

---

---

# INTERNATIONAL & NATIONAL SECURITY LAW

## ARIZONA'S ATTEMPT TO ENFORCE FEDERAL IMMIGRATION LAW: "FORCE MULTIPLIER," OR "BALL AND CHAIN"?

By Margaret D. Stock\*

---

**NOTE FROM THE EDITOR:** As part of a point-counterpoint on the topic of Arizona's Senate Bill 1070, The Federalist Society intends to publish an alternate view of the legislation from Kris Kobach, professor at University of Missouri-Kansas City School of Law and Secretary of State-elect of Kansas, in the next issue of *Engage*.

---

In recent years, as immigration has become a seemingly intractable political issue in the United States Congress, state and local legislatures have shown increasing interest in passing immigration legislation of their own.<sup>1</sup> State and local enforcement of American immigration laws is thought to be helpful to federal authorities that lack the resources to enforce U.S. immigration laws fully by themselves; one scholar who has authored many state and local immigration-related laws has argued that state and local regulation of immigration can be a "force multiplier" for the federal government.<sup>2</sup> And indeed, the federal government has traditionally sought assistance from states in enforcing immigration laws where states do so voluntarily and subject to federal direction and control. In 2010, however, Arizona's Senate Bill 1070 went well beyond the traditional boundaries of federal and state immigration cooperation to become the most widely publicized attempt by a state to expand its involvement in enforcement of federal immigration laws. SB 1070 makes certain civil and criminal violations of federal law into Arizona state crimes as well, thereby allowing unauthorized immigrants who enter Arizona to be charged criminally and prosecuted by the State of Arizona while they also potentially face civil and criminal prosecution by the federal government. Arizona's law goes well beyond previous attempts by the states to regulate immigration. At the urging of the U.S. Department of Justice, a United States district court judge partially enjoined enforcement of SB 1070 in July 2010, and the preliminary injunction remains in place at this writing, pending the resolution of an appeal to the U.S. Court of Appeals for the Ninth Circuit. Whether Arizona's law will stand or fail is likely to turn on whether the law is deemed to enhance or impede federal efforts to carry out immigration enforcement objectives.

### Background

On April 23, 2010, Arizona Governor Jan Brewer signed into law the Support Our Law Enforcement and Safe Neighborhoods Act, which had been introduced originally as Arizona Senate Bill 1070.<sup>3</sup> SB 1070 was a very broad measure that, *inter alia*, made it an Arizona state misdemeanor for a foreigner to be present in Arizona in violation of federal alien registration laws.<sup>4</sup> The law was scheduled to go into effect on July 29, 2010, but the United States sued to enjoin enforcement

of parts of the law.<sup>5</sup> A day before the law was to take effect, the U.S. district court in Arizona partially enjoined the law's enforcement by issuing a preliminary injunction against the most controversial provisions in the law.<sup>6</sup>

The federal lawsuit highlights one of the more interesting aspects of today's highly charged immigration enforcement debate: While the states and the federal government often work together cooperatively to enforce U.S. immigration laws, such efforts have only earned federal approval if they are directed and managed by the federal government so as to complement federal policies and priorities. In 1996, for example, Congress created a formal federal program for voluntary state immigration enforcement by enacting Section 287(g) of the Immigration & Nationality Act;<sup>7</sup> under Section 287(g) programs, states may enter into agreements with the federal government to allow state and local law enforcement officials to enforce federal immigration laws. But the federal government—through the Department of Homeland Security—sets priorities for 287(g) immigration enforcement and has overall control of the program. Similarly, through the federally-managed "Secure Communities" program, states and localities can transmit the fingerprints of foreign-born prisoners to the federal government, but it is up to the federal government whether to press civil or criminal immigration charges against these persons.<sup>8</sup>

