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Online symposium: Strong on theory while profiling ignored

This is the fourth post in our online symposium on today's decision in Arizona v. United States, the federal government's challenge to Arizona's S.B. 1070. During the next few days, we will be posting a series of essays on the decision by lawyers and scholars in the field. Lucas Guttentag is the Robina Distinguished Senior Fellow and Research Scholar, Yale Law School; Lecturer, Stanford Law School.

The Supreme Court delivered a mixed decision that strongly rejected Arizona's extreme view of state immigration power while declining to strike down – at this stage – the Section 2B racial profiling provision that garnered the most attention. Significantly, Justice Kennedy wrote for the Chief Justice, Ginsburg, Breyer and Sotomayor, with no separate opinions by any of them. Justices Scalia and Thomas would have upheld the entire law, and Justice Alito would have struck down only Section 3, the state crime for failing to register.

The ruling is both a strong endorsement that federal preemption prohibits state immigration laws and a failure by the Court to address the inevitable racial profiling that Section 2B will trigger. Both aspects are important. The decision constitutes a rejection of the theory espoused some that states may 'mirror' federal law with their own penalties or punishments. At the same time, the real-life devastating consequences for Latinos and others in Arizona if 2B is actually allowed to go into effect – something that is still far from certain at this point – will be profound. The analysis upholding Section 2B is significant for its narrowness and leaves open both further pre-enforcement preemption challenges as well as an array of facial and as applied civil rights claims that remain pending in the [parallel suit](#) pending in district court brought by a coalition of civil rights groups.

In striking down Sections 3, 5(C) and 6, the opinion strongly reiterates many of the reasons for federal primacy over immigration matters, including national responsibility for the conduct of foreign relations and, importantly, that "mistreatment of aliens in the United States" may lead to reciprocal mistreatment of Americans abroad. This linkage between foreign relations and harassment of foreign nationals resulting from state laws was recognized by the Court in [Hines v. Davidowitz](#) decades ago but is often overlooked as a critical reason for federal preemption.

The Court also strongly endorsed the role of the federal government's enforcement discretion. The opinion emphasized that discretion *not* to prosecute immigration violations "embraces immediate human concerns" and implicates equitable claims by immigrants based on their U.S. citizen children, longtime residence, military service and broad federal policy choices.

As expected, the Court addressed each provision of SB1070 separately. Unfortunately lost in that piecemeal approach is the expressly-stated purpose of Arizona's law to enact a policy of "attrition through enforcement." This phrase—as New York, California and other states supporting the federal challenge pointed out—is well known in anti-immigrant circles as a strategy to make life so difficult for undocumented immigrants—and their unwanted "networks of relatives, friends, and countrymen"—that they will "self-deport." That of course means targeting some unknown number of Arizona's estimated two million Latino residents for arrest, detention and harassment.

Section 3. The Court struck down Section 3 on the ground that the federal registration scheme addressed in [Hines v. Davidowitz](#) was comprehensive and barred *any* state legislation because Congress has occupied the field. Justice Alito agreed that Congress had enacted an "all-embracing system" so this ruling commanded six votes (without the recused Justice Kagan). Having found "field preemption," the Court rejected arguments that Arizona could complement or supplement just because Arizona claimed to "ha[ve] the same aim" as federal law and adopted the same substantive standards. This imposes important limits on the core argument that states may "mirror" federal law by enacting their own state punishment schemes for alleged federal violations.

Section 5. In striking down Section 5(C), which penalized seeking or engaging in unauthorized employment, the Court rejected Arizona's most radical claim of state power and also significantly limited the implications of the Court's decision last Term in [Chamber of Commerce v. Whiting](#). In that earlier case, the Court narrowly upheld Arizona's state employer sanctions scheme and mandatory E-verify mandate. In an opinion by Chief Justice Roberts, the Whiting court rejected the challengers' argument that Congress's extensive employer sanctions regime enacted in 1986 by the Immigration Reform and Control Act (IRCA) had fundamentally altered the power of states to adopt state employer sanctions laws. Before 1986, the Court had allowed such laws in [DeCanas v. Bica](#) and [Whiting](#) held that Congress had preserved some of that power in a "licensing" exception to a 1986 express preemption clause

Today, the Court acknowledges that the [DeCanas](#) preemption framework cannot survive the 1986 IRCA amendments. Belatedly, the Court recognizes that at the time of [DeCanas](#) federal law expressed only a "peripheral concern" with immigrant employment and that today IRCA imposes a comprehensive framework. That IRCA framework (and subsequent amendments) does not contain criminal penalties for unauthorized work as SB1070 would impose. In another recalcitrance of [Whiting](#), the Court emphasized that Arizona's law would interfere with "the careful balance struck by Congress with respect to unauthorized employment of aliens." This was precisely the point of the *dissenters* in [Whiting](#).

