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Collaborative Regulation: Cooperation Between State and Federal Governments is Key to Successful Immigration Reform

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NOTE

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I. Introduction

Dysfunctional. This is an unfortunate but appropriate description of the United States' current system of immigration regulation.[1] Some commentators place the blame for this regulatory breakdown on Congress.[2] Despite decades of effort, our government still fails to agree on the design of effective immigration reform.[3] Consequently, individual states attempt to regulate unilaterally.[4] However, in doing so, states must navigate hazy precedent regarding the limits on their proper authority over immigration. The recent *Arizona v. United States* decision sheds light on the continuing struggle between states and the federal government and illustrates the complexities of evaluating state authority over immigration.[5]

The tug-of-war between states and the federal government over the power to regulate immigration has plagued the country throughout its history.[6] The individual colonies were the first to consider how to properly regulate immigration.[7] Upon the nation's creation, the federal government began to step in.[8] The federal court system has since expanded federal power over immigration, restricting "[t]he spectrum of possible state participation."[9] Courts ground this expansion on preemption. Preemption is based on the Supremacy Clause in the United States Constitution, which mandates that the character of federal law takes precedence over state laws

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1. Stephanie Condon, *Despite Decades of Effort, Immigration Reform Still Eludes Congress*, CBS NEWS (Feb. 5, 2013, 1:02 PM), http://www.cbsnews.com/8301-250_162-57567583/despite-decades-of-effort-immigration-reform-still-eludes-congress/.

2. Ilya Shapiro, *States Can't Regulate Immigration, but They Can Regulate Illegal Immigrants: Remarks at the 2012* Charleston Law Review *and Riley Institute Law and Society Symposium*, 6 CHARLESTON L. REV. 585, 587-88 (2012).

3. *Id.*

4. *Id.*

5. 132 S. Ct. 2492 (2012).

6. *See infra* Part II.

7. *See* Brittney M. Lane, Comment, *Testing the Borders: The Boundaries of State and Local Power to Regulate Illegal Immigration*, 39 PEPP. L. REV. 483, 490 (2012).

8. 1 Stat. 103 (1790).

9. Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 130 (1994).

and even disallows them in certain areas.[10] A constantly shifting federalism line between state and federal authority forces states to continually reevaluate local immigration efforts.

As boundaries surrounding permissible state immigration action constrict due to federal authority over the area, states become increasingly dependent on the federal government for protection from the harms of unregulated, unauthorized immigration. However, the federal government has implemented a passive immigration policy,[11] perhaps motivated by a lack of federal resources and geographic removal from much of the actual harm. The result of this lenient federal policy leaves states with few options other than accepting unauthorized immigration and standing virtually stagnant as spectators. Though the federal government has been largely ineffective, arguments and policy considerations support a uniform federal immigration policy. Even with this in mind, the necessity of local involvement cannot be overlooked. The need for both a state and federal presence begs for a collaborative resolution.

Both state and federal governments have unique economic and social interests at stake, but the current system fails to adequately address them simultaneously. With consistent uncertainty as to where federal power ends and state power begins, effective solutions to regulate immigration are elusive.[12] One commentator notes that "[a]s a historical and practical matter, federal competence to enforce immigration laws now stands in serious doubt."[13] As federal enforcement continues to disappoint, state governments are attempting to fill the gaps in enforcement unilaterally.[14] Unilateral state regulation raises its own concerns, however, as immigration is a matter in which the federal government must have a hand. Without federal oversight, inconsistency among states would send mixed messages to immigrants and foreign countries.

Arizona v. United States presented the United States Supreme Court with the opportunity to determine the proper line between state and federal immigration regulation.[15] The Court considered one state's proactive attempt to curtail some of the predicaments caused by unauthorized

10. *See* Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 4 n.2 (1995).

11. *See* Condon, *supra* note 1 (noting that no president from Reagan to Obama has sufficiently enforced immigration legislation).

12. *See id.*

13. Spiro, *supra* note 9, at 128.

14. *Id.* at 129-30.

15. 132 S. Ct. 2492, 2498 (2012).

immigration that were unique to its locale and the result of ineffective federal policies.[16] Specifically, the case presented the question of whether the federal government's immigration objectives preempted, or invalidated, certain aspects of an Arizona immigration bill.[17] Of the four sections challenged, the Court found three preempted.[18] Some may view the Court's approval of a single section as a state victory; however, the section approved has little impact on the immigration issues Arizona faces without the support of the preempted sections. Additionally, the decision did little to clear the murky waters surrounding immigration federalism. The decision leaves states with few avenues to protect themselves and even less guidance on how to navigate those avenues without crossing the federalism line.

To avoid these issues, the federal government should focus on collaborating with states, accommodating the need for a uniform federal policy while also addressing problems specific to particular states and regions. Most federal programs already contain some degree of state involvement.[19] For example, "[e]ven national defense incorporates the state national guards."[20] Immigration regulation should be no different. A larger state role is crucial to effective immigration policies and implementation across the country.

Further, collaboration between the federal government and states would be an effective solution to local and national immigration problems. A supportive federal government should guide states on what actions may violate national policy, allowing each state to design unique solutions in line with that guidance. This Note proposes a potential solution that mirrors congressional management of the unique state interests in the water law arena. In managing water law, in order to prevent laws inconsistent with federal policy from violating the Commerce Clause, Congress has approved certain state laws that would typically be invalid.[21] This oversight-based method permits unique solutions in unique locations with a federal safety net ensuring each local method pursues the same national goals.

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16. *See id.* at 2497-2500.

17. *Id.* at 2501.

18. *Id.* at 2510.

19. Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 66.

20. *Id.*

21. *See* Scott M. Delaney, Note, *The New Red River Rivalry: Oklahoma's Unconstitutional Attempt to Calm the Waters by Restricting the Sale of Water Across State Lines*, 65 OKLA. L. REV. 351, 354-55 (2013).

This Note evaluates the Court's *Arizona* decision and suggests a new system for efficient immigration regulation. Part II illustrates how immigration law and policy have developed in the United States and describes the relevant law prior to *Arizona*. Part III focuses on the specifics of the *Arizona* case and the Court's decision. Part IV outlines problems created by the questions left unanswered after *Arizona* and unregulated unauthorized immigration in general. Finally, Part V proffers a path toward cooperative, efficient enforcement of a uniform federal immigration standard.

II. Development of Immigration Law in America

A look at the history of immigration law in the United States illustrates that the questions that faced the Court in *Arizona* were not new. For centuries, the Court has considered how to handle immigration and where authority to regulate the area lies.[22] The following sections explore the evolution of the treatment of immigration from the colonial days to the twentieth century.

A. Early Immigration Law

The individual colonies initially held the authority to regulate immigration.[23] Upon ratification of the Constitution, the new federal government claimed a stake in the regulation, and thus commenced the nationalization of immigration laws.[24]

The first colonies each independently restricted immigration; for example, "Plymouth Colony passed a law prohibiting individuals from housing aliens [foreigners] without colonial authorization."[25] The fact that similar laws appeared in other colonies illustrates that, at least initially, the colonies individually exercised the authority to regulate immigration.[26] The individual colonies maintained this authority through the seventeenth and

22. *See Historical Timeline: History of Legal and Illegal Immigration to the United States*, PROCON.ORG, http://immigration.procon.org/view.resource.php?resourceID=002690 (last updated June 19, 2013) [hereinafter *Historical Timeline*].

