



ENJOYED BUT NOT ENJOINED

To the *Bag*:

Over the years, I have enjoyed and respected Dean Chemerinsky's annual review of the prior Supreme Court term. The part of this year's report (*It's Now the Roberts Court*, 15 GREEN BAG 2D 389) dealing with Immigration (*Arizona v. United States*) bothered me so much that I decided to read the majority opinion written by Justice Kennedy. After noting that the majority held that preemption supported preliminary injunctions barring enforcement of three of the provisions in Arizona SB 1070, the Dean's report claims that the majority simply reversed the preliminary injunction aimed at the so-called "stopping" provision, but noted that "Even this provision was substantially narrowed" with reference to stop duration and arresting for illegal presence in the country. Summary descriptions in other publications have also left the impression that the stopping provision was upheld.

After reading the majority opinion, I find the Dean's report, to put it kindly, misleading. The actual decision was much more preliminary and tentative in scope, because they could not decide whether preemption applied "at this time" and on "this record". They concluded that the provision was susceptible to more than one interpretation. The Kennedy opinion did worry about constitutional problems if the provision were construed to extend duration and authorize arrest for immigration violations. On the other hand, they described a more narrow interpretation (simply an immigration status check) that they suggested might survive a preemption claim. Until the state courts had resolved the ambiguity, the majority was simply not willing to make a preemption decision. Here is the crucial language in the final paragraph of the majority opinion: "It was improper, however, to enjoin [the stopping provision] before the state courts had an opportunity to construe it and without some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives." The net effect of the majority decision is to allow the provision to go into effect at this time.

I do agree with the Dean that an "as applied" challenge seems



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inevitable, but my central point is that the victory claims by Arizona officials (including the Governor) were premature. They did not read the fine print. The stopping provision is still vulnerable on preemption grounds.

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