The ruling on 5C also provides support for legal challenges to laws (such as [Hazleton, Pennsylvania](#) and [Farmers Branch, Texas](#)) that seek to deny housing based on immigration status or verification. In those cases, like here, the proponents try to argue that the *absence* of federal law gives states

or cities the permission to legislate in the interstices. The Supreme Court has rejected that approach and makes clear that the entire federal scheme – both what’s prohibited and what is not penalized – must be considered in enforcing the balance that Congress has struck.

Section 6. The Court’s invalidation of Section 6 – state warrantless arrests for “removable” public offenses –strikes a blow to Arizona’s claim of inherent police immigration enforcement power. Importantly, the Court reminds everyone that as a general rule “it is not a crime for a removable alien to remain present in the United States.” The Court then finds that Section 6 would give more power to police than federal law gives to trained federal immigration officers and that police could – impermissibly – act without any input from the federal government. This in turn would allow the state to “achieve its own immigration policy” and lead to harassment of immigrants.

The Court’s analysis implicitly rejects a Bush-era controversial analysis by the Office of Legal Counsel endorsing a view of “inherent authority” by police agencies to enforce immigration violations without federal authority or involvement. That [OLC memo](#) featured prominently in Arizona’s defense, was the subject of discussion among the Ninth Circuit majority and dissent and was contrary to earlier views by the OLC itself. After today’s ruling, the foundations on which the OLC memo rests have crumbled.

Section 2B. Finally Section 2B. As I have written [elsewhere](#), even a narrow focus on preemption should not ignore the inevitable racial profiling and discrimination that will result. Preemption of state immigration laws should take account *both* of the federal immigration scheme, as the Court does, and of the broader prohibition on state alienage discrimination in federal Reconstruction-era civil rights laws that the Court does not consider. By failing to grapple with discriminatory purpose and effect of Section 2B, the decision unfortunately disregards the inevitable reality of the law’s operation. The harassment of foreign nationals that the opinion rightly acknowledges as a key concern should have been equally central here.

In upholding 2B, the Court focuses on the superficial limitations written into the statute rather than the necessary operation of the law on Latinos in Arizona. Not surprisingly, the Court rejected the United States’ claim that the state law’s mandatory “communication” by police to the federal Law Enforcement Service Center (LESC), even for categories of immigrants the government is not actually seeking to remove, does not by itself constitute an interference with the federal immigration scheme. But the Court then goes on to discuss the potential consequences of such police inquiries and sends some significant signals of concern.

First, it notes that “[d]etaining individuals solely to verify their immigration status would raise constitutional concerns.” Second, it warns that “it would disrupt the federal framework to put state offices in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision.” Congress, the Court emphasizes, “does not allow state or local offices to adopt this enforcement mechanism.”

But these concerns are not enough because 2B “could be read” to avoid them, depending on how state courts interpret the provision and how the law operates. The Court seeks to narrow the impact of its ruling by suggesting that “*if* Section 2B *only* requires” police to conduct status checks during an authorized lawful detention or after release, then the provision would “*likely* survive preemption....” (All emphasis added) But even there the Court leaves open that there could be a showing that 2B has “other consequences that are adverse to federal law and its objectives.” Throughout this part of the decision, the Court relies on the “basic uncertainty about what the law means and how it will be enforced.”

The 2B analysis concludes with the notation that it is not foreclosing “other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.” The specific preservation of further preemption and other claims is significant. And the Court’s language can only be understood as also allowing further additional pre-enforcement challenges if the uncertainties on which the Court relies at this preliminary injunction stage are clarified to demonstrate an interference with federal law or other constitutional principles. Those challenges are already in the courts.

Posted in [Arizona v. U.S., Immigration, Merits Cases](#)

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