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Preemption and United States v. South Carolina: Undermining Our Nation's Border and the Constitution's Border between State and Federal Sovereignty

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PREEMPTION AND *UNITED STATES V. SOUTH CAROLINA*: UNDERMINING OUR NATION'S BORDER AND THE CONSTITUTION'S BORDER BETWEEN STATE AND FEDERAL SOVEREIGNTY

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I. INTRODUCTION

Central to our system of federalism is "the principle that both the National and State Governments have elements of sovereignty the other is bound to respect."[1] The federal government has all enumerated powers given to it in the U.S. Constitution, and the Tenth Amendment recognizes that all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively."[2]

One consequence of federalism is that Congress and state legislatures often pass laws addressing similar circumstances. These laws sometimes are "in conflict or at cross-purposes."[3] To address this possibility, our nation's Founders included in the Federal Constitution the Supremacy Clause, which provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[4] Under this principle, Congress can trump state law in areas in which it has jurisdiction through what is called the *preemption power*.[5]

Congress's preemption power has been placed into three categories. The first, express preemption, occurs when Congress properly enacts a statute containing a provision that explicitly says it preempts state law.[6]

The second category, field preemption, occurs when Congress properly enacts legislation occupying a field that Congress intends to regulate

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1. Arizona v. United States, 132 S. Ct. 2492, 2500 (2012).
2. U.S. CONST. amend. X.
3. *Arizona v. United States*, 132 S. Ct. at 2500.
4. U.S. CONST. art. VI, cl. 2.
5. *Arizona v. United States*, 132 S. Ct. at 2500.
6. *Id.* at 2500–01.

exclusively.[7] This type of preemption is implied because the exclusive intent is "inferred from a framework of regulation so pervasive . . . that Congress left no room for the States to supplement it or where there is a federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[8] Notably, when field preemption exists, "even complementary state regulation is impermissible."[9]

The last type of preemption, conflict preemption, is similar to field preemption in that it is implied.[10] Conflict preemption occurs when Congress properly enacts legislation that conflicts with state law.[11] It "includes cases where compliance with both federal and state regulations is a physical impossibility, and those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[12]

The "heart" of preemption cases involves statutory construction.[13] However, because disputes most commonly arise in assertions of implied preemption, whether Congress has preempted state police power "is often a perplexing question."[14] Thus, courts have created "two cornerstones" for preemption analysis.[15] First, "the ultimate touchstone" is Congress's intent.[16] The second touchstone, which is interchangeably called the *presumption against preemption* or the *clear statement rule*,[17] posits that "courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress."[18]

Perhaps the most high profile examples of recent preemption jurisprudence have involved state laws designed to address problems arising from illegal

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7. *Id.* at 2501.

8. *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (internal quotation marks omitted).

9. *Id.* at 2502.

10. *Compare id.* at 2501 (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) (describing conflict preemption), *with supra* notes 7–8 and accompanying text (describing field preemption).

11. *Arizona v. United States*, 132 S. Ct. at 2501 (citing Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000)).

12. *Id.* (quoting *Florida Lime*, 373 U.S at142–43; *Hines*, 312 U.S. at 67) (internal quotation marks omitted).

13. Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 874 (2008).

14. *Rice*, 331 U.S. at 230–31 (citing Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944); South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938); Kelly v. Washington, 302 U.S. 1 (1937); Townsend v. Yeomans, 301 U.S. 441 (1937)).

15. Wyeth v. Levine, 555 U.S. 555, 565 (2009).

16. *Id.* (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted).

17. Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 271.

18. Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (quoting *Rice*, 331 U.S. at 230) (internal quotation marks omitted).

immigration. Just this past year, in *United States v. South Carolina*,[19] the U.S. Court of Appeals for the Fourth Circuit struck down three provisions in a South Carolina law intended to protect lawfully present individuals within the state, pursuant to the state's police powers.[20] This Essay discusses the circumstances that led to the passage of South Carolina's legislation, the Fourth Circuit's opinion, and the judicial precedent that played a significant part in the dispute. In concluding, this Essay argues that the Fourth Circuit's decision should concern not only state legislators, but also anyone interested in preserving the constitutional principle of federalism. Although the court sought to frame its opinion within the realm of foreign policy, the decision's primary impact is the manner in which it undermines the constitutional concept of state sovereignty.

II. LEGISLATIVE BACKGROUND

In 1952, Congress enacted the Immigration and Nationality Act (INA).[21] The INA established a federal statutory scheme for regulating immigration and naturalization, setting the terms of admission and subsequent treatment of aliens lawfully in the United States.[22]

Since the INA's enactment, many states have taken action to address problems related to illegal immigration.[23] In 1971, for example, California passed a law that prohibited the knowing employment of illegal aliens if that employment would adversely affect resident workers.[24] Five years later, the California law was the subject of a preemption challenge based upon the INA in the U.S. Supreme Court.[25] In that appeal, *De Canas v. Bica*,[26] the Court noted prior cases holding that the federal government has broad immigration and naturalization powers.[27] The Court, however, prefaced its opinion with a significant distinction:

> Power to regulate *immigration* is unquestionably exclusively a federal power. But the Court has never held that every state enactment which *in any way deals with aliens* is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised. . . . [S]tanding alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be *admitted into*

19. 720 F.3d 518 (4th Cir. 2013).
20. *See id.* at 522.
21. Pub. L. 82-414, 66 Stat. 163 (1952).
22. *Id.*
23 Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1973 (2011).
24 *Id.* at 1973–74 (citing 1971 Cal. Stats. ch. 1442, § 1(a)).
25. De Canas v. Bica, 424 U.S. 351 (1976).
26. 424 U.S. 351.
27. *Id.* at 358 n.6 (quoting Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948)).

