dressed this problem by providing gender-neutral leave provisions. The courts, however, are struggling to view a three-dimensional problem through a two-dimensional lens. *Coleman* reflects the need to modernize the law's approach to sex equality with a more nuanced understanding of discrimination.

II. FEDERAL JURISDICTION AND PROCEDURE

A. Federal Preemption of State Law

State Immigration Enforcement. — Congress's failure to pass meaningful immigration reform over the past decade has encouraged both the executive branch and state and local governments to take a series of stopgap measures that address wildly divergent issues. At one extreme, the Obama Administration recently announced that it would stop deporting young illegal immigrants who are not "enforcement priorities."[1] At the other end of the spectrum, many states have introduced or enacted legislation designed to reduce the number of illegal immigrants in their communities.[2] Arizona is one such state. In 2010, it enacted the Support Our Law Enforcement and Safe Neighborhoods Act,[3] better known as S.B. 1070, which made "attrition through enforcement the public policy of all state and local government agencies in Arizona."[4] The Supreme Court has long held that the federal government has exclusive authority to regulate immigration[5] but has also affirmed that states can enact laws that affect immigrants under their inherent police powers when Congress so allows.[6] Thus, S.B. 1070 and its progeny raise salient constitutional questions about the proper role of the states — if any — in combating illegal immigration through enforcement. Last Term, in *Arizona v. United States*,[7] the Supreme Court held that federal immigration law

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[1] Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. 1 (June 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[2] *See, e.g.*, Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 459 (2008) (noting that in 2007, "[f]or the first time ever, legislators in all fifty states introduced bills dealing with illegal immigration").

[3] Ch. 113, 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, and 41).

[4] *Id.* § 1, 2010 Ariz. Sess. Laws at 450.

[5] *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 68 (1941); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875).

[6] *See* De Canas v. Bica, 424 U.S. 351, 355 (1976) ("[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration . . . ."); *see also* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1981 (2011) ("Arizona's licensing law [penalizing employers for hiring illegal aliens] falls well within the confines of the authority Congress chose to leave to the States . . . .").

[7] 132 S. Ct. 2492 (2012).

preempted three of four disputed sections in S.B. 1070, but that section 2(B), a particularly controversial provision, withstood initial constitutional scrutiny.[8] Although the Court affirmed general federal supremacy over immigration policy, it left open the narrow question of when a court should go beyond a textual analysis of a state immigration enforcement law to explore how it is likely to be applied — a decision that provides little guidance to states seeking to craft immigration laws capable of withstanding initial constitutional challenges.

When enacted, S.B. 1070 became one of the strictest state immigration laws in the United States.[9] Four provisions would subsequently raise particularly salient preemption concerns: Section 3 made a state misdemeanor of an alien's "willful failure to complete or carry an alien registration document" in violation of federal immigration law.[10] Section 5(C) made it a state misdemeanor for an illegal alien to knowingly work or seek work in Arizona.[11] Section 6 allowed state and local officers to make warrantless arrests if they had probable cause to believe that the "person to be arrested has committed any public offense that makes the person removable."[12] And section 2(B) required officers to make "a reasonable attempt" to determine the immigration status of anyone they had legally stopped, detained, or arrested if they had reasonable suspicion that the person was an illegal alien.[13]

Before S.B. 1070 came into effect, the United States filed a complaint challenging the bill's constitutionality as well as a motion for a preliminary injunction in the U.S. District Court for the District of Arizona.[14] The federal government argued that it held exclusive power to regulate immigration and that S.B. 1070 was preempted by federal law.[15] Judge Bolton declined the government's invitation to enjoin S.B. 1070 in its entirety, noting that the bill contained a severability clause that "obligated" her "to consider S.B. 1070 on a section by section and provision by provision basis."[16] However, she found that the United States' specific challenges to sections 2(B), 3, 5(C), and 6 were likely to succeed on the merits and that a refusal to grant a preliminary injunction would cause the government irrepara-

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[8] *Id.* at 2510.