Arizona's law goes beyond the regulatory framework created by Congress in INA §287(g) and by DHS in the Secure Communities program. Rather than following the lead of the federal government by focusing on particular federal immigration enforcement priorities, Arizona's law mandates enforcement of federal immigration laws against all people who are stopped, arrested, or detained by Arizona law enforcement officials, if there is "reasonable suspicion . . . that the person is an alien and is unlawfully present in the United States."<sup>9</sup> Through this broad enforcement effort aimed equally at all immigration violators, Arizona seeks to implement a doctrine called "attrition through enforcement,"<sup>10</sup> whereby, through strict state enforcement of federal immigration laws, Arizona hopes to cause unauthorized immigrants to leave Arizona and go elsewhere, thereby causing "attrition" in the state's population of an estimated half million unauthorized immigrants. "Attrition by enforcement," however, is not the policy of the federal government, which prefers to pursue a policy of targeting immigration offenders based on the danger to the community and the seriousness of their immigration offenses.<sup>11</sup>

Because Hispanics are thought to comprise the majority of unauthorized immigrants in Arizona,<sup>12</sup> opponents of the Arizona law have argued that the law will encourage racial profiling of

---

\*Margaret D. Stock is an attorney admitted in Alaska; an adjunct professor in the Political Science Department at the University of Alaska Anchorage; and a retired lieutenant colonel in the U.S. Army Reserve Military Police Corps. The opinions expressed here are her own.

Hispanics. Opponents also argue that the complexity of federal immigration law will cause state and local officials to make mistakes and harm U.S. citizens and legal residents.<sup>13</sup> Finally, some question the assumption that increased efforts by the state to target unauthorized immigrants will reduce the overall crime rate in Arizona.<sup>14</sup> In the debate over the law, some Arizona law enforcement officials had differing views on whether the law would reduce crime, with some fearing that some crime victims in the community would stop reporting crimes to police for fear that such a report would trigger an investigation into their immigration status.<sup>15</sup>

Supporters of the law say that the law does not target anyone solely on the basis of race; that the law will cause unauthorized immigrants to leave Arizona and go elsewhere; that the law will reduce crime in Arizona; and that the law is necessary to protect Arizonans, because the federal government has failed to provide sufficient security along Arizona's border with Mexico.<sup>16</sup>

While Arizona faces many lawsuits as a result of enacting SB 1070, the most significant is the suit filed by the U.S. government. In defending itself against the federal lawsuit, Arizona has argued that its law is a permissible attempt by Arizona to engage in concurrent enforcement of federal law because the Arizona law only criminalizes behavior that is already unlawful under federal law.<sup>17</sup> Also, as a result of modifications made to the law after its passage, Arizona's law does not allow race to be used as a sole criterion for checking someone's immigration status, but only as a criterion "when permitted by the United States or Arizona Constitution."<sup>18</sup> Arizona has argued that past laws regarding state regulation of immigration have been upheld by the federal courts, and its new law is in keeping with this tradition of allowing state regulation of some aspects of immigration.<sup>19</sup> Finally, Arizona has cited the failure of the United States to secure the Arizona border and the proliferation of "sanctuary" policies within Arizona as reasons why Arizona must take steps—such as SB 1070—to mitigate the "ever-escalating social, economic, and environmental costs caused by illegal immigration . . ."<sup>20</sup>

In seeking a preliminary injunction against the law, the federal government argued that Congress has enacted a comprehensive regulatory framework over immigration matters, and the "Constitution and federal law do not permit the development of a patchwork of state and local immigration policies throughout the country."<sup>21</sup> The government has indicated that through its law, Arizona seeks to divert precious federal immigration enforcement resources to Arizona and away from other states. The government has said that the federal government, not Arizona, must be able to decide its enforcement priorities. The government has also argued that immigration law is extremely complex, and by failing to recognize that complexity, Arizona's law will inevitably harm U.S. citizens and foreigners who are lawfully present in the U.S. according to federal law. The federal government noted, for example, that Arizona's law requiring immigrants to carry documents fails to recognize that not all lawfully present immigrants are given documentary proof of their status by federal authorities, so that it is impossible for many legally present immigrants to satisfy Arizona's registration requirements. Overall, say DOJ lawyers,

Arizona's law is clearly preempted by Congress's enactment of a complex and pervasive scheme of immigration laws, some of which conflict with Arizona's new mandates.

