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Recentering Foreign Affairs Preemption in Arizona v. United States: Federal Plenary Power, the Spheres of Government, and the Constitutionality of S.B. 1070

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**RECENTERING FOREIGN AFFAIRS PREEMPTION
IN ARIZONA V. UNITED STATES: FEDERAL
PLENARY POWER, THE SPHERES OF
GOVERNMENT, AND THE CONSTITUTIONALITY
OF S.B. 1070**

PATRICK J. CHARLES*

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I. INTRODUCTION

With the Supreme Court granting certioari in *Arizona v. United States*,¹ it will be the first time in thirty years that the Court will hear a foreign affairs preemption case concerning immigration.² This is a fact that most commentators have overlooked as they focus on the case in the constraints of traditional preemption theories.³ Indeed,

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¹ See *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3354 (U.S. Dec. 12, 2011) (No. 11-182).

² See generally *Toll v. Moreno*, 458 U.S. 1 (1982) (addressing foreign affairs preemption as applied to a Maryland in-state tuition law affecting G-4 visa holders).

³ See Lauren Gilbert, *Presuming Preemption: Implications of Chamber of Commerce v. Whiting*, SCOTUSBLOG (July 5, 2011, 9:31 AM), <http://www.scotusblog.com/2011/07/presuming-preemption-implications-of-mchamber-of-commerce-v-whiting/> (discussing the

the federal government is claiming provisions of Arizona S.B. 1070 are unconstitutional under a number of preemption approaches,⁴ but the focal point of each theory is that these provisions conflict with the comprehensive federal scheme as to impede on foreign policy.⁵

It is an argument that the federal government is litigating in other states that have enacted copycat immigration through enforcement laws, including Alabama⁶ and South Carolina⁷ respectively. What is unique about the argument is it downplays congressional intent as guidance, and in its place asserts foreign affairs preemption through executive foreign policy objectives.⁸

At the Ninth Circuit Court of Appeals, a two judge majority agreed with this preemption theory, and buttressed their stance by citing to an amicus brief filed by foreign officials and international governing bodies.⁹ In particular, the two judges applied a rather broad foreign affairs preemption analysis to S.B. 1070 Section 2(B), which requires every “law enforcement official or a law enforcement agency” to make a “reasonable attempt” at verifying an alien’s immigration status where a “reasonable suspicion” arises that the alien is unlawfully present.¹⁰ The majority found such a state immigration verification requirement as undermining the President’s executive authority “to establish immigration enforcement priorities and

implications of the “presumption against preemption, and the doctrines of field, express, and conflict preemption); Larry Joseph, *Arizona v. United States: Narrowing Prevent-or-Frustrate Conflict Preemption*, SCOTUSBLOG (July 15, 2011, 1:04 PM), <http://www.scotusblog.com/2011/07/arizona-v-united-states-narrowing-%e2%80%9cprevent-or-frustrate%e2%80%9d-conflict-preemption/> (focusing on conflict preemption, even in the constraints of foreign policy considerations); Richard Samp, *The Constitutionality of S.B. 1070*, SCOTUSBLOG (July 11, 2011, 9:28 AM), <http://www.scotusblog.com/2011/07/the-constitutionality-of-s-b-1070/> (focusing analysis on implied preemption only).

⁴ See Brief for Appellee at 23-24, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645).

⁵ *Id.* at 25-28, 47-49, 61-63.

⁶ See Brief for Appellant at 10, 18, 20, 22-25, 26, 27, 30, 36, 37, 40, *United States v. Alabama*, 443 F. App’x 411 (11th Cir. 2011) (No. 11-14532-CC), 2011 U.S. App. LEXIS 20942, available at [http://lgdata.s3-website-us-east-1.amazonaws.com/docs/213/344161/USA_v._Alabama,_Brief_for_Appellant_\(11th_Cir._Nov._14,_2011\).pdf](http://lgdata.s3-website-us-east-1.amazonaws.com/docs/213/344161/USA_v._Alabama,_Brief_for_Appellant_(11th_Cir._Nov._14,_2011).pdf).

⁷ See Complaint for Declaratory & Injunctive Relief at 1-3, 6-7, 9, 15-16, 24, *United States v. South Carolina*, No. 2:11-CV-2958 (D. S.C. Dec. 22, 2011), 2011 U.S. Dist. LEXIS 151549, available at <http://www.justice.gov/opa/documents/us-v-sc-complaint.pdf>.

⁸ See *United States v. Arizona*, 641 F.3d 339, 353 (9th Cir. 2011); *United States v. Alabama*, No. 2:11-CV-2746-SLB, 2011 U.S. Dist. LEXIS 112362, at *52-53 (N.D. Ala. Sept. 28, 2011). See also *Ga. Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317 (N.D. Ga. 2011).

⁹ *Arizona*, 641 F.3d at 351-53.

¹⁰ ARIZ. REV. STAT. § 11-1051(B) (LexisNexis 2011). Utah maintains a similar requirement. See UTAH CODE ANN. § 76-9-1003(1)(a)(i) (LexisNexis 2011) (requiring police officers to verify the immigration status of vehicle passengers where there is a reasonable suspicion to believe that the vehicle contains unlawful immigrants).

strategies.”¹¹ The majority stated the verification requirement’s enforcement would have a “deleterious effect on the United States’ foreign relations” to the point that it creates “*actual* foreign policy problems of a magnitude far greater than incidental.”¹²

In dissent, Judge Carlos T. Bea found the executive foreign policy argument unconvincing. He pointed out that absent any international agreements or treaties supplementing the federal scheme, congressional intent controlled any foreign preemption analysis, not the whims of the executive branch.¹³ Particularly, Bea found Section 2(B) to work in accordance with the federal immigration scheme, for it embraced and furthered Congress’s purpose of deterring unlawful immigration.¹⁴ Bea argued that unless the federal government could pinpoint “*established* foreign relations goals” to the contrary, any foreign affairs preemption argument is insufficient as a matter of law.¹⁵ In other words, the federal government had to do more than demonstrate “*any effect* on foreign relations generally.”¹⁶

Other recent federal court decisions analyzing “attrition through enforcement” challenges reveal a similar divide over foreign affairs preemption. In *Georgia Latino Alliance for Human Rights v. Deal*, the United States District Court for the Northern District of Georgia applied the doctrine loosely to a Georgia law requiring law enforcement officials to determine the immigration status of criminal suspects *when* the suspect cannot provide one of five identity documents.¹⁷ Although the Georgia law is facially less intrusive than S.B. 1070 Section 2(B), the court held that it conflicted with “Executive Branch discretion” and had a “direct and immediate” impact on United States foreign relations.¹⁸

In *United States v. South Carolina*, the United States District Court of South Carolina agreed with this approach, and buttressed the theory with other interpretational tools.¹⁹ Presiding over the case, Judge Richard Mark Gergel jointly field preempted, implied obstacle preempted, and foreign affairs preempted a South Carolina law directing state and local law enforcement officers to verify the immigration status of persons whom they have a “reasonable suspicion” to believe are unlawfully present in the United States.

In coming to his decision, Gergel took into account a number of considerations. The first being a politically prepared statement by Deputy Secretary of State William

¹¹ *Arizona*, 641 F.3d at 352 (citing *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 377 (2000)).

¹² *Id.* at 352-353.

¹³ *Id.* at 380-81 (Bea, J., dissenting).

¹⁴ *Id.* at 382.

¹⁵ *Id.* at 381.

¹⁶ *Id.*

¹⁷ *Ga. Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317, 1330 (N.D. Ga. 2011).

¹⁸ *Id.* at 1333.

¹⁹ *United States v. South Carolina*, No. 2:11-CV-02958-RMG, 2011 U.S. Dist. LEXIS 151549, at *1 (D. S.C. Dec. 22, 2011), *available at* <http://www.legalactioncenter.org/sites/default/files/docs/lac/US-v-South-Carolina-order-on-temporary-injunction-12-22-2011.pdf>.

Burns, which he found convincing because South Carolina did not admit any equivalent “statements or other evidence to counter Secretary Burns’ declaration regarding the potential adverse impact . . . on American foreign policy interests.”²⁰ The other considerations Gergel took into account were the Constitution vesting plenary power over foreign affairs with the federal government, Supreme Court foreign affairs preemption precedent, executive discretion when determining “federal enforcement priorities,” and the affordance of agency deference when interpreting 8 U.S.C. § 1357(g)(10), which authorizes the states to cooperate in the identification of unlawful aliens.²¹

In conclusion, Gergel summed up the issuance of a temporary injunction, partly on foreign affairs preemption, as follows:

[Section 6] is without consideration of federal enforcement priorities and unquestionably vastly expands the persons targeted for immigration enforcement action. The United States asserts that this state statutory scheme will disrupt federal enforcement operations and burden finite immigration enforcement resources. The breadth and volume of these state-mandated immigration inquiries and investigations would . . . *raise significant foreign relations problems that would likely adversely affect American foreign policy interests.*²²

In contrast to the district courts in Georgia and South Carolina, the United States District Court for the Northern District of Alabama found that “something more is required” than the executive branch claiming diplomatic interference to “enjoin an otherwise valid state law on foreign policy grounds.”²³ Examining a number of Alabama H.B. 56 provisions, the court concurred with the approach taken in Judge Bea’s Ninth Circuit dissent. The court stated that the executive branch “must have some evidence of a national foreign policy” before foreign affairs preemption can even be considered.²⁴ While this could be proven by “either some evidence of Congress’s intent or a treaty or international agreement establishing the national position,”²⁵ some *actual* hard evidence was necessary.

