

FACT OR FICTION?:
SETTING THE RECORD STRAIGHT ON S.B. 1070[†]

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This Essay addresses three common assumptions made about Arizona's newest immigration law, Senate Bill ("S.B.") 1070,¹ and shows that they are based on pure fiction, not fact. I will then explain why S.B. 1070 is on legally sound footing in the face of the preemptive challenge brought by the Obama Justice Department.² Before addressing the three fictions of S.B. 1070, however, I would like to begin by respectfully disagreeing with the contention that conservatives should not support state and local efforts to discourage illegal immigration.³ I have two points of disagreement.

I. EFFICIENCY AND ECONOMIC COST REQUIRE
THE COLLABORATION OF FEDERAL, STATE, AND LOCAL EFFORTS
TO ENFORCE IMMIGRATION LAWS

First, efficiency requires that law enforcement problems of national proportions be addressed by collaborative efforts of all levels of law enforcement. When there is a serious and pervasive law enforcement problem of national dimension, I doubt anyone would seriously argue that the problem should be addressed only with one level of government, to the exclusion of all others.

For example, take the war on drugs. No reasonable person would contend that if we are going to stop drug abuse and drug crimes that we should tell the federal government, "DEA, stay out of it; this will be

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¹ S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (as amended by H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010)).

² See generally Complaint, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10–1413–PHX–SRB).

³ See, e.g., Clegg, *supra* pp. 349–51.

taken care of at the state and local level.” Nor would anyone seriously claim that the DEA should tell the states and local governments, “No, we don’t want you making the arrests; we’ll do everything.” When a pervasive law enforcement problem exists, it is necessary to have a coordinated effort in which all levels of government work together.⁴

Second, the cost incurred by state and local governments as a result of illegal immigration justifies state and local action. Illegal immigration’s net fiscal cost to United States taxpayers is approximately \$99.2 billion a year.⁵ I emphasize that this figure represents the *net* cost, so it includes any taxes or revenues received by federal, state, and local governments from illegal aliens.⁶ Nearly \$79.9 billion of the \$99.2 billion is borne by state and local governments,⁷ and \$19.3 billion is borne by the federal government.⁸ Thus, state and local governments have a significant financial interest in the vigorous enforcement of immigration law, even if the federal government reduces its enforcement efforts for political reasons.

In Arizona, the net annual fiscal cost of illegal immigration to the state is over \$2.4 billion a year.⁹ The biggest ticket items are K–12 education for children in illegal alien-headed households, uncompensated health care costs, and criminal incarceration costs.¹⁰ Almost fifteen percent of the inmates in Arizona’s detention facilities are illegal aliens.¹¹

There are also incredible criminal costs. Arizona rancher Robert Krentz was killed on his own land in April 2010, shortly before the law was passed.¹² In 2008, there were over 370 kidnappings in Phoenix alone.¹³ The vast majority of those kidnappings were associated with

⁴ KRIS W. KOBACH, CTR. FOR IMMIGRATION STUDIES, STATE AND LOCAL AUTHORITY TO ENFORCE IMMIGRATION LAW: A UNIFIED APPROACH FOR STOPPING TERRORISTS 5–6 (2004), available at <http://www.cis.org/articles/2004/back604.pdf>.

⁵ JACK MARTIN & ERIC A. RUARK, FED’N FOR AM. IMMIGRATION REFORM, THE FISCAL BURDEN OF ILLEGAL IMMIGRATION ON UNITED STATES TAXPAYERS 79 (2010), available at http://www.fairus.org/site/DocServer/USCostStudy_2010.pdf?docID=4921.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 78.

¹⁰ See FED’N FOR AM. IMMIGRATION REFORM, THE COSTS OF ILLEGAL IMMIGRATION TO ARIZONANS (2004), available at <http://www.fairus.org/site/DocServer/azcosts2.pdf?docID=101>.

¹¹ CHARLES L. RYAN, ARIZ. DEPT OF CORR., CORRECTIONS AT A GLANCE (2010), available at <http://www.azcorrections.gov/adc/reports/CAG/CAGJun10.pdf>.