> the country, and the conditions under which a legal entrant *may remain*.[28]

The Court held that "[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the [s]tate," and "California's attempt . . . to prohibit the knowing employment by California employers of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of such police power regulation."[29] The Court then held that the INA did not preempt California's law, reasoning that no legislative text or legislative history of the INA provided "any specific indication . . . that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular."[30]

A short time afterward, in *Plyler v. Doe*,[31] the Supreme Court described *De Canas* as recognizing that "the 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."[32] Subsequent federal appellate cases and a U.S. Department of Justice Office of Legal Counsel opinion further endorsed state enforcement of immigration laws, reasoning that the authority existed under states' inherent police powers and that federal law had not curtailed it.[33]

Based on this encouraging guidance, many states—including South Carolina—passed laws intended to mirror federal statutes.[34] These state laws were a response to growing concerns that the Federal Executive was—as a matter of *general* policy—not enforcing specific immigration laws passed by

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28. *Id.* at 354–55 (emphasis added) (citations omitted).

29. *Id.* at 356.

30. *Id.* at 358 (footnote omitted).

31. 457 U.S. 202 (1982).

32. *Id.* at 225.

33. *See, e.g.*, United States v. Vasquez-Alvarez, 176 F.3d 1294, 1295 (10th Cir. 1999) (concluding that federal law "does not limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws"); Gonzales v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983) (holding that federal law does not preclude local enforcement of the criminal provisions of the INA), *overruled on other grounds by* Hodgers–Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999); Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on* Arizona v. United States, 9 STAN. J. C.R. & C.L. 1, 23 (2013) ("[A]n undisclosed opinion [of the Office of Legal Counsel] . . . articulated a far-reaching view of police authority to arrest for violations of federal law inher[ing] in the States' status as sovereign entities. The memo stated that federal law did not bar and in fact affirmatively authorized state police arrests for federal immigration violations—both criminal *and* civil.") (internal quotation marks omitted).

34. *See, e.g.*, Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1974 n.1 (2011) (indicating state statutes that prohibit the employment of unauthorized aliens); Guttentag, *supra* note 33, at 6 (discussing the argument "that 'mirroring' federal law justified state legislation").

Congress to the detriment of the safety and employment interests of state residents.[35]

South Carolina's response was the Illegal Immigration Reform Act of 2008 (IIRA).[36] The IIRA was comprehensive, but its most significant sections addressed individuals who incentivized and facilitated illegal immigration. The IIRA mandated that employers verify the immigration status of new hires either through the federal government's E-Verify program or by requiring the review of state identification documents.[37] Further, it imposed civil fines and license suspensions on employers who failed to verify the status of new employees, or who knowingly or intentionally hired illegal immigrants.[38] Tracking federal law, the IIRA also imposed criminal penalties on individuals who transported, harbored, or concealed illegal immigrants from discovery.[39] As for provisions that worked directly upon illegal immigrants, the IIRA imposed criminal penalties on individuals who committed identity fraud for immigration purposes.[40] It also prohibited illegal immigrants from obtaining in-state tuition and scholarships.[41] Lastly, the bill required that the South Carolina Law Enforcement Division conduct investigations in cooperation with federal authorities.[42]

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35. John C. Eastman & Karen J. Lugo, *Arizona's Immigration Storm*, 12 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 68, 68 (June 2011). Further concerns emphasized that the Executive's refusal to enforce properly enacted immigration and naturalization laws undermines those laws' efforts to assimilate immigrants and educate them about traditional American history and culture. The immigration and naturalization laws are useful tools to combat the dangers to good government caused by the passions of a factious people, highlighted by Alexander Hamilton and James Madison in Federalist Numbers 9 and 10. THE FEDERALIST NO. 9 (Alexander Hamilton), NO. 10 (James Madison). As President Theodore Roosevelt intimated, an unchecked propensity of man to "keep segregated with men of his own origin and separated from the rest of America" weakens this Nation's internal harmony and security. Letter from Theodore Roosevelt to Richard M. Hurd, President of the American Defense Society (Jan. 3, 1919).

36. South Carolina Illegal Immigration Reform Act, No. 280, 2008 S.C. Acts 2325.

37. *Id.* § 19, 2008 S.C. Acts at 2355–56 (codified as amended at S.C. CODE ANN. §§ 41-8-10 through -140 (Supp. 2013)). During legislative deliberations, the IIRA hit a significant roadblock. I offered an amendment that would have required employers to use E-Verify for all newly hired employees. Others strongly opposed the use of E-Verify. An impasse ensued, which was ultimately broken with a compromise amendment that permitted employers to use either E-Verify or state-issued identification documents. *See* [2008] 1 S.C. SENATE J. 892. This compromise ultimately enabled the IIRA to pass into law.

38. § 19, 2008 S.C. Acts at 2358–60 (codified as amended at S.C. CODE ANN. § 41-8-50(D) (Supp. 2013)).

39. *Id.* § 9, 2008 S.C. Acts at 2342–43 (codified as amended at S.C. CODE ANN. § 16-9-460 (Supp. 2013)).

40. *Id.* § 9, 2008 S.C. Acts at 2343–44 (codified as amended at S.C. CODE ANN. § 16-13-525 (Supp. 2013)).

41. *Id.* § 17, 2008 S.C. Acts at 2354 (codified as amended at S.C. CODE ANN. § 59-101-430 (Supp. 2013)).

42. *Id.* § 4, 2008 S.C. Acts at 2335–36 (codified as amended at S.C. CODE ANN. § 23-3-80 (Supp. 2013), *repealed by* Act of June 17, 2011, No. 69, § 16, 2011 S.C. Acts 325, 345).

As the South Carolina General Assembly was considering the IIRA, laws passed by Arizona were the subject of substantial headlines.[43] The laws were similar to the IIRA in many respects.[44] In some ways, however, they were more effective at combating our mutual troubles. For example, Arizona employers were required to use E-Verify instead of having the option of checking prospective employees' state-issued identification documents in determining those employees' immigration status.[45] Moreover, Arizona explicitly suspended licenses unrelated to employment purposes—a step that was, in comparison, broader than the IIRA.[46] These Arizona laws were the subject of a federal court preemption challenge, and in March 2009, the Ninth Circuit Court of Appeals upheld them.[47] Groups opposed to the effort sought certiorari to the Supreme Court, which was granted.[48]

