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ESSAY

READING ARIZONA

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BOTH sides in our nation's ongoing immigration disputes are spinning the *Arizona v. United States*¹ ruling as a victory—plus an occasion to appeal to supporters for more money to battle through the fall election cycle and the predictable next rounds of litigation and legislation. It's the federal side, however, that has the better claim to success.

To be sure, the Court unanimously sustained—against a facial challenge—the “show your papers” provision that had drawn the most public attention. But the 5-3 majority (with Justice Kagan recused) did so with warnings about the provision's implementation and the likelihood of future litigation.² More importantly, the Court upheld a preliminary injunction against three of the four currently contested sections of Arizona's restrictive immigration law, known as SB 1070.

In reaching that result, the majority warmly reaffirmed a constitutional doctrine, known as obstacle preemption, that will favor the federal

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¹ No. 11-182, slip op. (U.S. June 25, 2012), <http://www.supremecourt.gov/opinions/11pdf/11-182.pdf>.

² *Id.* at 23–24.

government's interests in a wide swath of future cases. It also strongly endorsed the primacy of the federal government in immigration control, in the face of a stunningly vitriolic dissent from Justice Scalia asserting the sovereign exclusion powers of the states. And it rejected a "mirror-image" theory propounded by SB 1070's proponents that promised much future state legislative mischief.

The majority started with Section 3 of the Arizona law. That section imposed misdemeanor penalties, up to thirty days' jail time, on persons who have not complied with federal alien registration provisions. A classic preemption case from 1940, *Hines v. Davidowitz*,³ had struck down a Pennsylvania state registration law, finding it in conflict with the then-recently-enacted federal scheme. Arizona argued that its law is different, because it simply mirrors the federal obligation, punishing only those who could be punished by federal authorities, instead of creating a separate set of substantive requirements. This intuitively appealing proposition masks serious complications, and the Court saw through it. The majority ruled that even the addition of minor state penalties can disrupt "the careful framework Congress [has] adopted."⁴ Shaping a specific penalty structure and its enforcement machinery, while leaving its invocation in the hands of designated federal agencies, can be as significant a congressional policy decision as are substantive rules.

Because this mirror-image reasoning undergirds many of the recent state and local efforts to adopt their own restrictive immigration laws, a lot was riding on the Court's treatment of Section 3.⁵ If Arizona had prevailed, state legislators around the country could seize on this theory (as several had already) to push bills that would pile even stiffer state

³ 312 U.S. 52 (1941).

⁴ *Arizona*, No. 11-182, slip op. at 11. The Court also prominently cited three cases notable for their awareness of the way in which a carefully administered and unified federal enforcement regime can be distorted by state initiatives that might superficially seem compatible. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U. S. 341 (2001) (states may not impose their own punishment for fraud on the Food and Drug Administration); *Crosby v. National Foreign Trade Council*, 530 U. S. 363 (2000) (Massachusetts law imposing sanctions on firms that do business with Burma is preempted by the federal sanctions law); *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U. S. 282 (1986) (debarment from state contracting based on violations of federal labor law conflicts with the comprehensive scheme of regulation administered by the federal National Labor Relations Board). Justice Alito also agreed that § 3 is preempted.

⁵ A perceptive early critique of the mirror-image theory appears in Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration through Criminal Law*, 61 *Duke L.J.* 251 (2011). The theory is a favorite of Kris Kobach, who has spearheaded the effort for state-level immigration control laws throughout the nation and was deeply involved in the drafting of SB 1070. See Carissa Hessick, *Mirror image theory in state immigration regulation*, SCOTUSblog, (July 13, 2011, 2:34 PM), <http://www.scotusblog.com/2011/07/mirror-image-theory-in-state-immigration-regulation/>.

penalties onto a wide range of federal immigration prohibitions. The majority's reasoning may also call into question state-level provisions that criminalize alien smuggling, because federal laws contain a precise, graduated penalty scheme for that activity—and the interest involved is clearly federal. (In its 2010 complaint in this case, the Department of Justice included a challenge to Arizona's anti-smuggling provision; that provision was not at issue in the preliminary injunction proceedings, but the challenge remains alive on remand.⁶)

Next, the Court turned to Section 5(C) of SB 1070, which imposed criminal penalties on aliens who work without authorization from the federal government. Federal law obviously also outlaws such employment, but it imposes only civil sanctions (notably including removal from the country) on *employee* violators, reserving criminal penalties for egregious employer practices. Because an express preemption clause in the federal law blocks only state penalties *on employers*, Arizona argued that Congress did not intend to preempt state initiatives with regard to unauthorized workers. The Court disagreed. It found the existence of such a preemption clause no bar to applying background preemption principles to an allegedly incompatible provision not explicitly covered by the clause. Examining the legislative history of the 1986 federal employer sanctions law, the opinion went on to apply a separate analytical doctrine drawn from *Hines*: that a state law must yield where it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁷ This strong reliance on obstacle preemption came as a surprise, because a year ago the Court had seemed to set a very high threshold for applying that doctrine. That case was *Chamber of Commerce v. Whiting*, which upheld against a preemption challenge an earlier (and far more focused) Arizona immigration law.⁸ Section 5(C) was struck down.