[9] *See* Lauren Gilbert, *Immigrant Laws, Obstacle Preemption and the Lost Legacy of* McCulloch, 33 BERKELEY J. EMP. & LAB. L. 153, 155 (2012).

[10] ARIZ. REV. STAT. ANN. § 13-1509 (2012).

[11] *Id.* § 13-2928(C).

[12] *Id.* § 13-3883(A)(5).

[13] *Id.* § 11-1051(B).

[14] United States v. Arizona, 703 F. Supp. 2d 980, 986 (D. Ariz. 2010).

[15] Plaintiff's Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof at 11–46, *Arizona*, 703 F. Supp. 2d 980 (No. 2:10-cv-01413).

[16] *Arizona*, 703 F. Supp. 2d at 986.

ble harm.[17] She therefore granted a preliminary injunction against those four sections only.[18]

The Ninth Circuit affirmed.[19] Writing for the majority, Judge Paez[20] dismissed Arizona's arguments that federal law did not preempt the four enjoined sections and that the district court had erred in granting a preliminary injunction. Rather, he found section 2(B) preempted because it stood as an obstacle to the federal government's immigration enforcement discretion,[21] because it raised foreign relations issues,[22] and because it posed a "threat of 50 states layering their own immigration enforcement rules on top of the [federal regime]."[23] Similarly, he found section 3 preempted because "[n]othing [in the relevant federal statute] indicates that Congress intended for states to participate in the enforcement or punishment of federal immigration registration rules."[24] Next, the Immigration Reform and Control Act of 1986[25] (IRCA) preempted section 5(B), as Congress had "crafted a very particular calibration of force which does not include the criminalization of work."[26] Finally, section 6 was preempted because it "significantly expand[ed] the circumstances in which Congress has allowed state and local officers to arrest immigrants."[27]

Judge Noonan concurred but wrote separately to emphasize S.B. 1070's "incompatibility with federal foreign policy."[28] The statute intended to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States"[29] and was thus a distinct, state-crafted "policy on immigration."[30] As the federal government exclusively occupied the field of foreign affairs, Arizona impermissibly intruded on federal authority.[31]

Judge Bea concurred in part and dissented in part.[32] First, he would have held that section 2(B) was not preempted because "Con-

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17 *Id.* at 998–99, 1002, 1006–07.

18 *Id.* at 1008.

19 United States v. Arizona, 641 F.3d 339 (9th Cir. 2011).

20 Judge Paez was joined in full by Judge Noonan and in part by Judge Bea.

21 *Arizona*, 641 F.3d at 352.

22 *Id.* at 353–54 (discussing criticisms raised and protests lodged by foreign leaders).

23 *Id.* at 354.

24 *Id.* at 355.

25 Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

26 *Arizona*, 641 F.3d at 360.

27 *Id.* at 362. Specifically, section 6 would permit state and local officers "to conduct warrantless arrests based on probable cause of *civil* removability," which federal law does not allow. *Id.*

28 *Id.* at 366 (Noonan, J., concurring).

29 *Id.* (quoting S.B. 1070, ch. 113, § 1, 2010 Ariz. Sess. Laws 450, 450).

30 *Id.* at 367.

31 *Id.* at 368–69 (citing Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003)).

32 *Id.* at 369 (Bea, J., concurring in part and dissenting in part).

gress envisioned, intended, and encouraged intergovernmental cooperation between state and federal agencies" for purposes of verifying an individual's immigration status.[33] Moreover, he disagreed with the majority's foreign relations analysis, arguing that a state law with an impact on foreign relations conflicts with a federal foreign affairs policy only when the federal policy is "established."[34] Second, Judge Bea argued that section 6 was facially constitutional because a "'set of circumstances' existed" under which law enforcement officials could comply with federal immigration law,[35] because state and local officers have "inherent authority to enforce the civil provisions of federal immigration law,"[36] and because relevant federal law does not evince an intent to limit states' enforcement authority.[37]