The doctrinal divide over foreign affairs preemption even exists among members of the legal academy. Scholars on the extreme left²⁶ assert that foreign affairs preemption should apply to *any* state law that assists in the enforcement of federal immigration law. Take for instance Huyen Pham who argues state enforcement creates “a thousand borders” of ‘nonuniformity,’ which is unconstitutional because immigration laws must be “exercised uniformly and exclusively by the federal

²⁰ *Id.* at 31.

²¹ *Id.* at 32-36.

²² *Id.* at 40 (emphasis added).

²³ *United States v. Alabama*, No. 2:11-CV-2746-SLB, 2011 U.S. Dist. LEXIS 112362, at *54-55 (N.D. Ala. Sept. 28, 2011).

²⁴ *Id.* at *57.

²⁵ *Id.*

²⁶ See Peter H. Shuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 58 n.3 (claiming most immigration scholars support lenient immigration policies).

government.”²⁷ Michael A. Olivas conceives a similar standard of review. He asserts that any shift of immigration enforcement to the states as “contrary to constitutional law and theory” in that it acquiesces to fifty unique foreign affairs or immigration policies.²⁸ In agreement, Keith Cunningham-Parameter finds the overwhelming majority of state immigration laws as conflicting with United States equal protection principles, thus undermining federalism principles to include federal power over immigration.²⁹

In complete disagreement with foreign affairs preemption altogether, a 1994 article by Peter J. Spiro audaciously argued that the courts should do away with the doctrine, because “[a]s a practical matter, immigration is now largely a state-level concern.”³⁰ To date, no court has honored this request, but two prominent immigration scholars concur with Spiro’s baseline argument that state measures are a constitutional tool in deterring unlawful immigration or at least perfecting any flaws with the federal scheme. Peter H. Schuck calls his approach “immigration federalism,” which allows the states to operate under “federal immigration policies and supervision.”³¹ Strengthening Schuck’s base-line thesis, Kris W. Kobach argues the states maintain *inherent authority* to work within the federal scheme as long as they do not violate traditional preemption doctrine principles.³² Responding to leftist foreign affairs preemption claims, Kobach writes that foreign affairs preemption cannot come into question without the “crucial qualifier” that the state law is “inconsistent with federal policy.”³³

However, if the Supreme Court follows Kobach’s logic, foreign affairs preemption will be diminished to nothing more than conflict preemption. This is doctrinally problematic. Kobach wants to limit the foreign affairs preemption query

²⁷ Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 991-98 (2004) [hereinafter Pham, *Inherent Flaws*]. See generally Huyen Pham, *The Constitutional Right Not to Cooperate?: Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1377 (2006) [hereinafter Pham, *Local Sovereignty*] (arguing traditional federalism values are destroyed by state and local governments enforcing federal immigration law).

²⁸ Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 35, 53 (2007) [hereinafter Olivas, *Proper Role for Enforcement*]. See also Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT’L L. 217, 220 (1994) [hereinafter Olivas, *Preempting Preemption*].

²⁹ Keith Cunningham-Parameter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1722 (2011).

³⁰ Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT’L L. 121, 123 (1994) [hereinafter Spiro, *The States and Immigration*]. See also Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1629 (1997) [hereinafter Spiro, *Immigration Federalism*].

³¹ Schuck, *supra* note 26, at 66-67.

³² See generally Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT’L L. 155, 158 (2008).

³³ Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 229 (2005).

as follows: “What is the federal or foreign policy concerning unlawful immigration?” The problem with this approach is the answer to Kobach’s question will always satisfy state “attrition through enforcement” objectives—the deterrence of unlawful immigrants from entering, remaining, and working in the United States. In other words, if the Supreme Court agrees with Kobach’s generalized analysis, every state or local law that deters unlawful immigration must survive a foreign affairs preemption claim; an interpretation that does not comport with prior Court precedent.³⁴

At the same time, the extreme opposite holds true if the Supreme Court accepts the logic of the Ninth Circuit majority.³⁵ If compelling state and public officials to verify immigration status, in accordance with the federal scheme, impedes on executive foreign policy discretion, then almost the entire field of state immigration law should be preempted.³⁶

This begets the question: “Is foreign affairs preemption concerning immigration an *all* or *nothing* approach as the different lower courts and immigration scholars contend?” The purpose of this article is to answer this question by recentering foreign affairs preemption in accordance with constitutional intent, an objective reading of Supreme Court precedent, and then reassembling the whole into a workable doctrine.

This article will accomplish this in three parts. First, this article provides a brief examination of the plenary power doctrine over immigration, and its constructs according to the Founders’ Constitution.³⁷ This inquiry provides federal courts with the historical guideposts necessary to adjudicate foreign affairs preemption claims. Second, this article provides an overview of Supreme Court foreign affairs preemption precedent, with a focus on the preemption of state immigration laws. It confirms that the Court has never acquiesced to either an all inclusive or exclusive foreign affairs preemption doctrine as advanced by recent federal court decisions and scholars.³⁸ Instead, the Court’s precedent reveals a more centered approach where state or local immigration laws can be foreign affairs preempted despite advancing federal policy. This primarily occurs when state or local governments make immigration adjudications without the cooperation of the federal government or are not expressly authorized to act by federal law. Lastly, in light of this history and precedent, this article provides a three-part inquiry that should be used by the Supreme Court when adjudicating foreign affairs preemption in the constraints of immigration law.³⁹

³⁴ *See id.*

³⁵ *Arizona v. United States*, 641 F.3d 339, 351-53 (9th Cir. 2011).

³⁶ *See Pham, Inherent Flaws*, *supra* note 27, at 34; *Olivas, Proper Role for Enforcement*, *supra* note 28, at 53; *Cunningham-Parameter*, *supra* note 29, at 1722.

³⁷ *See Patrick J. Charles, The Plenary Power Doctrine and the Constitutionality of Ideological Exclusions: An Historical Perspective*, 15 *TEX. REV. L. & POL.* 61, 67-118 (2010).

³⁸ *See Olivas, Proper Role for Enforcement*, *supra* note 28, at 30.

³⁹ *See discussion infra* Parts I-III.

II. THE FOUNDERS' CONSTITUTION CONCERNING IMMIGRATION AND FOREIGN AFFAIRS

The use of history to adjudicate constitutional questions can often lead to more questions than answers, including the difficulty in accepting the moral opinions of generations prior as guiding the present.⁴⁰ However, when the historical record leads to but one conclusion, the use of history provides constitutional stability to properly rule on a constitutional question. As will be discussed in detail below, the *one historical conclusion* result holds true when defining the respective powers or spheres allotted to the federal and state governments over immigration.

There has been little, if any, dispute in our nation's history that the federal government maintains unquestioned authority over the entry, departure, naturalization, and conditions of settlement that can be imposed upon immigrants.⁴¹ Where there remains disagreement is the breadth of any concurrent or other immigration related powers reserved by the states. This disagreement primarily stems from the history of the Early Republic. During this period, the federal government imposed only a few laws affecting an alien's entry, departure, and conditions of settlement.⁴² Continuing through the nineteenth century, the only immigration field that the federal government took a consistent effort to occupy was that of naturalization. In the meantime, the states filled the remaining void by enacting different measures affecting an alien's conditions of settlement.⁴³

The failure of the federal government to completely occupy the immigration field for much of our early history has led some contemporaries to argue that the states maintain inherent authority over immigration enforcement.⁴⁴ The problem with coming to this conclusion, in terms of history, is that it ignores the origins of the Constitution, particularly the state centered problems the Articles of Confederation imposed on foreign affairs.⁴⁵

⁴⁰ See RONALD M. DWORIN, *LAW'S EMPIRE* 363-65 (1986) (discussing the difficulty in conducting historical analysis with integrity).

⁴¹ For the past century that has been the dispute whether the immigration power is unbridled. See, e.g., Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 858-63 (1987) (describing Supreme Court cases expanding the federal government's powers over immigration); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-60 (1990) (detailing the development and contours of the Plenary Power Doctrine). However, the history of the Constitution and law of nations weighs heavily in favor of a plenary power doctrine. See also Charles, *supra* note 37, at 65-88.