¹² *Murder of Arizona Rancher Roils Immigration Debate*, FOX NEWS (Apr. 10, 2010), <http://www.foxnews.com/politics/2010/04/10/murder-arizona-rancher-roils-immigration-debate/>.

¹³ Brian Ross, *Kidnapping Capital of the U.S.A.*, ABC NEWS (Feb. 11, 2009), <http://abcnews.go.com/Blotter/story?id=6848672&page=1>.

alien smuggling or with cartels involved in alien smuggling.¹⁴ There is simply no way to refute the fact that the fiscal and criminal impacts of illegal immigration are monumental, and to say that a state should ignore it or simply not be permitted to deal with it is a difficult position to support.

II. WHY THREE COMMON ASSUMPTIONS ABOUT S.B. 1070 ARE BASED ON FICTION, NOT FACT

Arizona's S.B. 1070 was designed as a common-sense way of facilitating cooperation among local, state, and federal law enforcement as well as slightly ratcheting up the level of enforcement of federal immigration statutes in Arizona.¹⁵ Few statutes, however, have been so grossly mischaracterized by members of the press, members of Congress, and the Administration.

Before discussing these mischaracterizations, it is important to set this law in context. S.B. 1070 is not Arizona's first step in the area of increasing state-level efforts to stop illegal immigration; it is the fourth of four steps. First, in 2004, Arizona passed Proposition 200,¹⁶ which restricted public benefits to illegal aliens.¹⁷ Second, in 2005, Arizona passed a law prohibiting human smuggling,¹⁸ which has been vigorously and successfully enforced by Sheriff Joe Arpaio in Maricopa County.¹⁹ Third, in 2007, Arizona passed the Legal Arizona Workers Act,²⁰ which was upheld by the Ninth Circuit Court of Appeals in a 3-0 decision in 2009.²¹ The case is currently before the United States Supreme Court.²² S.B. 1070, enacted in April 2010, is the fourth step.

¹⁴ *Id.*

¹⁵ See generally S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (as amended by H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010)).

¹⁶ *Arizona Law Requiring Voters To Prove Citizenship Is Struck Down*, FOX NEWS (Oct. 27, 2010), <http://www.foxnews.com/politics/2010/10/26/court-strikes-ariz-law-requiring-voters-prove-citizens/> (citing Arizona 2004 Ballot Propositions, Proposition 200 (Nov. 2, 2004)). In October 2010, the Ninth Circuit Court of Appeals in a 2-1 decision struck down the part of Proposition 200 that required voters to prove citizenship to register to vote. *Gonzalez v. Arizona*, 624 F.3d 1162, 1168, 1198 (9th Cir. 2010).

¹⁷ ARIZ. REV. STAT. ANN. § 46-140.01(A)(3) (2011).

¹⁸ ARIZ. REV. STAT. ANN. § 13-2319 (2011).

¹⁹ See JJ Hensley & Jolie McCullough, *Arpaio's New Sweep Targets Human Smuggling, Drugs*, ARIZ. REPUBLIC, Mar. 19, 2010, at B3.

²⁰ ARIZ. REV. STAT. ANN. §§ 23-211 to -214 (2011).

²¹ *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 860-61 (9th Cir. 2009), cert. granted sub nom., *Chamber of Commerce v. Candelaria*, 130 S. Ct. 3498 (2010).

²² *Chamber of Commerce v. Candelaria*, 130 S. Ct. 3498 (2010), sub nom. *Chamber of Commerce v. Whiting*, 131 S. Ct. 624 (2010) (granting the motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument). The Obama Administration urged the Supreme Court to grant certiorari. Brief for the United

With each step, Arizona has incrementally ratcheted up the level of enforcement, and the strategy is working. People are self-deporting out of Arizona.²³ I would argue that this is ultimately the objective of all law enforcement: deter people from breaking the law. In the context of illegal immigration, that means inducing illegal aliens to return to their countries of origin.