The Supreme Court affirmed in part and reversed in part.[38] Writing for the Court, Justice Kennedy[39] held that federal law preempted sections 3, 5(C), and 6 of S.B. 1070, but that section 2(B) — requiring officers to make efforts to verify an individual's immigration status during a legal stop, detention, or arrest under specific circumstances — survived the United States' facial challenge.[40] He first acknowledged that "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."[41] Such power — which includes significant executive discretion over enforcement decisions[42] — is grounded in the federal government's exclusive authority over foreign affairs,[43] its constitutional responsibility to "establish an uniform Rule of Naturalization,"[44] and the complex statutory immigration scheme crafted by Congress.[45] Justice Kennedy next explored the implications of illegal immigration for Arizona, citing allegations that unauthorized aliens comprise nearly six percent of its population and are associated with crime and other social ills.[46]

After examining the federal and state interests at stake, Justice Kennedy undertook a preemption analysis of each disputed provision.

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[33] *Id.* at 382.

[34] *Id.* at 381 (emphasis omitted).

[35] *Id.* at 383 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

[36] *Id.* at 386.

[37] *See id.*

[38] *Arizona*, 132 S. Ct. at 2510.

[39] Justice Kennedy was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, and Sotomayor. Justice Kagan took no part in the case.

[40] *Arizona*, 132 S. Ct. at 2510.

[41] *Id.* at 2498.

[42] *Id.* at 2499.

[43] *See id.* at 2498 (also noting that "[i]mmigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation").

[44] *Id.* (quoting U.S. CONST. art. I, § 8, cl. 4) (internal quotation marks omitted).

[45] *See id.* at 2499–2500 (discussing alien admission, registration, and removal).

[46] *Id.* at 2500.

First, because "the Federal Government has occupied the field of alien registration,"[47] section 3 — which created a state misdemeanor for the "willful failure to complete or carry an alien registration document"[48] — was preempted.[49] So too was section 5(C), which, by criminalizing illegal aliens' pursuit of work,[50] interfered with Congress's chosen means of preventing unauthorized employment under IRCA.[51] Third, section 6, which allowed state officers to arrest a person on probable cause that he was removable,[52] posed an obstacle to congressional goals and was therefore preempted[53] for enabling Arizona to "achieve its own immigration policy" and to engage in "unnecessary harassment of some aliens . . . whom federal officials determine should not be removed."[54]

Lastly, Justice Kennedy turned to section 2(B), which required Arizona officials to make a "reasonable attempt . . . to determine the immigration status" of anyone they stopped, detained, or arrested if there was "reasonable suspicion" that the individual was an illegal alien.[55] To make the requisite determination, Arizona officials would contact a federal agency, Immigration and Customs Enforcement (ICE).[56] In holding that federal law did not preempt section 2(B), Justice Kennedy argued that "[t]he federal scheme . . . leaves room for a policy requiring state officials to contact ICE as a routine matter."[57] Moreover, Arizona courts and officials could reasonably interpret section 2(B) in a way

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47 *Id.* at 2502. This conclusion stemmed from more than seventy years of precedent, and specifically from *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941), which held that Pennsylvania could not create a statewide immigrant registration scheme in light of pervasive federal regulations.

48 ARIZ. REV. STAT. ANN. § 13-1509 (2012).

49 *Arizona*, 132 S. Ct. at 2503. Arizona had argued that section 3 should "survive preemption because the provision has the same aim as federal law and adopts its substantive standards." *Id.* at 2502. The Court roundly rejected this so-called "mirror-image theory" of state immigration enforcement authority for being unpersuasive in its logic and for "ignor[ing] the basic premise of field preemption": that states may not intrude *at all* into a field over which the federal government has exclusive authority. *Id. See generally* Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251 (2011) (discussing recent influence of mirror-image theory and criticizing the same).

50 ARIZ. REV. STAT. ANN. § 13-2928(C).

51 *Arizona*, 132 S. Ct. at 2505. IRCA places criminal and civil penalties on *employers* who knowingly violate federal immigration laws, and the Court found that Congress "made a deliberate choice not to impose criminal penalties on aliens" who seek work. *Id.* at 2504.