The U.S. district court mostly sided with the federal government and granted a preliminary injunction against enforcement of the most controversial provisions of the Arizona law. The court left untouched the "purpose statement," and several sections of the law that had gone unchallenged by the federal government. Enjoined are the sections of the law that (1) require Arizona law enforcement officials to check the immigration status of persons whom they stop, detain, or arrest; (2) make it a crime to fail to apply for or carry alien registration papers; (3) make it a crime for an unauthorized alien to apply for or perform work; and (4) authorize warrantless arrests of persons who have committed crimes that make them "removable"<sup>22</sup> from the United States. The court's opinion provides a straightforward, preemption-based rationale for issuing a preliminary injunction, finding that if the Arizona law were to go into effect, the United States would suffer "irreparable harm" to its ability to enforce its overall immigration policies and achieve its immigration enforcement objectives.

### Preemption Issues

For more than a hundred years, the U.S. Supreme Court has affirmed that the federal government has broad and exclusive power to regulate immigration. The power to regulate immigration is not expressly enumerated in the U.S. Constitution, but the Supreme Court has described the immigration power as a plenary power inherent in the sovereignty of the United States.<sup>23</sup> State and local laws that attempt to regulate immigration may violate the Supremacy Clause of the U.S. Constitution and, if so, are preempted by federal law.

Congress has not specifically barred the states from making it a state crime to violate federal immigration law, but preemption doctrine does not require that Congress always expressly act to prohibit the states from legislating in an area of traditional federal expertise; it can also include "conflict preemption" and "field preemption."<sup>24</sup> Arizona's law does conflict with federal law and the overall federal immigration strategy, and there is also a very strong argument that Congress has so comprehensively regulated in the field of immigration enforcement—including in its legislation of the exact role that states may play in such enforcement—that Congress has left no room for states to exceed the specific role identified for them in federal statutes.

It is likely that Arizona's law will fail under both the "field" and "conflict" preemption doctrines. SB 1070 attempts to criminalize unauthorized workers who seek employment, but this provision is likely preempted under "field preemption" doctrine; the test there is whether Congress intended to oust the states completely from legislating in an area. The Supreme Court previously allowed state regulation of the employment of unauthorized workers, but only in a case that arose before Congress legislated in this area.<sup>25</sup> Under the Immigration Reform and Control Act of 1986 (IRCA), Congress amended the Immigration and Nationality Act to include a complex employer sanctions scheme, civil rights protections, and

preemption language. In fact, 8 U.S.C. 1324a(h)(2) expressly preempts any state or local law from imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or refer or recruit for a fee for employment, unauthorized aliens. Congress apparently chose not to criminalize the act of the workers in seeking employment, which Arizona now seeks to do.

The rest of the enjoined provisions likely fail under the “conflict preemption” doctrine. The rule to be applied there was explained by the United States in the leading case of *Hines v. Davidowicz*, in which the Court struck down a state system of alien registration because the state system was an “obstacle to accomplishment” of the goals of the federal system.<sup>26</sup> In deciding whether a state scheme to enforce immigration law will stand, the Court will inquire whether “under the circumstances of [the] particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>27</sup> As explained by Justice Hugo L. Black, federal power over this area of law is supreme:

That the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution, was pointed out by the authors of *The Federalist* in 1787, and has since been given continuous recognition by this Court. When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute, for Article 6 of the Constitution provides that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. “For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”<sup>28</sup>

Congress has not criminalized all violations of U.S. immigration law, and has even authorized immigration benefits for certain unlawfully present immigrants.<sup>29</sup> Most immigration law violators are not prosecuted criminally by federal authorities; instead, Congress has created an extensive administrative law system through the Executive Office for Immigration Review and its immigration judges. Presumably, Congress’s decision to process most immigration violators through the civil administrative immigration system reflects congressional recognition that criminalizing immigration violations would overburden the Article III federal courts and the criminal defense and prosecution resources of the federal government. Criminal defendants, after all, are entitled to the

full array of due process protections, while civil immigration “respondents” get much less due process—including, *inter alia*, “in absentia” deportation orders, a limited right to counsel, lesser evidentiary protections, and a much lower prosecutorial burden of proof.<sup>30</sup>

