ARIZONA'S S.B. 1070: SEPARATING FACT FROM FICTION

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ABSTRACT

When Arizona Governor Jan Brewer signed the legislation commonly referred to as Senate Bill 1070 into law, she sparked a firestorm of controversy in the local and national media. Commentators and activists on both sides of the immigration debate fanned the flames of that controversy by giving starkly different accounts of what the legislation contained and what its effects were likely to be. This short commentary identifies a number of examples where the public discussion of S.B. 1070 is incomplete or inaccurate.

In the late spring of 2010, the Arizona legislature passed Senate Bill 1070—legislation containing a number of provisions "intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."[2] S.B. 1070 prompted national media attention, numerous political rallies, and several lawsuits, including a lawsuit by the Department of Justice, which claimed that the Arizona legislation was preempted by federal law.

The intense public discussion surrounding S.B. 1070 has included a number of misstatements by both sides of the immigration debate. Whether these misstatements represent inadvertent misunderstandings of a concededly complicated area of law, or whether they represent deliberately misleading attempts to manipulate public opinion is unclear. The point of this brief commentary is not to resolve that issue. Rather, its goal is to identify and correct a number of these misstatements in the hope of promoting an accurate and informed discussion about the content and effects of the legislation.

The first set of misstatements concerns the issue of racial profiling. Opponents of S.B. 1070 have claimed that the legislation authorizes or encourages Arizona law enforcement to engage in racial profiling.[3] Meanwhile, proponents of S.B. 1070 have

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2. S.B. 1070, 49th Legis., 2d Sess. §1 (Ariz. 2010).

3. *See, e.g.*, Randal C. Archibold, *Arizona's New Immigration Law Widens the Chasm Between Sides*, N.Y. TIMES, Apr. 26, 2010, at A13 (noting that "demonstrators massed at the Capitol, including a few thousand Sunday afternoon denouncing the law as unconstitutional and an open invitation for racial profiling"); John Schwartz & Randal C. Archibold, *A Law Facing a Tough Road Through the Courts*, N.Y. TIMES, Apr. 28, 2010, at A17 (noting that Lucas Guttentag, director of the immigrants' rights project of the American Civil Liberties Union, stated that S.B. 1070 "will increase racial profiling and discrimination against Latinos and anyone who might appear to be an immigrant"); Desert Sun Roundtable, *Sounding Off on Arizona's Illegal Immigrant Law*, THE DESERT SUN, May 16, 2010, at B12 ("It's inherently suspect to racial profiling. . . . We don't get anywhere by encouraging racial profiling."); Dante Atkins, *Russell Pearce v. the Constitution*, DAILY KOS, May 22, 2010, http://www.dailykos.com/story/2010/5/22/868296/-Russell-Pearce-vs.-the-Constitution (characterizing S.B. 1070 as "institutionalizing racial profiling"); Lets Breakthrough, *Breaking News—Justice Department Files Lawsuit Against Arizona*, DAILY KOS (July 6, 2010, 3:22:55

maintained that the legislation prohibits any racial profiling.[4] The truth lies somewhere in between.

S.B. 1070 includes the following language:

> A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution.[5]

At first blush it might seem as though this language prohibits racial profiling entirely. But that is not the case. The language "except to the extent permitted by the United States or Arizona Constitution" means that whether S.B. 1070 permits racial profiling is a question that can be answered only by looking to the U.S. and state constitutions.

As a general matter, the U.S. Constitution "prohibits selective enforcement of the law based on considerations such as race."[6] However, in the context of immigration enforcement, both the U.S. and Arizona constitutions have been interpreted to permit law enforcement to consider an individual's race when determining whether to stop or investigate that individual.[7] According to the 1975 United States Supreme Court decision, *United States v. Brignoni-Ponce*, "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor."[8] The Arizona Supreme Court has similarly explained that:

PM), http://www.dailykos.com/storyonly/2010/7/6/882163/-Breaking-newsDepartment-of-Justice-files-lawsuit-against-Arizona-law ("The law, slated to begin on July 29th, is the subject of national controversy coming under fire from civil rights advocates for giving racial profiling the green light."); Chung-Wha Hong, Letter to the Editor, N.Y. TIMES, May 1, 2010 ("It's a shame that Gov. Jan Brewer didn't consider the downside to S.B. 1070, Arizona's new immigration law: It amounts to state-sanctioned racial profiling, usurps federal authority and feeds into a volatile dialogue on immigration in Arizona, which correlates with a rise in hate crimes.").