52 ARIZ. REV. STAT. ANN. § 13-3883(A)(5).

53 *Arizona*, 132 S. Ct. at 2507.

54 *Id.* at 2506. For example, the federal government would not want to harass veterans, college students, or individuals assisting the government with criminal investigations. *Id.*

55 ARIZ. REV. STAT. ANN. § 11-1051(B).

56 *Arizona*, 132 S. Ct. at 2507.

57 *Id.* at 2508.

that would mitigate constitutional concerns of prolonged detention.[58] But he cautioned that the Court's decision "does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect."[59]

Justice Scalia concurred in part and dissented in part.[60] He argued that the majority deprived Arizona "of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there."[61] He rejected the arguments that the federal government could occupy the field of immigration — a field that he believed went "to the *core* of state sovereignty"[62] — and that the Executive's exclusive foreign relations power could bear on the question of immigration regulation.[63] Consequently, he argued, "Arizona is *entitled* to have 'its own immigration policy' — including a more rigorous enforcement policy — so long as that does not conflict with federal law."[64]

Justice Thomas concurred in part and dissented in part.[65] He argued that federal law preempted none of the disputed provisions of S.B. 1070 because "there is no conflict between the 'ordinary meanin[g]'" of the federal and state statutes.[66] He reiterated his belief, also expressed in other opinions, that a "purposes and objectives"[67] preemption inquiry "is inconsistent with the Constitution because it invites courts to engage in freewheeling speculation about congressional purpose that roams well beyond statutory text."[68]

Justice Alito also concurred in part and dissented in part.[69] Unlike the majority, he would have held that federal law did not preempt sections 5(C) and 6. First, he argued that it was ambiguous whether Congress intended IRCA to prohibit states from imposing criminal pe-

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[58] *Id.* at 2509. Justice Kennedy envisioned that Arizona officers would complete the requisite immigration status check either during a detention whose length was independently justified or, if there was no such justification, after release. *Id.*

[59] *Id.* at 2510.

[60] *Id.* at 2511 (Scalia, J., concurring in part and dissenting in part). Justice Scalia concurred only with the majority's holding that section 2(B) was not preempted. *Id.* at 2516.

[61] *Id.* at 2511.

[62] *Id.* at 2514.

[63] *Id.* at 2514–15.

[64] *Id.* at 2516–17.

[65] *Id.* at 2522 (Thomas, J., concurring in part and dissenting in part). Justice Thomas concurred only with the majority's holding that federal law does not preempt section 2(B). *Id.*

[66] *Id.* (alteration in original) (quoting Wyeth v. Levine, 129 S. Ct. 1187, 1208 (2009) (Thomas, J., concurring in the judgment)).

[67] *Id.* at 2524 (internal quotation marks omitted).

[68] *Id.*

[69] *Id.* at 2524 (Alito, J., concurring in part and dissenting in part). Justice Alito concurred with the majority that the lower court incorrectly enjoined section 2(B) but correctly enjoined section 3. *Id.* at 2524–25.

nalties on illegal aliens seeking work.[70] Applying the presumption against preemption, he argued that the Court should have deferred to the Arizona legislature given the lack of clarity at the federal level.[71] Thus, the United States did not meet the "high threshold" of proof it needed to establish obstacle preemption for section 5(C).[72] Second, Justice Alito would have held that the United States failed to establish that "no set of circumstances exists under which [section 6] would be valid."[73] "The trouble with this premature, facial challenge," he noted, "is that it affords Arizona no opportunity to implement its law in a way that would avoid any potential conflicts with federal law."[74]

Although *Arizona* reaffirmed federal primacy over immigration law, it did so in a manner that provides only limited guidance for state legislatures seeking to craft immigration enforcement laws able to withstand preliminary constitutional challenges.[75] In particular, Justice Kennedy's analysis of S.B. 1070 section 6, in which he found the provision to be preempted, stands in stark contrast to his analysis of S.B. 1070 section 2(B), in which he found the opposite. Each discussion, read independently, is well grounded in defensible precedent. Read together, however, they present inherently contradictory accounts of when a court will engage primarily in a textual analysis of a state immigration statute and when a court will also explore the police behavior likely to flow from the statute's provisions.

