems of Illegal Immigration Leads to Exploitation*, CENTER FOR IMMIGRATION STUDIES (Aug. 2008), <http://cis.org/node/759> (citing a study by the American Academy of Sciences which found that the cheap labor of illegal immigrants and poor immigrants caused a 44% decrease in wages among the poorest Americans from 1980 to 1994.).

<sup>56</sup> Randal C. Archibold, *Side by Side, but Divided Over Immigration*, N.Y. TIMES, May 11, 2010, at A13, available at <http://www.nytimes.com/2010/05/12/us/12newmexico.html?pagewanted=all>; Jonathan J. Cooper & Paul Davenport, *Immigration Advocacy Groups to Challenge Arizona Law*, WASH. POST, Apr. 25, 2010, at A08, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/24/AR2010042402200.html>.

<sup>57</sup> Brian Jordon, Note, *Determining the Legality of Enforcing Immigration Laws: Arizona Senate Bill 1070 and Redefining States' Ability to Enact Immigration Policy in the United States*, 4 WASH. UNDERGRADUATE L. REV. 35, 43 (2011); Elliott Spagat, *Border States Shun Arizona Immigration Law: Other States Along Mexico Have Long Ties to Hispanic Communities*, ASSOCIATED PRESS, May 13,

Arizona is currently considered the biggest gateway for people sneaking into the United States from Mexico<sup>58</sup> with almost fifty percent of illegal aliens entering America through Arizona's southern border.<sup>59</sup> The Arizona Department of Corrections has estimated that criminal aliens comprise more than seventeen percent of Arizona's prison population.<sup>60</sup>

Additionally, the U.S.-Mexico border is considered one of the most dangerous areas in the world due to the prevalence of drugs and violence, which poses threats to both Arizona and the United States as a whole. The DOJ reported that the Mexican drug cartels, present in 230 cities, are the "biggest organized crime threat in the United States."<sup>61</sup> Thousands of people have been killed along the border in Mexico's drug wars,<sup>62</sup> raising anxiety that violence will spread into the United States.<sup>63</sup> Warring drug cartels are blamed for more than 560 kidnappings in Phoenix in 2007 and the first half of 2008.<sup>64</sup> As a result, Phoenix has been dubbed the most dangerous city for kidnappings.<sup>65</sup> Furthermore, the Mexican drug cartels operating along the southwest border traffic approximately eighteen to thirty-nine billion dollars of drugs per year into the United States.<sup>66</sup> For example, approximately 65% of the cocaine smuggled into the United

2010, available at <http://www.msnbc.msn.com/id/37116159>.

<sup>58</sup> Spagat, *supra* note 57; *Arizona Politicians in a Tizzy Over Immigration*, ASSOCIATED PRESS, Mar. 30, 2006, available at <http://www.msnbc.msn.com/id/12085263/ns/politics/t/arizona-politicians-tizzy-over-immigration>.

<sup>59</sup> Defendants' Response To Motion For Preliminary Injunction at 9, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 10-CV-01413-PHX-SRB), 2010 WL 3154413.

<sup>60</sup> *Id.*

<sup>61</sup> Spencer S. Hsu and Joby Warrick, *U.S. Stepping Up Response to Mexican Drug Violence: No New Troops or Funding in Obama's Plan*, WASH. POST, Mar. 25, 2009, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032401155.html?sid=ST2009032401562>.

<sup>62</sup> *U.S. Plans for Mexico Border Violence; Official: Military Force Last Resort in Dealing with Drug Wars*, ASSOCIATED PRESS, Mar. 12, 2009, available at <http://www.msnbc.msn.com/id/29659021/>; see Jaime Zapata, *US Agent Killed in Mexico Hailed at Funeral*, BBC NEWS, Feb. 22, 2011, available at <http://www.bbc.co.uk/news/world-us-canada-12544747>; see also Editorial, *Bloodshed at the Border: Law Enforcement Appears to be in Retreat as a Fierce Drug War in Mexico Kills Thousands a Year*, L.A. TIMES, Mar. 27, 2008.

<sup>63</sup> See Randal C. Archibold, *On Border Violence, Truth Pales Compared to Ideas*, N.Y. TIMES, June 19, 2010, at A18, available at <http://www.nytimes.com/2010/06/20/us/20crime.html> (citing F.B.I. statistics); see also S. Con. Res. 1006, 115th Leg., 1st Reg. Sess. (Az. 2011) (describing the fear felt by Arizona residents pertaining to the spread of organized criminal activity across the border).

<sup>64</sup> *U.S. Plans for Mexico Border Violence*, *supra* note 62; *Crackdown Success May Be Intensifying Brutality Mexico City- Headless Bodies in Tijuana, Kidnapped Children in Phoenix, Ariz., and Shootouts on the Streets of Vancouver, B.C.: These Are the Unwanted Byproducts of Progress in the Mexican Drug War*, ASSOCIATED PRESS, Mar. 11, 2009, available at THE OREGONIAN, 2009 WLNR 4932576.

<sup>65</sup> See Spagat, *supra* note 57; see also Steven B. Duke, *Mass Imprisonment, Crime Rates, and the Drug War: A Penological and Humanitarian Disgrace*, 9 CONN. PUB. INT. L.J. 17, 27 (2009).

<sup>66</sup> See Hsu, *supra* note 61; see also *Drug Trafficking Violence in Mexico Before the S. Caucus Int'l Narcotics Control* (2010) (statement of Sen. Dianne Feinstein).

States crosses the Southwest border, which includes Arizona.<sup>67</sup>

Whether illegal immigrants commit a disproportionate number of crimes is uncertain, with different authorities citing different statistics. Critics argue the rate of violent crime at the border and across Arizona has been declining and blame a perception bias amongst Arizona's citizens that cause them not to recognize the crime statistics.<sup>68</sup>

Regardless of whether the situation is actually improving, it is reasonably argued that the drug wars along America's unprotected border, as well as drug trafficking into Arizona and violent crimes including kidnappings and murder, when combined with the constant and unrestrained flow of illegal immigrants entering America imposes severe economic and social costs, which constitute a direct and distinct threat to Arizona. Accordingly, the people of Arizona, through their representatives, determined that action was necessary to protect its citizenry.

### *B. Arizona's Previous Steps Addressing Illegal Immigration*

Arizona has previously sought to address their unique illegal immigration problem. In July 2007, after the failure of President George Bush's comprehensive immigration reform proposal<sup>69</sup> championed by Arizona Senator John McCain,<sup>70</sup> the Arizona legislature enacted the Legal Arizona Workers Act ("LAWA"). Although then Governor Janet Napolitano previously vetoed two similar pieces of legislation, she signed this bill into law citing the failure of the federal government to address illegal immigration.<sup>71</sup> LAWA's two main aspects included: (1) provisions

<sup>67</sup> *Drug Trafficking in the United States*, UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, [http://www.justice.gov/dea/concern/drug\\_trafficking.html](http://www.justice.gov/dea/concern/drug_trafficking.html) (last visited Oct. 13, 2011); see *Drug Trafficking in the Southwest: Testimony Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, Mar. 29, 2001 (statement of Donnie R. Marshall, Administrator, Drug Enforcement Administration).

<sup>68</sup> See Archibold, *supra* note 63 (discussing how individual perceptions are playing a major role in Arizona's immigration debate); see also Judith Kunkel, *Emotional Migrant Issue Driven by Perception, Not Fact*, THE ARIZONA REPUBLIC, Jul. 7, 2010, at 39, available at <http://www.nytimes.com/2010/06/20/us/20crime.html>.

<sup>69</sup> See Donna Smith, *U.S. Senate Kills Bush Immigration Reform Bill*, REUTERS, June 29, 2007, available at <http://www.reuters.com/article/idUSN2742643820070629>; see also Press Release, White House, President Bush Disappointed by Congress's Failure to Act on Comprehensive Immigration Reform (June 28, 2007).