⁴² See Alien Enemy Act of 1798, ch. 66, § 1, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21-24 (2006)); Steerage Act of 1819, ch. 66, § 2, 3 Stat. 488 (1819); An Act Concerning Aliens, ch. 58, § 3, 1 Stat. 570 (1798) (expired 1800); Naturalization Act of 1795, ch. 20, § 1, 1 Stat. 414, *superseded* by Naturalization Act of 1798, ch. 56, § 1, 1 Stat. 566 (1798) (repealed 1802); An Act to Establish a Uniform Rule of Naturalization, ch. 3, § 1, 1 Stat. 103 (1790) (repealed 1795).

⁴³ See GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 19 (1996).

⁴⁴ See Kobach, *supra* note 33, at 199-201.

⁴⁵ For a concise and comprehensive history, see Charles, *supra* note 37, at 67-118.

At the time America declared independence in 1776, the law of nations prescribed that every sovereign was the gatekeeper of its borders. Hugo Grotius described immigration as a “friendship” between nations.⁴⁶ Immigration was never conceptualized as an individual right of persons,⁴⁷ but a submission to the receiving government as the tacit condition of protection.⁴⁸ Prominent international commentators Samuel Puffendorf, Emer de Vattel, William Blackstone, Daniel Defoe, Francis Bacon, and Matthew Bacon all attested to this rule of law.⁴⁹ It remained an attribute to national sovereignty that the founding generation never questioned.⁵⁰

Arguably, United States sovereignty began in 1776 upon adopting the Declaration of Independence.⁵¹ This is significant because free migration advocates often point to the Declaration stipulating the crown “endeavoured to prevent the population of these States; for that purpose obstructing the Laws for . . . migrations hither”⁵² as effectuating a basic right to immigrate.⁵³ However, the grievance solely referenced the crown usurping what was seen as colonial authority, not the recognition of any individualized rights to migrate.⁵⁴ It is a historical point of emphasis that as eighteenth century American political thought progressed, the idea of virtual representation made less sense,⁵⁵ and the colonists sought to establish a

⁴⁶ HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 819 (Francis W. Kelsey trans., 1925).

⁴⁷ *Id.* at 201-02 (“permanent residence ought not to be denied to foreigners who, expelled from their homes, are seeking a refuge, *provided that they submit themselves to the established government and observe any regulations which are necessary in order to avoid strifes*”) (emphasis added).

⁴⁸ See Patrick J. Charles, *Representation Without Documentation?: Unlawfully Present Aliens, the Doctrine of Allegiance, and the Law*, 25 *BYU J. PUB. L.* 35, 76-81 (2011).

⁴⁹ Charles, *supra* note 37, at 74-75, 78, 84-89.

⁵⁰ *Id.* at 92-118.

⁵¹ For a history showing the need for foreign support and recognition, see PATRICK J. CHARLES, *IRRECONCILABLE GRIEVANCES: THE EVENTS THAT SHAPED THE DECLARATION OF INDEPENDENCE* 299-324 (2008).

⁵² *THE DECLARATION OF INDEPENDENCE*, para. 3 (U.S. 1776).

⁵³ For some ahistorical claims that cast the Declaration of Independence as embodying immigration protections, see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 *TEX. L. REV.* 1, 81 (2002); Brandon E. Davis, *America’s Immigration Crisis: Examining the Necessity of Comprehensive Immigration Reform*, 54 *LOY. L. REV.* 353, 354 (2008); Gerald L. Neuman, *Whose Constitution?*, 100 *YALE L.J.* 909, 938 (1991).

⁵⁴ See Patrick J. Charles, *Restoring ‘Life, Liberty, and the Pursuit of Happiness’ in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 *WM. & MARY BILL RTS. J.* 457, 491-95 (2011) (addressing the grievances had to do with effectuating constitutional happiness with the consent of the governed, not virtual representation).

⁵⁵ See generally JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* 71 (2011) (discussing the lack of support for virtual representation after the tortious experience with the British Parliament).

government built upon the “consent of the governed” with equitable principles diffused throughout.⁵⁶

The Declaration’s reference to “Laws of Nature” and “Nature’s God” had nothing to do with individual natural rights. Instead, these references were an acknowledgment of the law of nations,⁵⁷ what was often referred to as the “laws of Nature” or “Nature’s God.”⁵⁸ Thus, from the United States’ very beginning, the law of nations over foreign affairs, peace, commerce, and immigration was intertwined with our constitutional structure. Although the Declaration itself did not grant the Continental Congress any express powers or duties, the nation’s greatest legal minds understood these sovereign powers must be vested with this national body.⁵⁹ This is supported by a number of Continental measures, including the sending of international emissaries, the formation of a national army, and the negotiation of treaties. In terms of immigration law, few are aware that the 1776 Continental Congress offered the first national amnesty. As a means to lure the German auxiliaries from the British lines,⁶⁰ the following proclamation was issued:

Whereas it has been the wise policy of these states to extend the protection of their laws to all those who should settle among them, of whatever nation or religion they might be, and *to admit them* to a participation of the benefits of civil and religious freedom; and, the benevolence of this practice, as well as its salutary effects, have rendered it worthy of being continued in future times . . . *Resolved*, Therefore, that these states will receive all such foreigners who shall leave the armies of his Britannic majesty in America, and shall chuse to become members of any of these states; that they shall be protected in the free exercise of their respective religions, and be invested with the rights, privileges and immunities of natives, as established by the laws of these states . . .⁶¹

⁵⁶ Charles, *supra* note 54, at 461, 469, 482, 491-502.

⁵⁷ See David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY Q. 39 (2002).

⁵⁸ See, e.g., 2 THE MAJOR POLITICAL AND LEGAL PAPERS OF JOSIAH QUINCY JUNIOR 181 (Daniel R. Coquillette and Neil Longley York eds., 2007). See also 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 66-67 (Oxford, Clarendon 1769) (showing the interrelation between the law of nature, municipal law, and the law of nations); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 66-67 (Oxford, Clarendon 1769) (showing the same); EMER DE Vattel, THE LAW OF NATIONS 68-72 (Knud Haakonssen ed., 2008) (discussing how the “*law of nations* is originally no other than the *law of nature applied to nations*”); Judge James Wilson, Charge to the Grand Jury of the Circuit Court of the United States, for the District of Pennsylvania (July 22, 1793), *reprinted in* THE NORTH-CAROLINA JOURNAL, August 21, 1793, at pg. 1 (“The LAW OF NATURE when applied to states or political societies receives a new name—that of the Law of NATIONS . . . The law of *Nations* as well as the law of *Nature* is of *obligation indispensable*: the law of nations as well as the law of nature is of *origin divine*.”).

⁵⁹ Charles, *supra* note 54, at 461-64.

⁶⁰ For a history, see CHARLES, *supra* note 51, at 287-98.

⁶¹ 5 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789, at 653-54 (Gov’t Printing Office 1906) (1776).

Much can be deduced from this proclamation in terms of immigration law. There are references to protection, participation, and the offer of equal privileges and immunities as a matter of good foreign policy. At the same time, we also see that the affordance of protection and privileges rested on the tacit condition that they are *admitted* by the sovereign nation.

This basic federal construct over international law was short lived upon the ratification of the Articles of Confederation.⁶² The Articles delegated to Congress defined legislative powers⁶³ with the “consent of nine States,”⁶⁴ leaving to the respective states their “sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States”⁶⁵ In terms of foreign affairs, naturalization, citizenship, and immigration, the Articles proved problematic. Despite being recognized as an independent nation, England and other countries were able to frustrate United States diplomatic relations by operating at the state level.⁶⁶

Meanwhile internally, the disparity between the laws of the respective states respecting the rights of citizenship was an influential factor in dispensing with the Articles of Confederation.⁶⁷ Thus, to prevent any future foreign embarrassments, the framers intended for any sovereign powers deemed within the law of nations, foreign affairs, immigration, naturalization, and citizenship to rest with the federal government.⁶⁸ This constitutional interpretation is supported by some of America’s most prominent eighteenth century jurists. For instance in 1793, John Marshall argued before Chief Justice John Jay and Associate Justice James Iredell that Congress has the “Right to legislate over Foreigners,” which “goes to rights of all kinds.”⁶⁹ Three years earlier, Chief Justice John Jay delivered a charge to the grand jury on the importance of the “law of nations” in our constitutional structure, stating “[w]e had become a nation—as such we were responsible to others for the observance of the *laws of nations*; and as our national concerns were to be regulated by *national laws*, national tribunals became necessary for the interpretation and execution of them both.”⁷⁰

⁶² ARTICLES OF CONFEDERATION of 1781. Although the Articles of Confederation were not yet in place with the adoption of the Declaration of Independence, the creation of the Articles were agreed in conjunction with the Declaration. See 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 61, at 425-26 n.2.

⁶³ ARTICLES OF CONFEDERATION of 1781, art. IX.

⁶⁴ *Id.* at art. X.

⁶⁵ *Id.* at art. II.

⁶⁶ PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776-1814, at 94-95 (1993).

⁶⁷ Charles, *supra* note 37, at 95-96.

⁶⁸ See U.S. CONST. art. I, § 8, cl. 4, 10 (granting the powers to “establish an uniform Rule of Naturalization” and “define” the “Offences against the Law of Nations”).