23. *See* Lane, *supra* note 7, at 490.

24. *See id.* at 495 (noting that the *New York v. Miln* Court viewed the Constitution as "conced[ing], at a minimum, concurrent state power over immigration").

25. *Id.* at 490 (citing EMBERSON EDWARD PROPER, COLONIAL IMMIGRATION LAWS: A STUDY OF THE REGULATION OF IMMIGRATION BY THE ENGLISH COLONIES IN AMERICA 23, 23 n.1 (1900)).

26. *Id.*

early eighteenth centuries.[27] Any other regulatory structure would have been unacceptable; as one commentator put it, "exclusive federal power over interstate and international migration would have been highly threatening under antebellum conditions."[28]

Under the Articles of Confederation, states retained substantially more authority than they currently hold under the Constitution, including powers over naturalization and immigration.[29] From that point forward, however, states gradually lost their stranglehold on this authority. When the Constitution was drafted, it placed the naturalization authority within the federal government.[30] For years certain authority remained within the states police powers.[31] However, Congress, by passing legislation, and the federal courts, by interpreting preemption, slowly and consistently diminished states' immigration authority.[32]

B. Immigration Law in the Courts

After the Constitution placed certain aspects of immigration authority under the umbrella of federal powers, state laws began facing challenges under the Supremacy Clause.[33] This placed the Supreme Court in the crucial position of drawing the line between state and federal power.

The Supreme Court initially focused on whether challenged state laws violated the Commerce Clause.[34] In 1837, New York required the masters of vessels arriving at its ports to report pertinent information, including the name, age, and last legal settlement, of all persons on board.[35] The federal government challenged the law claiming it was a violation of the foreign Commerce Clause.[36] The Supreme Court, in *New York v. Miln*, disagreed, determining that as long as the end was legitimately within the state's police powers, a law was not unconstitutional merely because it was similar to an act passed by Congress under a different power.[37] Thus, the Court

27. *Id.* at 491.

28. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776 – 1875)*, 93 COLUM. L. REV. 1833, 1889 (1993).

29. *See* Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 TULSA J. COMP. & INT'L L. 63, 69 (2002); *see also Historical Timeline*, *supra* note 22.

30. *See* U.S. CONST. art I., § 8, cl. 4; *see also Historical Timeline*, *supra* note 22.

31. *See* Lane, *supra* note 7, at 496-500.

32. *Id.* at 498-500.

33. *See id.* at 492-93.

34. *See* Neuman, *supra* note 28, at 1886.

35. Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 104 (1837).

36. *Id.* at 118.

37. *Id.*

held New York's action was still within the police powers retained by the states.[38]

The Court confirmed that states had an important role to play within the federal system: "A state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation; when that jurisdiction is not surrendered or restrained by the [C]onstitution."[39] In its decision, the Court supported the idea that power over the persons "admitted [into a society] is inherent in all communities."[40] Because this power belonged to the states prior to the Constitution and was not relinquished therein, it remained with the states as a police power.[41] Conflicting immigration interests of the different states supported the policy of each possessing authority within their sovereign jurisdiction.[42] Because immigration issues were local, the power to control remained local.[43]

However, in *The Passenger Cases* in 1849, the Court departed from that reasoning when it found that New York and Massachusetts statutes imposing taxes on alien passengers arriving in the ports of the states were not protected as proper exercises of state police powers.[44] This time, the Court held that the state laws infringed on the foreign Commerce Clause.[45] Although the states argued they were properly utilizing their police powers, the Court ruled that taxes, even if meant to offset the financial burden placed on the state due to the arrival of immigrants, ran afoul of the Commerce Clause.[46] This was an area of exclusive federal authority.[47]

The Court reinforced the exclusive nature of the Commerce Clause twenty-five years later in *Henderson v. Mayor of New York*, when the federal government challenged an amended version of the New York statute.[48] The revised statute required the master of every vessel bringing foreign passengers to pay a bond for each passenger landing in New York City.[49] The Court unanimously concluded that state regulations meant to

38. *Id.* at 147.
39. *Id.* at 103.
40. *Id.* at 110.
41. *Id.*
42. Lane, *supra* note 7, at 495 (citing *Miln*, 36 U.S. at 114).
43. *Id.*
44. The Passenger Cases, 48 U.S. (7 How.) 283, 408 (1849).
45. *Id.* at 409.
46. *Id.* at 408.
47. *Id.*
48. 92 U.S. 259, 267 (1875).
49. *Id.*

regulate the transport of foreign passengers and minimize social and economic dangers "fell within the purview of foreign commerce and exclusive federal power."[50] The Court emphasized that a catalogue of the passengers was an appropriate use of state police power, but that the payment demand encroached upon the exclusive federal commerce power.[51] The plenary federal power preempted state tax laws imposed on state entrants, even under the guise of state police power.[52] Because taxation on immigration was an aspect of foreign commerce, it fell within the federal power.[53] This affirmation led to the federal government's ultimate plenary power of immigration through Congress's swift passage of federal laws in the area.[54]

The next significant step toward a more exclusive federal power over immigration came in *Chy Lung v. Freeman*.[55] In *Chy Lung*, the Court considered the constitutionality of a California statute that required a bond not for every arriving passenger (like in the New York statute), but instead for only certain classes of individuals, such as "lewd and debauched women."[56] The state required the bond to prevent state "expense incurred for the relief, support, or care of such person[s]."[57] The Court looked further than the effect of the statute on the owners of vessels and considered the effect the statute could have on the whole country.[58] For instance, if the state held the passengers to an unfair standard, it "may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend."[59] The Court worried that a single state's actions could bring about an international inquiry focused, not on that state, but on the nation as a whole.[60] As a result, states could put the entire nation in a position to face the consequences for their independent actions.[61] The Court concluded that the Constitution was not so foolish as to forbid states from negotiating with other nations while leaving them the power to pass laws whose enforcement would render the federal government liable for their

50. Lane, *supra* note 7, at 499.
51. *Henderson*, 92 U.S. at 269-74.
52. *Id.* at 272.
53. *See id.* at 273.
54. Neuman, *supra* note 28, at 1887.
55. 92 U.S. 275 (1875).
56. *Id.* at 276.
57. *Id.* at 277.
58. *Id.* at 279.
59. *Id.*
60. *Id.*
61. *Id.* at 279-80.

repercussions.[62] Instead, the national power to deal with foreign nations inherently invalidated state laws inconsistent with that power.[63] Otherwise, a single state would have authority to "embroil [the country] in disastrous quarrels with other nations."[64] The federal government would be left to answer for actions of individual states.