<sup>70</sup> See Broder, *supra* note 1; see also Joseph Toce, *Developments in the Legislative Branch: Prospects for New Bipartisan Immigration Reform with a Democratic Majority in Congress*, 21 GEO. IMMIGR. L.J. 321, 321 (2007).

<sup>71</sup> See Border, *supra* note 70 (stating that the Governor decided to approve "the most aggressive action in the country . . . because it is now abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reforms our country needs."); see also *Impatience with Immigration: Arizona Enacts Immigration Penalties, Saying Congress Has Been Too Slow to Act*, LAS VEGAS SUN, Jul. 6, 2007 at A4, available at <http://www.lasvegassun.com/news/2007/jul/06/editorial->

that allowed the revocation of an employer's business license if the business is found to knowingly or intentionally employ illegal aliens; and (2) mandating the use of an electronic verification system developed by the federal government known as 'E-Verify'.<sup>72</sup> These provisions were challenged but the courts held that LAWA was not preempted by federal law.<sup>73</sup> Additionally, Proposition 200 was passed by referendum with 56% of the vote that required individuals to produce proof of citizenship before they may register to vote or apply for public benefits in Arizona.<sup>74</sup>

### *C. Briefly Demonstrating the Federal Government's Failures*

Although it is basically common knowledge and even accepted by the federal government that immigration policy is a failure, a brief overview demonstrating how the federal government has neglected and failed in its duties is warranted. This note will show through a variety of sources that the federal government has acted incompetently, negligently or willfully in refusing to adopt sound immigration policies. This will lay a foundation to the note's proposal that the interpretation of the 10th amendment should be changed to reflect a new reality.

DHS and ICE have repeatedly demonstrated that they will not comply with existing immigration law. For example, the Appropriations Act of 2008 requires the DHS construct a 700-mile fence along the southern border with Mexico. Instead, DHS unilaterally reduced the requirement to a "target" of 661 miles.<sup>75</sup> Furthermore, and of significantly more importance, ICE agents overwhelmingly believe that their department has become so politicized as to compromise the effectiveness and the safety of the American people. "[T]he National Immigration and Customs

impatience-with-immigration/.

<sup>72</sup> See *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 984–86 (9th Cir. 2008); see also ARIZ. REV. STAT. §§ 23-212, 214 (2011).

<sup>73</sup> See *Chicanos Por La Causa*, 544 F.3d at 988 (reasoning the law does not attempt to define who is eligible or ineligible to work under immigration laws. It is premised on enforcement of federal standards as embodied in federal immigration law); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1981 (2011).

<sup>74</sup> *Ballot Initiatives Affecting Immigrants: Past and Present*, NAT'L CONFERENCE OF STATE LEGISLATURES (Jan. 8, 2006), <http://www.ncsl.org/default.aspx?tabid=13122>; *2004 Election Analysis: Arizona's Proposition 200*, NATIONAL IMMIGRATION FORUM (Dec. 08, 2004), <http://www.immigrationforum.org/images/uploads/AZProp200Analysis.pdf>.

<sup>75</sup> *Secure Border Initiative: Technology Deployment Delays Persist and the Impact of Border Fencing Has Not Been Assessed: Testimony Before the Subcommittee on Border, Maritime and Global Counterterrorism, Committee on Homeland Security, House of Representatives*, Sept. 17, 2009 (statement of Richard M. Stana, Dir. Homeland Security and Justice Issues), available at <http://www.gao.gov/new.items/d091013t.pdf> at 3; Defendant's Answer and Counterclaim at 31, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-cv-01413-SRB).

Enforcement Council—an AFL-CIO affiliate—and affiliated local councils cast a *unanimous* 259-0 vote of no confidence in ICE Director John Morton and Assistant Director Phyllis Coven.<sup>76</sup> ICE agents charge that the leadership spends more time aimed at large scale amnesty legislation, rather than advising the American public and Federal lawmakers on the severity of the illegal immigration problem and the need for more manpower and resources within ICE to address it.<sup>77</sup> ICE agents further unanimously allege that senior leadership *prohibits* the majority of officers from making street arrests or enforcing United States immigration laws outside of the institutional jail setting effectively creating an “amnesty through policy” for anyone illegal in the United States who has not been arrested by another agency for a criminal violation.<sup>78</sup> For brevity’s sake, the note will only cite the above-referenced shortcomings which represent just two of a plethora of examples demonstrating the federal government’s failure.<sup>79</sup>

Congress as well as the President of the United States has admitted to the federal government’s failure to adequately protect the citizens of Arizona from illegal immigration. President Obama recently blamed the passage of S.B. 1070 on the federal government’s failure to properly address immigration reform.<sup>80</sup> More importantly, Congress has criticized the federal government for not implementing the laws in compliance with congressional intent.<sup>81</sup>

<sup>76</sup> Joel S. Gehrke Jr., Blog, *Immigration enforcement union took a no-confidence vote in its leadership*, WASHINGTON EXAMINER (Aug. 3, 2010, 3:00 AM), <http://washingtonexaminer.com/blogs/beltway-confidential/immigration-enforcement-union-took-no-confidence-vote-its-leadership> (emphasis added); *Border Agents Revolt Against ICE Director*, FOXNews.com, Aug. 05, 2010, <http://nation.foxnews.com/border-patrol/2010/08/05/border-agents-revolt-against-ice-director>.

<sup>77</sup> See Gehrke, *supra* note 76; see also FOXNews.com, *supra* note 76.

<sup>78</sup> See Gehrke, *supra* note 76; see also Letter from Chris Crane, President, AFGE Council 118 ICE, Vote of No Confidence in ICE Director John Morton and ICE ODPP Assistant Director Phyllis Coven, (June 25, 2010), available at <http://www.iceunion.org/download/259-259-vote-no-confidence.pdf>.

<sup>79</sup> See generally Answer and Counterclaim at 31, *US v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-cv-01413-SRB), available at [http://www.azag.gov/press\\_releases/feb/2011/answer%20and%20counterclaim.pdf](http://www.azag.gov/press_releases/feb/2011/answer%20and%20counterclaim.pdf).

<sup>80</sup> See *Immigration Excerpts: Obama vs. Brewer*, CNN.COM, (April 24, 2010), <http://edition.cnn.com/2010/POLITICS/04/23/immigration.obama.brewer/index.html> (“Indeed, our failure to act responsibly at the federal level will only open the door to irresponsibility by others. And that includes, for example, the recent efforts in Arizona, which threatened to undermine basic notions of fairness that we cherish as Americans, as well as the trust between police and their communities that is so crucial to keeping us safe.”); Statement by Governor Jan Brewer for the State of Arizona (Apr. 23, 2010), available at [http://azgovernor.gov/dms/upload/PR\\_042310\\_StatementByGovernorOnSB1070.pdf](http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf).

<sup>81</sup> As the States Criminal Alien Assistance Program (“SCAAP”) was set to expire Arizona Congressman Kolbe attached an amendment to Pub. L. No. 109-62. This unanimously approved amendment was intended to “ensure[] the Federal Government assumes more of its responsibility for incarcerating undocumented criminal aliens.” Defendant’s Answer and Counterclaim at 28, *US v.*

The failures of the federal government have been expressed by prominent members of both parties, helping prove that Arizona's security threats from illegal immigration cannot be reasonably disputed. Jan Brewer, the current Arizona Republican governor, has been a fierce critic of the federal government.<sup>82</sup> Additionally, and more significantly, Janet Napolitano, current DHS Secretary in the Obama Administration, declared a state of emergency in four southern Arizona counties while she was the Democratic Governor.<sup>83</sup> As governor, Napolitano also wrote the Secretary of Defense urging the federal government "to return safety and security to this region."<sup>84</sup>

#### *D. Arizona Takes Action—Passes S.B. 1070*

Against the background of their unique immigration problems, the Arizona legislature determined that it must take action<sup>85</sup> in the face of the federal government's continued inaction.<sup>86</sup> The Legislature's design of S.B. 1070 demonstrates an inherent understanding that the field of law of immigration is a federal issue.<sup>87</sup> As a result, Arizona structured S.B. 1070

Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 10-CV-01413-PHX-SRB) (citing 151 Cong. Rec. H8433-01 [2005]). However, Arizona continues to incarcerate illegal aliens without reimbursement from the federal government. Jim Kouri, *Illegal Alien Incarceration Bad for States' Budgets*, CANADAFREEPRESS.COM (June 15, 2010), <http://www.canadafreepress.com/index.php/article/24303>.