Meanwhile, members of the South Carolina General Assembly were hearing a consistent cry from constituents that people were taking advantage of the IIRA. While the IIRA was having encouraging impacts on the negative effects of illegal immigration in our state, it became clear to the General Assembly that the Act contained a number of weak provisions and loopholes. Moreover, at that time, *lack of work* constituted the most common reason for unemployment insurance claims in our state.[49] The state's seasonally adjusted unemployment rate had "more than doubled from 5.5% in January 2008 to 12.5% in January 2010."[50] In fact, while South Carolina had the sixth fastest growing labor force in the country between 2002 and 2009,[51] it had reached the sixth highest seasonally adjusted unemployment rate in 2010.[52] Further, considering our state's high proportion of seasonal jobs in tourism and agriculture,[53] as well as recent transitions from manual labor to automated processes in those industries, growing unemployment was more sharply felt by low-skilled, yet lawfully present, workers.[54]

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43. Tim Gaynor & David Schwartz, *Arizona Passes Tough Illegal Immigration Law*, REUTERS (Apr. 19, 2010, 6:30 PM), http://www.reuters.com/article/2010/04/19/us-immigration-usa-arizona-idUSTRE63I6TU20100419.

44. *Compare, e.g.*, § 8, 2008 S.C. Acts at 2357 (codified as amended at S.C. CODE ANN. § 41-8-30(A) (Supp. 2013)) (prohibiting employers from knowingly employing unauthorized aliens), *with* ARIZ. REV. STAT. ANN. § 23-212.01(A) (2010) (prohibiting employers from intentionally employing unauthorized aliens).

45. ARIZ. REV. STAT. ANN. § 23-214(A).

46. *See id.* §§ 23-211(9), -212(F), -212.01(F).

47 *See* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 863–67 (9th Cir. 2009) (citations omitted).

48 Chamber of Commerce v. Candelaria, 130 S. Ct. 3498 (2010).

49. S.C. DEP'T OF COMMERCE, RESEARCH DIV., SOUTH CAROLINA ECONOMIC INDICATOR REPORT 15, fig.13 (June 2010).

50. *Id.* at 14.

51. *Id.* at 15

52. *Id.* at 13.

53. *Id.* at 15.

54. *Id.* at 22.

Therefore, in the fall of 2010, South Carolina Senate Judiciary Committee Chairman Glenn McConnell appointed a special three-person subcommittee to lead an effort to review the IIRA. The subcommittee was headed by Senator Larry Martin, and I was one of the other two members.

The subcommittee held numerous public hearings all over the state. Testimony from businesses and individuals confirmed the problems our constituents had raised. A new bill was introduced in the Senate at the beginning of 2011,[55] and it passed that body in March 2011.[56] The South Carolina House of Representatives amended and returned it to the Senate on May 25, 2011.[57]

The next day, the U.S. Supreme Court affirmed the Ninth Circuit's validation of Arizona's E-Verify and license suspension laws.[58] State Senator Larry Martin and I, along with South Carolina Department of Labor, Licensing and Regulation Director Catherine Templeton, prepared an amendment conforming the bill to that decision.[59] The amendment was adopted,[60] and the bill was eventually signed into law as Act 69 on June 27, 2011.[61]

In line with the concerns expressed by citizens, Act 69 strengthened our state's law as it pertained to illegal immigrants. Pursuant to our state's inherent police powers, Act 69 clarified the ban of sanctuary cities[62] and established a state illegal immigration enforcement unit.[63] It codified the inherent power of state law enforcement officers to verify immigration status during lawful stops and arrests based upon nonimmigration violations when the officers have reasonable suspicion that a person is an illegal immigrant.[64] The Act expanded and required the sole use of E-Verify by employers to determine the immigration status of prospective employees,[65] and it increased the licensing penalties for failure to verify that status.[66] Finally, the Act imposed criminal penalties for conduct Congress had already prohibited: the failure to carry immigration

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55. S. 0020, 119th Gen. Assemb., 1st Reg. Sess. (S.C. 2011).

56. [2011] 2 S.C. SENATE J. 1202–15. The Senate vote was thirty-four "Ayes" and nine "Nays." *See id.* at 1214–15.

57. [2011] 3 S.C. HOUSE J. 3401–03.

58. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1987 (2011).

59. *See* [2011] 3 S.C. SENATE J. 3150–70.

60. *Id.* at 3170–71.

61. Act of June 17, 2011, No. 69, 2011 S.C. Acts 325.

62. *Id.* § 1, 2011 S.C. Acts at 327–28 (codified as amended at S.C. CODE ANN. § 6-1-170 (Supp. 2013)). For more background on sanctuary cities, see Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 170–71 (2008).

63. *Id.* § 17, 2011 S.C. Acts at 345–47 (codified as amended at S.C. CODE ANN. § 23-6-60 (Supp. 2013)).

64. *Id.* § 6, 2011 S.C. Acts at 331–35 (codified as amended at S.C. CODE ANN. § 17-13-170 (Supp. 2012)).

65. *Id.* § 3, 2011 S.C. Acts at 329 (codified as amended at S.C. CODE ANN. § 8-14-20 (Supp. 2013)).

66. *See id.* §§ 9–14, 2011 S.C. Acts at 337–45 (codified as amended at S.C. CODE ANN. §§ 41-8-20 through -60, -120(A) (Supp. 2013)).

documents;[67] the use, creation, or provision of false immigration documents for immigration purposes;[68] and the transportation or harboring of illegal immigrants by themselves.[69]

Act 69 was set to become effective on January 1, 2012.[70] Combined with the IIRA, it was strong state policy, enacted pursuant to South Carolina's sovereign police powers, and intended to protect the safety and employment prospects of lawfully present individuals in our state by mirroring and furthering Congress's immigration objectives and encouraging cooperation with federal authorities.