In the case of Arizona, many illegal aliens are actually returning to their country of origin and not just relocating to California. After the Legal Arizona Workers Act went into effect in January 2008, the legislature of the Mexican state of Sonora sent a delegation to Arizona.²⁴ The Sonoran legislators complained to the Arizona legislators that Arizona's new law was sending too many Mexican nationals home too quickly, and that the Sonoran infrastructure of housing and other facilities was insufficient to handle the incoming load.²⁵ In their view, Arizona should bear the fiscal cost. This is the context in which S.B. 1070 was introduced in 2010 and the context in which it must be analyzed now.

I will now focus on the three commonly-made assumptions about S.B. 1070. The first false assumption is illustrated by U.S. Attorney General Eric Holder's interview on *Meet the Press*, in which he famously gave a stern warning that the law has the possibility of leading to racial profiling.²⁶ Holder had a somewhat embarrassing moment a few days later when, in a congressional committee, he was asked if he had read the law.²⁷ He admitted that he had not.²⁸

If he had, he would have noticed that S.B. 1070 expressly prohibits an officer from enforcing the terms of the Act based on a person's skin color, race, or national origin in four different places.²⁹ Therefore, if an officer does engage in racial profiling, in almost all circumstances

States as Amicus Curiae, *Chamber of Commerce v. Candelaria*, 130 S. Ct. 3498 (2010) (No. 09-115); Robert Barnes, *Administration Opposes Arizona Law That Penalizes Hiring of Illegal Immigrants*, WASH. POST, May 29, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/28/AR2010052804319.html>.

²³ See Press Release, Dep't of Homeland Sec., Remarks by Homeland Security Secretary Michael Chertoff and Attorney General Mukasey at a Briefing on Immigration Enforcement and Border Security Efforts (Feb. 22, 2008), available at http://www.dhs.gov/xnews/releases/pr_1203722713615.shtm; see also E. J. Montini, *A 'Bonus' Consequence: Self-Deportation*, ARIZ. REPUBLIC, Apr. 27, 2010, at B1.

²⁴ Sheryl Kornman, *Sonoran Officials Slam Sanctions Law in Tucson Visit*, TUCSON CITIZEN, Jan. 16, 2008, at 4A.

²⁵ *Id.*

²⁶ Stephen Dinan, *Holder Balks at Blaming 'Radical Islam'; Attorney General Critical of Arizona Law He Admits He Hasn't Read*, WASH. TIMES, May 14, 2010, at A1.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See S.B. 1070, 49th Leg., 2d Reg. Sess. §§ 2.B, 3.C, 5.13-2928.D, 5.13-2929.C (Ariz. 2010) (as amended by H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010)).

imaginable any prosecution would not stand because the law would have been violated in the process of making the arrest.³⁰ Furthermore, the protections under the Fourth and Fourteenth Amendments against racial profiling are still available.³¹ By specifically prohibiting racial profiling, this law goes well beyond what normal statutes do in protecting minority rights. Thus, the mischaracterization that S.B. 1070 will lead to racial profiling more than what already takes place is a fiction on its face. This mischaracterization is also revealed by the fact that the Justice Department's legal complaint against S.B. 1070, which was filed a few months later, did not contain any claim related to racial profiling.

The second false assumption made about S.B. 1070 is that the law would require aliens to carry documentation that they otherwise did not have to carry.³² Our President was perhaps the greatest purveyor of this misconception. You may remember the analogy he made: “[N]ow suddenly if you don’t have your papers, and you took your kid out to get ice cream, you’re gonna be harassed.”³³ The curious word in President Obama’s phrasing is “suddenly.” Evidently, he was not briefed before he went to the microphone on the fact that for more than fifty years, federal law has required all aliens in the United States to carry on their person at all times certain federal documents.³⁴ There is nothing sudden about this requirement. S.B. 1070 simply states that if someone violates these provisions of federal law (provisions found in 8 U.S.C. §§ 1304(e)³⁵ and 1306(a)³⁶) he also commits a misdemeanor under Arizona law.³⁷ Arizona is simply taking seriously the documentation provisions of federal law. It is thus a serious mischaracterization to paint S.B. 1070 as containing a new and oppressive documentation requirement.