<sup>82</sup> *Brewer to Countersue Federal Government Over Immigration Enforcement*, FoxNews.com, Feb. 11, 2011, <http://www.foxnews.com/politics/2011/02/10/brewer-countersue-federal-government-immigration-enforcement/>; Statement by Governor Jan Brewer for the State of Arizona (Apr. 23, 2010), available at [http://azgovernor.gov/dms/upload/PR\\_042310\\_StatementByGovernorOnSB1070.pdf](http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf).

<sup>83</sup> *Bill Richardson, Janet Napolitano Accused of Border Hypocrisy*, NEWSMAX.COM (Aug. 30, 2005), <http://archive.newsmax.com/archives/articles/2005/8/30/145007.shtml>; *Arizona Governor Declares State of Emergency Along Mexican Border*, PHOENIX BUS. J. (Aug. 16, 2005), <http://www.bizjournals.com/phoenix/stories/2005/08/15/daily11.html?page=all>.

<sup>84</sup> Letter from Janet Napolitano, Governor of Arizona, to Donald Rumsfeld, Secretary of Defense (Dec. 30, 2005), available at <http://securetheborder.org/images/pdf/NapolitanoAdditionalLetters.pdf>; Todd J. Gillman, *Napolitano Steadfast Against Perry's Plea for More Troops*, THE DALLAS MORNING NEWS (Sept. 18, 2010), <http://www.dallasnews.com/news/politics/state-politics/20100918-Napolitano-steadfast-against-Perry-s-plea-8895.ece>.

<sup>85</sup> Defendants' Response To Motion For Preliminary Injunction at 8, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 10-CV-01413-PHX-SRB) (citing the Adams Decl. Tabs 28, 29, 39 & 36).

<sup>86</sup> See *Immigration Excerpts*, supra note 80; see also Charles Babington, *White House Disputes Jon Kyl's Claims That It's Stalling Border Security*, HUFFINGTON POST (June 21, 2010), [http://www.huffingtonpost.com/2010/06/21/white-house-disputes-jon\\_n\\_620014.html](http://www.huffingtonpost.com/2010/06/21/white-house-disputes-jon_n_620014.html) (describing the dispute between Arizona Senator Jon Kyl who accused the Obama Administration of intentionally not sending troops to the border unless comprehensive immigration reform was passed. The Obama Administration denied these allegations).

<sup>87</sup> Anne E. Kornblut & Spencer S. Hsu, *Arizona Governor Signs Immigration Bill, Reopening National Debate*, WASH. POST (Apr. 24, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/23/AR2010042301441.html> (quoting Governor Janet Brewer as saying, "We in Arizona have been more than patient waiting for Washington to act . . . [b]ut decades of federal inaction and misguided policy have created an unacceptable situation.").

so it would complement, and not conflict with, federal immigration law in an endeavor to evade federal supremacy and preemption legal challenges.<sup>88</sup>

S.B. 1070 has five pertinent sections. Section one declares the goal of attrition through enforcement of public policy of all state and local government agencies in Arizona.<sup>89</sup> Section one also states that the provisions of the Act “are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity” by illegal aliens.<sup>90</sup> Section two addresses various issues including: (1) requiring officers to make a reasonable attempt, when reasonable suspicion exists, to determine an individual’s immigration status during any lawful stop, detention, or arrest;<sup>91</sup> (2) compelling law enforcement to verify the immigration status of all those arrested prior to their release;<sup>92</sup> and (3) requiring notification to ICE or Customs and Border Protection whenever an unlawfully present alien is discharged or assessed a monetary obligation.<sup>93</sup> Section three imposes a state misdemeanor penalty for those who are in violation of 8 U.S.C. § 1304(e), which requires individuals to complete or carry an alien registration document.<sup>94</sup> Section five prevents an occupant of a motor vehicle stopped on a street to attempt to hire a person to work at another location,<sup>95</sup> makes it illegal for a person to enter a vehicle in order to gain employment,<sup>96</sup> and makes it illegal for an illegal alien to solicit work.<sup>97</sup> Section six permits an officer to arrest a person without a warrant if the officer has probable cause to believe that “the person to be arrested has committed any public offense that makes the person removable from the United States.”<sup>98</sup>

While President Obama criticized S.B. 1070 as “misguided,” warning that it could violate citizens’ civil rights and result in racial profiling, the DOJ instead challenged the law on preemption grounds.<sup>99</sup> United States

<sup>88</sup> 2010 Ariz. Sess. Laws 113 § 1 (expressing that S.B. 1070 was intended to be a “cooperative enforcement of federal immigration laws” and “attrition through enforcement” attempting to establish concurrent jurisdiction).

<sup>89</sup> 2010 Ariz. Sess. Laws 113 § 1.

<sup>90</sup> 2010 Ariz. Sess. Laws 113 § 1.

<sup>91</sup> See ARIZ. REV. STAT. § 11-1051(B) (LexisNexis 2011).

<sup>92</sup> See ARIZ. REV. STAT. § 11-1051(B), (E) (LexisNexis 2011).

<sup>93</sup> See ARIZ. REV. STAT. § 11-1051(C) (LexisNexis 2011).

<sup>94</sup> See ARIZ. REV. STAT. § 13-1509(A) (LexisNexis 2011).

<sup>95</sup> See ARIZ. REV. STAT. § 13-2928(A) (LexisNexis 2011).

<sup>96</sup> See ARIZ. REV. STAT. § 13-2928(B) (LexisNexis 2011).

<sup>97</sup> See ARIZ. REV. STAT. § 13-2928(C) (LexisNexis 2011).

<sup>98</sup> See ARIZ. REV. STAT. § 13-3883(A)(5) (LexisNexis 2011).

<sup>99</sup> See Kornblut & Hsu, *supra* note 87; see also Steven D. Schwinn & Ruthann Robson, *DOJ Files Complaint Against Arizona SB 1070 Alleging Statute Unconstitutional: Analysis*, Constitutional Law Prof Blog (Jul. 7, 2010), <http://lawprofessors.typepad.com/conlaw/2010/07/doj-files-complaint-against->

District Judge Susan R. Bolton held that the DOJ demonstrated a likelihood of success that the above referenced pertinent sections are likely preempted by federal law and accordingly issued a preliminary injunction from enjoining them.<sup>100</sup> Arizona appealed the District Court's opinion and the decision was upheld by the U.S. Court of Appeals for the 9<sup>th</sup> Circuit.<sup>101</sup>

#### IV. THE FEDERAL GOVERNMENT'S IMMIGRATION POWERS SHOULD NOT BE CONSIDERED ABSOLUTE

The application of current supremacy law as argued by the DOJ and confirmed by Judge Bolton<sup>102</sup> and the 9<sup>th</sup> Circuit<sup>103</sup> demonstrates the absurdity, inefficiency and significant dangers of adhering to a rigid interpretation of current preemption law.<sup>104</sup> The federal government's handling of immigration offers the courts an opportunity to address the issue of a state's limited rights and options by distinguishing immigration from other congressional powers and chart a new and more flexible approach to preemption law which would prevent a state's paralysis when confronted by an incompetent federal government willfully not enforcing its laws, ignoring the intent of Congress, and not discharging its powers.