III. THE WINDING ROAD TO A FOURTH CIRCUIT DECISION

In October 2011, before Act 69 became effective, the United States filed a preenforcement action against the Act in the U.S. District Court for the District of South Carolina.[71] The Federal Government sought preliminary injunctions against sections in the Act and the IIRA that created state crimes for congressionally prohibited conduct: the transportation or harboring of illegal immigrants by themselves (first-party) or others (third-party), the failure to carry certain federally issued immigration documents, the provision of false picture identification to prove lawful presence, and the creation of false immigration documents.[72] The Federal Government also sought a preliminary injunction against the codification of state law enforcement's reasonable suspicion powers.[73]

In its order, the district court found that all sections challenged by the Administration were likely preempted by federal law.[74] The court further granted preliminary injunctions against all challenged sections—except the false immigration documents provision—because it found these sections would disrupt federal enforcement priorities, prosecution prerogatives, and foreign affairs policies.[75] The court declined to enjoin enforcement of the false documents section because the Federal Government had not made a clear showing that it would suffer irreparable harm should the injunction not be

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67. *Id.* § 5, 2011 S.C. Acts at 331 (codified as amended at S.C. CODE ANN. § 16-17-750 (Supp. 2013)).

68. *Id.* §§ 6, 15, 2011 S.C. Acts at 332, 345 (codified as amended at S.C. CODE ANN. § 17-13-170(B)(2) (Supp. 2013); § 16-13-480 (Supp. 2012)).

69. *Id.* § 4, 2011 S.C. Acts at 330 (codified as amended at S.C. CODE ANN. § 16-9-460(A), (C), (E) (Supp. 2013)).

70. *Id.* § 20, 2011 S.C. Acts at 348.

71. *See* United States v. South Carolina, 840 F. Supp. 2d 898, 904 (D.S.C. 2011). Another party subsequently filed a second action that was combined with the United States' action. *See id.* This Essay discusses only the issues that are relevant to the United States and South Carolina as parties in the litigation.

72. *Id.* at 907.

73. *Id.*

74. *Id.* at 917–19, 924.

75. *Id.* at 925–27.

granted.[76] The court reasoned that "[e]nforcement of this section does not appear . . . to necessarily involve the arrest and prosecution of unlawfully present persons and would not likely raise the foreign policy sensitivities raised by other sections of Act 69 addressed above."[77]

South Carolina appealed the district court's injunctions to the Fourth Circuit.[78] While the case was on appeal, however, the U.S. Supreme Court decided a second Ninth Circuit appeal, *Arizona v. United States*.[79]

In *Arizona v. United States*, the Supreme Court again had to decide whether various pieces of state legislation were preempted by federal immigration law.[80] The Court ultimately struck down three provisions and upheld one.[81] The Court first concluded that a section criminalizing the willful failure to complete or carry an alien registration document in violation of federal law was field and conflict preempted.[82] Second, the Court held that a section criminalizing attempts by illegal aliens to work in the state was conflict preempted as an obstacle to Congress's immigrant employment system.[83] Third, the Court held a section authorizing state and local officers to make warrantless arrests solely based upon the probable cause belief that the person was an illegal immigrant was conflict preempted as an obstacle to the federal removal system.[84] However, the Court declined to find the fourth section—a provision similar to South Carolina's reasonable suspicion codification—preempted on the record before it.[85]

Back in the Fourth Circuit, the court remanded the Act 69 challenge to the district court for reconsideration in light of *Arizona v. United States*.[86] On remand, the district court lifted the injunction as to the codification of law enforcement's reasonable suspicion powers, but otherwise left in place its prior order.[87]

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76. *Id.* at 927.

77. *Id.*

78. *See* United States v. South Carolina, 906 F. Supp. 2d 463, 466 (D.S.C. 2012) (explaining that the matter came before the district court pursuant to a limited remand from the Fourth Circuit in light of the Supreme Court's decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012)).

79. 132 S. Ct. 2492 (2012).

80. *Id.* at 2497.

81. *Id.* at 2510.

82 *See id.* at 2501, 2503 (citing ARIZ. REV. STAT. ANN. § 11-1509(A) (Supp. 2011)).

83. *See id.* at 2503, 2505 (citing ARIZ. REV. STAT. ANN. § 13-2829(C) (Supp. 2011)).

84. *See id.* at 2505, 2507 (citing ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (Supp. 2011)).

85. *See id.* at 2510; *see also* Act of June 17, 2011, No. 69, § 6, 2011 S.C. Acts 331 (codified as amended at S.C CODE ANN. § 17-13-170(A) (Supp. 2013)) (noting South Carolina's reasonable suspicion codification).

86. *See* United States v. South Carolina, 906 F. Supp. 2d 463, 466 (D.S.C. 2012).

87. *Id.* at 474.

IV. *UNITED STATES V. SOUTH CAROLINA*

When the Administration's challenge of Act 69 reached the Fourth Circuit for a second time, the challenge had been considerably limited.[88] Notably, the provision that garnered most of the media's attention and abhorrence—the reasonable suspicion codification—had been upheld as a valid exercise of state authority.[89] The remaining provisions all attempted to protect the safety and employment prospects of lawfully present people in South Carolina by mirroring and furthering Congress's immigration law pursuant to the state's inherent police powers.[90] However, the Fourth Circuit would provide South Carolina little relief.[91]

The Fourth Circuit began its analysis with a startling decision: it refused to apply the second touchstone of the preemption doctrine—the presumption against preemption.[92] The rationale for this refusal was the court's conclusion that "immigration is an area traditionally regulated by the federal government" and involves an "extensive federal presence."[93]

Upon adopting that analytical framework, the court moved onto the precise provisions in question, first holding that the first-party transportation and concealment sections were conflict preempted.[94] Specifically, these sections made it a state crime for illegal aliens to transport themselves "within the State," or conceal or shelter themselves "from detection," with the specific "intent to further [their] unlawful entry into the United States or avoid[] apprehension or detection of [their] unlawful immigration status by state or federal authorities."[95] The court noted that these sections "violate[] the clear rule of *Arizona* that unlawful presence is not a criminal offense," and it found them "plainly at odds" with the federal system, which subjects immigrants to civil removal proceedings—not criminal penalties—for unlawful presence.[96] The court quoted *Arizona v. United States*, stating that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials" and that this broad federal discretion is "necessary because it involves policy choices that bear on this Nation's international relations."[97] Thus, the court believed the state crimes

88. *See* United States v. South Carolina, 720 F.3d 518, 524 (4th Cir. 2013) (citing *United States v. South Carolina*, 906 F. Supp. 2d at 466–69, 473–74) (explaining the procedural history of the case).

89. *See United States v. South Carolina*, 906 F. Supp. 2d at 470–71.