⁶⁹ James Iredell, Oral Arguments to the Middle Circuit Court of Virginia (1793) (on file with the Library of Congress Rare Books Division).

⁷⁰ JOHN JAY, THE CHARGE OF THE CHIEF JUSTICE TO THE GRAND JURIES OF THE EASTERN CIRCUIT 7 (Portsmouth, N.H., George Jerry Osborne 1790).

Then in 1798, defending the Alien Act, Associate Justice James Iredell issued the following charge to the grand jury defending federal plenary power over aliens, and the importance of the conditions of settlement: [T]here are certain conditions, without which no alien can ever be admitted, if he stay ever so long; and one is . . . *he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same* . . . Besides, any alien coming to this country must or ought to know, that this being an independent nation, it has all the rights concerning the removal of aliens which belong by the law of nations to any other; that while he remains in the country in the character of an alien, he can claim no other privilege than such as an alien is entitled to, and consequently, whatever risque he may incur in that capacity is incurred voluntarily, with the hope that in due time by his unexceptionable conduct, he may become a citizen of the United States.⁷¹

Associate Justice William Cushing,⁷² Pennsylvania Judge Alexander Addison,⁷³ James Madison,⁷⁴ Alexander Hamilton,⁷⁵ and James Wilson⁷⁶ also touched upon how the politics involving immigration were an issue of national concern in accordance with the law of nations and Constitution. It was not until debate surfaced over the constitutionality of the 1798 Alien Act that the states claimed any immigration authority. What is interesting about this debate is that there was no disagreement over the constitutional exclusion or expulsion of foreigners.⁷⁷ There was also little, if any, debate up to that time that foreigners could be excluded from the privileges

⁷¹ Associate Justice James Iredell, Charge to the Grand Jury, *reprinted in* CLAYPOOLE'S AM. DAILY ADVERTISER (Philadelphia), May 16, 1799, at 2.

⁷² See The Honorable Judge Cushing, A Charge Delivered to the Federal Grand Jury for the District of Virginia, on the 23d Nov. 1798: By the Honorable Judge Cushing, published by request of the Grand Jury, THE EASTERN HERALD AND GAZETTE OF MAINE, Jan. 21, 1799, at 1-2.

⁷³ See ALEXANDER ADDISON, ON THE ALIEN ACT: A CHARGE TO THE GRAND JURIES OF THE COUNTRY COURTS OF THE FIFTH CIRCUIT OF THE STATE OF PENNSYLVANIA 11 (Washington, John Colerick 1799); ALEXANDER ADDISON, ANALYSIS OF THE REPORT OF THE COMMITTEE OF THE VIRGINIA ASSEMBLY 21 (Philadelphia, Zachariah Poulson, Jr. 1800). For the importance of Alexander Addison in American constitutional jurisprudence, see Patrick J. Charles, *Originalism, John Marshall, and the Necessary and Proper Clause: Resurrecting the Jurisprudence of Alexander Addison*, 58 CLEV. ST. L. REV. 529, 529-74 (2010). For historical proof that George Washington, Bushrod Washington, and John Marshall agreed with Addison's legal analysis concerning the 1798 Alien Act, see *id.* at 536-45.

⁷⁴ For a summary of James Madison's views, see Charles, *supra* note 37, at 100-01, 107, 116.

⁷⁵ See 25 THE PAPERS OF ALEXANDER HAMILTON 491-95 (Harold C. Syrett ed., 1977) (discussing the national politics of admitting foreigners into the United States).

⁷⁶ 2 COLLECTED WORKS OF JAMES WILSON 1038-52 (Kermit L. Hall & Mark David Hall eds., 2007) (discussing the difference between citizens and aliens and how only foreigners of "good character" should be admitted, "for numbers without virtue are not our object").

⁷⁷ See Charles, *supra* note 37, at 108-18.

and immunities of federal or state citizenship.⁷⁸ The center of the debate was whether the federal or state governments had the power to expel “alien friends.”⁷⁹

Ultimately, the consensus reached was that the federal government must be vested with sole authority over immigration in the interests of national self-preservation.⁸⁰ Despite the claims of some contemporary immigration scholars,⁸¹ aliens did not retain any vested constitutional rights for lawfully settling.⁸² It was well established that any sovereign nation retained full authority to accept or send away aliens as prescribed by law.⁸³ This was not to say that the states did not retain any authority over their respective political institutions or the granting of state privileges and immunities.⁸⁴ These powers were unquestionably a matter of state sovereignty, which could be politically tailored to attract or deter immigrants into respective jurisdictions.⁸⁵ However, unlike the Articles of Confederation that allowed the states to define citizenship, naturalize foreigners, and grant all the rights of citizenship throughout the Union,⁸⁶ the Constitution only permitted the states to afford rights, privileges, and immunities within their respective sphere of government.

At no point within this *sphere* did the states maintain the authority to usurp or undermine federal authority over immigration and foreign affairs.⁸⁷ As the debates concerning the 1798 Alien Act confirm, to grant the states this authority is to undermine the Constitution itself, for our national self-preservation rested with the Union,⁸⁸ not the individual preferences of individuals or the states. In the words of Alexander Addison:

⁷⁸ *Id.* at 93-118.

⁷⁹ *Id.* at 116-18.

⁸⁰ *Id.* at 110-13.

⁸¹ See Anita Ortiz Maddali, *Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents*, 61 AM. U. L. REV. 1 (2011) (arguing for constitutional protections for lawful permanent residents from deportation for crimes committed); James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of The Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 359-441 (2010) (arguing the founding generation viewed immigration in terms of transparency and prospectivity).

⁸² See Charles, *supra* note 37, at 67-118 (tracing the Anglo-American and international origins of plenary power over immigration as unquestioned).

⁸³ *Id.*

⁸⁴ U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States”).

⁸⁵ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1799-1800 (Boston, Hilliard, Gray & Co. 1833).

⁸⁶ *Id.* at § 1098; WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 79 (Philadelphia, H.C. Carey & I. Lea 1825); ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 197 (Liberty Fund 1999).

⁸⁷ STORY, *supra* note 85, at § 1099.

⁸⁸ Charles, *supra* note 37, at 108-18.

[The federal] government is vested all authority over general or national and external subjects And to this government we must owe the prosperity of our commerce, the payment of our debts, and our national defence. To the government of each state is severally reserved authority over local and internal subjects, the administration of justice, and protection of persons and property within the territory of each. And to this government we owe the security of those personal enjoyments which we regard life, liberty, reputation, and estate.⁸⁹

Addison was not alone in articulating the division of federal-state powers in terms of national and local interests. In 1803, St. George Tucker described federal jurisdiction as encompassing “all cases arising under the political laws of the confederacy, or such as relate to its general concerns with *foreign nations*, or to the several states, as members of the confederacy.”⁹⁰ Undoubtedly, any powers touching upon “foreign nations” included immigration law. In contrast, Tucker did not even infer the states maintained any authority within the sphere of foreign affairs. He defined state power as extending to the “cognizance of all matters of a civil nature, or such as properly belong to the head of municipal law; except in some few cases, where, by a special provision contained in the constitution either concurrent, or exclusive, jurisdiction is granted to the federal government.”⁹¹

III. OUR CONSTITUTIONAL “SPHERES OF GOVERNMENT” AS INTERFACE TO FOREIGN AFFAIRS PREEMPTION WITHIN IMMIGRATION LAW

As Part I details, the founding generation intended for any powers concerning immigration to be vested with the federal government. Despite the best intentions of the Articles of Confederation, the ability of the thirteen different states to disrupt foreign relations led to the adoption of the more resolute Constitution. Essentially, the states were stripped of any immigration or foreign affairs powers as a means to prevent international embarrassments. Indeed, the Constitution’s federalist structure grants the states power over the health, safety, and welfare of their respective inhabitants, and the authority to parcel state privileges and immunities to foreigners.⁹² However, any laws, regulations, or policies that negatively impact or undermine federal immigration policy, including who is a member of the political community, are *per se* unconstitutional as a matter of original intent.

This understanding of the Constitution’s spheres of government is properly conceptualized in a number of Supreme Court cases touching upon foreign affairs preemption in state-federal immigration law. From its first federal-state immigration case, *New York City v. Miln*,⁹³ to its most recent decision in *Chamber of Commerce v. Whiting*,⁹⁴ the Supreme Court has consistently held that state authority over

⁸⁹ ALEXANDER ADDISON, REPORTS OF CASES IN THE COUNTY COURTS OF THE FIFTH CIRCUIT AND IN THE HIGH COURT OF ERRORS AND APPEALS OF THE STATE OF PENNSYLVANIA 189 (Washington, John Colerick 1800).

⁹⁰ TUCKER, *supra* note 86, at 128 (emphasis added).

⁹¹ *Id.*

⁹² See RAWLE, *supra* note 86, at 81-82.

⁹³ 36 U.S. 102 (1837).