By any objectionable standard, the federal government has failed in the area of immigration law leaving states like Arizona vulnerable and forced to bear the significant burden of social, economic, and even bodily costs.<sup>105</sup> Arizona has been frustrated by the lack of progress in Washington D.C. after repeated requests from Arizona state officials and attempts from Arizona senators to focus the nation's attention and pass comprehensive immigration reform.<sup>106</sup> Even President Obama has acknowledged that the

arizona-sb-1070-alleging-statute-unconstitutional.html.

<sup>100</sup> See *United States v. Arizona*, 703 F. Supp. 2d 980, 987 (D. Ariz. 2010).

<sup>101</sup> Marc Lacey, *Appeal Court Rules Against Arizona*, N.Y. TIMES, Apr. 12, 2011, at A12, available at [http://www.nytimes.com/2011/04/12/us/12arizona.html?\\_r=1](http://www.nytimes.com/2011/04/12/us/12arizona.html?_r=1).

<sup>102</sup> See *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010).

<sup>103</sup> See *United States v. Arizona*, 641 F.3d 339 (9th Cir. Ariz. 2011).

<sup>104</sup> It is worth noting that this note only disagrees with Judge Bolton's ruling that A.R.S. §11-1051 (B) is preempted under current preemption law. This note took the position that this would be overturned by the Ninth Circuit, however this prediction was incorrect. However, more importantly, it is the arguments articulated by Bolton regarding this and the other sections of current preemption law in regards to S.B. 1070 as a whole that demonstrate the need for a new approach, hopefully the approach articulated in this note. *Id.*

<sup>105</sup> See discussion *supra* Section III. A, C.

<sup>106</sup> See Dan Nowicki, *Arizona Immigration Law Ripples Through History*, U.S. POLITICS, THE ARIZONA REPUBLIC (Jul. 25, 2010), <http://www.azcentral.com/arizonarepublic/news/articles/2010/07/25/20100725immigration-law-history-politics.html>; see also Op-Ed, *Arizona's Immigration Frustration: The New State Law is the Result of a Failed National Policy*, WALL ST. J. (Apr. 27, 2010), <http://online.wsj.com/article/SB10001424052748703465204575208382473306238.html>.



federal government has failed in its responsibilities to the people of Arizona and the United States to effectively address this issue.<sup>107</sup>

Accordingly, Arizona should have the right to address the problems of illegal immigration that the people through their representatives have determined pose a significant threat to the state's economic, social and physical welfare in the face of federal inaction. In the final analysis, when the federal government neglects or fails to enforce a constitutionally delegated or plenary power that creates economic and social turmoil and threatens a state's security, a state should have the right to enact legislation to address the federal government's shortcomings in an effort to put pressure on an inept federal government to fulfill its constitutional requirements.

#### *A. The Current State of Immigration Law and the Constitution*

The power to regulate immigration is "unquestionably *exclusively* a federal power."<sup>108</sup> However, the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and therefore a constitutionally per se preempted power.<sup>109</sup> In other words, the mere fact that aliens are the subjects of a state statute does not render it a regulation of immigration or preempted by federal law.<sup>110</sup> Accordingly, under current case law, the preemption of a state law addressing immigration is a question of both express and implied preemption. Furthermore, concurrent jurisdiction will therefore be a question of whether congress intended to allow a state to enact a particular piece of legislation affecting immigration.<sup>111</sup>

#### *B. Applying Current Preemption Law to Immigration Endangers the States*

S.B. 1070 demonstrates the inefficiencies and absurdities of applying current preemption law to immigration. Preemption of S.B. 1070 reveals an irrationality of formalism over substance and a failure to recognize how

<sup>107</sup> See *Immigration Excerpts*, *supra* note 80; see also Michael Martinez, *Debate Over Arizona Immigration Law Heard in Appeals Court*, CNN.COM, Nov. 1, 2010, [http://articles.cnn.com/2010-11-01/us/arizona.immigration.lawsuit\\_1\\_arizona-law-immigration-law-appeals-court?\\_s=PM:US](http://articles.cnn.com/2010-11-01/us/arizona.immigration.lawsuit_1_arizona-law-immigration-law-appeals-court?_s=PM:US).

<sup>108</sup> *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (emphasis added).

<sup>109</sup> See *De Canas*, 424 U.S. at 355.

<sup>110</sup> See *id.* ("[I]mmigration is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.").

<sup>111</sup> See *e.g.*, *De Canas*, 424 U.S. at 358 (holding the respondents failed to demonstrate anything in the plain language of 8 U.S.C.S. § 1101 et seq., or its legislative history, that warranted the conclusion that it was intended to preempt harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular).

the role of actual circumstances and the situation on the ground should properly affect the way the courts apply federal preemption law. The application of federal supremacy law under current case law precedent values strict adherence to a doctrine that is not protecting its citizens, while requiring the courts to wear blinders to reality.

The problems of current preemption law as applied to immigration are best represented by Judge Bolton's recent decision and the current debate regarding the proper role of the states in immigration. Arizona attempted to address the failures of the federal government and current immigration system by passing S.B. 1070. Accordingly, there is a need to examine S.B. 1070 in a broader context to reveal the predicament Arizona finds itself in and the need to change the interpretation of the Tenth Amendment.

### 1. States are at the Mercy of Washington D.C.'s Priorities

The White House's objectives, regardless of the person or party that occupies it, are often in direct contrast to the intentions of Congress and can interfere with a state's ability to address the needs of its citizens. A state's ability to address local concerns is vulnerable to Washington D.C. politicians with national ambitions and priorities, whose immediate attention is not directed towards or necessarily aligned with the concerns of a state.<sup>112</sup> This inherent tension between the federal government's priorities, congressional intent and states' concerns are exposed in Arizona's immigration dilemma. S.B. 1070 sought to address some of these concerns.

#### a. Enforcement and Communication between ICE and the states

Congress's objectives via the state's proper role concerning the exchange of information are clear, and to some extent are aligned with Arizona. For example, Congress envisions an area of cooperation in immigration enforcement among the federal, state and local governments. Specifically, 8 U.S.C. § 1373 states that: "a Federal, State, or local government entity or

<sup>112</sup> See Charles Babington, *White House Disputes Jon Kyl's Claims That It's Stalling Border Security*, HUFFINGTON POST (June 21, 2010), [http://www.huffingtonpost.com/2010/06/21/white-house-disputes-jon\\_n\\_620014.html](http://www.huffingtonpost.com/2010/06/21/white-house-disputes-jon_n_620014.html) (describing a dispute between Arizona Senator Jon Kyl who accused the Obama Administration of intentionally not sending troops to the border unless comprehensive immigration reform was passed. The Obama Administration denied these allegations. While this may or may not be true, more importantly, the Arizona Senator is expressing a belief that Arizona is unable to address immigration problems due to wider goals of the Obama Administration); see also Ruben Navarrette, Jr., *Rahm Emanuel no friend on immigration*, CNN.COM, Sept. 30, 2010, [http://articles.cnn.com/2010-09-30/opinion/navarrette.rahm.emmanuel.immigration\\_1\\_immigration-reform-immigration-debate-guest-workers](http://articles.cnn.com/2010-09-30/opinion/navarrette.rahm.emmanuel.immigration_1_immigration-reform-immigration-debate-guest-workers) (arguing that Rahm Emanuel is putting off the immigration debate for the sake of political goals).

official *may not prohibit or in any way restrict*, any government entity or official from sending to, or receiving from, information regarding the immigration status, lawful or unlawful, of any individual.”<sup>113</sup> Additionally, courts have long recognized that states have a right to conduct warrantless searches for federal criminal violations.<sup>114</sup> Accordingly, Congress has demonstrated a clear intent to allow concurrent jurisdiction in certain areas of immigration and that the free flow of information and inquiries between the state and local government agencies may not be disturbed.