90. *See United States v. South Carolina*, 720 F.3d at 529.

91. *See generally id.* at 529, 532, 533 (finding the challenged sections to be preempted by federal law).

92. *See id.* at 529.

93. *Id.*

94. *See id.* at 529–30.

95. Act of June 17, 2011, No. 69, § 4, 2011 S.C. Acts 325, 329–30 (codified as amended at S.C. CODE ANN. § 16-9-460(A), (C) (Supp. 2013)).

96. *United States v. South Carolina*, 720 F.3d at 529–30.

97. *Id.* at 530 (quoting Arizona v. United States, 132 S. Ct. 2492, 2499 (2012)) (internal quotation marks omitted).

created by these sections "interfere[d] with the discretion entrusted to federal immigration officials" and "st[ood] as an obstacle to the execution of the federal removal system."[98]

Next, the Fourth Circuit struck down the third-party transportation and concealment sections as field and conflict preempted.[99] These sections made it a state crime for third parties who know or clearly should know another person is an illegal immigrant to "transport that person within the State," or conceal or shelter that person "from detection," with the specific "intent to further that person's unlawful entry into the United States or avoid[] apprehension or detection of that person's unlawful immigration status by state or federal authorities."[100] The court stated that these provisions were field preempted because Congress had likewise passed a federal statute that criminalized the transportation, concealment, and harboring of an illegal alien.[101] The court reasoned that federal regulation "on this subject is . . . so pervasive . . . that Congress left no room for the States to supplement it."[102] Moreover, the court held the statutes were conflict preempted because they "create[d] an obstacle to the smooth functioning of federal immigration law."[103] Federal statutes criminalize this type of conduct and do permit state and local officials to make arrests for violations,[104] but the federal statutes leave prosecution for these federal crimes at the discretion of federal officials.[105] Thus, the court believed the state counterparts "strip federal officials of the authority and discretion necessary in managing foreign affairs" and immigration policies.[106]

Moving to the failure to carry provision, the Fourth Circuit continued its prior trend. This section made it a state crime for "a person eighteen years of age or older to fail to carry in the person's possession any certificate of alien registration or alien registration receipt card issued to the person pursuant to [federal law] while the person is in [South Carolina]."[107] Relying upon the *Arizona v. United States* discussion of a similar provision, the Fourth Circuit held that this section was field preempted.[108] The court did not address conflict preemption.

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98. *Id.*

99. *Id.* at 531 (citing *Arizona v. United States*, 132 S. Ct. at 2501).

100. § 4(B), (D), 2011 S.C. Acts at 330 (codified as amended at S.C. CODE ANN. § 16-9-460(B), (D) (Supp. 2013)).

101. *United States v. South Carolina*, 720 F.3d at 530 (citing 8 U.S.C. § 1324(a)(1)(A)(ii)–(iii) (2012)).

102. *Id.* at 531 (alteration in original) (citations omitted) (quoting Arizona v. United States, 132 S. Ct. at 2501) (internal quotation marks omitted).

103. *Id.*

104. *See id.* at 530 (citing 8 U.S.C. § 1324(a)(1)(A)(ii)–(iii), (c)).

105. *Id.* (citing 8 U.S.C. § 1324(c)).

106. *Id.* at 531–32.

107. Act of June 17, 2011, No. 69, § 5, 2011 S.C. Acts 325, 331 (codified as amended at S.C. CODE ANN. § 16-17-750(A) (Supp. 2013)).

108. *United States v. South Carolina*, 720 F.3d at 532.

Finally, the court addressed the false documentation section. This provision made it a state crime for a person to display or possess "counterfeit picture identification for the purpose of offering proof of the person's lawful presence in the United States."[109] The court concluded that the section was field and conflict preempted.[110] According to the court, the section was field preempted because Congress had criminalized the creation or use of false immigration documents.[111] The court stated that the section was conflict preempted "because enforcement of these federal statutes necessarily involves the discretion of federal officials, and a state's own law in this area, inviting state prosecution," would be an obstacle to Congress's "full purposes and objectives."[112]

In the end, the court concluded that the preliminary injunctions were appropriate based on the following reasoning: "The irreparable injury to the nation's foreign policy if the relevant sections take effect has been clearly established by the United States. And for individual, unlawfully present immigrants and others, the likelihood of chaos resulting from South Carolina enforcing its separate immigration regime is apparent."[113]

V. DISCUSSION

Since the adoption of the INA, encouraging legal guidance from federal appellate courts and the U.S. Department of Justice seemed to recognize that states could protect lawfully present individuals from the negative effects of illegal immigration through their traditional police powers.[114] With this guidance in mind, the South Carolina General Assembly did not attempt to create its own standard for naturalizing immigrants, nor did it attempt to set different standards under which a person may be permitted to immigrate into the state or the Union. Instead, the General Assembly exercised the state's traditional and sovereign police powers to protect the safety and employment interests of people lawfully present in South Carolina by concurrently proscribing conduct already prohibited by Congress,[115] and it did so because the Federal Executive was not enforcing specific immigration laws passed by Congress as a matter of general policy.[116]

Still, in *United States v. South Carolina*, the Fourth Circuit held that our efforts were preempted.[117] The court's holding did not rest upon any federal law

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109. § 6, 2011 S.C. Acts at 332 (codified as amended at S.C. CODE ANN. § 17-13-170(B)(2) (Supp. 2013)).

110. *United States v. South Carolina*, 720 F.3d at 533.

111. *Id.* at 533.

112. *Id.* (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

113. *Id.*

114. *See supra* notes 21–35 and accompanying text.

115. *See, e.g.*, United States v. South Carolina, 906 F. Supp. 2d 463, 467, 469 (D.S.C. 2012) (highlighting the areas of the IIRA that are similar to federal law).

116. Eastman & Lugo, *supra* note 35.

117. *See supra* notes 88–110 and accompanying text.

expressing that state action was barred; rather, the court believed the fullness of the congressional scheme, breadth of executive power, and importance of executive flexibility in this realm suggested an intent to preempt state law.[118] Taken as a whole, I believe the court's analysis significantly risks state autonomy.