4. Arizona Governor Jan Brewer has stated that it is "crystal clear and undeniable that racial profiling is illegal, and will not be tolerated in Arizona." Statement, April 30, 2010, http://azgovernor.gov/dms/upload/PR_043010_StatementGovBrewer.pdf (signing HB 2162, amending S.B. 1070). The author of S.B. 1070, State Senator Russell Pearce, has written that S.B. 1070 "explicitly prohibits racial profiling." Russell Pearce, *Arizona or San Francisco: Which Path Will America Take on Immigration*?, TOWNHALL.COM (May 12, 2010), http://www.townhall.com/columnists/RussellPearce/2010/05/12/arizona_or_san_francisco_which_path_will_america_take_on_immigration). *See also* William G. Ross, Op-Ed., *Arizona's Immigration Law: Constitutional, But . . .*, JURIST, May 3, 2010, http://jurist.org/forum/2010/05/arizonasimmigrationlaw.php (claiming that "the statute specifically forbids consideration of 'race, color or national origin' in its implementation"); Dan Nowicki, *Court Fight Looms on New Immigration Law*, Apr. 25, 2010, ARIZ. REPUBLIC, *available at* http://www.azcentral.com/arizonarepublic/news/articles/2010/04/25/20100425immigration-bill-jan-brewer-arizona.html (noting that Kris Kobach, who counseled the author of S.B. 1070 stated "There is absolutely nothing in the bill that could be construed as legitimizing racial profiling . . . On the contrary, such profiling is prohibited.").

5. ARIZ. REV. STAT. § 11-1051.

6. Whren v. United States, 517 U.S. 806, 813 (1996).

7. *See* Gabriel J. Chin, et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 at 62-70, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1617440.

8. United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975). *See also, e.g.*, United States v. Hernandez-Moya, 335 Fed. Appx. 930 (5th Cir. 2009) (unpublished) (reaffirming relevance of race in affirming roving border patrol stop). *See generally* Gabriel J. Chin & Kevin R. Johnson, *A High Court Ruling Underpins Arizona Law*, WASH. POST, July 13, 2010, at A15.

> Mexican ancestry alone, that is, Hispanic appearance, is not enough to establish reasonable cause, but if the occupants' dress or hairstyles are associated with people currently living in Mexico, such characteristics may be sufficient. The driver's behavior may be considered if the driving is erratic or the driver exhibits an "obvious attempt to evade officers." The type or load of the vehicle may also create a reasonable suspicion.[9]

Because the U.S. Constitution and the Arizona Constitution both permit the consideration of race in immigration enforcement, proponents of S.B. 1070 are incorrect when they claim that the legislation prohibits racial profiling.[10] But that does not necessarily mean S.B. 1070 opponents' contrary claims—that the legislation promotes or encourages racial profiling—are correct. It is the preexisting interpretation of the U.S. and Arizona constitutions—not the enactment of S.B. 1070—that permits racial profiling.[11]

A second set of misstatements concerns the content of Judge Susan Bolton's preliminary injunction ruling. S.B. 1070's supporters and its detractors both claim that the judge's ruling represents a victory for their side.[12] In reality, Judge Bolton's decision in this case was, in most respects, a quite balanced one, giving neither side a clear win.