⁹⁴ 131 S. Ct. 1968 (2011).

immigration is limited to regulations touching upon traditional powers, or when the state regulation works in accordance with federal policy as to not impede or impose new conditions on lawful residence. Meanwhile, any state regulation that may affect or disrupt the federal scheme concerning the entrance, expulsion, removal or conditions of residence is preempted in that it impedes on United States' foreign policy objectives.

In 1837, when the Supreme Court heard *New York City v. Miln*, there were but a few federal regulations touching upon immigration.⁹⁵ The comprehensive scheme that Americans are accustomed to hearing about today was virtually non-existent,⁹⁶ yet this statutory void never superseded the constitutional status quo that plenary power over immigration rested with the federal government.⁹⁷ In particular, the *Miln* case concerned the constitutionality of a New York law that required any foreign ship or vessel entering the state to provide passenger data.⁹⁸ For every passenger not lawfully reported, the owner would have to pay a seventy-five dollar fine.⁹⁹

The Supreme Court addressed the issue under the spheres of government paradigm. If the state law concerned a matter of foreign commerce, the Court would weigh its constitutionality in light of congressional power. However, if the state law fell into the category of a "police" provision,¹⁰⁰ then it would be constitutional so long as the federal government did not intend to regulate the subject.¹⁰¹ The answer to the question ultimately turned as to when the federal regulatory scheme ceased and state regulation began. "[There is "no collision"] with the law of a state, whose operation only begins when that of the laws of congress ends; whose operation is *not even on the same subject*, because, although the person on whom it operates is the same"¹⁰²

⁹⁵ See sources cited *supra* note 42.

⁹⁶ At this point in American history, there were a number of state laws affecting immigration and not yet preempted by federal regulation. See NEUMAN, *supra* note 43, at 19-20.

⁹⁷ See Charles, *supra* note 37, at 67-118.

⁹⁸ *Miln*, 36 U.S. at 131.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 132. The Court defined state police power as encompassing "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike-roads, ferries, &c., [as] component parts of this mass." *Id.* at 133.

¹⁰¹ *Id.* at 137-38:

[W]hilst a state is acting within the legitimate scope of its power, as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by congress, acting under a different power; subject, only, say the court, to this limitation, that in the event of collision, the law of the state must yield to the law of congress. The court must be understood, of course, as meaning that the law of congress is passed upon a subject within the sphere of its power.

¹⁰² *Id.* at 138-39 (emphasis added).

Indeed, the Court acknowledged state sovereignty over persons who may be within its territorial limits, but conditioned this power in terms of traditional federal-state spheres of government. At no point did the Court acquiesce to or recognize any inherent state immigration powers. Instead, the Court acknowledged state power over “municipal legislation” or what was referred to as “internal police” powers.¹⁰³

This basic understanding of the *Miln* opinion is further supported by the Court’s closing paragraphs. To set the stage for these paragraphs, Justice Joseph Story dissented that the New York law was unconstitutional in that it regulated foreign commerce,¹⁰⁴ a power he found to be expressly vested with Congress.¹⁰⁵ In reply, the majority disagreed because the “laws of the United States expressly sanction the quarantines,”¹⁰⁶ there were no conflicting treaties or trade agreements, and the New York law did not “assume to regulate commerce between the port of New York and foreign ports.”¹⁰⁷ In other words, the *Miln* majority acknowledged federal plenary authority over foreign affairs and immigration, but found insufficient evidence to strike down a law that fell within the state’s respective sphere of government.

It was not until over a century later that the Supreme Court would again take up the federal-state “spheres of government” issue concerning immigration and foreign affairs.¹⁰⁸ At this point in American jurisprudence, the Court had repeatedly affirmed federal plenary authority over immigration and foreign affairs.¹⁰⁹ The question that remained unsettled was whether a state may regulate on the same immigration subject as the federal government without being preempted.¹¹⁰

In *Hines v. Davidowitz*, the Court answered this question by examining the “respective powers of state and national governments” over immigration.¹¹¹ The Court held that once the federal government has ratified a treaty or enacted legislation “touching the rights, privileges, obligations or burdens of aliens,” no state can “add to or take away from the force and effect” of those provisions.¹¹² It emphasized the importance of one national foreign policy “free from local

¹⁰³ *Id.* at 139.

¹⁰⁴ *Id.* at 154-56 (Story, J., dissenting).

¹⁰⁵ See U.S. CONST. art I, § 8.

¹⁰⁶ *Miln*, 36 U.S. at 142 (emphasis added).

¹⁰⁷ *Id.* at 143.

¹⁰⁸ *Hines v. Davidowitz*, 312 U.S. 52 (1941).

¹⁰⁹ See *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904); *United States v. Wong Kim Ark*, 169 U.S. 649 (1897); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

¹¹⁰ In *New York v. Miln*, the Supreme Court upheld the state law because it did not operate on the same subject. 36 U.S. at 138-39.

¹¹¹ 312 U.S. at 62.

¹¹² *Id.* at 63.

interference,”¹¹³ yet did not foreclose the constitutionality of state immigration laws so long as they remained “subordinate to supreme national law.”¹¹⁴

The Court elaborated on the interplay between immigration, foreign affairs, and federal-state laws regulating the same subject as follows:

Legal imposition of distinct, unusual and extraordinary burdens and obligation upon aliens—such as subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials—thus bears an inseparable relationship to the welfare and tranquility of all the states, and not merely to the welfare and tranquility of one. Laws imposing such burdens are not mere census requirements, and even though they may be immediately associated with the accomplishment of a local purpose, they provoke questions in the field of international affairs And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.¹¹⁵

This passage seemingly forecloses the passage of any state laws that burden aliens—lawful or unlawful—any more than the federal government intended. The *Hines* Court was rather clear that federal immigration law was paramount to state law. Still, the Court never foreclosed *every* state law concerning immigration, for it inferred that one of the threshold foreign affairs preemption queries rested with whether aliens, as a class, were burdened any more by the complimentary state law than the federal government intended.

Thirty-five years later the Supreme Court again articulated this construct of the foreign affairs preemption doctrine, albeit with a narrow caveat.¹¹⁶ The case, *DeCanas v. Bica*, addressed whether California may prohibit and punish the employment of unlawfully present aliens.¹¹⁷ The Court reiterated that it “never held that *every* state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this [federal] constitutional power, whether latent or exercised.”¹¹⁸ The Court even reaffirmed the plenary power doctrine, stating that the federal scheme is “paramount” to “vital state interests” affecting immigration.¹¹⁹ However, the Immigration and Nationality Act did not provide any indication that Congress sought to preclude the states’ “police power” to regulate employment.¹²⁰ Thus, the Court upheld the California law as constitutional.

¹¹³ *Id.*

¹¹⁴ *Id.* at 68.

¹¹⁵ *Id.* at 65-67.

¹¹⁶ *DeCanas v. Bica*, 424 U.S. 351 (1976).

¹¹⁷ *Id.* at 352-53.

¹¹⁸ *Id.* at 355 (emphasis added).

¹¹⁹ *Id.* at 357.

¹²⁰ *Id.* at 356, 359-61.

The caveat of *DeCanas* was the Court's acknowledgement that unlawfully present aliens were not as similarly situated with lawfully present aliens in the realm of foreign affairs preemption.¹²¹ This caveat is important, for it affirmed the states may discriminate against unlawfully present aliens. At the same time however, the caveat is rather narrow. At no point did the *DeCanas* Court acquiesce to *any* or *every* law that discriminates against unlawfully present aliens. It merely held that the California law operated in a traditional area of state police power and complimented the federal scheme. In the words of Justice William J. Brennan, the California law remedied "local problems, and operates only on local employers, and only with respect to individuals whom the Federal Government has already declared cannot work in this country."¹²²

Brennan's articulation of foreign affairs preemption is crucial, for six years later he authored the last two Supreme Court opinions to address the issue in the framework of federal immigration law—*Plyer v. Doe*¹²³ and *Toll v. Moreno*.¹²⁴ In *Plyer*, the Court struck down a Texas law denying public school benefits to the children of unlawfully present aliens. The opinion is an anomaly of sorts. This is due to Justice Brennan reaffirming permissible state discrimination to unlawfully present aliens, yet finding the children not to be a "comparably situated" class.¹²⁵ The rationale being the Texas law imposed a "discriminatory burden on the basis of a legal characteristic over which children can have little control."¹²⁶

Placing this distinguishing factor aside,¹²⁷ Brennan properly stressed how federal immigration law takes into account foreign policy considerations. It was for this reason that the Court must ensure state immigration laws, "with respect to illegal aliens . . . mirrors federal objectives and furthers a legitimate state goal."¹²⁸ To put it another way, *Plyer* confirmed the legal proposition that state or local legislation cannot affect the federal scheme as to negatively impact foreign relations. Unless the state or local law "harmoniously" advances a federal objective, and falls within

¹²¹ The Court reiterated its holding in *Takahashi v. Fish & Game Commission*, stating, "State laws which impose discriminatory burdens upon the entrance or residence of *aliens lawfully within* the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." *Id.* at 358 (quoting *Takashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (emphasis added)).