The federal government has maintained nearly exclusive authority over immigration law for more than 130 years,[76] but states do have some room to regulate immigrant behavior under their inherent police powers.[77] Courts uphold state laws that touch on immigration policy

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[70] *Id.* at 2525.

[71] *Id.* at 2530–31.

[72] *Id.* at 2531 (quoting Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1985 (2011) (plurality opinion)).

[73] *Id.* at 2534 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)) (internal quotation mark omitted).

[74] *Id.*

[75] *See* Gilbert, *supra* note 9, at 183–84 (advocating for consistent preemption principles to "assess[] different types of state laws regulating immigrants," *id.* at 183).

[76] *See* Chy Lung v. Freeman, 92 U.S. 275, 280–81 (1875) (striking down California immigration statute on foreign relations grounds and emphasizing that the federal government holds exclusive power to regulate immigration because "otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations," *id.* at 280); *see also* Toll v. Moreno, 458 U.S. 1, 10 (1982) (discussing sources of federal immigration authority in the case law).

[77] *See, e.g.*, *Whiting*, 131 S. Ct. at 1973 (upholding Arizona law penalizing employers for knowingly hiring illegal aliens because federal law included savings clause for sanctions imposed under "licensing and similar laws"); De Canas v. Bica, 424 U.S. 351, 356 (1976) (noting that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State"). *See generally* John C. Eastman, *Papers, Please: Does the Constitution Permit the States a Role in Immigration Enforcement?*, 35 HARV. J.L. & PUB. POL'Y

only if Congress has not explicitly or implicitly expressed its intent to preempt state law in the area at issue.[78] The doctrine governing when state immigration law will be preempted is unsettled; courts split on the question of whether states can act under their police powers in the absence of a congressional prohibition or whether states can legislate in a field only when Congress affirmatively allows it.[79]

Any overlap of federal and state immigration enforcement authority would pose a significant challenge to resolving the growing tension between federal and state enforcement goals. Yet because of a recent nationwide lobbying campaign,[80] the United States has seen a rash of proposed state immigration laws that are deliberately more restrictive than federal policy has been over the past two administrations.[81] *Arizona*, in its disparate analyses of sections 2(B) and 6, did very little to help federal and state legislators resolve these tensions.

While the Court distinguished sections 2(B) and 6 on several grounds — including the different police powers conferred and the different legislative contexts of the relevant federal provisions — it failed to acknowledge the ways in which the provisions were strikingly similar. Both governed how Arizona police officers should interact with someone they believe to be removable from the United States.[82] Both encouraged local officers to determine an individual's immigration status in order to fulfill S.B. 1070's goal of achieving attrition through enforcement.[83] Both implicated the federal statutory immigration detention and removal scheme under the guise of "cooperation" with federal

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569 (2012) (concluding that states are not constitutionally barred from regulating aspects of immigration enforcement).

[78] *See, e.g.*, *Whiting*, 131 S. Ct. at 1973 (holding that Arizona had authority to restrict business licenses of employers that knowingly hired illegal aliens because the federal statutory scheme explicitly let states enact "licensing" penalties); *De Canas*, 424 U.S. at 356 ("[A]bsent congressional action, [a state statute is not] an invalid state incursion on federal power."); Hines v. Davidowitz, 312 U.S. 52, 74 (1941) (finding state alien registration law preempted by federal statute).

[79] *See, e.g.*, Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 336 (noting that *Whiting* could be read to support either view).

[80] *See* Chin & Miller, *supra* note 49, at 253–57 (discussing success of S.B. 1070 and similar bills, as well as the lobbying effort to get such laws enacted).

[81] Both President Barack Obama and former President George W. Bush have supported congressional reform efforts that ultimately stalled. *See* Julia Preston, *Obama to Push Immigration Bill as One Priority*, N.Y. TIMES, Apr. 9, 2009, at A1; Press Release, White House, President Bush Disappointed by Congress's Failure to Act on Comprehensive Immigration Reform (June 28, 2007), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2007/06/20070628-7.html.