Unfortunately, the Fourth Circuit's opinion need not have risked such expansive implications. The opinion could have significantly curtailed possible misuse of its holding by at least acknowledging that the presumption against preemption applied to the case at hand. Instead, the court refused to apply the presumption because it believed the statutes affected immigration, which it found to be an area "traditionally regulated by the federal government" and "with extensive federal presence."[119] This finding is disconcerting for several reasons.

First, in deciding whether the presumption against preemption applied, the Fourth Circuit asked whether there has been a history of significant federal presence in the field at issue and focused on the federal government's historical and current involvement in immigration.[120] To be fair, the Supreme Court has used this approach in at least one international maritime case, *United States v. Locke*.[121] Still, that approach seems to invert the presumption's customary focus, which normally emphasizes an assumption that "the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress."[122] The customary inquiry's focus upon the state's traditional role is important because the state and federal governments often exercise concurrent—rather than exclusive—powers.[123] Where Congress may have an historic presence, so too may the states.[124] And what were once concurrent powers should not easily become exclusive. Thus, in the spirit of the Tenth Amendment, the presumption is applicable unless Congress expressed a "clear and manifest purpose" that it not be.[125]

Second, much of the Fourth Circuit's decision, even the portion rejecting the presumption against preemption, relied upon *Arizona v. United States*. Like the opinion in *United States v. South Carolina*, the *Arizona v. United States*

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118. *See generally United States v. South Carolina*, 720 F.3d at 528–33 (discussing the Fourth Circuit's reason for holding that Sections 4, 5, and 6(B)(2) are preempted by federal law).

119. *Id.* at 529.

120. *See id.*

121. 529 U.S. 89, 108–09 (2000).

122. Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (internal quotation marks omitted).

123. *See, e.g.*, Medtronic Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("In all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, we start 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 *Rice*, 331 U.S. at 230)) (internal quotation marks omitted).

124. *See, e.g.*, *id.* (reasoning that the presumption against preemption is "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety").

125. *Rice*, 331 U.S. at 230 (citing Napier v. Atl. Coast Line R. Co., 272 U.S. 605, 611 (1926)).

majority's introductory rhetoric swept broadly, with much of its text devoted to the federal government's interests and comparatively less reserved to the state's.[126] The Court specifically made a point to emphasize that the federal power in question involved both the constitutional immigration powers[127] and the "inherent power as sovereign to control and conduct relations with foreign nations."[128]

Despite this apparent short-shrifting of state interests, however, the majority specifically repeated the customary statement of the presumption against preemption.[129] Moreover, in his concurring and dissenting opinion, Justice Scalia contended that for "the first 100 years of the Republic, the States enacted numerous laws restricting the immigration of certain classes of aliens," including laws that removed and imposed penalties on unlawful immigrants and those who aided their immigration.[130] He noted that state immigration laws grew out of "the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there."[131] Justice Scalia further asserted that only recently had the "primary responsibility for immigration policy . . . shifted from the States to the Federal Government."[132] In other words, at least from the text of their opinions, the majority and Justice Scalia agreed that the presumption against preemption applied in some form. They disagreed mostly about whether Congress's immigration scheme did, in fact, constitute a clear and manifest intent to preempt inherent state powers.[133]

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126 *See Arizona v. United States*, 132 S. Ct. at 2498–99 (quoting U.S. CONST. art. I, § 8, cl. 4; Hines v. Davidowitz, 312 U.S. 52, 64 (1941)). In striking down Arizona statutes based upon federal immigration laws, the Court relied, in part, on *Hines v. Davidowitz*. *See id.* at 2501–07 (citations omitted). In *Hines*, the Court struck down Pennsylvania statutes that imposed upon legal immigrants' registration obligations because those statutes constituted direct immigration regulation and were more onerous and intrusive than the scheme created by Congress. *See Hines*, 312 U.S. at 59–61, 74. Invoking that case, the *Arizona v. United States* Court consistently refrained that state enforcement statutes would undermine the Nation's foreign policy needs in making immigration decisions. *Arizona v. United States*, 132 S. Ct. at 2501–02 (citing *Hines*, 312 U.S. at 66–67).

127. *Arizona v. United States*, 312 U.S. at 2489 (citing U.S. CONST. art. I, § 8, cl.4).

128. *Id.*

129. *Id.* at 2501 ("In preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress.") (internal quotation marks omitted). The Court did not decline to address whether the presumption applied, like in *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000), and the Court did not say that the presumption was inapplicable, like in *United States v. Locke*, 529 U.S. 89, 108 (2000).

130. *Id.* at 2512 (Scalia, J., concurring in part and dissenting in part) (citing Gerald L. Neuman, *The Lost Century of American Immigration (1776-1875)*, 93 COLUM. L. REV. 1833, 1835, 1841–80, 1883 (1993)).

131 *Id.* at 2511 (majority).

132. *Id.* at 2513.

133. *Compare id.* at 2501–07 (holding that portions of Arizona's law either conflict with or create an obstacle to the execution of Congress's immigration objectives), *with id.* at 2522 (Scalia, J., concurring in part and dissenting in part) (asserting that Arizona's immigration laws do not conflict with federal law, "but merely enforce [federal] restrictions more effectively"). The Eleventh Circuit has twice applied the presumption to similar cases. *See* United States v. Alabama,

In rejecting the presumption, the Fourth Circuit significantly departed from the analysis conducted by the *Arizona v. United States* Court.