The Court continued to expand the federal government's power over immigration beyond regulations of foreign commerce in *The Chinese Exclusion Case*.[65] In this case, the Court further justified federal immigration power as an aspect of the nation's external sovereignty.[66] In the name of national sovereignty, peace, and security, the Court approved congressional power to determine who may enter the country.[67] This power also included the authority to deport aliens.[68] This case significantly expanded federal power in the immigration arena and "marked the near-complete federalization of immigration law and general displacement of state and local regulation."[69] The Court had firmly established the foreign affairs preemption and the ability to invalidate state laws that interfered with the need for a single national immigration policy. "Thus was laid the solid foundation for the modern rule of federalism in immigration law, namely, that there is very little of it."[70] Instead of a distribution of power between the federal and state governments, the federal government now dominated.

C. Twentieth-Century Immigration Law

The next phase of immigration regulation involved continued state attempts to pass laws impacting immigration while avoiding the federal government's plenary power over the area.

In *Hines v. Davidowitz*,[71] over half a century after *The Chinese Exclusion Case*, the Court ruled on a Pennsylvania law requiring aliens over the age of eighteen to register and carry identification cards at all times.[72] At the time,

62. *Id.* at 280.
63. *See id.*
64. *Id.*
65. 130 U.S. 581 (1889).
66. Neuman, *supra* note 28, at 1892.
67. The Chinese Exclusion Case, 130 U.S. at 606.
68. Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893).
69. Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 613 (2012).
70. Spiro, *supra* note 9, at 138.
71. 312 U.S. 52 (1941).
72. *Id.* at 52.

there was also a congressional act requiring registration; however, the federal law did not require the alien to carry identification.[73] In *Hines*, the Court clarified that immigration power is not concurrent; instead, state law is subordinate to national law.[74] When the federal government passes a statute "[n]o state can add to or take from the force and effect of such . . . statute."[75] Federal law should be "free from local interference."[76] Because the federal registration law was complete and comprehensive, the Pennsylvania law "[stood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[77] For this reason, the law was preempted.[78]

In the late twentieth century, the expansion of federal power and focus on federal exclusivity began to calm, and court decisions began to illustrate that states have at least some role to play. In *De Canas v. Bica*, the Court upheld a California statute that outlawed employers knowingly employing aliens who were not authorized to work in the United States.[79] The Court determined it was a proper exercise of the state's police power.[80] Though power to regulate immigration was exclusively a federal power, states could pass legislation indirectly touching immigration as long as the measure directly addressed state interests.[81] Therefore, because the law addressed employment, an area within the broad authority of state police power, and there was no indication Congress intended to preclude state laws in the employment field, the law was not preempted.[82] Instead, the state law operated parallel to federal law.[83] Due to the significant state interests involved, the Court refused to view the vast federal immigration scheme as determinative evidence that Congress intended complete occupation of other fields.[84] The Court clarified that a state law was not necessarily immigration regulation just because aliens were its focus;[85] not every state

73. *Id.* at 52-53.
74. *Id.* at 53.
75. *Id.* at 62-63.
76. *Id.* at 63.
77. *Id.* at 67.
78. *Id.* at 74.
79. 424 U.S. 351, 352-54 (1976).
80. *Id.* at 356.
81. *Id.* at 355-56.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 355.

regulation touching immigration infringes on federal authority over immigration.[86]

Another case where the Court declined to expand federal immigration authority was *Plyler v. Doe*.[87] Although the Court held unconstitutional a Texas law preventing state funds from supporting the education of undocumented aliens, it did so on equal protection grounds.[88] This holding prevented a narrowing of state police powers and left open the legality of non-discriminatory police power regulation touching immigration.[89] The Court confirmed the importance of state involvement when state interests are impacted: "States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal."[90]

This line of cases shows that "state and local governments . . . cannot directly regulate immigration, such as by denying admission into the state or deporting people from their jurisdiction."[91] Even with these limitations, however, *De Canas* and *Plyler* display that there is some room left for states to indirectly regulate immigration under their police power. The parameters of permissible state legislation remain unclear. The line between appropriate and inappropriate state legislation is unfortunately quite grey, and past immigration cases provide minimal guidance for preemption analysis.

D. The State of Immigration Law and Federalism Today

The current state of the relationship between the federal and state governments in the immigration arena is "bewilderingly complex."[92] "The spectrum of possible state participation has been significantly narrowed by the courts . . . ."[93] Past cases demonstrate that states do have some power to police their internal affairs, including the effects of immigration.[94] However, they also illustrate the unpredictable, hazy nature of court treatment of immigration issues.

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86. *Id.* at 355-56; *see also* Jordan Jodré, *Preemptive Strike: The Battle for Control over Immigration Policy*, 25 GEO. IMMIGR. L.J. 551, 555 (2011).

87. 457 U.S. 202 (1982).

88. *Id.* at 230.

89. *Id.* at 225-26.

90. *Id.* at 225.

91. Johnson, *supra* note 69, at 613.

92. Schuck, *supra* note 19, at 66.

93. Spiro, *supra* note 9, at 130.

94. John C. Eastman, *Papers, Please: Does the Constitution Permit the States a Role in Immigration Enforcement?*, 35 HARV. J.L. & PUB. POL'Y 569, 577 (2012).

When states attempt to pass immigration legislation, they must navigate precedential hurdles, including the different types of preemption. "Whether [a] federal law preempts state law is fundamentally a question [of] whether Congress has intended such a result . . . ."[95] As immigration law is currently interpreted, there are several ways state action may be preempted.[96] Federal supremacy "may preempt state law 'by express language in a congressional enactment,' by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment."[97] To ensure validity, a state law must pass tests for express preemption, field preemption, conflict preemption, and foreign affairs preemption.[98]

Express preemption applies when Congress explicitly and specifically removes a power from the states.[99] The key question for courts is whether Congress has made its intent sufficiently clear through a declaration that an enactment will preempt state law.[100] When determining express preemption, a court must determine the parameters of congressional intent.[101]

"Field preemption occurs when Congress legislates in a field of law so pervasively – or creates a comprehensive scheme of legislation – that it implies that Congress did not want the states legislating in the same area."[102] Courts must determine that Congress intended to completely occupy the field, leaving no room for state supplementation;[103] the federal interest is so dominant that it precludes any state laws on the same subject.[104] *Henderson*, for example, appears to be a field preemption case.[105]

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95. Peatros v. Bank of Am. NT & SA, 990 P.2d 539, 542 (Cal. 2000).

96. Jonathan Futrell, Comment, *Aliens in a Foreign Field: Examining Whether States Have the Authority to Pass Legislation in the Field of Immigration Law*, 63 MERCER L. REV. 1077, 1088 (2012).

97. Jodré, *supra* note 86, at 556 (internal punctuation omitted) (quoting Dow Chem. Co. v. Ebling, 753 N.E.2d 633, 637 (Ind. 2001)).

98. Futrell, *supra* note 96, at 1088; Patrick J. Charles, *Recentering Foreign Affairs Preemption in* Arizona v. United States*: Federal Plenary Power, the Spheres of Government, and the Constitutionality of S.B. 1070*, 60 CLEV. ST. L. REV. 133, 136 (2012).

99. Futrell, *supra* note 96, at 1088-89 (citation omitted).

100. Medtronic, Inc. v. Lohr, 578 U.S. 470, 485-86 (1996).

101. *Id.*

102. Futrell, *supra* note 96, at 1088-89 (citation omitted).

103. Jodré, *supra* note 86, at 555.

104. *Id.*

105. 92 U.S. 259, 273-75 (1875).

