

Putting States Out of the Immigration Law Enforcement Business

*Kevin J. Fandl, J.D., Ph.D. **

INTRODUCTION

A federal district court struck down Arizona's anti-immigrant smuggling law in November 2014, asserting that the law attempts to usurp federal immigration enforcement authority.¹ The month prior, an *en banc* panel of the Ninth Circuit Court of Appeals tossed out a different Arizona anti-immigration law that denied bail to unlawful immigrants² charged with one of a variety of felonies.³ Following on the heels of the 2012 U.S. Supreme Court decision striking down most of Arizona's broad anti-immigration bill SB 1070, and succeeded by a Fifth Circuit gutting of Alabama's even stricter HB 56 in 2014, states are left wondering what they can do to curtail the effects of unlawful migration in their states. In this article, I argue that immigration law enforcement should be left to the federal government and that states should limit their actions to coordination with federal authorities only.

That same month, President Obama unveiled a far-reaching and ambitious immigration policy, shifting away from his predecessors by emphasizing the importance of keeping immigrant families intact and working to remove serious criminals.⁴ Since then, he has interpreted his executive power to enable him to implement some aspects of immigration reform, including a shift in deportation priorities, without waiting for congressional action. His administration has repeatedly asserted that the Congress must act to reform our "broken immigration system," yet they continue to bicker over the right way to reform that system.

* Kevin J. Fandl, Ph.D. (George Mason University), J.D./M.A. (American University), B.A. (Lock Haven University), is an Assistant Professor of Legal Studies and Strategic Global Management at Temple University. He is the former Counsel to the Assistant Secretary for U.S. Immigration and Customs Enforcement. He lectures around the world on issues that bridge the nexus between law and public policy. Special thanks to the impressive work of the editorial staff at the *Harvard Law & Policy Review*, who provided outstanding guidance on this piece. And special thanks to his wife Monica and daughter Isabella for their tireless support of his work.

¹ See *United States v. Arizona*, No. CV 10-1413-PHX-SRB, at *4, 17, 21, 23, 27, 33 (D. Ariz. Nov. 7, 2014).

² Note that throughout this article I will refer to aliens who are present in the United States without lawful status, either due to entering without permission or staying beyond their lawful permission, as "unlawful immigrants." Substantial debate exists over the language used to describe these individuals, ranging from undocumented to illegal. My choice of terminology relates merely to legal status under current immigration laws and has no relationship to the criminality of those individuals.

³ See *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 775, 792 (9th Cir. 2014).

⁴ See The White House, *Fixing the System: President Obama is Taking Action on Immigration* (Nov. 20, 2014), <http://perma.cc/2YKR-APRM>.

In the midst of these federal actions, states have flexed their legislative muscles by delving deeper into immigration regulation within their own borders. They have justified their aggressive moves as a response to the failed efforts of Congress to address the problems that are most visible at the state and local level as immigrants crowd schools and hospitals, and change the cultural landscape of the communities they occupy.

Yet these impacts are only one aspect of the overall immigration process, which includes larger issues such as foreign policy, national security, and broad economic growth. By allowing states to take a bolder stance in determining immigration policy, we are crippling the federal government's ability to maintain a unified and consistent policy toward countries from which immigrants arrive, and a clear set of rules for entry, legal residence, and removal. Like other foreign affairs matters, the effects of immigration are frequently felt at the local level, but must be implemented at the national level.

In this article, I will explain the key historical aspects of the debate between state and federal control over immigration law enforcement. I will highlight the preemption aspects of the recent significant federal cases challenging state and local enforcement laws. Finally, I will suggest that the trend in federal courts has increasingly been toward more federal control of immigration law and an unwillingness to allow states to take immigration enforcement into their own hands. These recent decisions reaffirm the federal government's supremacy over immigration enforcement decisions and clarify the minimal role that states should play in enacting their own immigration regulations.

I. IMMIGRATION LAW: ALWAYS A FEDERAL POWER?

Prior to 1891, the federal government did not have the will or the resources to take on broad immigration enforcement, as comprehensive legislation had not been passed until that time.⁵ Ports were largely operated by states, and immigrants entered the United States at the discretion of the local port director. At that time, immigrants largely arrived by sea from Europe or Asia, rather than across land borders. Arriving immigrants faced a hodgepodge of regulations depending on the port at which they landed. Port directors took advantage of their authority, often in a discriminatory fashion, charging intending immigrants exorbitant fees and threatening them with deportation or incarceration.⁶ The inconsistent state rules affecting arriving im-

⁵ See, e.g., Kevin J. Fandl, *Immigration Posses: U.S. Immigration Law and Local Enforcement Practices*, 34 J. LEGIS. 16, 18–19 (2008) [hereinafter *Immigration Posses*] (discussing immigration law during the 1800s).