The Fourth Circuit's rejection of the presumption against preemption likely was rooted in difficulties presented by the presumption analysis itself—the "attempt to distinguish between the historic police powers of the States and area[s] where there has been a history of significant federal presence."[134] At least one preemption expert, Professor Ernest A. Young,[135] agrees with this concern, positing that the distinction is often unreflective of historical reality and has become most significant in cases that implicate foreign affairs, citing the aforementioned *Locke* case as an example.[136]

In *Locke*, the Supreme Court held that a federal scheme of oil tanker regulations preempted the state of Washington's regulations of oil tankers operating in Puget Sound.[137] The Court diverted from earlier precedent in which the Court had applied the presumption against preemption under nearly identical facts.[138] In doing so, the Court declared the presumption "is not triggered when the State regulates in an area where there has been a history of significant federal presence."[139] Because the Washington laws bore "upon national and international maritime commerce," the court reasoned that "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers."[140]

Professor Young summarized the weakness in the *Locke* Court's refusal to apply the presumption against preemption in the following manner:

> Ironically, the oldest and most prominent cases illustrating the overlap of state and federal spheres are cases about the regulation of navigable waters. In *Gibbons v. Ogden*, the Marshall Court recognized that many forms of state "police power" regulation would cover the health and safety aspects of navigation. And *Cooley v. Board of*

691 F.3d 1269, 1281–82 (11th Cir. 2012); Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250, 1263 (11th Cir. 2012).

134. *See* Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 178 (2001) (alteration in original) (quoting *Locke*, 529 U.S. at 108) (internal quotation marks omitted).

135. Amanda Frost, *Academic Highlight: Young on the Roberts Court and Preemption*, SCOTUSBLOG (Aug. 1, 2012, 1:40 PM, 2014), http://www.scotusblog.com/2012/08/academic-highlight-young-on-the-roberts-court-and-preemption/.

136. *See* Young, *supra* note 134, at 177–79.

137. *Locke*, 529 U.S. at 116.

138. *See* Young, *supra* note 134, at 176–78.

139. *Locke*, 529 U.S. at 108 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

140. *Id.*

> *Wardens* expressly rejected the proposition that navigation was a subject reserved for exclusive federal regulation.[141]

As Professor Young notes, the difficulty in characterizing whether a bill operates in a field traditionally involving state or federal power arises from the simple fact that almost all pieces of legislation impact multiple areas of the law, one of which may be considered traditionally federal and another of which may be considered traditionally state.[142] This difficulty was not absent in *United States v. South Carolina*.

As documented above, states were historically allowed to police who could enter their borders.[143] Apart from that power, the provisions at issue in Act 69 sought to protect the safety and employment interests of people lawfully present in South Carolina—historically a role reserved to the states. The provisions did not attempt to create a new standard for the immigration or naturalization of immigrants.

Third, the Fourth Circuit's refusal to apply the presumption against preemption is alarming because of its potential effect on individual legislators' abilities to represent constituents. These concerns flow from the two related purposes served by the presumption's clear statement rule.

On one hand, the presumption against preemption serves as a reminder to courts that they should hesitate to read an ambiguous congressional scheme as depriving the states of authority inherent to their governmental responsibilities. Without this reminder, courts may be more likely to give greater weight to questionable evidence of congressional intent than that evidence warrants.[144] This risk is especially apparent in both field and conflict preemption, two doctrines that necessarily involve searching outside a statute's text for evidence of congressional intent.[145] For various reasons, it is often a leap of faith to

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141. Young, *supra* note 134, at 178 (citing Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299 (1851); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

142. *Id.* at 179.

143. *See supra* notes 130–33 and accompanying text.

144. *See, e.g.*, Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 981–982 (2002) (explaining that the *Garmon* Court did not mention the presumption against preemption, but instead took into account Congress's "compelling congressional direction," rather than a clear statement, to preempt state tort law (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242–444 (1959))).

145. *See supra* notes 7–11 and accompanying text. These types of implied preemption are particularly problematic: the mere fact that Congress rejected one possible scheme of regulation by passing a bill containing a different scheme does not necessarily mean that Congress intended to prohibit states from enacting the rejected scheme into their own legal codes. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 281 (2000). Because Congress represents a broader electorate than state legislatures, congressional inaction quite possibly reflects a lack of political will to impose a scheme itself, yet a desire to permit the state legislatures to complement the federal scheme through their own police powers. *Id.* at 280–81; *see also* Young, *supra* note 134, at 171–72 (discussing situations in which Congressional delegation of legislative authority to the Executive is sometimes done for political purposes, not as an express preemption of traditional state police powers); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the*

believe that this extra-statutory evidence represents Congress's actual intent.[146] Consequently, without the presumption, courts may read into federal law a preemptive intent that did not exist when the law was passed.

On the other hand, the presumption against preemption is designed to protect the interests of the states and the electorate by ensuring these parties have notice that federal legislation threatens their right to develop policy at the state level.[147] Without a clear indication in federal legislation that the state democratic process will no longer be an option upon a federal law's passage, the electorate and the states are denied an opportunity to express concerns or dissatisfaction over the erosion of state power to their Senators and Congressmen.[148] In a federal system in which two levels of government are engaged in a never-ending struggle for power, this involvement is essential.[149] Preemption without a clear manifestation of preemptive intent can dangerously alter our federal system of dual sovereignty—in derogation of limited government and to the detriment of the citizens—without notice to the voters.[150]

Thus, preemption claims premised upon vague and vacillating policy interests, untied to congressional intent, threaten some of our most precious founding principles—federalism, separation of powers, and checks and balances. Yet in *United States v. South Carolina*, the Fourth Circuit colored its entire analysis with references to a need to protect executive "enforcement priorities"

Composition and Selection of the National Government, 54 COLUM. L. REV. 543, 559–60 (1954) (explaining that the Founders envisioned Congress as the ultimate check on the states when they enacted laws in conflict with federal laws, not the Judiciary).

146. Congressional history, especially for high profile legislation, raises perhaps the most inherent credibility problems. Each body of Congress is comprised of numerous members—100 in the Senate, and 435 in the House of Representatives. Office of the Clerk, U.S. House of Representatives, *Congressional Profile*, http://clerk.house.gov/member_info/cong.aspx (last visited Apr. 10, 2014). With that many people to please, passing any law is a work in compromise. *See* Nelson, *supra* note 145, at 279–80 (explaining that because statues are products of compromise, they necessarily reflect a variety of purposes and objectives that may not be in concert with one another). Thus, a bill will change when it is in a committee of each body, when it is on the floor of each body, and when it is in conference of both bodies. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 378 n.13 (2000) (discussing the several proposed and rejected amendments to the bill as it passed between the House of Representatives and the Senate). As the language changes, the intent behind the bill changes. *See generally id.* at 390–91 (Scalia, J., concurring) (noting that the intent of individual members is not a reliable indication of what both Houses of Congress intended). But the only time a congressional intent exists is after a majority of both bodies has voted for the bill. *Id.* Moreover, a statement by one member of the body, or by third parties, does not necessarily reflect the intent of Congress even when a bill is finally passed. *Id.* These people may explain a bill incompletely or inaccurately, whether innocently or nefariously. The failure of language allowing for state action to make the final version of a bill should be considered "most likely expressive of what inaction ordinarily expresses: nothing at all." Arizona v. United States, 132 S. Ct. 2492, 2520 (2012) (Scalia, J., concurring in part and dissenting in part).