"Conflict preemption exists when the federal and state laws cannot coexist or be enforced at the same time."[106] There are two types of conflict preemption. Impossibility conflict preemption arises when it is not possible to comply with both state and federal laws simultaneously, and obstacle conflict preemption occurs where the "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[107] This preemption stands on the principle that state laws may not frustrate the purpose of federal law.[108] For instance, *Hines* illustrates the Court's concern with obstacle conflict preemption.[109]

Foreign affairs preemption presents one more obstacle states must avoid.[110] Foreign affairs preemption represents the court-recognized need for a single national voice when dealing with other nations.[111] "Because immigration policy and the treatment of aliens implicate foreign relations, the states have no acceptable independent role in the area; were it otherwise, at the extreme a single state could, by offending a foreign nation and prompting its retaliation, place the entire Union at peril."[112] There is a fear that a single state's actions toward immigrants may change a foreign nation's attitude or position toward the United States as a whole and could create national difficulties.[113] By way of example, *Chy Lung* presents an application of the foreign affairs preemption.[114]

The preemption doctrines leave little room for state participation. Because courts have found many areas within immigration law to be occupied by Congress, it seems federal immigration law now operates in a fashion similar to that of the Commerce Clause, having both active and dormant corollaries.[115] The Commerce Clause of the Constitution vests Congress with the exclusive power to regulate commerce between the states.[116] This grant of authority has an impact even when Congress has not affirmatively legislated in an area. State legislation is void, even in the midst of congressional silence, if it would unduly burden interstate

106. Futrell, *supra* note 96, at 1089 (citation omitted).

107. Jodré, *supra* note 86, at 555 (quoting Gray v. City of Valley Park, No. 4:07CV00881 ERW, 2008 WL 294294, at *8 (E.D. Mo. Jan 31, 2008)).

108. *Id.* at 556.

109. 312 U.S. 52, 80-81 (1941).

110. Charles, *supra* note 98, at 136.

111. *See* Spiro, *supra* note 9, at 144.

112. *Id.* at 122.

113. *Id.*

114. 92 U.S. 275, 280 (1875).

115. Schuck, *supra* note 19, at 67.

116. U.S. CONST. art. I., § 8, cl. 3.

commerce.[117] This is known as the dormant Commerce Clause.[118] This feature prevents states from unfairly advancing their own interests at the expense of national interests even when Congress has not acted.[119] The dormant feature is concerned with the relative power between federal and state governments and ensuring that state law does not interfere with federal legislation.[120]

Similarly, the Supreme Court has granted the federal government ultimate authority over the immigration field.[121] As courts strike down an increasing number of state laws as inconsistent with the federal government's occupation of the field, this authority is becoming much more exclusive. Like the dormant Commerce Clause, even if no federal law specifically conflicts with a state-passed immigration law, courts may find the state law inconsistent with the federal government's plenary authority over the area. Regardless of a lack of specific federal action, the congressional occupation of the entire area creates a dormant aspect, eliminating certain state action in the field.[122] This dormant feature may invalidate even innocent state measures.[123] In fact, in the case of congressional silence, it is often much harder for a state to properly navigate preemption and pass a law that the courts will uphold.[124] Parameters of congressional intent are clearer when there is a specific piece of congressional legislation in the area, sometimes providing escapes, or specifying certain state action as permissible. The history of immigration cases, much like dormant Commerce Clause analysis, makes clear that even the dormant feature cannot prevent or interfere with certain action falling under the reserved state police power.[125] Unfortunately, where this police power ends is unclear.

The preemption doctrines and the parameters of federal immigration authority are far from clear-cut, making it difficult to predict their application. Any room the courts have left for states to regulate immigration

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117. Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978).

118. *See, e.g.*, United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007).

119. *Philadelphia*, 437 U.S. at 623-34.

120. *Id*.

121. Schuck, *supra* note 19, at 57; *see also* Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889).

122. Delaney, *supra* note 21, at 353 (citing Sporhase v. Nebraska, 458 U.S. 941 (1982)).

123. Spiro, *supra* note 9, at 157.

124. Schuck, *supra* note 19, at 87.

125. *See* De Canas v. Bica, 424 U.S. 351, 355 (1976).

is not expressly clear.[126] Courts evaluate preemption on a case-by-case basis, but this makes it difficult to "read the tea leaves" and predict how courts will treat provisions before them.[127] The current state of immigration regulation forces states to face the consequences of failing federal immigration policies with little remedy. As frustrated citizens pressure their state governments to compensate for a lack of federal immigration enforcement, states are acting unilaterally.[128] States continue to pass immigration legislation attempting to avoid preemption, but these laws are consistently challenged.[129] Arizona represents just one state that attempted to take immigration into its own hands, but it was swiftly followed by other states: "Alabama, Georgia, South Carolina and Indiana . . . frustrated by Congress's idling on immigration reform, have challenged federal authority by taking it upon themselves" to create policies for undocumented immigrants within their borders.[130] Many anticipated the Court's *Arizona* decision, seeking clarification of preemption issues and hoping for guidance on how states could properly exercise their immigration authority. Unfortunately, the case does not sufficiently define the lines of permissible future state action and will lead to continued litigation in the area.

III. Statement of the Case

Arizona v. United States presented the Supreme Court its most recent opportunity to resolve the immigration debate.[131] In 2010, faced with many of the consequences of failed federal immigration regulation, the Arizona legislature passed the Support Our Law Enforcement and Safe Neighborhoods Act (Senate Bill 1070) to "'discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.'"[132] The United States filed suit "seeking to enjoin [the law] as preempted."[133] Four sections of the law were challenged:

126. Johnson, *supra* note 69, at 614.

127. Shapiro, *supra* note 2, at 588.

128. *Id.* at 587-88.

129. Johnson, *supra* note 69, at 613, 613 n.13.

130. Peter J. Spiro, Op-Ed., *Let Arizona's Law Stand*, N.Y. TIMES, Apr. 23, 2012, at A19, *available at* http://www.nytimes.com/2012/04/23/opinion/let-the-arizona-law-stand-then-wither.html.

131. United States v. Arizona, 132 S. Ct. 2492 (2012).

132. *Id.* at 2497.

133. *Id.*

- Section 2 allowed officers to attempt to verify a person's immigration status upon an arrest, detention, or stop;
- Section 3 created a state misdemeanor for "failure to comply with federal alien-registration requirements;"
- Section 5 created a state "misdemeanor for an unauthorized alien to seek or engage in work in [Arizona];" and
- Section 6 gave authorization to state officers "to arrest without a warrant a person 'the officer has probable cause to believe . . . has committed a public offense.'"[134]

At the district court level, the court granted an injunction against all four sections.[135] The Ninth Circuit Court of Appeals then affirmed.[136] After granting certiorari "to resolve important questions concerning the interaction of state and federal power with respect to the law of immigration and alien status," the Supreme Court affirmed in part and reversed in part.[137]

A. Section 3

The Court first evaluated section 3 of Senate Bill 1070, which created penalties for unauthorized aliens who failed to register as required by federal law.[138] The Court read the provision as a requirement for unauthorized aliens in the state to comply with federal registration laws.[139] In its analysis, the Court looked to *Hines v. Davidowitz*, a case where the Court determined that Congress created a "complete system for alien registration" and intended for this system to be the "single . . . all-embracing system."[140] Though the federal regulations at the time of *Arizona* were "not identical" to those in *Hines*, the system "remain[ed] comprehensive."[141] The Court used this as evidence that Congress intended "the Federal Government [to occupy] the field of alien registration."[142] This

134. *Id.* at 2497-98 (quoting ARIZ. REV. STAT. ANN. §§ 13-1509, 13-2928C, 13-3883(A)(5) (West Supp. 2011)).

