

How Would the House be Apportioned If a Moon-Sized Asteroid Wiped out the U.S. West of the Mississippi?

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Undoubtedly, in an extreme emergency, such as, say, a full scale nuclear war or a catastrophic [impact event](#), some aspects of federalism and separation of powers would have to change. For example, the rule that each state gets two senators and at least one representative might have to be reconsidered if the state was completely destroyed in a natural disaster. But I am not sure how much intellectual energy should be devoted to questions of this nature. Which is why I raised an eyebrow after reading Justice Kennedy's question in *Arizona v. United States*.

He asked the Solicitor General to assume a situation in which federal authorities acknowledged that they could not enforce federal immigration law because they did not have the resources, and "that the State of Arizona has a massive emergency, with social disruption, economic disruption, people leaving the State because of a flood of immigrants. . . . Does that give the State of Arizona any powers or authority or legitimate concerns that any other State would not have?"

Perhaps Justice Kennedy is considering voting to strike down some or all of SB1070 while leaving the door open for expanded state powers in dire circumstances. But why speculate about such situations when they have never happened? Yes, if every state except Montana is vaporized by starships from Alpha Centauri, the island nation of Montana's right to make a treaty almost certainly springs into being notwithstanding the Constitution. But we do not need a Supreme Court to tell us that, nor is that the most urgent question under those circumstances.

Another possibility, which I hope and suspect is not the case, is that Justice Kennedy is considering invoking an emergency exception in the present situation. The facts just do not support it. Of course, the United States is putting unprecedented resources into immigration enforcement, and they are working. As Pew [reported](#), before SB1070 was passed, net immigration from Mexico had slowed or reversed. The Cato Institute reports that immigration is [not associated with increased crime](#). And the [CBO estimated](#) that the net cost of undocumented immigration to states and localities is "most likely modest." If

an emergency exception to the Constitution applied whenever a state judged, on its own, that heightened measures were warranted, the Constitution would be meaningless. States almost always believe that their actions respond to emergencies or are necessary to head off emergencies down the road.

A final reason that the question rings false is that the Immigration and Nationality Act already addresses this precise situation: 8 U.S.C. 1103(a)(10) provides: " In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize" state officers to enforce federal immigration law. If an emergency arises, this and a number of other, existing parts of the INA allow for use of state resources under federal supervision.

The constitutional question still exists, I suppose, because perhaps an additional fact will be present: 1) there is an actual emergency, 2) the federal government admits that it wants to enforce the law but does not have the resources, as Justice Kennedy hypothesized, and 3) in spite of 2), the federal government refuses to allow the state to cooperatively enforce federal immigration law. But this seems like another science-fiction question. I am hard-pressed to think of an example where the federal government refused in an emergency to let a state use its own resources to help itself, even in an area of predominant federal authority. Can anyone think of one?