The third false assumption is that the law requires police officers to accost people on the street and demand documents from them. This

³⁰ See Ariz. S.B. 1070 § 8.B.

³¹ U.S. CONST. amends. IV, XIV; see also *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975) (holding that ethnicity alone is not sufficient to establish reasonable suspicion to justify a “seizure” under the Fourth Amendment).

³² See *Palin to Obama: ‘Do Your Job, Secure Our Border’*, CNN (May 16, 2010), http://articles.cnn.com/2010-05-16/politics/arizona.palin.brewer_1_brewer-sarah-palin-new-law?_s=PM:POLITICS [hereinafter *Do Your Job*].

³³ *Id.*

³⁴ Immigration and Nationality Act, Pub. L. No. 82-414, § 264(e), 66 Stat. 163, 225 (1952) (codified at 8 U.S.C. § 1304(c) (2006)).

³⁵ § 1304(e) (imposing penalties on non-resident aliens for failure to have in one’s possession any certificate of alien registration).

³⁶ 8 U.S.C. § 1306(a) (2006) (imposing penalties on any alien who fails to register and be fingerprinted).

³⁷ S.B. 1070, 49th Leg., 2d Reg. Sess. §§ 3.A, 3.H (Ariz. 2010) (as amended by H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010)).

misconception was also fueled by President Obama's example.³⁸ Section 2 of the law requires very specifically that for S.B. 1070's requirements to be triggered, an officer must first make a "lawful stop, detention or arrest . . . in the enforcement of any other law or ordinance of a county, city or town or this state . . ." ³⁹ Individuals will not be stopped at an ice cream parlor, as President Obama claimed, because of their skin color. Individuals will be stopped, however, if they run out of the ice cream parlor with an ice cream cone in one hand and a bag of money in the other, and someone is shouting, "Stop that thief!" It is that simple.

The most common instance in which S.B. 1070 will come into play is during a traffic stop. Thousands of traffic stops happen across this country every day, hundreds in the state of Arizona. Suppose a police officer pulls over a minivan on Highway 17 northeast of Phoenix for some traffic violation one night. Inside the minivan are sixteen people, crammed in, head to toe. The second and third row seats have been removed (this is very common; I have been with Sheriff Joe's deputies⁴⁰ when such scenarios have occurred) and underneath the human cargo are trash bags filled with drug cargo—a common way of moving aliens and drug cargo out of Phoenix—now the primary hub for illegal immigration in the United States—and on to other parts of the country.⁴¹

In this situation, S.B. 1070 requires that if an officer develops "reasonable suspicion" that the person to whom he is talking is an alien unlawfully present in the country, he should act on that reasonable suspicion and not turn a blind eye.⁴² Reasonable suspicion generally requires the presence of multiple factors.⁴³ In the context of illegal immigration, such factors include, but are not limited to, traveling on a known human smuggling corridor,⁴⁴ the fact that the passengers in the vehicle have no identification documents whatsoever,⁴⁵ and the driver's evasive response when questioned about where he has been or where he

³⁸ *Do Your Job*, *supra* note 32.

³⁹ Ariz. S.B. 1070 § 2.B.

⁴⁰ *See supra* note 19 and accompanying text.

⁴¹ Ted Robbins, *A Backlash in Phoenix over Immigration from Mexico*, NPR (Mar. 14, 2006), <http://www.npr.org/templates/story/story.php?storyId=5260526>.

⁴² Ariz. S.B. 1070 § 2.B.

⁴³ The U.S. Supreme Court has held that a determination of reasonable suspicion is based on the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

⁴⁴ *Id.* at 277.