[82] Section 6 allows an officer to make an arrest if he has probable cause to believe the individual is removable. ARIZ. REV. STAT. ANN. § 13-3883 (2012). Section 2(B) requires an officer to check the immigration status of someone he detains or arrests. *Id.* § 11-1051(B). By contrast, sections 3 and 5(C) criminalize certain acts taken by illegal aliens. *See id.* §§ 13-1509, 13-2928(C).

[83] S.B. 1070, ch. 113, § 1, 2010 Ariz. Sess. Laws 450, 450.

law.[84] And both faced constitutional challenges before Arizona officials had a chance to construe and implement the provisions.

Yet the Court glossed over these similarities, applying dramatically different analytical techniques in its discussion of each provision. Justice Kennedy's analysis of section 2(B) turned primarily on whether the text *could* be constitutionally interpreted and applied by Arizona courts and police officers, resulting in the Court's showing greater deference to the Arizona legislature. In contrast, the Court's discussion of section 6 delved into how the statute was *likely* to be applied by state officials, leading to a finding of preemption. The former approach evinces a lingering adherence to the Court's presumption against preemption when state police powers are at issue;[85] the latter reflects a line of case law establishing that the federal government has exclusive authority over immigration policy.[86] By using differing modes of analysis without clarifying when each approach is appropriate, *Arizona* will force lower courts and state legislatures to determine which judicial approach should, and is likely to, apply to state immigration enforcement statutes.

Take section 6 first. It stipulates that a state officer, "without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offence that makes [him] removable from the United States."[87] Justice Kennedy held that this language conflicted with federal law regulating "when it is appropriate to arrest an alien during the removal process."[88] But his discussion focused not only on the textual challenge, but also on potentialities: the state authority at issue "*could* be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case."[89] Arizona *could* "achieve its own immigration policy."[90] The provision *could* cause "unnecessary harassment of some aliens . . . whom federal officials determine should not be removed."[91]

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[84] Both section 6 and section 2(B) deal with federal removability provisions, *see Arizona*, 132 S. Ct. at 2505, 2508, and implicate 8 U.S.C. § 1357(g) (2006), which provides parameters for federal-state cooperation in immigration enforcement. *See Arizona*, 132 S. Ct. at 2506, 2508. By contrast, the United States claimed that section 3 interfered with federal immigration registration requirements, *see id.* at 2501, and that section 5(C) interfered with the federal illegal immigration employment scheme, *see id.* at 2503.

[85] *See* Young, *supra* note 79, at 344 (arguing that the "2010 Term reveal[s] a Court that has still not made up its mind about preemption").

[86] *See* Gilbert, *supra* note 9, at 163 (arguing that *Whiting* shows a trend in the Court "to no longer explicitly apply the presumption against preemption and in some cases to do the opposite").

[87] 132 S. Ct. at 2505 (alterations in original) (quoting ARIZ. REV. STAT. ANN. § 13-3883(A)(5)).

[88] *Id.*; *see id.* at 2507.

[89] *Id.* at 2506 (emphasis added).

[90] *Id.*

[91] *Id.*

Now turn to section 2(B). It requires state officers to determine or make a "reasonable attempt . . . to determine the immigration status" of any person legitimately stopped or arrested if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States."[92] Justice Kennedy acknowledged that the provision could raise constitutional worries if incorrectly implemented,[93] but brushed aside the potential for unconstitutional police harassment of immigrant communities by way of prolonged detention because section 2(B) "could be read to avoid these concerns."[94] Ultimately, the Court concluded that, if interpreted correctly by Arizona courts and law enforcement officials, section 2(B) would be a permissible exercise of state power "absent some showing that it has other consequences that are adverse to federal law and its objectives."[95]