147. Young, *supra* note 13, at 877.

148. Young, *supra* note 17, at 265.

149. *See id.* at 264.

150. *Id.* at 265.

and "foreign affairs policy."[151] These interests play a special role in the portions of the Fourth Circuit's opinion concluding that South Carolina's laws created an obstacle to Congress's "full purposes."[152] The court believed the creation of a state crime based upon conduct prohibited by federal law would allow state officials to interfere with federal authority to decide whether to prosecute illegal aliens.[153] But this rationale should lack merit in a dual system of government in which the state and federal governments, as well as the branches within them, were intended to check each other's hunger for power.

Fourth, the court's focus on executive enforcement priorities and foreign affairs policy should be concerning in a more specific sense. The Fourth Circuit was not merely talking about the federal government's need to make enforcement decisions in each individual immigration case; rather, the court's reasoning has broader implications. The United States argued at the district court that the state laws at issue were "contrary to federal immigration priorities, which focus upon unlawfully present persons who are national security and public safety risks, and would burden and disrupt federal immigration enforcement efforts and the national government's administration of foreign policy."[154] Justice Alito, in his *United States v. Arizona* concurrence, set forth why this argument should not be accepted:

> The United States' attack on § 2(B) is quite remarkable. The United States suggests that a state law may be pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency's current enforcement priorities. Those priorities, however, are not law. They are nothing more than agency policy. I am aware of no decision of this Court recognizing that mere policy can have pre-emptive force. If § 2(B) were pre-empted at the present time because it is out of sync with the Federal Government's current priorities, would it be unpre-empted at some time in the future if the agency's priorities changed?[155]

Given the courts' consistent recognition that Congress has broad powers to legislate immigration policy, it is quite odd that they would now vest so much of their preemption analysis upon executive enforcement priorities. It is one thing

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151. *See, e.g.*, United States v. South Carolina, 720 F.3d 518, 531–32 (4th Cir. 2013) (quoting Arizona v. United States, 132 S. Ct. 2492, 2499, 2501 (2012)) (holding Sections 4(B) and (D) of Act 69 preempted because those sections created an obstacle to the enforcement of federal immigration law and, in turn, could disrupt the uniformity of the Nation's foreign policy).

152. *Id.* at 533 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

153. *Id.* at 530, 531 (quoting *Hines*, 312 U.S. at 66–67).

154. United States v. South Carolina, 840 F. Supp. 2d 898, 915 (D.S.C. 2011).

155. *Arizona v. United States*, 132 S. Ct. at 2527 (Alito, J., concurring in part and dissenting in part) (citations omitted).

for lawfully enacted statutes, treaties, and regulations to preempt state law,[156] but it is terribly disturbing to allow broad-scale executive priorities to become a source of preemption. It seems likely that the Fourth Circuit's decision will support further expansion of "priority" preemption as the President continues to issue broad priority directives contrary to immigration laws passed by Congress.[157]

VI. CONCLUSION

In view of the breadth of the Fourth Circuit's analysis, the preemption power expounded in *United States v. South Carolina* may no longer require formal congressional action. It may be vested in the President and limited only by his respect for the rule of law. Preemption that flows from executive enforcement priorities regarding federal law, rather than the federal law itself, shifts power from the states and Congress to the President. However, the tendency for rulers to consolidate power, whether immediately or gradually, was considered a great and ever-present danger by the Founders. In Federalist 51, James Madison couched the issue as such:

> In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[158]

Madison's auxiliary precautions centered upon "contriving the interior structure of the government, as that its several constituent parts may, by their mutual

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156. *See, e.g.*, City of New York v. F.C.C., 486 U.S. 57, 63–64 (1988) (citing La. Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 368–69 (1986)) (recognizing that federal agencies also have the power to preempt state law when the mere subject matter of the agency's action is within the scope of the agency's delegated power).

157. *See* Lourdes Medrano, *'Parole in Place': Obama's Illegal-Immigration Order Stokes Amnesty Worries*, CHRISTIAN SCI. MONITOR, Dec. 9, 2013, *available at* http://www.csmonitor.com/USA/Politics/2013/1209/Parole-in-place-Obama-s-illegal-immigration-order-stokes-amnesty-worries. For example, in a memo to high-level U.S. immigration officials, Secretary of Homeland Security Janet Napolitano directed that certain criteria be satisfied before the Department of Homeland Security can enforce federal immigration laws against illegal aliens. Memorandum from Janet Napolitano, Secretary of Homeland Security, to David V. Aguilar, Acting Commissioner for U.S. Customs and Border Protection, Alejandro Mayorkas, Director of the U.S. Citizenship and Immigration Services, and John Morton, Director of U.S. Immigration and Customs Enforcement (June 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. The criteria do not exist in statute or regulation.

158. THE FEDERALIST NO. 51 (James Madison).

relations, be the means of keeping each other in their proper places."[159] In other words, Madison's design was to structure a system that diffused political power among the national government, state governments, and the three branches at each level so that political "[a]mbition [was] made to counteract [political] ambition."[160] Thus, the Fourth Circuit's decision not only contravenes the text of the Supremacy Clause, but it also presents a clear and present threat to federalism, the separation of powers, and the checks and balances designed by the Founding Fathers to limit government and preserve individual liberty.[161] Ironically—considering the preemption doctrine's importance to protecting our federal system—the decision threatens this structure by undermining the central principle of federalism itself "that both the National and State Governments have elements of sovereignty the other is bound to respect."[162]

159. *Id.*
160. *Id.*
161. *See supra* notes 149–52 and accompanying text.
162. Arizona v. United States, 132 S. Ct. 2492, 2500 (2012).