⁶ See THE CONGRESSIONAL DIGEST, Volume II at 296 (Alice Gram & Velma Hitchcock eds. 1922) (citing Reports of the U.S. Immigration Commission, Vol. 2). For example, Asian immigrants arriving on the West Coast were often subjected to high fees and threats of deportation at a time when such immigrants were largely disfavored. See *In re Ah Fong*, 145 P. 153 (Cal. Ct. App. 1914).

migrants led the U.S. Supreme Court to clarify the role of the states in regulating arriving immigrants.

Although the Supreme Court began striking down state laws on immigration as early as the mid-nineteenth century,⁷ it was toward the end of that century following a proliferation of discriminatory laws toward Asian immigrants when the Court dramatically shifted the balance of immigration power from states to the federal government. The Court asserted this role most aggressively in the 1876 *Chy Lung* case, which was brought by a group of female immigrants from China who were detained by the California port director, demanding bonds of \$500 each before he would allow them entry to the United States.⁸ Upon refusal to pay, some were detained by the director pending deportation. The intending immigrants challenged their detention and the authority of the port director to unilaterally determine the requirements for entry into the United States. The case made its way to the U.S. Supreme Court, which ultimately struck down the California statute allowing their state port director discretion over immigration.

In the *Chy Lung* case, the Court said, “[t] is hardly possible to conceive a statute more skilfully [sic] framed, to place in the hands of a single man the power to prevent entirely vessels engaged in a foreign trade, say with China, from carrying passengers, or to compel them to submit to systematic extortion of the grossest kind.”⁹ The Court then criticized states for not taking into account the effects of their immigration laws on the international obligations of the United States. “[I]f citizens of our own government were treated by any foreign nation as subjects of the Emperor of China have been actually treated under this law, no administration could withstand the call for a demand on such government for redress.”¹⁰

Finally, seeing this as an opportunity to clarify the role of states and the federal government in the enforcement of immigration law, the Court concluded:

The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.¹¹

Rather than looking to the Naturalization Clause of the U.S. Constitution, the Court here explained that immigration is a matter of foreign com-

⁷ See, e.g., Jennifer Chacón, *Who is Responsible for U.S. Immigration Policy?*, 14 IN-SIGHTS ON LAW AND SOCIETY, no. 3, Spring 2014, <http://perma.cc/5FNF-FTKF>.

⁸ *Chy Lung v. Freeman*, 92 U.S. 275, 278 (1876).

⁹ *Id.* at 278.

¹⁰ *Id.* at 279.

¹¹ *Id.* at 280.

merce, which is exclusively a federal power according to Article I § 8. And while the Naturalization Clause (immediately following the Commerce Clause) leaves no doubt that a state is expressly precluded from promulgating statutes that affect in any way the requirements for citizenship and the naturalization process, it is the Commerce Clause that situates broad immigration enforcement powers in the hands of the federal government.

Shortly after the *Chy Lung* case, the Court gave Congress the expansive immigration enforcement power that Congress had previously lacked. In *Fong Yue Ting v. United States*, the Court concluded that the federal government had the “absolute and unqualified” power to deport aliens in the interest of national sovereignty.¹² These combined decisions established what is referred to today as “pure” immigration authority—the power of the federal government to control the entry, naturalization, and deportation of non-citizens, as well as most immigration law enforcement powers.

Later cases, such as *United States v. Curtiss-Wright Export Corp.*,¹³ strengthened the argument that matters of foreign affairs are within the exclusive purview of the federal government. Only the federal government can speak as the representative of the United States in front of other nations. Thus, if immigration is a matter of foreign relations, there can be little doubt that only the federal government is empowered to regulate the field of pure immigration issues.¹⁴

However, pure immigration issues were not the *only* immigration issues. States maintained that neither the Commerce nor the Naturalization Clause prevented them from promulgating laws regulating the acts of immigrants within their state borders. And they were right—to a degree. The Court in *DeCanas v. Bica* upheld a California statute that made it unlawful for an employer to knowingly employ a non-citizen not entitled to lawful residence if they could show that such employment would have an adverse effect on lawful workers.¹⁵ In the decision, Justice Blackmun said, “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 immigration power, whether latent or exercised.”¹⁶

The *DeCanas* case has been interpreted to mean that state legislatures are allowed to regulate immigration so long as they do so in an area that is not expressly controlled by the federal government. For instance, the Court later upheld state statutes that restricted the issuance of driver’s licenses to unlawful migrants.¹⁷ This dovetailed with some earlier precedents as well; for example, the Court had earlier set forth special probate rules for non-

¹² 149 U.S. 698, 707 (1893).

¹³ 299 U.S. 304, 318 (1936).

¹⁴ For a more complete history of legislation and court decisions about immigration, see Fandl, *Immigration Posses*, *supra* note 5, at 17–20.

¹⁵ See 424 U.S. 351, 356 (1976).

¹⁶ *Id.* at 355.