However, the executive branch’s enforcement priorities of immigration law conflict with the objectives stated by Congress. Executive immigration priorities are accorded to “aliens who pose a danger to national security or a risk to public safety,”<sup>115</sup> and organizations that smuggle aliens and contraband.<sup>116</sup> With regards to persons who have committed no criminal offense, the executive focuses on persons who have recently entered the United States illegally or fail to comply with a final order of removal.<sup>117</sup> Aliens who have no prior criminal history and have been present in the United States without authorization are given a significantly lower enforcement priority.<sup>118</sup> Arizona Revised Statutes (“A.R.S.”) Section 11-1051(B) sought to address this problem.

Arizona sought to proactively take on the presence of illegal immigration and also address the problems of communication and the transmission of information between itself and ICE by passing A.R.S. Section 11-1051(B).<sup>119</sup> This section does not create a separate violation of federal immigration law nor does it decide what actions make an individual removable from the United States. For each suspected violation of federal law made by an Arizona enforcement agent with reasonable care, ICE is notified. ICE then determines what disciplinary action should be taken.

Judge Bolton gave heavy emphasis to “federal enforcement priorities,”

<sup>113</sup> 8 U.S.C. §1373 (2011) (emphasis added).

<sup>114</sup> See *United States v. Di Re*, 332 U.S. 581, 591 (1948); see also *Johnson v. United States*, 333 U.S. 10, 15 n.5 (1948); *Miller v. United States*, 357 U.S. 301, 305 (1958); *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928).

<sup>115</sup> Brief of Respondent at 49–50, *United States v. Arizona*, No. CV 10-1413-PHX-SRB (9th Cir. Sept. 23, 2010) (citing *Ragsdale Decl.* ¶ 17 [SER 111]).

<sup>116</sup> *Id.* at ¶ 13 [SER 109]).

<sup>117</sup> *Id.* at ¶ 18 [SER 111]).

<sup>118</sup> See *Gehrke*, *supra* note 76; see also Alicia A. Caldwell, *Many Undocumented Immigrants Without Criminal Records Facing Deportation Will Stay In U.S.*, HUFFINGTON POST (Aug. 18, 2011), [http://www.huffingtonpost.com/2011/08/18/breaking-undocumented-immigrants-can-stay-in-us\\_n\\_930668.html](http://www.huffingtonpost.com/2011/08/18/breaking-undocumented-immigrants-can-stay-in-us_n_930668.html).

<sup>119</sup> See ARIZ. REV. STAT. § 11-1051 (LexisNexis 2011) (requiring officers to make a reasonable attempt when reasonable suspicion exists to determine an individual’s immigration status during any lawful, stop, detention, or arrests and notify ICE of any unlawfully present alien in Arizona).

enforcement of the law, and the alleged flexibility and adaption of congressional policy.<sup>120</sup> However, this note disagrees with Bolton's holding because the court inappropriately focused on ICE's enforcement priorities<sup>121</sup> rather than then the appropriate analysis which should rely on the clear *intentions of Congress*.<sup>122</sup> This note takes the position that, similar to the way another federal court has recently ruled,<sup>123</sup> the Supreme Court will ultimately overturn Bolton's decision when it reviews this law in the upcoming term.<sup>124</sup>

Regardless of the judiciary's ultimate determination of section 11-1051(B), the reasoning behind Arizona's enactment of this provision is compelling to understand the current preemption law's failures as applied to immigration. The practical implications of preventing Arizona from enforcing A.R.S. section 11-1051(B) as a matter of preemption is contrary to public policy and Arizona's security. Arizona is simply filling a void the federal government is ignoring. Furthermore, the application of the Supremacy Clause ignores that state governments are simply checking whether someone in the United States is in the country legally, a task state governments via E-verify, are in a much better position to handle. After all, a state's enforcement infrastructure is already in place and has more encounters with suspected illegal immigrants than federal agents. For example, it is the state and local police who have more interaction with the people of Arizona whether it is through patrolling public grounds, giving traffic tickets, etc. The federal government does not have the continual access to immigrants, both legal and illegal, that Arizona's police enjoy.<sup>125</sup> Additionally, Arizona is not setting immigration policy in this context except passing along the names and information of illegal aliens to ICE.

<sup>120</sup> See Brief of Respondent at 45, *United States v. Arizona*, No. CV 10-1413-PHX-SRB (9th Cir. Sept. 23, 2010); see also *U.S. v. Arizona*, 703 F. Supp. 2d 980, 995 (the court also gave additional weight to the possibility of reciprocal and retaliatory treatment of US citizens abroad which would according to the court, thereby limit both the federal government's ability to conduct foreign policy and US citizens' ability to travel, conduct business and live abroad) (emphasis added).

<sup>121</sup> See Peter Henderson, *Judges Ask Tough Questions on Arizona Immigration Law*, REUTERS, Nov. 1, 2010, available at <http://www.reuters.com/article/idUSTRE6A04XF20101102?feedType=RSS&sp=true>.

<sup>122</sup> See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); see also *U.S. v. Locke*, 529 U.S. 89, 107 (2000) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

<sup>123</sup> Campbell Robertson, *Alabama Wins in Ruling on Its Immigration Law*, N.Y. TIMES, Sept. 28, 2011, available at <http://www.nytimes.com/2011/09/29/us/alabama-immigration-law-upheld.html>; see Henderson, *supra* note 121.

<sup>124</sup> David G. Savage, *Arizona Appeals Immigration Ruling to Supreme Court*, L.A. TIMES, Aug. 11, 2011, available at <http://articles.latimes.com/2011/aug/11/nation/la-na-court-immigration-20110811>.

<sup>125</sup> See Gehrke, *supra* note 76; see generally Lisa M. Seghetti et al., CONG. RESEARCH SERV., RL32270, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* (2009), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32270.pdf>.

The federal government should have a compelling interest in collecting computer-generated data concerning the whereabouts of individuals who are in America illegally and cannot be identified or located. Protecting illegal aliens, who by their very definition are breaking the law as non-citizen aliens, over the rights and security of American citizens' is contrary to the nation's overall interests.

b Arizona is Prevented from Establishing a Mechanism to Easily Identify Illegal Immigrants or Providing Disincentives to Thwart the Continued Influx of Illegal Immigration into Their State

Preemption law prevents Arizona from establishing lawful conditions to effectively identify legally present immigrants and also inhibits Arizona from providing disincentives to address the continued influx of illegal immigration. These are the preeminent examples of the inefficiencies and the federal government's incompetence associated with the preemption doctrine's application to immigration.

As previously demonstrated, illegal immigration has a disproportionate impact on states due to a state's geographic location, yet states remain dependent on a federal government that has repeatedly demonstrated a lack of political courage to address the issue.<sup>126</sup> Under current preemption law, Arizona bears the bulk of a national epidemic that they are powerless to prevent and precluded from addressing, while they are forced to suffer the social, economic and security burdens associated with illegal immigration.

Preemption law prevents Arizona from establishing a simple and non-burdensome statute to efficiently identify illegal immigrants. Judge Bolton properly ruled that A.R.S. Section 13-1509(A), which creates a state misdemeanor for violating federal statutes that require aliens to carry documentation of registration<sup>127</sup> and penalize the willful failure to register,<sup>128</sup> is preempted by federal law.<sup>129</sup>

This *appropriate ruling* and analysis by Judge Bolton highlights Arizona's helpless condition due to the restrictions of current preemption

<sup>126</sup> See Broder, *supra* note 1; see also David G. Savage, *Arizona Appeals Immigration Ruling to Supreme Court*, L.A. TIMES (Aug. 11, 2011), <http://articles.latimes.com/2011/aug/11/nation/la-na-court-immigration-20110811>.