Under SB 1070, Arizona has chosen to criminalize all immigration violations, including those that are civil violations under federal immigration law. For example, Arizona’s law criminalizes the act of being present in Arizona without being authorized under federal immigration law to be present in the United States, but being present without authorization is only a civil violation under federal law. Normally, someone who is present without authorization—such as a person who overstays his permission to be in the U.S.—would not be charged with a crime by federal authorities, but would merely be ordered to appear before an administrative law judge. If such a person is present in Arizona when SB 1070 goes into effect, however, that person will be charged under Arizona state law with a crime; he or she will be booked into the Arizona state jail system and provided with a defense attorney if he or she cannot afford one; that attorney must also—under the recent U.S. Supreme Court case in *Padilla v. Kentucky*<sup>31</sup>—provide the person with expert advice as to the immigration consequences of the Arizona criminal conviction. An Arizona state prosecutor must prosecute the case, which may involve determining whether the person is “removable” under federal immigration law; the prosecutor must also prove beyond a reasonable doubt that the person has violated federal immigration law, a matter that will require Arizona prosecutors and defense lawyers to become immigration and citizenship law experts. Once provided with defense counsel, the person may also find out that he is really a United States citizen<sup>32</sup> or otherwise entitled to apply for immigration benefits,<sup>33</sup> thus mooted the state prosecution (and potentially giving the person a cause of action for damages for wrongful prosecution).

Kris Kobach, the author of the Arizona immigration law, has expressed the view that Arizona’s law is required because Immigration and Customs Enforcement (ICE), the DHS agency charged with immigration enforcement inside the United States, does not conduct interior “patrols” to find unauthorized immigrants.<sup>34</sup> Because of the lack of ICE patrols, argues Mr. Kobach, Arizona state law enforcement should be given the power to charge criminally any unauthorized immigrants that they encounter. But the lack of ICE patrols is merely confirmation that Arizona’s SB 1070 strategy is in conflict with the overall federal strategy; ICE agents do not conduct interior community patrols because—in addition to offending Americans who would be constantly stopped and asked about their citizenship status—such patrols would be an ineffectual means of prioritizing ICE resources, which are presently directed against the worst immigration violators. The worst immigration violators are most likely to be found in state and federal correctional facilities, where ICE maintains a constant presence. If SB 1070 goes into effect, then Arizona will flood its state correctional system with thousands of immigration violators who have committed federal civil immigration violations; ICE resources in Arizona will be overwhelmed, ICE may be forced to ignore Arizona enforcement efforts, and DHS



will be unable to achieve its goal of efficiently identifying the worst violators. And if all of the minor immigration violators arrested by Arizona police are processed for deportation, federal immigration courts in Arizona—and ultimately the Ninth Circuit Court of Appeals, which handles immigration court appeals involving Arizona—will face a “surge” in cases unlike anything ever seen before.<sup>35</sup>

Congress has also specifically explicated a role for state and local law enforcement in its carefully crafted scheme under Immigration & Nationality Act §287(g).<sup>36</sup> Arizona is free to assist federal immigration enforcement efforts through INA 287(g) program participation—but SB 1070 goes well beyond the careful parameters of the federal 287(g) program, which has specific training and certification requirements, and which allows designated state and local officers to perform immigration law enforcement functions, as long as they are trained and they function under the supervision of ICE officers. Arizona’s SB 1070 operates independently of the 287(g) program as devised by Congress. Accordingly, SB 1070 is likely preempted for that reason as well.