Section 6 of SB 1070 authorized warrantless arrests by Arizona officers when they have probable cause to believe that someone has committed a “public offense that makes the person removable from the United States.”⁹ Noting that, as a “general rule, it is not a crime for a removable alien to remain present” in the country, the Court found that this provision would give Arizona officers more authority to arrest than even trained federal officers enjoy under Congress's handiwork.¹⁰ Arizona

⁶ Plaintiff's Motion for Preliminary Injunction, *Arizona v. United States*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-cv-1413-NVW), 2010 WL 2959365.

⁷ *Arizona*, No. 11-182, slip op. at 8 (citing *Hines*, 312 U.S. at 67).

⁸ 131 S. Ct. 1968, 1985 (2011).

⁹ Ariz. Rev. Stat. Ann. § 13-3883 (West 2012).

¹⁰ *Arizona*, No. 11-182, slip op. at 15.

had countered by citing a 1996 federal law that broadly allows state officers to “cooperate with the [federal government] in the identification, apprehension, detention, or removal of aliens not lawfully present.”¹¹ The meaning of that clause had been vigorously debated at oral argument when the justices questioned the Solicitor General about his interpretation of “cooperate.”¹² In the end, the majority accepted the SG’s view. Justice Kennedy’s majority opinion states that, although there may be some ambiguity as to what constitutes cooperation, “no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government.”¹³ In short, cooperation may continue—and the federal government always wanted to litigate this case in a way that would maintain an open avenue toward cooperation with state and local law enforcement—but it must occur on the federal government’s terms.

One might think that this reasoning would lead the Court to strike down Section 2(B) as well, the “show your papers” requirement. (Under it, Arizona officers must make a “reasonable attempt . . . to determine the immigration status” of any person they lawfully stop, detain, or arrest if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.”¹⁴) The SG, after all, had argued that under SB 1070 Arizona officers would not be following the federal government’s priorities when checking on immigration status.¹⁵ But the Supreme Court saw it differently—and was unanimous in finding no facial flaw in Section 2(B). That provision is premised on a lawful “stop, detention or arrest” by an Arizona officer applying Arizona law, whereas Section 6 allows a warrantless Arizona arrest for no evident purpose other than federal immigration enforcement.¹⁶ Moreover, certain provisions Congress enacted in 1996 do encourage the sharing of information about possible immigration violations with federal immigration officers, while also requiring a federal response advising of immigration status whenever a state agency asks about a person who falls within its jurisdiction.¹⁷ The Court evidently saw those provisions as sufficient con-

¹¹ Id. at 18 (discussing 8 U.S.C. § 1357(g)(10)(B) (2006)).

¹² Transcript of Oral Argument at 44–57, *Arizona*, No. 11-182, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-182.pdf.

¹³ *Arizona*, No. 11-182, slip op. at 18.

¹⁴ Ariz. Rev. Stat. Ann. § 11-1051(B) (West 2012).

¹⁵ Transcript of Oral Argument, *supra* note 12, at 42–43.

¹⁶ *Arizona*, No. 11-182, slip op. at 2.

¹⁷ 8 U.S.C. §§ 1373(c), 1357(g)(10)(A), 1644 (1996), discussed in *Arizona*, No. 11-182, slip op. at 20–21.

gressional “approval” or “instruction” to get Section 2(B) past the shoals on which Section 6 had foundered.

The Court’s decision to uphold this section against a facial challenge is the most modest of victories for Arizona. Section 2(B) is not facially invalid, but Justice Kennedy’s opinion for the Court issued a firm warning that the provision must be implemented in a constitutionally sound manner.¹⁸ Arizona could run afoul of constitutional limitations, for example, if the law prolongs a stop or detention beyond what the Fourth Amendment allows. The Court essentially called upon the Arizona courts to provide a definitive interpretation of the section that will keep its application both lawful and reasonable. It added: “This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.”¹⁹ Several private lawsuits are already pending against Section 2(B). It is not clear whether they will need to be refiled, so as to rest on at least some actual experience of the law as applied.