⁴⁵ *United States v. Fuentes*, No. C-09-860, 2010 WL 707424, at *4 (S.D. Tex. Feb. 23, 2010).

is going.⁴⁶ S.B. 1070 requires that if some of these factors are present, the officer must follow up on them.⁴⁷

Following up means that the officer calls the Law Enforcement Support Center, a 24/7 hotline that has been in operation since the mid-1990s and that exists exactly for this purpose.⁴⁸ Every day, on average, more than 2200 calls are made by law enforcement officials all over the country to this hotline to find out whether the persons to whom they are talking in a traffic stop or other law enforcement situation is indeed an illegal alien.⁴⁹ S.B. 1070 simply states that it is Arizona's policy that every officer should do this⁵⁰—if an officer develops reasonable suspicion, he should make the call immediately from his squad car. S.B. 1070 merely takes something that was, and is, done regularly all over the country and makes it Arizona's uniform policy.

Now that it is clear what S.B. 1070 actually does, it is appropriate to turn to the legal arguments made against it.

III. S.B. 1070 IS NOT PREEMPTED BY CONGRESS AND MUST NOT BE PERMITTED TO BE PREEMPTED BY EXECUTIVE POLICY DECISIONS

The principal assertion made by the Justice Department's lawsuit against Arizona is that Arizona is prohibited from enforcing S.B. 1070 under the doctrine of pre-emption.⁵¹ The basic principle of pre-emption is that Congress has the power to proscribe state action in certain areas where Congress has authority. In order to preempt the states, however, Congress must act in a way that demonstrates unmistakable intent to preempt.⁵² The problem with the Justice Department's lawsuit is that

⁴⁶ See *United States v. Nichols*, 142 F.3d 857, 865 (5th Cir. 1998); *Fuentes*, 2010 WL 707424, at *4.

⁴⁷ Ariz. S.B. 1070 § 2.B.

⁴⁸ U.S. GEN. ACCOUNTING OFFICE, GAO/AIMD-95-147, LAW ENFORCEMENT SUPPORT CENTER: NAME-BASED SYSTEMS LIMIT ABILITY TO IDENTIFY ARRESTED ALIENS 1 (1995).

⁴⁹ See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FISCAL YEAR 2008 ANNUAL REPORT iv (2008).

⁵⁰ Ariz. S.B. 1070 § 2.B.

⁵¹ Complaint at 14–15, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB).

⁵² See *De Canas v. Bica*, 424 U.S. 351, 356 (1976) (stating that pre-emption only occurs where it is clear “either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.”) (quoting *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884–85 (2000) (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79, 90 (1990) (explaining that “[p]re-emption fundamentally is a question of congressional intent” (alteration in original), and that “[t]he Court has observed repeatedly that pre-emption is ordinarily not to be implied absent an ‘actual conflict.’”)).

there is no federal statute that expressly prohibits the state action in question. Congress has simply never passed a law declaring that states may not make arrests on the basis of unlawful immigration status in order to assist the federal government. Indeed, Congress has done just the opposite and passed laws encouraging states to pass laws like S.B. 1070.⁵³

Because no federal statutes expressly preempt S.B. 1070, the Justice Department was forced to bring an implied pre-emption challenge.⁵⁴ Its implied pre-emption argument was that the law conflicts with congressional objectives in regulating immigration.⁵⁵ The problem with this theory is not only has Congress specifically encouraged states to assist in immigration law enforcement,⁵⁶ but the U.S. Supreme Court has also long recognized that states may take actions to discourage illegal immigration.⁵⁷ The last time that the Supreme Court spoke on this subject was in 1976 in the case of *De Canas v. Bica*.⁵⁸ In that case, the Court upheld a California law that prohibited the employment of unauthorized alien workers.⁵⁹ The Court held that the law was not preempted and that states may permissibly pass laws that touch on immigration and discourage illegal immigration as long as they are harmonious state regulations that do not conflict with federal law.⁶⁰

Justice Kennedy, in his concurrence in *Gade v. National Solid Wastes Management Association*, wisely cautioned the Court that it must be careful in inviting judicial inquiries to find conflict pre-emption in the nooks and crannies of federal laws: “A freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law.”⁶¹ Furthermore, in 2005, a unanimous Supreme Court in *Muehler v. Mena* held that local law enforcement officers have the authority to inquire into the immigration status of individuals who

⁵³ *E.g.*, 8 U.S.C. § 1357(g)(1) (2006) (providing for state and local law enforcement officers to be immigration agents); § 1357(g)(10) (expressly reserving to states authority to enforce immigration law); 8 U.S.C. § 1373(c) (2006) (requiring federal officials to respond to state and local law enforcement inquiries related to immigration enforcement).