### Conclusion

Key provisions of Arizona’s law have now been enjoined as a preliminary matter, but Arizona continues to face opposition to the enjoined law, not only from the federal government, but also in the form of boycotts, other lawsuits, and international condemnation. Hispanics—both legal and unauthorized—had been leaving the state for years, but this trend has accelerated.<sup>37</sup> Proponents of the law have urged other states to enact similar legislation, but after the federal government filed suit against Arizona and obtained a preliminary injunction, other states that had considered similar legislation appeared to be awaiting the ultimate outcome of the suit before taking further action. As of the date of this writing, no other state has followed Arizona’s example, although some plan to do so in the future and some proposed legislation is pending. Arizona has appealed the district court’s decision to the Ninth Circuit Court of Appeals, which is expected to rule later this year.

Congress has created a complex system of civil and criminal immigration laws that are legendary for their variety and complexity.<sup>38</sup> The Department of Homeland Security, the federal agency primarily charged with enforcing this complex code, has generally lacked the full resources necessary to enforce federal law to the letter, and has accordingly adopted a strategy of prioritizing its efforts so as to concentrate on the worst immigration offenders. DHS uses a variety of civil and criminal tools to implement that strategy. To supplement its efforts, the Department has long sought assistance from state and local authorities—but only when the federal government has been able to direct and control those efforts. By creating mandatory state criminal sanctions for even the most minor civil immigration violations, Arizona’s foray into immigration enforcement is likely to disrupt federal immigration enforcement efforts substantially, creating a surge of immigration cases in the civil immigration and federal criminal court systems. If other states copy Arizona’s law, the resulting tidal wave of cases could completely overwhelm federal resources. Given these practical realities, it is understandable that the United States has chosen

to seek an injunction against the Arizona law. Rather than being a “force multiplier,” Arizona’s law forces an even greater burden on the already overwhelmed federal immigration system, threatening to become a “ball and chain” that undermines overall federal immigration enforcement efforts.

### Endnotes

1 These attempts have included efforts to assist immigrants, as well as efforts to enforce federal immigration laws against unauthorized immigrants. For a general overview of such laws as well as up-to-date information on the current status of state and local immigration-related legislation, see THE NAT’L COUNCIL OF STATE LEGISLATURES, IMMIGRANT POLICY PROJECT, at <http://www.ncsl.org/default.aspx?TabId=20881>.

2 Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority Of Local Police To Make Immigration Arrests*, 69 ALBANY L.REV. 179 (2006).

3 After passage, SB 1070 was almost immediately modified by Arizona House Bill 2162 after critics raised objections to some of the language in the original SB 1070 bill. For ease of reading, this article will refer to the final bill as “SB 1070,” although the final, enacted law consists of SB 1070 as well as the changes made by HB 2162.

4 SB 1070 also added state penalties for harboring and transporting illegal immigrants, employing illegal immigrants, and smuggling humans, among other things.

5 In its complaint, the United States sought to enjoin Sections 1 through 6 of the Arizona law, leaving untouched the later Sections. See *United States v. Arizona*, Complaint, Case No. 10-CV-01413, at 24.

6 Order, *United States v. Arizona*, Case No. 10-CV-01413-SRB, July 28, 2010 (granting preliminary injunction against SB 1070).

7 Section 287(g) was enacted as part of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996, P. L. 104-208, §133.

8 See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES PROGRAM, available at <http://www.ice.gov/about/offices/enforcement-removal-operations/secure-communities/index.htm> (“ICE determines if immigration enforcement action is required, considering the immigration status of the alien, the severity of the crime and the alien’s criminal history. Secure Communities also helps ICE maximize and prioritize its resources to ensure that the right people, processes and infrastructure are in place to accommodate the increased number of criminal aliens being identified and removed . . . [allowing ICE to prioritize] resources toward the greatest threats.”).

9 See Arizona SB 1070 as amended by Arizona HB 2162, §2, available at <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>.

10 See Arizona SB 1070 as amended by Arizona HB 2162, §1, Intent (“[T]he intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona.”), available at <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>.

11 See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, UPDATED FACTS ON ICE’S 287(G) PROGRAM (Apr. 12, 2010), available at [http://www.ice.gov/pi/news/factsheets/section287\\_g-reform.htm](http://www.ice.gov/pi/news/factsheets/section287_g-reform.htm).