This was not the outcome the federal government sought, but it’s close—particularly with the Court’s emphasis, in its Section 6 discussion, on how cooperation calls for request, approval or instruction from the federal side, rather than unilateral state action. Furthermore, the federal government remains in firm control of the final immigration treatment of anyone stopped and identified by Arizona officers. As several justices noted during oral argument, when Arizona makes its request for information as a result of Section 2(B), the Department of Homeland Security (DHS) must indeed notify of any unlawful status,²⁰ but it can then inform the officer that it does not wish to pursue enforcement, if removal in the particular case would not accord with DHS’s priorities.²¹ When that happens, the Arizona officer must of course release the person (unless properly held on criminal charges).

The majority opinion also contains strong support for the exercise of prosecutorial discretion by DHS, including to address “immediate human concerns.”²² This emphasis is notable, because the decision came down within two weeks of Homeland Security Secretary Janet Napolitano’s announcement of a policy that will generally prevent removal of unauthorized aliens who came to the United States as children and have lived here for five years—a bold but defensible use of prosecutorial dis-

¹⁸ *Arizona*, No. 11-182, slip op. at 24.

¹⁹ *Id.*

²⁰ 8 U.S.C. § 1373(c).

²¹ Transcript of Oral Argument, *supra* note 12, at 44–45, 50–57.

²² *Arizona*, No. 11-182, slip op. at 4. See also *id.* at 16–18.

cretion.²³ The majority never mentions that DHS policy directly, but Justice Scalia excoriated it,²⁴ both in his dissent and in the oral summary that he read from the bench on the morning the decision was handed down.²⁵

Scalia's unsolicited pronouncement on late-breaking executive policy was not the only peculiar thing about his opinion. He also invoked a vision of state sovereignty over alien control matters that the Supreme Court itself had left behind by 1876, in the great case of *Chy Lung v. Freeman*.²⁶ By striking down most of Arizona's law, the majority, he charges, "deprives States of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there."²⁷ I have no polling data to support me, but I'd wager that most Americans, and probably even the authors of SB 1070, routinely consider the power to exclude to be a *federal* sovereign power—even if they think the feds are exercising it badly. That's why those authors worked so hard to base their defenses of the law on the mirror-image theory. And numerous Supreme Court cases say flatly that the power to regulate immigration, which they acknowledge to include the power to exclude, admit, and set the terms of admission, belongs exclusively to the federal government.²⁸

Hence it is not surprising that no one joined Scalia's intemperate dissenting opinion. But the majority, notably including the Chief Justice

²³ DHS Announces Deferred Action for "DREAMers," 89 Interpreter Releases 1194 (2012). My defense of the legal and political soundness of the new prosecutorial discretion policy appears in David A. Martin, A Lawful Step for the Immigration System, Wash. Post, June 24, 2012.

²⁴ *Arizona*, No. 11-182, slip op. at 19–22 (Scalia, J., concurring in part and dissenting in part).

²⁵ Justice Scalia's dissent has prompted wide-ranging critical comment. See, e.g., E.J. Dionne, Justice Scalia Must Resign, Wash. Post, June 27, 2012, http://www.washingtonpost.com/opinions/ej-dionne-jr-justice-scalia-should-resign/2012/06/27/gJQApkO06V_story.html; Richard Posner, Supreme Court Year in Review: Scalia is upset about illegal immigration. But where is his evidence?, Slate, June 27, 2012, http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/_supreme_court_year_in_review/supreme_court_year_in_review_justice_scalia_offers_no_evidence_to_back_up_his_claims_about_illegal_immigration_.html.

²⁶ 92 U.S. 275 (1876).

²⁷ *Arizona*, No. 11-182, slip op. at 1 (Scalia, J.).

²⁸ See, e.g., *DeCanas v. Bica*, 424 U.S. 351, 354–55 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1973) ("The power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country . . . is settled by our previous adjudications.") (quoting from *Lem Moon Sing v. United States*, 158 U.S. 538, 547(1895)); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 416 (1948) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government").

and Justice Kennedy, went out of its way to provide an unremitting response, without expressly trumpeting that they were rejecting Scalia's views. The opinion's substantive discussion opens with these words: "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."²⁹ That power is federal in large part because "foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States."³⁰ Moreover, "[p]erceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad."³¹ As the *Chy Lung* case perceptively observed, such a consequence would not fall only on the state whose actions gave offense.³² This solicitude for foreign impact is poles apart from the Scalia view.

The majority's closing passages impart a different emphasis: "The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse."³³

These Kennedyesque words (Anthony, not John), are apparently addressed to the political branches of the federal government. But they may also carry implicit criticism of the legislative fever that led to Arizona's law—and perhaps even more subtly of Justice Scalia's high-temperature dissent.

²⁹ *Arizona*, No. 11-182, slip op. at 2.

³⁰ *Id.* at 3.

³¹ *Id.*

³² 92 U.S. at 279–80.

³³ *Arizona*, No. 11-182, slip op. at 25.