⁵⁴ *See* Complaint at 14–18, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB).

⁵⁵ *Id.*

⁵⁶ *See supra* note 53.

⁵⁷ *See, e.g.*, *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

⁵⁸ *Id.* The Supreme Court will soon speak again, in the case of *Chamber of Commerce v. Whiting*, 131 S. Ct. 624 (2010), concerning the Legal Arizona Workers Act of 2007.

⁵⁹ *Id.* at 352, 365.

⁶⁰ *See id.* at 355–58.

⁶¹ 505 U.S. 88, 111 (1992) (Kennedy, J., concurring).

have been lawfully detained even without first developing a reasonable suspicion that the person is an illegal alien.⁶²

In addition to these judicial precedents, Congress has taken steps to encourage states to assist the federal government in immigration enforcement.⁶³ The Tenth Circuit in *United States v. Vasquez-Alvarez* correctly held that federal law “evinces a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws.”⁶⁴ If there is no act of Congress that says, even implicitly, that states cannot regulate in a particular manner, then the pre-emption argument must fail.

The Justice Department attorneys addressed this flaw in their case by advancing a novel theory. They claimed that even if Congress did not preempt the states, the Executive Branch did by choosing not to enforce certain federal immigration laws when setting its own priorities in immigration enforcement.⁶⁵ Therefore, the argument runs, because the Executive Branch has chosen not to enforce certain laws, the states are preempted from enforcing the same laws.⁶⁶

This argument is absurd and dangerous for two reasons. First, it makes a mockery of Article II of the Constitution, which states that the President “shall take care that the Laws be faithfully executed,”⁶⁷ which, notably, is the President’s “most important constitutional duty.”⁶⁸ According to the Justice Department’s logic, by abrogating his constitutional duty, the President has thereby preempted the states. Second, it is absurd because the Supremacy Clause of Article VI, which is the source of pre-emption, only comes into operation when *Congress* acts.⁶⁹ Only laws of Congress or treaties ratified by Congress have preemptive effect under the Supremacy Clause.⁷⁰ Unilateral executive

⁶² 544 U.S. 93, 100–01 (2005) (holding that police questioning, even on the subject of immigration status, does not constitute a seizure, and thus “officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status”).

⁶³ *E.g.*, 8 U.S.C. § 1357(g) (2006) (encouraging the states to cooperate with the federal government in immigration enforcement).

⁶⁴ 176 F.3d 1294, 1300 (10th Cir. 1999).

⁶⁵ *See* Complaint at 17–18, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10–1413–PHX–SRB).

⁶⁶ *See id.*

⁶⁷ U.S. CONST. art. II, § 3.

⁶⁸ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

⁶⁹ U.S. CONST. art. VI, cl. 2.

⁷⁰ “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . shall be the supreme Law of the Land . . .” *Id.* Thus by implication, only the Constitution, laws properly passed by Congress under the Constitution, or treaties ratified by the Senate may preempt state law through the Supremacy Clause power. *See id.*; KRIS W. KOBACH, THE HERITAGE FOUND., HERITAGE

actions that are contrary to Congress' manifest intent that federal laws should be enforced, do not, and should not, have any preemptive effect under the Supremacy Clause.

The implications of the Justice Department's argument are truly significant. We are now in a situation where the Executive Branch is asserting that it can unilaterally preempt by choosing not to enforce a federal law, and that its choice not to enforce that law will have the constitutionally significant effect of pushing the states off the field. If an executive whim or an executive order can preempt, then the states will be pushed off the field at the will of the executive, without any congressional action whatsoever. Regardless of one's personal views about the Arizona law, presumably all would agree that the notion of executive pre-emption is truly dangerous to our constitutional republic.