12 PEW HISPANIC CTR., HISPANICS AND ARIZONA’S NEW IMMIGRATION LAW (Apr. 29, 2010), available at <http://pewresearch.org/pubs/1579/arizona-immigration-law-fact-sheet-hispanic-population-opinion-discrimination>.

13 Mistaken deportations of U.S. citizens have risen in recent years with the increasingly strict enforcement of U.S. immigration laws by federal authorities. See, e.g., Alex Perez & B.J. Lutz, *American Citizen Faced Deportation: Despite ID and Birth Certificate, Chicago Man Detained for Three Days*, NBC CHIC., May 24, 2010, available at <http://www.nbcchicago.com/news/local-beat/eduardo-caraballo-puerto-rico-deportation-94795779.html>; Marisa Taylor, *US Citizen’s Near-Deportation Not A Rarity*, McCLATCHY NEWS SERV., Jan. 26, 2008, available at <http://www.startribune.com/nation/14456137.html>.

14 See, e.g., Spencer S. Hsu, *U.S. Police Chiefs Say Arizona Immigration Law Will Increase Crime*, WASH. POST, May 27, 2010 (“Arizona’s law will

intimidate crime victims and witnesses who are illegal immigrants and divert police from investigating more serious crimes.”); AMERICA’S VOICE, ARIZONA IMMIGRATION LAW COULD LEAD TO SURGE IN VIOLENT CRIME, *available at* [http://amvoice.3cdn.net/166b34220b0f52c7fc\\_zpm6bo6lu.pdf](http://amvoice.3cdn.net/166b34220b0f52c7fc_zpm6bo6lu.pdf).

15 Randal C. Archibold, *Arizona’s Effort to Bolster Local Immigration Authority Divides Law Enforcement*, N.Y. TIMES, Apr. 21, 2010, *available at* <http://www.nytimes.com/2010/04/22/us/22immig.html>.

16 For the purpose statement in the law, see Arizona SB 1070 as amended by Arizona HB 2162, §1, *available at* <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>; *see also* ARIZ. GOVERNORS’ OFFICE, COMMON MYTHS AND FACTS ABOUT SENATE BILL 1070, *available at* <http://azgovernor.gov/documents/BorderSecurity/SB1070MythsandFacts.pdf>.

17 *See* [http://www.azgovernor.gov/dms/upload/PR\\_072010\\_USvAZDefendantsResponsePlaintiffMotionPI.pdf](http://www.azgovernor.gov/dms/upload/PR_072010_USvAZDefendantsResponsePlaintiffMotionPI.pdf).

18 *See* SB 1070 as amended by HB 2162, §2 (amending Title 11, chapter 7, Arizona Revised Statutes, to add an Article 8), *available at* <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>.

19 *See, e.g.*, *Gonzales v. City of Peoria (AZ)*, 722 F.2d 468 (9th Cir. 1983) (“[N]othing in federal law precluded . . . police from enforcing the criminal provisions of the Immigration and Naturalization Act.”).

20 Defendants’ Response to Plaintiff’s Motion for Preliminary Injunction, *United States v. Arizona*, No. 10-CV-01413-PHX-SRB, July 20, 2010, at 8.

21 Plaintiff’s Motion for Preliminary Injunction and Memorandum of Law In Support Thereof, *United States v. Arizona*, No. 10-CV-01413-NVW, July 6, 2010, at 1.

22 Whether someone is “removable” is a very complex determination that is normally made by federal immigration judges in the context of a removal proceeding in federal immigration court; it is thus unclear how Arizona law enforcement officials will make this determination when a person has not yet completed immigration court removal proceedings.

23 *See, e.g.*, *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Fong Yue Ting v. U.S.*, 149 U.S. 698, 711 (1893).

24 *See* *DeCanas v. Bica*, 424 U.S. 351, 355–56 (1976) (describing the three types of preemption, and also stating that the “[p]ower to regulate immigration is unquestionably exclusively a federal power”); *see also* *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Fiallo v. Bell*, 430 U.S. 787 (1977); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

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

26 312 U.S. 52 (1941).

27 *Id.* at 67.

28 *Id.* at 62 [internal footnotes and citations omitted].