¹²² *Id.* at 363.

¹²³ *Plyer v. Doe*, 457 U.S. 202 (1982).

¹²⁴ *Toll v. Moreno*, 458 U.S. 1 (1982).

¹²⁵ *Plyer*, 457 U.S. at 219-20.

¹²⁶ *Id.* at 220.

¹²⁷ See Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections on, and Beyond, Plyer v. Doe*, 44 U. PITT. L. REV. 329 (1983). See also Dan Solemani, Note, *Plyer in Peril: Why the Supreme Court's Decision in Plyer v. Doe is at Risk of Being Reversed—And What Congress Should Do About It*, 25 GEO. IMMIGR. L.J. 195 (2010) (arguing *Plyer* is in danger of being overruled should the Court apply a rationale basis standard of review to laws affecting undocumented children).

¹²⁸ *Plyer*, 457 U.S. at 225 (emphasis added).

the respective sphere of government, it could be subject to foreign affairs preemption.¹²⁹

Just two weeks later, Brennan elaborated on this legal proposition in *Toll v. Moreno*. Writing for the majority, Brennan found a Maryland law denying G-4 status aliens in-state tuition unconstitutional. In formulating the opinion, Brennan relied on foreign affairs preemption doctrine—“[This Court’s prior decisions] stand for the broad principle that “state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress.”¹³⁰

It is important to point out that Brennan and the *Toll* majority expressly denounced the proposition that foreign affairs preemption requires “a *clear encroachment* on exclusive federal power to admit aliens into the country or a *clear conflict* with a specific congressional purpose” to apply to state laws.¹³¹ In other words, the federal government *did not* have to show the state law conflicted with express foreign policy objectives to succeed on a foreign affairs preemption claim. The federal government only needed to show an “ancillary ‘burden not contemplated by Congress.’”¹³²

Since *Toll*, the Supreme Court has yet to expand or contract the foreign affairs preemption doctrine concerning immigration. Given that Congress has twice enacted comprehensive immigration reform with the 1986 Immigration Reform and Control Act and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, this may come as a surprise. In fact, the closest the Court has come in recent years is *Chamber of Commerce v. Whiting*, but the majority was able to brush aside the foreign affairs argument given the Arizona law at issue fell within a savings clause.¹³³ The majority buttressed this position with the fact that licensing laws fall within the traditional state sphere of government.¹³⁴ For these reasons the Court found no interference with the federal scheme or national foreign policy.¹³⁵

In light of Arizona S.B. 1070, however, the Court’s thirty year silence on foreign affairs preemption and federal-state immigration law will end. Part III takes up this issue and provides the framework for how the Court should examine its provisions in

¹²⁹ *Id.* at 226.

¹³⁰ *Toll v. Moreno*, 458 U.S. 1, 12-13 (1982) (quoting *DeCanas v. Bica*, 424 U.S. 351, 358 n.6 (1976)).

¹³¹ *Id.* at 11 n.16 (Rehnquist, W., J., dissenting) (emphasis added).

¹³² *Id.* at 14.

¹³³ *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968 (2011).

¹³⁴ Those defending the constitutionality of S.B. 1070 49th Leg., 2nd Reg. Sess. (Ariz. 2010) assert that the Supreme Court’s decision in *Chamber of Commerce v. Whiting* supports S.B. 1070’s attrition through enforcement scheme. See Brief for Petitioner at 33-34, *Arizona v. United States*, No. 11-182 (9th Cir. Aug. 10, 2011), 2011 WL 3556244 at *1, available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/12/Arizona-v.-USA-cert.pdf>. (This is a rather broad reading of the *Whiting* decision; a close reading indicates that Arizona’s licensing laws passed constitutional scrutiny due to the subject being a traditional area of state concern and within a federal savings clause).

¹³⁵ See *Whiting*, 131 S. Ct. at 1983.

accordance with both the Constitution's historical purpose and foreign affairs preemption doctrine.

IV. CENTERING FOREIGN AFFAIRS PREEMPTION IN CONJUNCTION WITH ARIZONA
S.B. 1070

As discussed in the beginning of this Article, the problem that plagued the lower federal courts is the lack of a centered approach to foreign affairs preemption.¹³⁶ Even at the Ninth Circuit Court of Appeals, the majority and dissenting opinions were not objectively centered with the Constitution's history and subsequent Supreme Court precedent. Each opinion rests at different ends of the foreign affairs preemption spectrum. The majority interprets foreign affairs preemption loosely by asserting that the executive branch's priorities are sufficient to preempt state or local immigration laws.¹³⁷ The problem with this approach is it conflicts with the Supreme Court repeatedly stating that congressional intent is the primary benchmark to operate from.¹³⁸ More importantly, the fact that the executive branch has changed its policy numerous times in recent years, dependant on the respective administration, makes it difficult to accept this preemption argument as constitutionally valid. In other words, for any court to support this position is to claim that the executive branch may reinterpret federal law at its convenience, preempt state immigration law at will, and perhaps other areas of state regulation.

A different consequence presents itself if one agrees with the dissent. Judge Carlos T. Bea's claim that foreign affairs preemption requires the federal government to pinpoint "*established* foreign policy goals" and demonstrate more than "*any effect* on foreign relations generally"¹³⁹ does not adequately capture Supreme Court precedent touching upon foreign affairs preemption. If anything, Bea's interpretation essentially mirrors the failed dissent in *Toll v. Moreno*, where then Associate Justice William Rehnquist argued foreign affairs preemption required a "clear encroachment on exclusive federal power to admit aliens" or a "clear conflict with a specific congressional purpose."¹⁴⁰

To be precise, Bea's approach to foreign affairs preemption fails to take into account clearly established precedent that state or local immigration laws may be foreign affairs preempted if it fails any portion of a three-part inquiry. Precedent dictates that foreign affairs preemption is triggered if the state or local law (1) regulates a facet of immigration policy solely within the federal sphere of

¹³⁶ Given the impact of immigration laws in both the domestic and international sphere, the preemption dilemma facing the federal judiciary extends well beyond the foreign affairs preemption doctrine. See Nathan G. Cortez, *The Local Dilemma: Preemption and the Role of Federal Standards in State and Local Immigration Laws*, 61 SMU L. REV. 47 (2008); Olivas, *Preempting Preemption*, *supra* note 28, at 219-20 (discussing the constant tug of war between state and federal governments over immigration policy); Cunningham-Parameter, *supra* note 29, at 1688.

¹³⁷ *United States v. Arizona*, 641 F.3d 339, 352-53 (9th Cir. 2011).

¹³⁸ See *Plyer v. Doe*, 457 U.S. 202, 225 (1982); *Toll v. Moreno*, 458 U.S. 1, 12-14 (1982); *DeCanas v. Bica*, 424 U.S. 351, 357 (1976); *Hines v. Davidowitz*, 312 U.S. 52, 68-73 (1941); *N.Y.C. v. Miln*, 36 U.S. 102, 137-39 (1837).

¹³⁹ *Arizona*, 641 F.3d at 381 (Bea, J., dissenting).

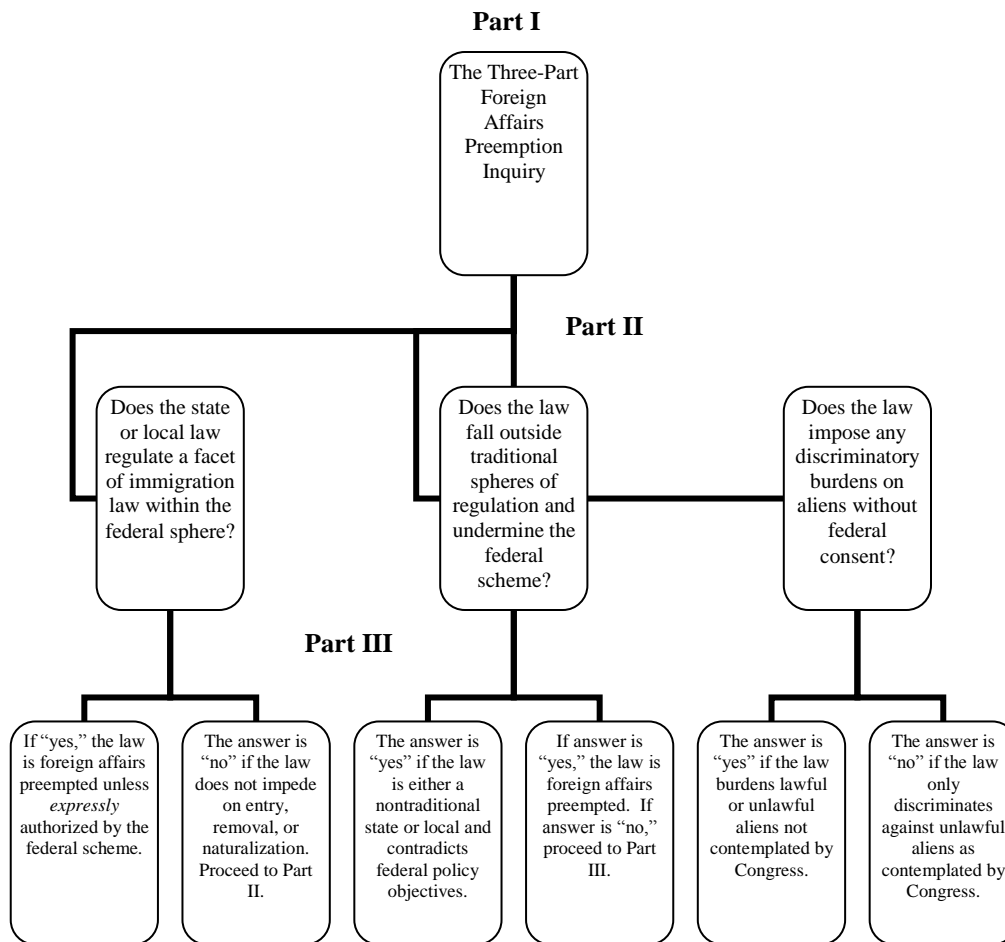
¹⁴⁰ *Toll*, 458 U.S. at 29 (Rehnquist, J., dissenting).