135. United States v. Arizona, 703 F. Supp. 2d 980, 1008 (2010), *aff'd*, 641 F.3d 339, 366 (9th Cir. 2011), *aff'd in part and rev'd in part*, 132 S. Ct. 2492 (2012).

136. United States v. Arizona, 641 F.3d 339, 366 (9th Cir. 2011), *aff'd in part and rev'd in part*, 132 S. Ct. 2492 (2012).

137. *Arizona*, 132 S. Ct. at 2498, 2510.

138. *Id.* at 2501.

139. *Id.*

140. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 70, 74 (1941)).

141. *Id.* at 2502.

142. *Id.*

interpretation means that even state regulations that are complementary or parallel to the federal system are impermissible.[143]

Arizona argued that section 3 was not preempted because it shared the same "aims" and "substantive standards" as federal law.[144] The Court quickly rejected this argument as inconsistent with the premise of field preemption.[145] State-created penalties for a federal crime undermine federal prosecutorial discretion.[146] This "frustrate[s] federal policies."[147] In addition to the field preemption concerns, the Court mentioned the inconsistency of the penalties proscribed by Senate Bill 1070 and federal laws.[148] Because section 3 did not allow for a probationary sentence while federal law did, the Court concluded Arizona's law created conflict with the congressional plan.[149] Ultimately, section 3 was preempted based on these conflicting penalties and because it entered a field occupied by Congress.[150]

B. Section 5

Next, the Court analyzed section 5's creation of a misdemeanor for unauthorized aliens seeking employment.[151] Here, the Court began by differentiating *Arizona* from *De Canas v. Bica*.[152] At the time the Court decided *De Canas*, Congress had only expressed "a peripheral concern with [the] employment of illegal entrants."[153] But when *Arizona* came before the Court, Congress had passed "a comprehensive framework for 'combating the employment of illegal aliens.'"[154] The Court viewed this framework as evidence of an intentional decision not to impose criminal penalties on those "seek[ing] or engag[ing] in unauthorized employment."[155] Though the Arizona law targeted employees while the federal system targeted employers, it still conflicted with congressional intent.[156] The Court

143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 2503.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* (quoting De Canas v. Bica, 424 U.S. 351, 360 (1976)).
154. *Id.* at 2504 (quoting Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002)).
155. *Id.*
156. *Id.* at 2504-05.

reviewed the legislative background of these acts and found that a congressionally established commission determined that penalties on the employees "would be 'unnecessary and unworkable.'"[157] While Arizona's goal to discourage employment of unauthorized aliens may have been a good faith effort to mirror federal policy, the methods conflicted.[158] For this reason, section 5 conflicted with congressional objectives by imposing penalties where Congress deemed it would be inappropriate, and due to this conflict, the section was preempted.[159]

C. Section 6

The Court next evaluated section 6, which allowed state officers to make warrantless arrests upon probable cause to believe a person had committed a removable offense.[160] "[F]ederal statutory structure instructs when it is appropriate to arrest an alien during the removal process."[161] Under federal law, when an officer suspects a person of being a removable alien, the suspected person is not arrested but instead given a Notice to Appear at a removal proceeding.[162] Further, federal law calls for arrests after warrants are issued and then executed by federal officers who have been trained in immigration law enforcement.[163] Outside of a warrant, federal law limits a federal officer's authority to make an arrest; he may only do so where the alien is in "violation of any [immigration] law" and "likely to escape before a warrant can be obtained."[164] Section 6 of Senate Bill 1070 purported to grant state officers less limited authority by allowing warrantless arrests.[165] Additionally, federal law already specifies instances when state officers may "perform the functions of an immigration officer," and Arizona's law would expand on those instances.[166] The Court held that both of these

157. *Id.* at 2504 (quoting U.S. SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY WITH SUPPLEMENTAL VIEWS BY COMMISSIONERS 65-66 (1981)).

158. *Id.* at 2505.

159. *Id.* at 2504-05.

160. *Id.* at 2505.

161. *Id.*

162. *Id.*

163. *Id.* at 2505-06.

164. *Id.* at 2506 (quoting 8 U.S.C. § 1357(a)(2) (2012)).

165. *Id.*

166. *Id.*

expansions of state officer authority exceeded the authority granted under the federal scheme.[167] As a result, section 6 conflicted with federal law.[168]

In its defense of the section, Arizona pointed to federal law allowing state officers to "cooperate" with the Attorney General in immigration law enforcement, meaning the state officers could assist in furthering federal initiatives.[169] The Court, though, determined that the word "cooperate" did not encompass "the unilateral decisions of state officers to arrest an alien . . . absent any request, approval, or other instruction from the Federal Government."[170] Because section 6 attempted to grant state officers authority entrusted solely to the federal government, it was preempted.[171]

D. Section 2

The final section challenged, section 2, required the Court's deepest inquiry. This section required state officers making a stop, arrest, or detainment to "determine the immigration status" of the person if there was "reasonable suspicion that the person . . . [was] unlawfully present in the United States."[172] To perform these checks, state officers would contact Immigrations and Customs Enforcement (ICE), a federal group that would determine the person's status by checking a federal database.[173] The Arizona statute stated that all persons were presumed to be lawfully present aliens; "race, color, or national origin" may not be considered; and the provisions must be "implemented in a manner consistent with federal law."[174] The United States argued that because section 2 required status checks, regardless of whether federal enforcement priorities made it unlikely that the Attorney General would seek removal, the statute interfered with the federal immigration scheme.[175] The Court indicated, however, that Congress had made no limitations on when state officials may communicate with ICE about immigration status.[176] Congress allows for state officers to communicate with the federal government involving immigration status and requires ICE to respond to such inquiries.[177] Section

167. *Id.* at 2506-07.
168. *Id.* at 2507.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* (quoting ARIZ. REV. STAT. ANN. § 11-1051(B) (2012)).
173. *Id.*
174. *Id.* at 2507-08 (quoting § 11-1051(L)).
175. *Id.* at 2508.
176. *Id.*
177. *Id.*

2 did not conflict with congressional legislation but, instead, fell into a category of action encouraged by Congress.[178] This part of Senate Bill 1070 was not preempted.[179]

While ultimately allowing section 2 to stand, the Court described potential constitutional concerns with its implementation.[180] For instance, if a person were detained for the sole purpose of determining his or her immigration status, this would "disrupt the federal framework" by allowing state officers, without federal oversight, to hold aliens for unlawful presence.[181] The state argued this should be of no concern and drew attention to the fact that the status determination could be completed after the stop had been completed, while arrests and detainments, by nature, allow more time for checks to be completed.[182] The Court submitted that as long as stops, arrests, and detainments were not prolonged for an unreasonable period for the sole purpose of determining status, Arizona could avoid this issue.[183] The Court, though, refused to determine at what point a stop became unreasonably prolonged.[184] Based on uncertainty about the section's enforcement, the Court refused to assume that it would be construed in a manner conflicting with federal law.[185]

Upon finding three of the four challenged provisions preempted, the Court's opinion closed by generally addressing the federalism question in immigration: "Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law."[186] This holding leaves states on the sidelines while the federal government continues to dominate immigration regulation and does little to truly define the boundaries surrounding appropriate state action. Continued grey parameters surrounding proper state action, along with inconsistent federal enforcement, will continue to result in difficulties in particular states.