Judge Bolton's preliminary injunction opinion was what I would describe as modest. Although the Department of Justice had asked that the Arizona legislation be enjoined in its entirety,[13] Judge Bolton issued only a partial injunction.[14] In particular, she refused to enjoin any section of the bill against which the Department had failed to make specific preemption arguments. As there were a number of provisions that the Department did not individually challenge as preempted, that meant a number of the bill's provisions were never analyzed by Judge Bolton. And even for those provisions that the

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9. State v. Gonzalez-Gutierrez, 927 P.2d 776, 780 (Ariz. 1996) (quoting Brignoni-Ponce, 422 U.S. at 885).

10. Racial profiling is generally understood as the "law-enforcement practice of using race, national origin, or ethnicity as a salient basis for suspicion of criminal activity." BLACK'S LAW DICTIONARY 1286 (8th ed. 2004).

11. However, that does not mean S.B. 1070 may not ultimately result in increased use of race by law enforcement. Whether S.B. 1070 will, in practice, result in increased racial profiling will depend on administrative policy, law enforcement training, and a number of other factors. What is more, other provisions of the law, which require law enforcement to enforce immigration laws to the full extent permitted by federal law might also affect the extent to which Arizona law enforcement consider an individual's race in the context of immigration enforcement. *See* Chin, et al., *supra* note 7, at 18.

12. *See, e.g.*, Russell Pearce, Opinion, *Arizona Law Still in Win Column*, POLITICO, Aug. 6, 2010, http://www.politico.com/news/stories/0810/40764.html#ixzz0xBlZrKSi ("Opponents of immigration enforcement are calling the temporary injunction against parts of Arizona's anti-illegal-immigration law a death blow to state enforcement. The Mexican American Legal Defense Fund called it a "warning to other states" that want to enact similar legislation. As the author of the new law, S.B. 1070, I can honestly say that July 29, when the pared-down law went into effect, was a victory."); DFutureIsNow, *Gov. Jan Brewer Appeal of SB1070 Law is DENIED*, DAILY KOS, (July 31, 2010, 7:53:58 AM), http://www.dailykos.com/story/2010/7/31/889198/-Gov.-Jan-Brewer-+-Racist-GOP-DENIED-Quick-Appeal-Of-SB1070-Law (characterizing Judge Bolton's ruling and the Ninth Circuit's refusal for an expedited appeal as defeats for Governor Brewer).

13. Brief of Plaintiff at 12-13, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413) ("As explained in detail in the next section, individual provisions of S.B. 1070 are invalid under the Supremacy Clause because each separately conflicts with federal immigration law and policy. But the statute, taken as a whole, also suffers from a fundamental, overarching defect: It impermissibly attempts to set immigration policy at the state level and is therefore preempted.").

14. United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (granting in part and denying in part the United States' Motion for Preliminary Injunction).

Department did challenge, Judge Bolton refused to enjoin one of them, expressing skepticism at the Justice Department's dormant commerce clause arguments.[15]

In claiming that Judge Bolton's decision represented a victory for their side, S.B. 1070 proponents and opponents spoke in terms of which portions of the bill were most important—with the importance of a particular provision apparently depending on whether the speaker supported the legislation or opposed it.[16] Opponents of S.B. 1070 claimed that the decision enjoined the enforcement of the most important provisions of the law, while proponents stated that the most important provisions remained intact. It is, of course, difficult to objectively quantify a provision's importance. But the fact that both sides rushed to claim Judge Bolton's decision as a win strongly suggests that neither side was engaging in a close analysis of the opinion. Instead, these claims of victory seem to be little more than political posturing.

A final barrage of misstatements involves what it means for a state law to be preempted by federal law. A number of S.B. 1070 commentators—who I presume have little or no legal training—framed the preemption issue as a question whether the Arizona law preempted federal immigration power.[17] Those statements betray a fundamental misunderstanding of preemption doctrine. In its most basic terms, preemption is the constitutional principle that, because the Supremacy Clause identifies federal law as the supreme law of the land,[18] federal law supersedes any conflicting state law or

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15. *Id.* at 1004.