government,¹⁴¹ (2) regulates immigration outside the traditional state or local government's sphere and in a manner that it undermines the federal scheme,¹⁴² or (3) if the law imposes discriminatory burdens on the alien class as a whole—lawful and unlawful—even if the law only seeks to burden unlawful aliens.¹⁴³

¹⁴¹ See *Plyer*, 457 U.S. at 225; *Toll*, 458 U.S. at 11; *DeCanas*, 424 U.S. at 354-55; *Hines*, 312 U.S. at 62-63; *Miln*, 36 U.S. at 132-33, 137-39.

¹⁴² See *Plyer*, 457 U.S. at 219 n.19, 225-26; *Toll*, 458 U.S. at 14-17; *DeCanas*, 424 U.S. at 356-63; *Hines*, 312 U.S. at 65-67.

¹⁴³ See *Plyer*, 457 U.S. at 219 n.19; *Toll*, 458 U.S. at 13; *DeCanas*, 424 U.S. at 358 n.6; *Hines*, 312 U.S. at 69. For another three part approach to examining the constitutionality of state immigration laws, see *Cortez*, *supra* note 136, at 52 (adopting a general preemption approach with the *DeCanas* opinion). For a three part approach to foreign affairs preemption generally, to include immigration preemption issues, see Harold G. Maier, *Preemption of State Law, A Recommended Analysis*, 83 AM. J. INT'L L. 832 (1989) ("a court must (1) determine whether the state law falls within the realm of acceptable state authority; (2) determine whether the state act in question touches on matters relating to foreign affairs; and (3) balance the value of achieving a nationally uniform position against the value of giving effect to local decision-making on the question involved, to arrive at a decision that accurately reflects the appropriate roles of the states and the nation in regulating the subject matter concerned.").



This three-part inquiry is in line with the Founders’ intent when drafting the Constitution to ensure a “more perfect Union.”¹⁴⁴ As discussed in Part I, power over immigration, foreign affairs, naturalization, and citizenship was intended to be centralized with the federal government as a means to prevent foreign embarrassments at the state level.¹⁴⁵ The federal-state balance struck is perhaps best conceptualized by William Rawle in his 1825 treatise *A View of the Constitution of the United States of America*:

The United States do[es] not intermeddle with the local regulations of the states in [respect to its privileges and immunities]. Thus an alien may be admitted to hold lands in some states, and be incapable of doing so in others. On the other hand, there are certain incidents to the character of a citizen of the United States, with which the *separate states cannot interfere*. The nature, extent, and duration of the allegiance due to the

¹⁴⁴ U.S. CONST. pmb1.

¹⁴⁵ *See supra* pp. 5-11.

United States, the right to the general protection and to commercial benefits at home and abroad, derived either from treaties or from the acts of congress, are *beyond the control of the states, nor can they increase or diminish the disadvantages to which aliens may, by such measures on the part of the general government, be subjected.*¹⁴⁶

Often relying on history (particularly eighteenth and nineteenth century history) to decide modern cases and controversies can prove controversial in that it may conflict with principles of *stare decisis* or the evolution of legal customs as guided by judicial precedent.¹⁴⁷ Also, in many instances, what was deemed the constitutional status quo in the eighteenth or nineteenth century is no longer applicable today.¹⁴⁸ As Kent Greenawalt aptly states it, “[c]ustomary law depends on existing customary practice. What has once been a rule of customary law can cease to be so if customary morality or practice alters radically.”¹⁴⁹

To put it another way, the question that always looms when importing history into modern cases and controversies is whether there has been a change to the law that supersedes the historical record. Fortunately, in the case of dividing immigration powers between federal and state governments this does not apply. The Constitution has never been amended to redistribute these powers, nor is there any Supreme Court precedent that conflicts with the Founders’ intent. Thus, in the case of foreign affairs preemption, history stabilizes and confirms the Court’s precedent, rather than undermines it.

If one applies this foreign affairs preemption construct to contemporary state or local laws and the current federal immigration scheme, a number of state and local immigration laws should be foreign affairs preempted, including provisions of Arizona S.B. 1070. An entire field of law that falls into this category is the growing attempts to criminalize immigration law at the state level. As Juliet P. Stumpf details, a number of states are reimagining immigration law as a “domestic affair linked with employment, welfare, and crime” as a means to “expand judicial acceptance of state and local participation in immigration control.”¹⁵⁰ Perhaps these

¹⁴⁶ RAWLE, *supra* note 86, at 81-82 (emphasis added).

¹⁴⁷ Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 452-55, 474-95 (1984).

¹⁴⁸ For a discussion, see DWORKIN, *supra* note 40, at 387-99 (discussing the different outcomes of *Brown v. Board of Education* should one apply different objectivity theories, including originalism).

¹⁴⁹ KENT GREENAWALT, *LAW AND OBJECTIVITY* 183 (1992).

¹⁵⁰ Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1565 (2008). Stumpf astutely sums up the legal dilemma state criminalization is imposing on foreign policy:

[T]he development of crimmigration law transformed immigration law and its enforcement. Although immigration law maintains the veneer of a civil proceeding, it has become infused with national security concerns and substantive criminal law norms. This development has in turn invited states to occupy the space created by the linking of crimmigration law and national security, implanting in the public imagination a role for police to address terrorism concerns as part and parcel of their work. When the traditional police enforcement of criminal laws intermingles with

laws could survive implied preemption analysis. In terms of foreign affairs preemption, however, absent the invitation of the federal government to criminalize immigration at a state or local level, such laws are unconstitutionally regulating a nontraditional sphere of government: the conditions of presence, residence, or domicile of aliens. Indeed, as the history of the Constitution shows, state or local governments may retract privileges and immunities as a means to curtail unlawful immigration,¹⁵¹ but to criminalize immigration at the state or local level—lawful or unlawful—treads into federal plenary power.

It is more than reasonable to argue that Arizona S.B. 1070 Section 3 qualifies in this respect, for it establishes a separate state crime for unlawful presence.¹⁵² Section 3 stipulates, in addition to any federal penalties for unlawful presence,¹⁵³ an unlawful alien in Arizona will be found guilty of the crime of trespassing and ordered to pay any jail costs associated. This law cannot survive foreign affairs preemption. Section 3 not only does regulate a federal sphere of immigration without any express authority to do so, but there is little, if any, tradition of states fining immigrants for unlawful presence.¹⁵⁴

On similar grounds, foreign affairs preemption would also be applicable to the warrantless arrest provision in Arizona S.B. 1070, which provides that a “peace officer, *without a warrant*, may arrest a person if the officer has probable cause to believe . . . [t]he person to be arrested has committed any public offense that makes the person removable from the United States.”¹⁵⁵ A “warrantless” arrest for immigration violations is not only inconsistent with 8 U.S.C. § 1252c,¹⁵⁶ but also

immigration law and terrorism, the delineation between foreign policy and domestic law falls away.

Id. at 1595-96.

¹⁵¹ See *Gonzalez v. Arizona*, 485 F.3d 1041, 1191 n.20 (9th Cir. 2010) (confirming state and local governments may institute unlawful immigrant protections in state or local elections); Charles, *Representation Without Documentation?*, *supra* note 48, at 41-45 (detailing that state and local governments may exclude aliens from apportionment as to ensure political integrity at state and local elections).

¹⁵² ARIZ. REV. STAT. ANN. § 13-1509(A) (2010) (West).

¹⁵³ 8 U.S.C. §§ 1304(e), 1306(a) (2012).