Read independently, both analyses were correct under existing doctrine. By finding section 6 preempted, Justice Kennedy adhered to a long line of cases stating that the power to regulate immigration "is unquestionably exclusively a federal power."[96] As such, he correctly went beyond S.B. 1070's text and examined its likely consequences: the provision could enable local police to harass immigrants, such harassment could interfere with federal removal priorities, and the regulation was therefore preempted as an impermissible obstacle to federal law. In contrast, his textual analysis of section 2(B) followed a line of doctrine that applies a presumption against preemption to state statutes when a saving construction is fairly possible.[97]

Read as a whole, however, the Court's differing treatment of similar provisions — without a clear articulation of the relevant distinguishing factors — provides limited guidance for state legislatures that have enacted, or that want to enact, statutes similar to S.B. 1070.[98] Under *Arizona*, a federal court may enjoin enforcement of a statute if it has the potential to lead to police harassment of immigrants, or the court may seek a plausible statutory interpretation that could save the

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[92] ARIZ. REV. STAT. ANN. § 11-1051(B).

[93] *Arizona*, 132 S. Ct. at 2509 ("Detaining individuals solely to verify their immigration status would raise constitutional concerns.").

[94] *Id.*

[95] *Id.*

[96] De Canas v. Bica, 424 U.S. 351, 354 (1976); *see also* Toll v. Moreno, 458 U.S. 1, 10 (1982).

[97] *See De Canas*, 424 U.S. at 354–55; *see also* Wyeth v. Levine, 129 S. Ct. 1187, 565 (2009) (discussing presumption against preemption and noting that the Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted)).

[98] As of April 2012, five other states had enacted immigration enforcement laws similar to S.B. 1070; all of them were at least partially enjoined when enacted. *See Anti-Illegal Immigration Laws in States*, N.Y. TIMES (Apr. 22, 2012), http://www.nytimes.com/interactive/2012/04/22/us/anti-illegal-immigration-laws-in-states.html.

legislation from constitutional violations. A court may find that state immigration legislation encroaches on federal authority, or it may find that the relevant federal scheme encourages state cooperation.

A more internally consistent outcome would have been to find either that both sections 2(B) and 6 were preempted by federal law or that both sections were facially constitutional such that they could survive a preemptive challenge. Not one of the other opinions in the *Arizona* line of cases — from Judge Bolton of the District Court of Arizona to Justice Alito of the Supreme Court — upheld one of the sections while striking down the other. *Arizona*, far from being a definitive statement about the proper role of the states in immigration enforcement efforts, will generate future litigation as states continue to explore the precise contours of their police powers in immigration enforcement.

B. Habeas Corpus

Excuse of State Procedural Default. — For nearly forty years, one of the primary barriers facing state prisoners who seek to challenge their confinement in federal habeas court has been the adequate and independent state ground of procedural default. The current doctrine, roughly speaking, dictates that if a state court has ruled that a prisoner missed his chance to litigate a federal constitutional issue, the federal courts must respect that determination and let the conviction stand.[1] This principle, however, is subject to several narrow exceptions, including the rule from *Wainwright v. Sykes*[2] that a federal court may excuse procedural default and proceed to the merits of a claim upon a petitioner's showing of cause for, and prejudice resulting from, the default. One common basis for a finding of cause and prejudice is ineffectiveness of counsel. If a prisoner has inadvertently defaulted on a federal constitutional claim because of his trial or appellate counsel's incompetence, and that incompetence meets the standard of constitutional inadequacy set forth in *Strickland v. Washington*,[3] a federal habeas court will excuse the default and reach the merits of the claim.[4]

Last Term, in *Martinez v. Ryan*,[5] the Supreme Court opened up another narrow avenue through which state prisoners may revive defaulted constitutional claims, holding that ineffective assistance of counsel during *postconviction review* can serve as cause to excuse a defaulted claim of ineffective assistance of trial counsel if the postconviction proceeding was the first opportunity for the prisoner to raise

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[1] Coleman v. Thompson, 501 U.S. 722, 729 (1991).
[2] 433 U.S. 72 (1977).
[3] 466 U.S. 668 (1984).
[4] *See* Murray v. Carrier, 477 U.S. 478, 488–89 (1986).
[5] 132 S. Ct. 1309 (2012).