June 25, 2012 Justice Antonin Scalia

Bench Statement

No. 11-182 – Arizona v. United States

For almost a century after the Constitution was ratified, there were no federal immigration laws except one of the infamous Alien and Sedition Acts that was discredited and allowed to expire. In that first century all regulation of immigration was by the States, which excluded various categories of would-be immigrants, including convicted criminals and indigents. Indeed, many questioned whether the federal government had any power to control immigration—that was Jefferson's and Madison's objection to the Alien Act.

The States' power to control immigration, however, has always been accepted, and is indeed reflected in some provisions of the Constitution. The provision that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" was a revision of the provision in the Articles of Confederation which gave those privileges and immunities to "inhabitants" of each State. It was revised because giving that protection to mere "inhabitants" would allow the immigration policies of one State to be imposed on the others. Even that revision was not thought to be enough, because the States were not willing to have their immigration policies determined by the *citizenship*

requirements of other States. Hence the Naturalization Clause of the Constitution, which enables the federal government to control who can be a citizen.

Of course the *federal* power to control immigration was ultimately accepted, and rightly so. But where does that power come from? Jefferson and Madison were correct that it is nowhere to be found in the Constitution's enumeration of federal powers. The federal power over immigration cannot plausibly derive from the Naturalization Clause. Not only does the power to confer citizenship have nothing to do with the power to exclude immigrants, but, as I have described, the Naturalization Clause was a vindication of state rather than federal power over immigration.

Federal power over immigration comes from the same source as state power over immigration: it is an inherent attribute—perhaps the fundamental attribute—of sovereignty. The States, of course, are sovereign, the United States being a Union of sovereign States. To be sovereign is necessarily to possess the power to exclude unwanted persons and things from the territory. That is why the Constitution's prohibition of a State's imposing duties on imports made an exception for "what may be absolutely necessary for executing it's inspection Laws." Thus, this Court's cases have held that the States retain an inherent power to exclude. That power can be limited only by the Constitution or by laws enacted pursuant to the Constitution. The Constitution, as we have seen, does not limit the

States' power over immigration but to the contrary vindicates it. So the question in this case is whether the laws of the United States forbid what Arizona has done.

Our cases have held, with regard to claimed federal abridgment by law of another inherent sovereign power of the States—their sovereign immunity from suit—that the abridgement must be "unequivocally expressed." The same requirement must apply here; and there is no unequivocal congressional prohibition of what Arizona has done. It is not enough to say that the federal immigration laws *implicitly* "occupy the field." No federal law says that the States cannot have their own immigration law.

Of course the Supremacy Clause establishes that federal immigration law is supreme, so that the States' immigration laws cannot conflict with it—cannot admit those whom federal law would exclude or exclude those whom federal law would admit. But that has not occurred here. Arizona has attached consequences under state law to acts that are unlawful under federal law—illegal aliens' presence in Arizona and their failure to maintain *federal* alien registration. It is not at all unusual for state law to impose additional penalties or attach additional consequences to acts that are unlawful under federal law—state drug laws are a good example. That does not conflict with federal law.

In sum, Arizona is *entitled* to impose additional penalties and consequences for violations of the federal immigration laws, because it is *entitled* to have its own

immigration laws. As my opinion describes in more detail, however, most of the provisions challenged here do not *even* impose additional penalties or consequences for violation of federal immigration laws; they merely apply stricter enforcement. The federal government would have us believe (and the Court today agrees) that even that is forbidden. The government's brief asserted that "the Executive Branch's ability to exercise discretion and set priorities is particularly important because of the need to allocate scarce enforcement resources wisely." But there is no reason why the federal Executive's need to allocate *its* scarce enforcement resources should disable Arizona from devoting *its* resources to illegal immigration *in Arizona* that in its view the Federal Executive has given short shrift. Arizona asserts without contradiction and with supporting citations the following: "[I]n the last decade federal enforcement efforts have focused primarily on areas in California and Texas, leaving Arizona's border to suffer from comparative neglect. The result has been the funneling of an increasing tide of illegal border crossings into Arizona. Indeed, over the past decade, over a third of the Nation's illegal border crossings occurred in Arizona." Must Arizona's ability to protect its borders yield to the reality that Congress has provided inadequate funding for federal enforcement—or, even worse, to the Executive's unwise targeting of that funding?

But leave that aside. It has become clear that federal enforcement priorities—in the sense of priorities based on the need to allocate so-called scarce enforcement resources—is not the problem here. After this case was argued and while it was under consideration, the Secretary of Homeland Security announced a program exempting from immigration enforcement some 1.4 million illegal immigrants. The husbanding of scarce enforcement resources can hardly be the justification for this, since those resources will be eaten up by the considerable administrative cost of conducting the nonenforcement program, which will require as many as 1.4 million background checks and biennial rulings on requests for dispensation. The President has said that the new program is "the right thing to do" in light of Congress's failure to pass the Administration's proposed revision of the immigration laws. Perhaps it is, though Arizona may not think so. But to say, as the Court does, that Arizona *contradicts federal law* by enforcing applications of federal immigration law that the President declines to enforce boggles the mind.

The Court's opinion paints what it considers a looming specter of inutterable horror: "If §3 of the Arizona statute were valid, every State could give itself independent authority to prosecute federal registration violations." That seems to me not so horrible and even less looming. But there *has* come to pass, and is with us today, the specter that Arizona and the States that support it predicted: A federal government that does not want to enforce the immigration laws as written, and

leaves the States' borders unprotected against immigrants whom those laws exclude.

So the issue is a stark one: Are the sovereign States at the mercy of the federal Executive's refusal to enforce the Nation's immigration laws? A good way of answering that question is to ask: Would the States conceivably have entered into the Union if the Constitution itself contained the Court's holding? Imagine a provision—perhaps inserted right after Art. I, §8, cl. 4, the Naturalization Clause—which included among the enumerated powers of Congress "To establish Limitations upon Immigration that will be exclusive and that will be enforced only to the extent the President deems appropriate." The delegates to the Grand Convention would have rushed to the exits from Independence Hall.

As is often the case, discussion of the dry legalities that are the proper object of our attention suppresses the very human realities that gave rise to the suit. Arizona bears the brunt of the country's illegal immigration problem. Its citizens feel themselves under siege by large numbers of illegal immigrants who invade their property, strain their social services, and even place their lives in jeopardy. Federal officials have been unable to remedy the problem, and indeed have recently shown that they are simply unwilling to do so. Arizona has moved to protect its sovereignty—not in contradiction of federal law, but in complete compliance with it. The laws under challenge here do not extend or revise federal

immigration restrictions, but merely enforce those restrictions more effectively. If securing its territory in this fashion is not within the power of Arizona, we should cease referring to it as a sovereign State. For these reasons, I dissent.