16. *Compare On the Record with Greta Van Susteren* (FOX News television broadcast July 29, 2010), (transcript *available at* http://www.foxnews.com/on-air/on-the-record/transcript/sb-1070-co-author-judge039s-ruling-039this-huge-victory-arizona039) (featuring Russell Pearce claiming that the most important portions of the bill are still in effect after Bolton's ruling) *with* Jerry Markon & Stephanie McCrummen, *Arizona immigration law SB 1070—Judge blocks some sections*, WASH. POST, July 29, 2010, at A01 ("Cecillia Wang, a lawyer for the ACLU—along with other civil rights groups that filed one of six other lawsuits against Arizona—said the judge had stopped 'key egregious portions of the law.'").

17. *See, e.g.*, Editorial, *Arizona goes loco: Anti-immigrant law is completely over the top*, N.Y. DAILY NEWS, Apr. 29, 2010, at http://www.nydailynews.com/opinions/2010/04/29/2010-04-29_arizona_goes_loco.html ("The bottom line is that Arizona's law is counterproductive in the extreme. On the bright side, federal courts may well throw it out as an unconstitutional attempt by a state to preempt federal jurisdiction."); Michael O'Keefe, *Activists outside MLB offices urge Bud Selig to take stand, move 2011 All-Star game from Arizona*, N.Y. DAILY NEWS, July 9, 2010, at http://www.nydailynews.com/sports/baseball/yankees/2010/07/09/2010-07-09_calls_for_bud_to_desert_ariz.html ("The law is scheduled to go into effect on July 29, but the Justice Department asked a judge to block SB 1070 this week, saying it is unconstitutional because it attempts to preempt federal law."); Bill O'Reilly: The O'Reilly Factor Flash, *Factor Mail* (July 7, 2010), http://www.billoreilly.com/show?action=viewTVShow&showID=2640#7 ("If the Justice Department believes it is unconstitutional for the state to preempt federal law, why doesn't the DOJ sue the sanctuary cities?"); Desert Sun Roundtable, *Sounding Off on Arizona's Illegal Immigrant Law*, THE DESERT SUN, May 16, 2010, at B12 ("The states do not have the right to preempt the federal government in this area."); *Feds Sue to Overturn Arizona Immigration Law*, CNN.com, July 7, 2010, http://www.cnn.com/2010/POLITICS/07/06/arizona.immigration.lawsuit/index.html ("Justice Department lawyers argued that the state statute should be declared invalid because it has improperly preempted federal law."); *Countdown With Keith Olbermann*, (MSNBC television broadcast Apr. 28, 2010), (transcript *available at* http://www.msnbc.msn.com/id/36846955/) ("I believe it's unconstitutional. I don't think, as you pointed out earlier in this show, that the states have the authority to preempt federal government when it comes to immigration issues."); Byron York, *How Obama Could Lose Arizona Immigration Battle*, WASH EXAMINER, Apr. 30, 2010, http://www.washingtonexaminer.com/politics/How-Obama-could-lose-Arizona-immigration-battle-92460459.html#ixzz0yE9HWdAX (noting "the claim that only the federal government can handle immigration matters, and thus the Arizona measure pre-empts federal law").

18. U.S. CONST. art. VI, § 1, cl. 2 ("This 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*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.") (emphasis added).

regulation.[19] But the doctrine is a one-way street. Federal law can preempt state law, but state law cannot preempt federal law.

Other mischaracterizations of the preemption issue are less glaring. For example, opponents of S.B. 1070 seem to suggest that preemption is tantamount to unconstitutionality.[20] As for proponents, some seem to suggest that, if federal immigration law preempts state immigration law, then the federal government has an obligation to enforce those federal laws.[21] And other proponents have indicated that federal preemption applies only because the Obama Administration is failing to enforce immigration law.[22] None of these claims are accurate.