178. *See id.*
179. *See id.*
180. *Id.* at 2509.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 2510 (noting that when possible, courts are to construe statutes in a manner so as to avoid unconstitutionality).
186. *Id.*

IV. The Court's Inability to Mitigate the Issues Created by Uncertain Boundaries of Federal Authority

A. Even the Court's Proper Application of the Law Keeps States in the Dark

Because prior cases have previously defined the preemption doctrines, many academics made varying predictions regarding the outcome of *Arizona*.[187] Nonetheless, the doctrines these prior cases established can be extremely unwieldy to apply. Looking at the decision now, it is difficult to disagree with the Court's reasoning and application of the pre-existing case law in the area. The Court seems to have appropriately applied the preemption doctrines as they stand and reaffirmed the federal power over immigration.[188] However, it remains unclear where the federal power ends and state authority begins.

One of the more significant pieces of the decision was the Court's conclusion that section 5 did not appropriately mirror federal policy.[189] The Court determined that Congress's imposition of penalties on employers and not employees illustrated a decision not to penalize employees.[190] This, without more clear evidence of congressional intent, is a logical fallacy. The legal premise that the inclusion of one means the exclusion of all others does not always hold true. This demonstrates the problem with the preemption doctrines. They are centered on interpreting congressional intent, even when Congress has not clearly spoken.[191] It is not reasonable to expect the Court to firmly establish the parameters of this unspoken intent. Instead, courts must determine whether state laws conflict with this intent one case at a time.[192]

For this reason, the importance of *Arizona* is not in its holding regarding the specific provisions of Senate Bill 1070 but in its affirmation that even proper application of the preemption doctrines leaves states hardly better off than before the decision. No matter its decision, the Court was unlikely to clearly define the limits of the preemption doctrines. The current doctrines force the courts to evaluate state action on a case-by-case basis and provide little guidance on how states can properly participate in the immigration arena. This, however, is not a problem the courts can solve.

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187. *See, e.g.*, Eastman, *supra* note 94; Charles, *supra* note 98; Johnson, *supra* note 69; Shapiro, *supra* note 2.

188. *Arizona*, 132 S. Ct. at 2498.

189. *Id.* at 2505.

190. *Id.*

191. Medtronic, Inc. v. Lohr, 578 U.S. 470, 485-86 (1996).

192. *Id.*

The current system requires courts to act as middlemen between Congress and the states, evaluating ever-changing legislative intent. Congress must institute a system that cuts out these middlemen and make its intent much clearer to the courts and states. In the absence of congressional action, the continuance of today's system will only lead to more of today's problems. States will continue to be pulled into court for honest attempts to participate in regulation and protect their local interests.

B. A Lack of Federal Enforcement and Uncertain Boundaries of Federal Authority Heavily Burden the States

The Court's *Arizona* decision did little to empower states to participate in the regulation of immigration. Even when approving section 2, the Court issued a warning that the section nearly crossed the preemption line.[193] After this holding, states will continue to be subject to and reliant on federal immigration regulation. This will prolong the state struggles that unauthorized immigration creates and continue to drive a wedge between pro-immigration and anti-immigration constituencies.[194]

Unauthorized immigration presents economic and social difficulties for much of the nation. However, the federal government's attempts to remedy these difficulties have been unsuccessful.[195] States have indicated that "the costs of educating students who [do] not speak English fluently are . . . [up to] forty percent higher than the costs incurred for native-born students."[196] In the healthcare industry, the cost of uncompensated care is rising as unauthorized immigrants use those services at an increasing rate.[197] There is little debate that taxes paid by undocumented aliens are insufficient to cover these costs.[198] In fact, the Congressional Budget Office (CBO) found that the tax income from unauthorized immigrants far from offsets their cost.[199] Even federal aid programs cannot make up the financial gap.[200]

States ultimately have little option but to shoulder much of these burdens. The federal government requires states to provide specific services

193. *Arizona*, 132 S. Ct. at 2509.

194. Spiro, *supra* note 9, at 130.

195. *Id.* at 127.

196. CONG. BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 2 (2007) [hereinafter IMPACT], *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/87xx/doc8711/12-6-immigration.pdf.

197. *Id.* at 8.

198. Spiro, *supra* note 9, at 126.

199. IMPACT, *supra* note 196, at 9-10.

200. *Id.* at 10.

to individuals, "regardless of their immigration status."[201] Due to this requirement, state and local governments bear much of the cost of providing education and healthcare services to unauthorized immigrants.[202] States also incur heavy law enforcement expenses as they cover the costs of investigation, detainment, prosecution, and incarceration for state non-immigration crimes committed by unauthorized immigrants.[203]

The CBO found states had little recourse for "avoiding or minimizing [these] costs."[204] The financial struggles states face due to immigration are a reflection of the fact that

> most tax revenues generated by immigrants, both legal and illegal, flow to Washington, and many other benefits of immigration (say, lower consumer prices) are also enjoyed nationally, while almost all of the costs (say, burdens on locally-funded social services, adverse effects on low-skilled Americans, and immigrant crime) are borne locally.[205]

That immigration imposes disproportionate burdens (for example, higher costs of public benefits and services and downward pressure on wage rates) felt more at the state and local level than the national level "suggests that states are in the best position to assess and manage the tradeoffs among conflicting public goals peculiar to their polities."[206]

Additionally, states do not share these burdens equally. Just as in colonial days, many immigration issues the nation faces are unique to specific locales. Illustrative of this is the fact that the matter is hardly on the political radar of most states, while in some states it is a key political issue.[207] "[W]hat is essentially a non-issue in Missouri or Massachusetts has become the most sensitive point of political conflict in states such as California, Florida, and Arizona."[208]

Moreover, as the Supreme Court acknowledged in *Arizona*, the impacts of unauthorized and unregulated immigration are felt exponentially more in a small number of states.[209] This disproportionate impact theory is