<sup>127</sup> See 8 U.S.C. § 1304(e) (2011).

<sup>128</sup> See 8 U.S.C. § 1306(a) (2011).

<sup>129</sup> See *United States v. Arizona*, 703 F. Supp. 2d 980, 999 (D. Ariz. 2010) (holding that A.R.S. §13-1509(A) legislates a failed considered to fall under the field preemption category and that Congress's vision of cooperation did not designate the state a right to create a misdemeanor for federal crimes but instead refer violations to ICE).

law.<sup>130</sup> By preempting a state law that creates a misdemeanor for not complying with a federal statute,<sup>131</sup> which the federal government is failing to enforce, reveals Arizona's helpless condition. Arizona is literally at the mercy of a federal government that has repeatedly demonstrated an inability to tackle a controversial issue desperately requiring political leadership.<sup>132</sup> As a result, Arizona is forced to engage in a fight with their hands tied behind their back. Arizona cannot create an efficient system to check the status of suspected illegal immigrants because the federal government refuses to enforce a law mandating that only the federal government may require illegal aliens to carry identification. This circular logic reveals the inefficiency and danger the current preemption doctrine has on the public policy surrounding immigration in Arizona and the country.

Similarly, preemption law prevents Arizona from cutting off the incentives that attract illegal immigrants to their state and America. Judge Bolton properly ruled that federal law preempts A.R.S. Section 13-2928(C), which makes it a state crime for persons unlawfully present in the United States to work or seek work in Arizona.<sup>133</sup>

This *appropriate ruling* and analysis by Judge Bolton further demonstrates Arizona's inability to address the illegal immigration problem under the current system.<sup>134</sup> Arizona is prevented from penalizing individuals from seeking work<sup>135</sup> even though employment is the main reason illegal immigrants come to America.<sup>136</sup> Instead, Congress has

<sup>130</sup> See *id.* This note agrees that Judge Bolton made the proper ruling as applied to A.R.S. §13-1509(A) and will be upheld.

<sup>131</sup> See ARIZ. REV. STAT. 13-1509(A) (LexisNexis 2011).

<sup>132</sup> See Suzy Khimm, *Blame Rahm for Immigration Inaction?*, MOTHER JONES (May 21, 2010, 11:00 AM), <http://motherjones.com/politics/2010/05/immigration-reform-rahm-emanuel> (citing the Obama Administration's failure to address immigration as a desire not to touch the "the third rail of American politics"); see also Jerry Markon, *Judge faults Justice in immigration case*, WASH. POST, Nov. 2, 2010, at A03, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/01/AR2010110104018.html?sid=ST2010110104196>.

<sup>133</sup> See *Arizona*, 703 F. Supp. 2d at 1000, 1008; see also *Nat'l Ctr. For Immigrants' Rights v. INS*, 913 F.2d 1350, 1368 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991) (noting that Congress discussed the merits of fining, detaining or adopting criminal sanctions against the employee but it ultimately rejected all such proposals); Henderson, *supra* note 121 (commenting that Judge Noonan of the Ninth U.S. Circuit Court of Appeals, a Regan appointee and deep skeptic of the DOJ's preemption argument, dismissed Arizona's argument pointing out that previous courts decided that federal rules avoid punishing employees while their immigration status is determined).

<sup>134</sup> See *Arizona*, 703 F. Supp. 2d at 1000, 1008. This note agrees that Judge Bolton made the proper ruling as applied to A.R.S. §§13-2928(C). *Id.*; see also Editorial, *Immigration: You Can't Rely On E-Verify*, L.A. TIMES, May 27, 2011, at A16, available at <http://articles.latimes.com/2011/may/27/opinion/la-ed-arizona-20110527>.

<sup>135</sup> *Infra* section 4; see *Arizona*, 703 F. Supp. 2d at 997 (preventing Arizona's implementation of A.R.S. §§13-2928(A)&(B)).

<sup>136</sup> David Pierson, *An influx of illegal workers: Sound familiar? It's happening in China where the*

chosen to only allow penalties on *employers* of illegal aliens.<sup>137</sup> Congress reasons that “many who enter illegally do so for the best of motives—to seek a better life for themselves and their families . . . [and] legislation containing employer sanctions is most humane, credible and effective way to respond to the large-scale influx of undocumented aliens.”<sup>138</sup> Congress’s policy decisions combined with ICE’s enforcement priorities<sup>139</sup> implicitly encourage illegal aliens who know if they illegally enter and are illegally hired to work in America, they will not be punished for these illegal actions. Illegal aliens are offered all carrots and no sticks, leaving Arizona powerless and helpless to address the issue.

### c. Preliminary Injunction Tests Value Federal Inaction Over Arizona’s Security

Additionally, when issuing a preliminary injunction against a preempted law, the court applies the irreparable harm test which values the federal priorities of inaction and non-enforcement of immigration laws over Arizona’s economic, physical, and social security. The basic doctrine of equity jurisprudence is that a “court of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.”<sup>140</sup> Here, the United States has the burden to establish that, absent a preliminary injunction, there is a likelihood—not just a possibility—that it will suffer irreparable harm.<sup>141</sup> Based on current preemption law, Bolton applied the correct standard noting that an alleged constitutional infringement will often alone constitute irreparable harm.<sup>142</sup>

The idea that a government can prove irreparable harm for failing to enforce its own statute further demonstrates the absurdity and irrationality of the preemption doctrine and its effects on immigration law.

pay looks Good to Vietnamese, L.A. TIMES, September 19, 2010, at A01, available at <http://articles.latimes.com/2010/sep/19/business/la-fi-china-illegal-immigration-20100919>; Matthew T. Hovey, *Oh, I’m Sorry, Did That Identity Belong to You? How Ignorance, Ambiguity, and Identity Theft Create Opportunity for Immigration Reform in the United States*, 54 VILL. L. REV. 369, 400–01 (2009) (noting that employment is the primary incentive because their counties of origin typically have weak economies and high levels of unemployment).

<sup>137</sup> 8 U.S.C. §1324a (1986) (emphasis added).

<sup>138</sup> H.R. REP. NO. 99-682, pt. 1, at 5650 (1986).

<sup>139</sup> See *Infra* section 5; see also Ragsdale Decl. ¶ 17, available at <http://www.justice.gov/opa/documents/declaration-of-daniel-ragsdale.pdf>.

<sup>140</sup> *Younger v. Harris*, 401 U.S. 37, 43–44 (1971).

<sup>141</sup> See *Winter v. NRDC, Inc.*, 129 S. Ct. 365, 374–75 (2008); *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983).

<sup>142</sup> See *Arizona*, 703 F. Supp. 2d at 1006–07 (quoting *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997)); see also *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991).

Additionally, the application of the irreparable harm standard is counter to public policy and does not outweigh the damage inflicted on Arizona's security. Accordingly, the irreparable harm standard should be revised to include that a federal government cannot suffer irreparable harm for a power they have neglected to implement.

*C. Comparing Other Congressional Powers to Demonstrate Why Immigration Preemption Should Be Changed*

Immigration is unlike other issues that are entangled with preemption law. Immigration is not a right conferred upon the federal government through the expanded use of the Commerce Clause. The power to create a Uniform Rule of Naturalization is specifically delegated to the Congress while federal policy on immigration is considered a plenary power.<sup>143</sup> In order to conclude and recommend a significantly broader interpretation of the 10th Amendment, which is almost entirely meant for the application of immigration law, a careful and thoughtful analysis will be conducted to demonstrate how immigration is different from other exercised federal powers that give rise to preemption law.