Ordinarily, when we classify legislation as "unconstitutional," we are stating that the legislation conflicts with the Constitution. In contrast, when legislation is found to be preempted by federal law, the conflict is statutory: The federal government has already legislated on this topic, and the state law conflicts with the federal legislation. Under the Supremacy Clause, federal law trumps that conflicting state law. But that is quite different from stating that the state legislation conflicts with the text of the Constitution itself.[23]

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19. BLACK'S LAW DICTIONARY 1216 (8th ed. 2004).

20. *See, e.g.*, Michael O'Keefe, *Activists outside MLB offices urge Bud Selig to take stand, move 2011 All-Star game from Arizona*, N.Y. DAILY NEWS, July 9, 2010, http://www.nydailynews.com/sports/baseball/yankees/2010/07/09/2010-07-09_calls_for_bud_to_desert_ariz. ("The law is scheduled to go into effect on July 29, but the Justice Department asked a judge to block SB 1070 this week, saying it is unconstitutional because it attempts to preempt federal law."); Desert Sun Roundtable, *Sounding Off on Arizona's Illegal Immigrant Law*, THE DESERT SUN, May 16, 2010, at B12 ("The reasons that the law is unconstitutional are fairly straightforward. No. 1: Immigration is a federal subject."); *Countdown With Keith Olbermann*, (MSNBC television broadcast Apr. 28, 2010), (transcript *available at* http://www.msnbc.msn.com/id/36846955/) ("I believe it's unconstitutional. I don't, as you pointed out earlier in this show, that the states have the authority to preempt federal government when it comes to immigration issues.").

21. *See, e.g.*, Editorial, *Suing Arizona Isn't Enough*, WASH. POST, July 7, 2010 ("It's easy to understand the frustration of people in Arizona who decided to take matters into their own legislative hands. Congress for years has ignored practical realities and succumbed to xenophobia and fear-mongering to derail efforts to craft sensible immigration reforms. It's fine to claim a right to 'preempt' state law, but that right comes with a responsibility to do the job."); Julie Myers, *Flawed Analysis Blocks Part of 2010 Arizona ImmigrationLaw*, Aug.20, 2010, http://www.lexisnexis.com/Community/emergingissues/blogs/*focusonimmigration*/archive/2010/08/20/julie-myers-wood-flawed-analysis-blocks-parts-of-2010-arizona-immigration-law-s-b-1070.aspx ("The first line of Judge Bolton's opinion makes clear that the current federal resources devoted to interior and border enforcement are grossly inadequate to combat the 'rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns' in Arizona. . . . Judge Bolton's judicial acknowledgment of the problem makes it even more significant and makes the part of her decision to prevent Arizona from enforcing some portions of S.B.1070 based on federal preemption even more troubling. For although the opinion makes clear that federal resources are insufficient, the United States insists on assuming the entire responsibility to address illegal immigration. Accordingly, as a policy matter, what are the citizens of Arizona left with? Simply a declaration on the part of the United States that Arizona's expressed needs are not 'federal priorities,' but that Arizona is powerless to address the rampant illegal immigration and associated criminal activity in the state.").

22. In a Fox News interview, State Senator Russell Pearce characterized Judge Bolton's ruling on preemption as "simply sa[ying] policy over law, that we think it may interfere with the priorities of the Obama administration. (INAUDIBLE) clearly, we know because their administration's policy is non-enforcement. Of course, [S.B. 1070]'s going to be in conflict with that!" *On the Record with Greta Van Susteren* (FOX News television broadcast July 29, 2010), (transcript *available at* http://www.foxnews.com/on-air/on-the-record/transcript/sb-1070-co-author-judge039s-ruling-039this-huge-victory-arizona039). *See also* Heather MacDonald, *The Racial Profiling Smoke Screen*, NATIONAL REVIEW ONLINE, May 25, 2010, http://www.nationalreview.com/corner/199796/racial-profiling-smoke-screen/heather-mac-donald ("Opponents of SB 1070 can argue that a state's detection of illegal aliens conflicts with federal policy only if it is federal policy that those illegal aliens never be subjected to the immigration laws in the first place.").