201. *Id.* at 1.
202. *Id.* at 3.
203. *Id.* at 9.
204. *Id.* at 3.
205. Schuck, *supra* note 19, at 80.
206. *Id.* at 70.
207. *See* Spiro, *supra* note 9, at 121.
208. *Id.*
209. *See Fiscal Costs Map*, FED'N FOR AM. IMMIGR. REFORM, http://www.fairus.org/facts/facts3 (last visited Sept. 15, 2013) (showing less than a third of states spend over a

illustrated by the fact that undocumented immigrants are concentrated in a small number of states.[210] Currently, immigrants are most concentrated in the southern border states.[211] "Roughly half of all *unauthorized* immigrants in the United States live in four states: California, Florida, New York, and Texas."[212] These states, more than others, deal with the difficulties created by high volume immigration and have the most incentive for effective regulation. For example, in 1994, California paid almost $1.8 billion for undocumented alien incarceration, education, and medical services while only receiving an estimated $732 million in total taxes from the same population.[213] This leaves a $1 billion shortfall. Additionally, "in 2000, county governments that share a border with Mexico incurred almost $190 million in costs for providing uncompensated care to unauthorized immigrants. . . . [and] those costs are increasing rapidly."[214]

These are just some of the negative impacts of the current federal immigration policy, and they illustrate that the federal government's "de facto benign neglect has not been a winning strategy."[215] Greater state involvement is needed in immigration regulation. While the nation as a whole may have little motivation to clamp down on unauthorized immigration, the states where unauthorized immigration is most concentrated are left desperate for relief. Though these states are motivated to regulate immigration, the case-by-case determination of the preemption doctrines creates uncertain boundaries and leads to state stagnancy. Congress must develop a program encouraging state involvement.

V. Collaborative Regulation: A Path Forward

The Court drastically understated the problem when it noted that "[t]here are significant complexities involved in enforcing federal immigration law."[216] The questions the Court answered in *Arizona* were

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billion dollars a year on immigration); Kit Johnson, Peter J. Spiro, Debate, *Immigration Preemption After* United States v. Arizona, 161 U. PA. L. REV. ONLINE 100, 111 (2012), http://www.pennlawreview.com/online/161-U-Pa-L-Rev-Online-100.pdf (citing Arizona v. United States, 132 S. Ct. 2492, 2500 (2012)).

210. Schuck, *supra* note 19, at 79-80.

211. Spiro, *supra* note 9, at 125.

212. Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1708 (2011) (emphasis added).

213. Spiro, *supra* note 9, at 126-27.

214. IMPACT, *supra* note 196, at 8.

215. Shapiro, *supra* note 2, at 587.

216. Arizona v. United States, 132 S. Ct. 2492, 2506 (2012).

difficult. It would benefit states and the judicial system to avoid such questions in the future. The current system provides little clarity and fails to regulate effectively. Even the federal government is aware of the issues. President Obama acknowledged that the current system for immigration regulation is broken, but Congress has been unable to pass an effective reform package.[217] Unless future reform packages address the fact that different problems in different states require different solutions, these problems will remain.

The United States desperately needs a path forward. Successful reform must harness and embrace state involvement. Reform efforts should focus on creating a uniform federal immigration policy while simultaneously harnessing state desires to join regulation efforts. Congress can encourage and specifically define proper state participation while retaining ultimate legislative authority through an approval process. The system this article describes below avoids the current dysfunctional process, which consists of courts attempting to interpret congressional action, followed by states attempting to interpret court decisions.

The Court's decision in *Arizona* does little to clear the murky water immersing immigration law. Commentators argue that state authority over specific areas may better serve legitimate federal immigration goals.[218] However, current state involvement is difficult because "[n]either the Supreme Court nor the lower federal courts have precisely defined when a state law bearing on immigration is consistent with, tracks, mirrors, or reinforces federal policy."[219] Why not design a program where courts do not have to answer this difficult question? Rather than keep states buried in a trial and error process where they are consistently attempting to navigate federal preemption and taken to court to determine the legality of their statutes, Congress should lend a hand to state governments, giving them such authority and creation ability "fit not to deny them."[220] Congress should help states design local legislation consistent with national policies.

Nominal state participation in immigration will not be effective. Merely allowing state officials to participate in federally designed immigration problems will not satisfy the need for unique policies designed for the unique problems in specific areas. Some states need stricter policies while other states would benefit from more immigration-friendly policies. Congress can tailor specific roles for states to play "without jeopardizing

217. Johnson, *supra* note 69, at 616-17.
218. *E.g.*, Schuck, *supra* note 19, at 64.
219. *Id.* at 86.
220. Spiro, *supra* note 9, at 171.

legitimate federal interests" while allowing states a greater role in design, administration, and enforcement of immigration law.[221] I call this system "Collaborative Regulation."

An example of how a system of this nature successfully navigates difficult federalism issues is the congressional handling of states' desires to deal with unique, local water issues without violating the dormant Commerce Clause. In order to avoid invalidating local water laws that courts would otherwise strike down as inconsistent with the Supremacy and Commerce Clauses, after states have created plans tailored to their specific needs, Congress authorizes the state laws by adopting them as federal law for the specific locale.[222] In other words, these interstate compacts are congressionally ratified agreements between the participating states and interpreted as federal law.[223] This makes these local laws immune from Commerce Clause attacks, allowing states to act in a way that would otherwise conflict with the dormant Commerce Clause.[224]

The process begins and ends with the federal government, but state involvement is key.[225]

> Typically, Congress invites the states to initiate negotiations, with the expectation that whatever accommodation is achieved will receive subsequent congressional approval. Upon approval by Congress a compact becomes a law of the United States. Thereafter, the compacting states act to incorporate the terms of the compact into their respective state laws. This dual codification aids in the enforcement of the compact's terms. The federal codification ensures that states cannot back out, and eliminates any potential for a dormant commerce clause attack on the allocation. State codification ensures that every affected individual water user will be subject to the benefits and burdens of the compact.[226]

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221. Schuck, *supra* note 19, at 92.

222. Delaney, *supra* note 21, at 357.

223. *Id.*

224. *Id.*

225. Christopher H. Meyer, *Interstate Water Allocation: The Law and Its Implications for the Pacific Northwest*, IDAHO WATER RESOURCE BOARD, 7 (Apr. 21, 2010), http://www.idwr.idaho.gov/waterboard/WaterPlanning/CAMP/RP_CAMP/PDF/2010/05-21-2010_InterstateWaterAllocation.pdf.

226. *Id.*

Immigration regulation should mirror this system. Just as with state water issues, the federal government is far removed from the unique issues immigration presents states yet has dominant legal authority over the area. However, "[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States."[227] States, though, do not have the only interests at stake. As with interstate commerce, the federal government has a crucial interest in overseeing the implementation and protection of a uniform national policy.[228] To address both concerns, consultation and cooperation between federal and state governments must be a key feature of the immigration system.[229] Though the need for cooperation is apparent, immigration policy has yet to achieve it successfully.

Under Collaborative Regulation, states would still be obligated to respect the federal plenary power over immigration by submitting to Congress's ultimate judgment concerning the legality and compatibility of state-designed programs with federal interests. States could develop policies designed to handle local problems while Congress could ensure that locally-designed laws do not undermine federal interests. With Congress reviewing and approving them, the state regulations would enjoy the force of federal law, preventing preemption.[230]

Alas, this collaborative system requires front-end state cooperation, as Congress cannot force state participation.[231] To achieve cooperation, the federal government must willingly encourage state participation in the design of immigration policies without handing over ultimate control. Congress should proactively seek state involvement by requesting states to design policies tailored to local issues. Currently, states are unilaterally attempting to do this, with courts then determining whether the state laws fit the national scheme.