¹⁵⁴ South Carolina S.B. 20 Section 5(A) would also be foreign affairs preempted on similar grounds. It imposes a state fine on any alien that fails to carry alien registration pursuant to 8 U.S.C. § 1304. See S.B. 20, 119th Leg. Reg. Sess. (S.C. 2011) (“It is unlawful for a person eighteen years of age or older to fail to carry in the person’s personal possession any certificate of alien registration or alien registration receipt card issued to the person pursuant to 8 U.S.C. Section 1304 while the person is in this State.”). By regulating a condition of lawful presence (even by monetary fines), the South Carolina provision is foreign affairs preempted in that it occupies an area solely within the federal sphere of government without an express invitation to do so. See *Toll v. Moreno*, 458 U.S. 1, 11 (1982); *DeCanas v. Bica*, 424 U.S. 351, 355 (1976); *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941).

¹⁵⁵ ARIZ. REV. STAT. ANN. § 11-1051(E) (West 2010) (emphasis added).

¹⁵⁶ The statute provides:

Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who—(1) is an alien illegally present in the United States; and (2)

places immigration enforcement in the hands of state officials. Certainly, if a state or local official was instructed by federal immigration authorities to detain an individual or took steps to cooperate with federal authorities,¹⁵⁷ this would facially be constitutionally permissible.¹⁵⁸

This last legal point is significant because it serves as the justification for the constitutionality of S.B. 1070 Section 2(B), even under a foreign affairs preemption paradigm.¹⁵⁹ While Section 6 is phrased in a manner that usurps the delicate constitutional balance in the area of foreign affairs, Section 2(B) is not.¹⁶⁰ At no point does Section 2(B) acquiesce to a federally independent determination of immigration status. Instead, it works perfectly within the constraints of 8 U.S.C. § 1357(g) by requiring verification of immigration status by the federal authorities.

Certainly, the Ninth Circuit Court of Appeals majority was correct to question the constitutionality of Section 2(B) under a foreign affairs preemption paradigm. The majority just applied the test improperly and mischaracterized 8 U.S.C. § 1357(g) as a whole in the process.¹⁶¹ This section, 8 U.S.C. § 1357(g), establishes a system for state and local law enforcement officials to enforce immigration law—the 287(g) program. By entering into an agreement with the Attorney General, the state or locality’s officials would “be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States.”¹⁶²

has previously been convicted of a felony in the United States and deported or left the United States after such conviction, *but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual* and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

8 U.S.C. §§ 1252c(a)(1)-(2) (2012) (emphasis added).

¹⁵⁷ See generally H.B. 56 2011 Reg. Sess. (Ala. 2011). This is a constitutional example of state legislation where the state and local enforcement officers are required to verify the immigration status of any alien “arrested and booked” with the proper federal authorities. This provision not only works to deter unlawful immigration in accordance with the federal immigration scheme, but also requires the determination to be made by federal authorities. Section 12(b) also passes any foreign affairs preemption discriminatory burdens, for it does not impede or discriminate against law-abiding lawfully present aliens.

¹⁵⁸ See 8 U.S.C. §§ 1252c, 1373, 1644 (West 2012).

¹⁵⁹ ARIZ. REV. STAT. ANN. § 11-1051(B) (West 2010).

¹⁶⁰ Other states maintain similar provisions. See e.g., UTAH CODE ANN. § 76-9-1003(1)(a)(i) (2012) (requiring “reasonable suspicion” of unlawful presence, verification with federal authorities, and that the purpose of the stop or suspicion be in accordance with the United States and Utah Constitutions); Illegal Immigration Reform and Enforcement Act of 2011. H.B. 87, Art. 5(b), (d) 2011 Reg. Sess. (Ga. 2011) (requiring “probable cause” of unlawful presence, verification with federal authorities, and the stop or probable cause cannot be based on “race, color, or national origin”); An Act Relating to Illegal Immigration, H.B. 56., § 12(a) 2011 Reg. Sess. (Ala. 2011) (requiring “reasonable suspicion” of unlawful presence, verification with federal authorities, and purpose of the stop or suspicion in accordance with the United States and Alabama Constitutions).

¹⁶¹ See *United States v. Arizona*, 641 F.3d 339, 352-53 (9th Cir. 2011).

¹⁶² 8 U.S.C. § 1357(g)(1) (2012).

However, the 287(g) program does not limit state verification inquiries in accordance with federal law. The 287(g) program makes state and local officials the near equivalent of federal immigration officials.¹⁶³ In other words, political subdivisions that enter into the 287(g) program may enforce portions of federal immigration law when in contact with an unlawfully present alien, often without the express direction of a federal official. Indeed, the 287(g) program places the state or local officials under the “direction and supervision of the Attorney General,”¹⁶⁴ but this does not preclude state and local officials from making independent immigration decisions when necessary.¹⁶⁵

This understanding of congressional purposes and objectives for the 287(g) program is supported by the text of 8 U.S.C. § 1357(g)(1). For an official to be “qualified to perform a function of an immigration officer in relation to the *investigation*, apprehension, or detention of aliens” is to have some *independent* authority to act.¹⁶⁶ In contrast, 8 U.S.C. § 1357(g)(10) does not grant state and local officials any discretionary authority. It merely authorizes communication with federal officials by requiring “cooperat[ion] with the Attorney General in the *identification*, apprehension, detention, or removal of aliens not lawfully present in the United States.”¹⁶⁷ There is a substantial difference between having federal *investigatory* authority, and *cooperating* with the Attorney General to identify unlawfully present aliens. The former is quasi-independent authority under the color of federal authority, and the latter requires the assistance of the federal authorities.

It is for these reasons that S.B. 1070 Section 2(B) passes the first two parts of the foreign affairs preemption inquiry easily. Section 2(B) regulates the traditional sphere of state law enforcement policies, and does so in a manner consistent with federal policy objectives as envisioned by Congress. However, this still leaves Section 2(B) susceptible to one category of foreign affairs preemption unaddressed—state or local laws that impose discriminatory burdens on lawfully present aliens. As Supreme Court precedent confirms, the states may adopt discriminatory legislation as a means to deter unlawful immigration consistent with federal objectives.¹⁶⁸ Section 2(B) undoubtedly accomplishes this. The question left unanswered is whether compelling state and local law enforcement to verify immigration status imposes discriminatory burdens on lawfully present aliens.¹⁶⁹ Providing a definitive answer to this question is rather difficult, but without any

¹⁶³ §§ 1357(g)(2)-(3), (8).

¹⁶⁴ § 1357(g)(3).

¹⁶⁵ It is worth noting that if the state of Arizona had 287(g) authority, section 6 could survive foreign affairs preemption. This is because every Arizona law enforcement officer would have some independent federal authority to make a determination of unlawful status. Of course, given that the state of Arizona does not have 287(g) authority, section 6 is foreign affairs preempted.

¹⁶⁶ § 1357(g)(1) (emphasis added).

¹⁶⁷ § 1357(g)(10) (emphasis added).

¹⁶⁸ Plyer v. Doe, 457 U.S. 202, 223 (1982); DeCanas v. Bica, 424 U.S. 351, 358 n.6 (1976); Takahashi v. Fish & Game Comm’n, 334 U.S. 410, 419 (1948).

¹⁶⁹ Toll v. Moreno, 458 U.S. 1, 12-13 (1982). See also Hines v. Davidowitz, 312 U.S. 52, 65-66 (1941).

compelling data showing rampant discrimination, Section 2(B) should be held to pass the third part of the foreign affairs preemption inquiry.¹⁷⁰

V. CONCLUSION

The Constitution's purpose in centralizing foreign affairs and immigration with the federal government, coupled with subsequent foreign affairs preemption precedent, provides the Supreme Court with the necessary guideposts to adjudicate the provisions in S.B. 1070. Absent a treaty or international agreement stating express foreign policy objectives, executive policy preferences alone are insufficient to preempt state and local immigration laws. Instead, it is Congress's purposes and objectives that are the benchmark from which courts must adjudicate foreign affairs preemption.

Arizona S.B. 1070 is not saved from preemption just because it does not implicitly conflict with the federal scheme. The Court's longstanding foreign affairs preemption doctrine provides instances where a state or local law may still be preempted after surviving traditional preemption analyses. This occurs when state or local governments regulate immigration outside their constitutionally allocated or traditional sphere of government. However, there are other instances where a state or local immigration law may be preempted, including when a state or local law may work within the federal scheme or be an attribute to state and local police power, yet impose discriminatory burdens on lawfully present aliens not contemplated by Congress.

¹⁷⁰ Compare Kris W. Kobach, *Why Arizona Drew a Line*, N.Y. TIMES, Apr. 28, 2010, available at <http://www.nytimes.com/2010/04/29/opinion/29kobach.html> (arguing that federal law requires all aliens to carry registration papers, which would make the checking of alien registration a discriminatory burden contemplated by Congress), with Kevin Johnson, *Response to Arizona v. United States Symposium Contributors*, SCOTUSBLOG (July 19, 2011, 10:53 AM), available at <https://www.scotusblog.com/2011/07/response-to-arizona-v-united-states-symposium-contributors/> (state enforcement will increase racial profiling, which would impose a discriminatory burden not contemplated by Congress).