1. Comparing and Contrasting Other Congressional Powers to Immigration

Regulating immigration is different from Congress's other expressly enumerated powers whose authority does not stem from an expanded Commerce Clause interpretation. Many of these delegated powers deal with the federal government's ability to operate and fund itself,<sup>144</sup> or to defend itself.<sup>145</sup> Article 1, Section 8 also allows Congress to set national standards for certain fields of law, including immigration, bankruptcy and patent law.<sup>146</sup> Accordingly, it follows logically to compare and contrast the Constitution's intended congressional scope in regards to immigration law and also to the enumerated powers concerning single standards.

<sup>143</sup> See U.S. CONST. art. I, § 8, cl. 4.

<sup>144</sup> See U.S. CONST. art. I, § 8 (including the power to borrow money, coin money, and establish a Post Office).

<sup>145</sup> *Id.* (including the power to declare war, maintain a Navy and militia).

<sup>146</sup> *Id.* 8 (delegating Congress the authority to "establish uniform an Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States" and to promote the development and science through the issuance of patents). See generally *DeCanas v. Bica*, 424 U.S. 351 (1976) (designating immigration as a federal issue).



a. Purpose of Uniform Standards Envisioned by the Founding Fathers

The founding fathers sought to establish a government with a proper balance of federalism and national power, while still maintaining their resistance to an overbearing central government they feared under prior British rule. After experiencing many problems under the Articles of Confederation, the founders sought to create a proper balance by specifically enumerating the powers of Congress<sup>147</sup> and giving all remaining powers to the states.<sup>148</sup> The purpose of this new system of federalism was to promote “[h]armony and proper intercourse among the states.”<sup>149</sup>

In order to promote this ‘harmony’, the Constitution provided for uniform federal bankruptcy and patent laws throughout the states with the underlying purpose of promoting commerce and preventing states from defrauding one another. The purpose of uniform bankruptcy standards envisioned by the founders is relatively straightforward. Bankruptcy is “so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.”<sup>150</sup> Likewise, the founder’s delegation of patent law to the Congress was meant to provide “a convenient instrument of justice” and promote commerce and creativity.<sup>151</sup>

This same logic concerning the need for uniform standards in bankruptcy and patent law is similar to the founders’ reasoning to give federal authority to immigration. The purpose of specifically delegating Congress the power to adopt uniform Rules of Naturalization appears to stem from the need: to complement the Privileges and Immunities Clause by preventing states from purposefully not recognizing the rights of citizenship from other States; to prevent states from having conflicting standards for national citizenship; and to stop states from taking advantage of citizens from other states. These goals would be accomplished by a uniform national standard for naturalization. This is consistent with the premise that federal regulation of immigration is “essentially a determination of who should and should not be admitted into the country, and the conditions under which a legal entrant remain[s].”<sup>152</sup>

<sup>147</sup> See U.S. CONST. art. I, § 8.

<sup>148</sup> See U.S. CONST. amend. X.

<sup>149</sup> THE FEDERALIST NO. 42, at 235 (James Madison) (Clinton Rossier ed., 1961).

<sup>150</sup> *Id.* at 239.

<sup>151</sup> *Id.*

<sup>152</sup> *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

The framers' vision of a uniform national standard for naturalization would therefore logically apply to "legal entrants"<sup>153</sup> who received rights of citizenship or temporary alien status from the federal government. However, extending sole jurisdiction to the federal government for illegal entrants and thereby restricting a state's ability to address the problems of unlawful entry and presence in one's state would be contrary not only the Constitution's original intent, but also to conventional immigration law as it has been historically interpreted by the courts.<sup>154</sup> Additionally, for a country that was founded on a fear of excessive central government, it is hardly logical to assert that the founders envisioned a scenario where a federal government would not act within its authority. In fact, the fear stemmed from a central government exercising power and influence in too many areas of law, not just those given to them, but also those reserved for states. It cannot be reasonably argued that the founders intended for a state like Arizona, which is not making rules determining how one becomes a naturalized citizen of America, to remain helpless when confronted by a willfully negligent federal government refusing to protect the border or enforce its immigration laws.

#### b. Why Arizona's Immigration Problem is Different from Other Congressional Powers and Preemption Issues

Unlike other areas of preemption law, the federal government has failed to enforce federal immigration laws in accordance with the intent and mandates of Congress, or at a minimum to provide a mechanism for states to respond to demands from its citizenry. As previously demonstrated, Arizona has repeatedly sought effective federal enforcement of immigration law already on the books, but has been denied by an incompetent federal government.<sup>155</sup>

While the federal government's reasoning behind enacting a law that potentially preempts other state laws is open to policy criticisms, there is almost always some legitimate purpose sought by Congress. Legitimate congressional motives behind laws that preempt state law vary far and wide, but Congress usually attempts to encourage or protect commerce and

<sup>153</sup> See *id.*

<sup>154</sup> See *id.* at 354–55 (reasoning that, although immigration regulation is a federal power, not every state law that implicates aliens is a regulation of immigration); see also *Graham v. Richardson*, 403 U.S. 365, 372–73 (1971) (citing a line of cases that, although overturned in part, still stand for the valid proposition that state statutes regulating aliens do not necessarily regulate immigration).

<sup>155</sup> See discussion *infra* section IV.C.

other issues intertwined with commerce.<sup>156</sup> Some examples from a certainly non-exhaustive list include Congress's desire: to address perceived abuses in class-action securities litigation;<sup>157</sup> to encourage pharmaceutical companies to create new and better vaccines;<sup>158</sup> and to provide a uniform system for regulating retirement schemes and benefits.<sup>159</sup> These cases are simple examples of the wide range of preemption issues that are presented to the courts. A common theme behind the passage of these bills is that they do not significantly frustrate or outweigh the economic, social, and most importantly the physical security of both local states and the nation as a whole.

As opposed to other preemption cases, this note concludes that there is no compelling, legitimate or even rational governmental interest or reason that outweighs Arizona's genuine security concerns. Some of the reasons put forth by the United States District Court for the District of Arizona and the DOJ to preempt S.B. 1070 include draining resources of the federal government; the mere possibility of reciprocal and retaliatory treatment of US citizens abroad, thereby limiting the federal government's ability to conduct foreign policy and US citizen's ability to travel, conduct business, and live abroad; and asserting that a requirement that all citizens carry documentation of citizenship or alien status places an unconstitutional burden on legally present aliens.<sup>160</sup>

The reasons presented by Judge Bolton and the DOJ are simply inadequate. While there may be an increase in demand of ICE's resources, this was already envisioned by the Congress. Bolton basically argues that the federal government's resources will be unnecessarily drained if it is forced to comply with the intent of Congress. Furthermore, the continued drain on Arizona's resources, economic and physical security represents a

<sup>156</sup> Most of this legislation stems from Congress's expanded authority under the Commerce Clause.

<sup>157</sup> See *Merrill Lynch v. Dabit* 547 U.S. 71, 81 (2006) (noting that Congress passed the Private Securities Litigation Reform Act of 1995, placing restrictions on federal securities fraud class actions, in response to perceived abuses of the class-action vehicle in securities litigation); see also *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740–41 (1975) (referring to the intent of Congress to limit vexatious securities litigation when crafting securities law).

<sup>158</sup> See *Pliva Inc. v. Mensing*, 131 S. Ct. 2567, 2582 (2011) (stating that federal regulation of the generic drug market has allowed the market to expand and thrive, and that Congress and the FDA retain such regulatory authority); see also *Bruesewitz v. Wyeth, L.L.C.*, 131 S. Ct. 1068, 1082 (2011) (holding that federal law prevents civil suits based on design-defect claims against manufacturers of FDA-approved childhood vaccines).