29 *See, e.g.*, 8 U.S.C. §1101(a)(15)(T) (2010) (authorizing immigration benefits for unlawfully present non-citizens who are victims of human trafficking).

30 Congress has also failed repeatedly to fund DHS enforcement efforts at a level that would allow the deportation of all unlawfully present non-citizens. *See* Darryl Fears, *\$41 Billion Cost Projected to Remove Illegal Entrants*, WASH. POST, July 26, 2005 (estimating “the cost of forcibly removing most of the nation’s estimated 10 million illegal immigrants at \$41 billion a year, a sum that exceeds the annual budget of the Department of Homeland Security”), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/25/AR2005072501605.html>.

31 130 S. Ct. 1473 (2010) (holding that criminal defense attorneys have an obligation to inform their clients if a guilty plea carries a risk of deportation).

32 Each year, many persons whom government officials thought were “removable aliens” turn out to be United States citizens. *See, e.g.*, Jill Serjeant, *Lawsuit Filed Over Man Deported and Lost in Mexico*, REUTERS, Feb. 27, 2008, *available at* <http://www.reuters.com/article/idUSN2747919120080227>.

33 For example, many “unauthorized” immigrants turn out—when an immigrant expert reviews the facts of their cases—to be eligible for Temporary Protected Status, adjustment of status, or “T” and “U” visas because they have been human trafficking or crime victims. *See, e.g.*, Chelsea Phua, *U Visas*

*Can Help Illegal Immigrant Crime Victims*, SACRAMENTO BEE, July 5, 2010 (describing how undocumented immigrants victimized by crime can obtain lawful status by cooperating with police), *available at* <http://www.sacbee.com/2010/07/05/2869340/u-visas-can-help-illegal-immigrant.html>.

34 Kris W. Kobach, Remarks at The Federalist Society National Lawyers Convention, Washington, D.C., Nov. 18, 2010. Mr. Kobach discussed only a lack of Immigration & Customs Enforcement (ICE) patrols; a separate DHS agency, Customs and Border Protection (CBP), does conduct patrols to find unauthorized immigrants within extremely large border patrol sectors that reach well into the interior of the United States. For a map of border patrol sectors in the U.S., *see* [http://www.cbp.gov/linkhandler/cgov/careers/customs\\_careers/border\\_careers/bp\\_agent/sectors\\_map.ctt/Sectors\\_Map.pdf](http://www.cbp.gov/linkhandler/cgov/careers/customs_careers/border_careers/bp_agent/sectors_map.ctt/Sectors_Map.pdf). *See also* Nina Bernstein, *Border Sweeps in North Reach Miles into U.S.*, N.Y. TIMES, Aug. 29, 2010, *available at* [http://www.nytimes.com/2010/08/30/nyregion/30border.html?\\_r=1](http://www.nytimes.com/2010/08/30/nyregion/30border.html?_r=1).

35 Federal courts along the border are already overwhelmed with cases. *See* Amanda Lee Myers, *Overwhelmed Courts Need \$40 Million for Border Plan*, ASSOCIATED PRESS, June 29, 2010 (“The current workload in our Southwest border courts is staggering.”), *available at* <http://www.azcentral.com/news/articles/2010/06/29/20100629arizona-immigration-federal-court-costs.html>.

36 IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEET, DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION & NATIONALITY ACT, *available at* <http://www.ice.gov/news/library/factsheets/287g.htm>.

37 Randal C. Archibold, *Arizona Seeing Signs of Flight By Immigrants*, N.Y. TIMES, Feb. 12, 2008; Alan Gomez, *Hispanics Flee Arizona Ahead of Immigration Law*, USA TODAY, June 9, 2010, *available at* [http://www.usatoday.com/news/nation/2010-06-08-immigration\\_N.htm](http://www.usatoday.com/news/nation/2010-06-08-immigration_N.htm).

38 *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) (“The Tax Laws and Immigration and Nationality Acts are examples we have cited of Congress’s ingenuity in passing statutes certain to accelerate the aging process of judges.”).