Instead, Congress should request that states submit the proposals to it for review and potential approval. Upon approval, Congress would implement the state suggestions as federal law for the specific locale, just like the congressional approval of state water compacts. This would prevent courts from hypothesizing which state laws conflict with federal immigration

227. Arizona v. United States, 132 S. Ct. 2492, 2500 (2012).

228. Charles, *supra* note 98, at 147-48.

229. *Arizona*, 132 S. Ct. at 2508.

230. Delaney, *supra* note 21, at 357 (citing Intake Water Co. v. Yellowstone River Compact Comm'n, 769 F.2d 568, 569-70 (9th Cir. 1985), *aff'g* 590 F. Supp. 293, 296 (D. Mont. 1983) (per curiam)).

231. *See* Jodré, *supra* note 86, at 556.

authority. Congress can conclusively determine which laws can coexist with a uniform federal policy. Instead of a federal government attempting to address unique, local issues with a single system, a program mirroring the water compact system allows each area to design a distinct solution for its distinct issues, while maintaining a uniform federal policy.

Because Congress may not delegate its authority to legislate,[232] it cannot merely present a set of guidelines for states to meet and give blanket approval to state laws meeting the guidelines. Congressional approval of state action, such as through an interstate compact, avoids this issue because Congress retains ultimate authority without delegating any power to actually create federal law. States merely become cooperative agents of federal policy.[233] The state and federal governments speak with one voice.[234] In the case of water law compacts, in order for the court to treat state law as federal law, Congress must have an "unmistakably clear" intent to approve the compact.[235] This same requirement could be carried over to immigration; Congress would maintain authority to set the parameters of the nation's immigration policy umbrella and state an "unmistakably clear" intent to approve a state program as fitting within that umbrella.

If implemented, Collaborative Regulation will also allow for specific feedback from Congress to states on what is compatible with the federal policy. This would be much more efficient than courts attempting to interpret congressional intent in the area on a case-by-case basis. Congress, not the courts, will determine whether a state-designed scheme poses an obstacle to federal immigration goals. Instead of requiring courts to hypothesize about congressional intent, Congress will make this explicitly clear. Congress will declare its intent expressly every time a state submits a proposal by specifying what is consistent with that intent. This keeps the legislative authority in the legislature and out of the judiciary.

Collaborative Regulation puts states and the federal government on the same team. Immigration litigation is often adversarial between the state and federal governments. A process encouraging them to work united toward a common goal would create efficiencies. The current system wastes resources as state laws wind through the court systems awaiting a determination on their legality. These resources are better spent implementing local plans that Congress has approved through a more

232. *See* United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932); *see also* Field v. Clark, 143 U.S. 649, 692 (1892).

233. Spiro, *supra* note 9, at 159.

234. *Id.*

235. South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 91 (1984).

expeditious process. Under Collaborative Regulation, state legislation such as Arizona's Senate Bill 1070 is much less likely to clog the federal dockets with challenges focusing on their consistency with federal law. Instead of states attempting to pass laws affecting immigration that will not interfere with national interests and waiting for judicial approval, Collaborative Regulation encourages express authorization. While some may claim a program of this nature is inefficient, forcing states to wait for congressional approval before implementing a plan, it will be no more inefficient that the current process that forces states to wait years while their immigration laws are subjected to legal challenges in court. For example, Arizona waited over two years for a determination of whether Senate Bill 1070 was preempted.[236]

Further, the success of a program of this nature in the water law arena has proven the design to be both functional and rational. In contrast, reliance on court determination is both inefficient and unpredictable. Instead of trying to "integrate 50 different situations into a single one-size-fits-all national policy,"[237] Collaborative Regulation allows tailored solutions in each state created to fit the specific contours of local immigration.

Collaborative Regulation also encourages innovation and experimentation among the states, demonstrating what works without subjecting the entire country to certain policies. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[238] This minimizes the effects of failed systems and allows for a larger number of potentially successful policies to be tested. Instead of the entire nation feeling the impacts of a single policy and then altering it accordingly, each state can sculpt its own process. The effects and externalities of flawed policies would be contained to the states that designed them. States could then look to their more successful neighbors and manipulate their policies to fit their own needs.

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236. *Timeline: Chronology of Arizona Immigration Law Battle*, CHI. TRIB. (June 25, 2012), http://articles.chicagotribune.com/2012-06-25/news/sns-rt-us-usa-immigration-court-chronologybre85o0um-20120625_1_republican-governor-jan-brewer-illegal-immigrants-immigration-status.

237. Schuck, *supra* note 19, at 70.

238. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

"[E]ffective federal immigration enforcement often depends upon the extensive participation of state and local officials."[239] Instead of friction between federal and state governments, states should be eager to implement Collaborative Regulation. A key factor to state participation would be economic benefits.

> State-level modulation of federal immigration policies could . . . work to distribute the costs of undocumented aliens more equitably among the states, and to encourage such aliens to relocate to where their presence may pose a net social and economic benefit, or at least not such a concentrated perceived harm. The scalpel of state action replaces Washington's unwieldy sledgehammer.[240]

Collaborative Regulation allows for diverse solutions to the unique complexities of a national problem.[241] Instead of federal and state governments fighting for authority or declining to support the other's efforts, the two will be more eager to support policies they both played a role in creating. This will generate a hybrid form of immigration policies, harmonizing state desires with the need for a unified federal policy.

VI. Conclusion

Arizona charged the Supreme Court with the task of applying unworkable doctrines to one of many state laws seeking to regulate immigration within local borders.[242] The Court ultimately struck down three of the four sections of the Arizona law that the federal government challenged.[243] What the Court was unable to do, however, was create clear parameters for appropriate state action. Even logical application of the current preemption doctrines failed to create certainty in the area. The perpetuation of the current system will continue to result in states passing laws with no guidance as to whether they are permissible.

The United States' current system for immigration regulation is wholly inadequate. Though preemption prevents them from doing so effectively, states are in the best position to deal with their own unique problems using their own unique solutions. While these state interests are valid, there are

239. Schuck, *supra* note 19, at 72.
240. Spiro, *supra* note 9, at 173 (footnote omitted).
241. Cunningham-Parmeter, *supra* note 212, at 1676.
242. Arizona v. United States, 132 S. Ct. 2492 (2012).
243. *Id.* at 2510.

legitimate concerns that leaving immigration regulation in state hands may interfere with national foreign policy.

For these reasons, the best solution is one that accounts for both state and federal concerns. A successful program must consider concerns on both sides of the federalism line. Because murky preclusion doctrines force states to inefficiently guess at whether their needed regulations will run afoul of the federalism line, it would suit all parties to avoid the application of these doctrines altogether. This Note's proposed system, Collaborative Regulation, centers on state-designed programs and offers the original solutions each state needs. Requiring congressional approval of these programs prior to their enforcement as federal law ensures that local policies remain consistent with a uniform national system for immigration. This program merges state and federal involvement and avoids the "pin the tail on the donkey" guesswork involved in determining the application of current preclusion principles.

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