<sup>159</sup> See *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (holding that Congress intended ERISA to provide a uniform system for regulating retirement schemes and benefits.); see also *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522–23 (1981) (stating that ERISA's language makes it clear that the federal statute is meant to pre-empt state regulation of pension plans).

<sup>160</sup> See *United States v. Arizona*, 703 F. Supp. 2d 980, 997–98 (D. Ariz. 2010).

far greater impact on Arizona's limited budget<sup>161</sup> compared to enormous budget of the federal government.<sup>162</sup> Additionally, the court either values the relatively small amount of Americans who are abroad compared with the enormous amount of people who actually live in the United States or the court is simply ignorant that the very problems U.S. citizens could potentially face abroad are currently prevalent and actually plaguing Arizona and many other states in the country right now. Moreover, carrying documentation is not an undue burden, at least compared to the economic and physical burdens placed on the people of Arizona. Also, it is documented that aliens often carry identification and if they do not, a legal alien can simply provide their "A" number.<sup>163</sup>

Finally, the federal government has a constitutional obligation to protect states from invasion and domestic violence.<sup>164</sup> While invasions are more associated with standing armies, history lends weight to the conclusion that Arizona is currently facing an invasion or domestic violence on its southern border. Protecting states from invasion is "due from every society to the parts composing it. The latitude of the expression here used seems to secure each State, not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbors."<sup>165</sup> Considering there are more illegal aliens currently in Arizona<sup>166</sup> than the total amount of people in Mexico's armed forces,<sup>167</sup> the economic turmoil inflicted upon

<sup>161</sup> See Mary Jo Pitzl, *Arizona Budget Passes: the Cuts Total \$1.1 Billion*, ARIZ. REP. (Mar. 12, 2010, 12:00 AM), <http://www.azcentral.com/community/ahwatukee/articles/2010/03/12/20100312budgetvote0312.html> (reporting that the Arizona State Legislature passed an \$8.9 billion budget); see also OFFICE OF STRATEGIC PLANNING & BUDGETING, EXEC. OFFICE OF THE GOVERNOR OF ARIZONA, THE EXECUTIVE BUDGET SUMMARY, FISCAL YEAR 2011, 1 (2010), available at [http://www.ospb.state.az.us/documents/2010/FY2011\\_BudgetSummaryFINAL.pdf](http://www.ospb.state.az.us/documents/2010/FY2011_BudgetSummaryFINAL.pdf).

<sup>162</sup> See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, A NEW ERA OF RESPONSIBILITY: RENEWING AMERICA'S PROMISE, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2010, (2009), available at <http://www.gpoaccess.gov/usbudget/fy10/pdf/fy10-newera.pdf> (estimating the 2010 United States Federal Budget to be 3.552 trillion dollars); see also Jonathan Weisman, *Obama Budget Pushes Sweeping Change*, WALL ST. J., Feb. 27, 2009), at A1, available at <http://online.wsj.com/article/SB123564748462081261.html>.

<sup>163</sup> See Brief of Appellant at 32, *United States v. Arizona*, No. CV 10-1413-PHX-SRB (9th Cir. 2010) (noting that aliens often carry identification and for the ones who do not, they can simply provide their "A" number); see also *N.S. v. Nat'l Ctr. For Immigrants' Rights*, 502 U.S. 183, 195-96 (1991).

<sup>164</sup> See U.S. CONST. art 4, § 4.

<sup>165</sup> THE FEDERALIST NO. 43 (James Madison).

<sup>166</sup> See Cooper and Davenport, *supra* note 56 (estimating there are 460,000 illegal immigrants currently in Arizona); see also David Osborne, *Obama Condemns Arizona's Plans to Hunt Down Illegal Immigrants*, THE INDEPENDENT, April 24, 2010, at 34, available at <http://www.independent.co.uk/news/world/americas/obama-condemns-arizonas-plans-to-hunt-down-illegal-immigrants-1952995.html>.

<sup>167</sup> *Armed Forces Personnel; Total in Mexico*, TRADING ECONOMICS, <http://www.tradingeconomics.com/mexico/armed-forces-personnel-total-wb-data.html> (estimating Mexico had 286,000 active armed forces personnel in 2008); *Military Stats: European Union vs.*

Arizona, and the physical and bodily tolls on Arizona citizens, it is not unreasonable to declare that Arizona is currently under an invasion or suffering domestic violence of sorts from illegal immigrants crossing its unprotected border.

Furthermore, while Madison and the founders were suspicious of a too powerful central government, they did envision a scenario where the federal government would be compelled to intervene and protect a state. "Insurrections in a State will rarely induce a federal interposition, unless the number concerned in them bear some proportion to the friends of government . . . [t]he existence of a right to interpose, will generally prevent the necessity of exerting it."<sup>168</sup>

Madison's piece is telling for two reasons. First, the founders envisioned circumstances where the federal government would be forced to quell insurrections in cases where the numbers of the adversary are so great as to be in proportion with those of the government which is certainly the case here given the amount of illegal immigrants in Arizona. Secondly, while the very existence of this power would probably deter insurrections, it would be useless if the adversary knew the federal government would not devote the necessary resources and take appropriate action, which has certainly been the case surrounding Arizona's illegal immigration and border problems. Accordingly, in the absence of the federal government fulfilling its constitutionally charged obligations, to protect a state from invasion and domestic violence, a reasonable solution should be proposed to allow Arizona to protect itself while the federal government sits on the sidelines.

#### CONCLUSION

This note sought to demonstrate the extreme problems that a state can suffer due to the inaction of a federal government that either willfully neglects or incompetently enforces an enumerated or plenary constitutional power. As previously mentioned, the Tenth Amendment has become mostly obsolete, lacking the power to specifically reserve rights and obligations to the states.<sup>169</sup> Instead, the Tenth Amendment allows the state to address areas of law the federal government has not addressed or is not

*Mexico*, NATIONMASTER, (Oct. 10, 2011, 4:28 PM), <http://www.nationmaster.com/compare/European-Union/Mexico/Military>.

<sup>168</sup> FEDERALIST NO. 43 (James Madison).

<sup>169</sup> See *supra* section I; but see Bravin, *supra* note 14 (justices currently debating the scope and protections of the 10<sup>th</sup> amendment).

authorized to implement under the Commerce Clause.

The interpretation of the Tenth Amendment should be altered to include powers forfeited by the federal government. This should be a narrow, sparingly used doctrine, based on a strict application of the following conditions: (1) a state demonstrates that the federal government has an implied or expressed power that preempts state legislation addressing the same issue; (2) the state proves by clear and convincing evidence the federal government has failed to effectively implement this power; (3) the state has petitioned the federal government to address their continued and repeated failures; (4) the federal government has been given a reasonable amount of time to act but has demonstrated an inability to comply with the state's request to address their failure; and (5) the federal government's failure has directly and continues to contribute to the significant loss of life, limb, property and economic detriment of the state. If these conditions are met, then the federal government temporarily forfeits its powers. This proposal is designed to allow a state to exert real influence and pressure on an inept federal government. When the federal government finally takes effective action, the state law would then become preempted. Alternatively, the state should at a minimum be allowed to enact legislation that is in compliance with the intents of Congress that the federal government is ineffectively enforcing.

Most importantly, the 10th amendment should be read in accordance with the Constitution's other provisions that the federal government is given enumerated or plenary *responsibilities*—not powers—that can be forfeited. Then through the theory of disclaimer, these rights and responsibilities are given temporarily to the states. While this may be considered an extreme departure from constitutional and historical precedence, this note sought to alleviate these concerns by demonstrating that this proposed solution is supported by the intent of the Constitution's founders and, more importantly, the inefficiencies of current preemption law. In the final analysis, the suggested rule change is a reasonable approach that empowers the people of Arizona to protect themselves when preempted by a federal government tainted by impotence and irresponsibility.