23. *Cf.* Jonathan H. Adler, *More Thoughts on the AZ Immigration Ruling*, The Volokh Conspiracy (July 30, 2010, 1:12 PM), http://volokh.com/2010/07/30/more-thoughts-on-the-az-immigration-ruling/ (characterizing the ruling as holding that "provisions are preempted by federal law, not that Arizona's law is discriminatory or otherwise

The proponents' claims that a finding of federal preemption requires the federal government to increase its immigration enforcement efforts, or that Arizona's law is preempted only because of a lack of federal enforcement, fare no better. Preemption is a matter of federal legislative supremacy—a finding that Congress has acted to exclude state regulation of a particular arena—it has nothing to do with executive enforcement. Prosecutorial discretion—the power to decide how vigorously to enforce the law—is an executive prerogative grounded in separation of powers principles.[24] Preemption, on the other hand, is a federalism issue that allocates power between the federal and state legislatures.[25] The executive branch's decision not to fully enforce the laws that Congress enacts will, as a practical matter, decrease the force of those laws; but that decision does not alter the federal-state balance of power underlying the preemption doctrine.

Because preemption and lack of enforcement are legally unrelated, proponents' claims in this area are legally inaccurate. Of course, it may be that as a political matter the federal government cannot press a claim of preemption in the courts, while at the same time adhering to a policy of under-enforcement.[26] But that political question—as well as the empirical question whether this administration is under-enforcing immigration law—are well beyond the scope of this short commentary.

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In closing, let me note that the current furor over S.B. 1070 and immigration reform is not unique to this time and place. Consider the following statement:

> Few of their children in the country learn English . . . The signs in our streets have inscriptions in both languages . . . Unless the stream of their importation could be turned they will soon so outnumber us that

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unconstitutional").

24. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996) ("The Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'") (quoting Wayte v. United States, 470 U.S. 598, 607 (1985); U.S. CONST., art. II, § 3); Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed.") (quoting U.S. CONST., Art. II, § 3); *see also* Brandon L. Garret, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 905 (2007) ("Prosecutorial exercise of discretion . . . stems from separation of powers and the President's power to 'take Care that the Laws be faithfully executed.'").

25. *See, e.g.*, Michael Burger, *"It's Not Easy Being Green": Local Initiatives, Preemption Problems, and the Market Participant Exception*, 78 U. CIN. L. REV. 835, 852 (2010) ("Federalism concerns are at the heart of preemption doctrine, so there is often said to be a 'presumption against preemption.'"); Victor E. Schwartz & Cary Silverman, *Preemption of State Common Law By Federal Agency Action: Striking the Appropriate Balance that Protects Public Safety*, 84 TUL. L. REV. 1203, 1226 (2010) ("Preemption is often expressed as an issue of federalism.").

26. *See, e.g.*, Statement by Governor Jan Brewer, July 28, 2010, http://azgovernor.gov/dms/upload/PR_072810_StatementGovBrewer.pdf (characterizing the passage of S.B. 1070, even after Judge Bolton's preliminary injunction ruling, as having "already made some progress in waking up Washington").

> all the advantages we have will not be able to preserve our language, and even our government will become precarious.[27]

These statements seem to capture the sentiments of many who support S.B. 1070 and similar legislation. But this statement is not from the Arizona immigration debate. The statement was made by Benjamin Franklin when he was discussing the influx of German immigrants into Pennsylvania in the 1750s. Just as the German immigration crisis of the mid-eighteenth century and the Chinese immigration crisis of the late nineteenth and early twentieth centuries were resolved without dire consequences, I believe that we will be able to resolve the current immigration crisis without irreparable harm to our country. I do, however, think that such a resolution is far more likely if the public discussion is not riddled with inaccuracies.

27. Letter from Benjamin Franklin to Richard Jackson (May 5, 1753), *in* 3 THE WRITINGS OF BENJAMIN FRANKLIN 140 (Albert Henry Smyth, ed. 1905).