¹⁷ *John Doe No. 1 v. Georgia Dep’t of Pub. Safety*, 147 F. Supp. 2d 1369, 1370–71, 1376 (N.D. Ga. 2001).

citizens.¹⁸ Accordingly, if the federal government has not legislated specifically in these areas of immigration law, and so long as the state statutes do not conflict with other federal laws, states may be permitted to legislate here. However, this has become an increasingly narrow grant of power.

Advocates for more restrictive immigration laws have consistently argued that the states have the ability to pass laws that would place immigration law enforcement authority squarely within the hands of state authorities.¹⁹ Pro-immigrant rights groups have favored the argument that the federal government is the only entity with the legal authority to touch immigrants.²⁰ This is not a question of whether the federal government *can* exclusively control immigration law, but rather whether they *have* done so. Given that the Constitution does not definitively answer this question, states have attempted to fill the void with their own legislation, leaving it up to the courts and Congress to clarify the scope of federal immigration power on a case-by-case basis.

II. RECENT STATE IMMIGRATION ENFORCEMENT ACTIONS

State legislatures are actively engaged in the regulation of immigrants within their borders. As of June 2014, 41 states and the District of Columbia had enacted some form of legislation related to immigrants.²¹ Several of these state laws provided additional benefits to unlawful immigrants, such as in-state tuition benefits (Florida, Tennessee, Washington), permission to practice law if in possession of a valid work authorization (Florida), and numerous resolutions asking the President to suspend deportations for non-criminal aliens and encouraging Congress to reach agreement on comprehensive immigration reform.

Though many immigrant regulations expand the rights and protections of those individuals, other state legislatures have taken steps to curtail those rights.²² These enactments include making knowing acceptance of identity documents belonging to someone else an aggravated felony (Arizona), requiring gun purchasers to be U.S. citizens (Kentucky), and eliminating the border crossing card as a valid form of identification for liquor purchases (Arizona).

And still other states have attempted to pass more extensive restrictions on immigrants, but most of these have been diluted or overturned by federal

¹⁸ *Clark v. Allen*, 331 U.S. 503, 517 (1947).

¹⁹ See, e.g., Kris W. Kobach, *State and Local Authority to Enforce Immigration Law: A Unified Approach to Stopping Terrorists*, CTR. FOR IMMIGRATION STUDIES (June 2004), <http://perma.cc/5A83-PATB>.

²⁰ See, e.g., *Congress Should Oppose Attempts to Require or Authorize States to Regulate Immigration*, NAT'L IMMIGRATION LAW CTR. (Mar. 2011), <http://perma.cc/BRZ6-9T2J>.

²¹ *2014 Report on State Immigration Laws: January–June*, NAT'L CONFERENCE ON STATE LEGISLATURES (Aug. 12, 2014), <http://www.ncsl.org/research/immigration/2014-report-on-state-immigration-laws-jan-june.aspx>, <http://perma.cc/KZX8-EUU5>.

²² See Fandl, *Immigration Posses*, *supra* note 5, at 22–23.

courts. California passed Proposition 187, known as the Save Our State proposition, in 1994, which banned unlawful immigrants from receiving any public services, including educational services.²³ The economic recession and rising number of Hispanic immigrants in California played a role in the bill's passage.²⁴ The law was largely stripped of regulatory power over immigrants by a California District Court, a decision that the Governor of California chose not to appeal.²⁵

In July 2007, the City of Hazleton, Pennsylvania enacted an ordinance that punished landlords or employers that were found to rent to or hire illegal immigrants. In his decision striking down the ordinance, Federal District Judge Munley stated, “[t]he city could not enact an ordinance that violates rights the Constitution guarantees to every person in the United States, whether legal resident or not. The genius of our Constitution is that it provides rights even to those who evoke the least sympathy from the general public.”²⁶

Utah attempted to pass legislation that would balance both the interests of pro-immigrant rights groups and those concerned about criminal aliens. They proposed a statute that would have brought unlawful immigrants out of the shadows and offered them some employment opportunities similar to a guest worker program. That statute has yet to be implemented. However, their collateral enforcement statute, the Utah Illegal Immigration Enforcement Act of 2011 (HB 497), successfully passed and was quickly challenged by the United States and rights groups.

The Utah statute tracks existing federal legislation in many ways and was largely upheld by a Utah federal district court in 2014.²⁷ But that court struck down all provisions that attempted to elicit new state enforcement powers, including a clause requiring alien registration, criminalizing the inducement or harboring of aliens, and allowing warrantless arrests of aliens subject to removal. The court emphasized that the federal government has not “field” preempted all immigration law; however, the decision left no new state enforcement practice standing.²⁸

Indiana passed the 2011 Senate Enrolled Act 590 (SEA 590) in an effort to protect their job market from unlawful workers. Though the Act took effect, two provisions attempted to give state law enforcement authorities immigration arrest powers beyond what federal law provided. Section 20 authorized state officials to arrest aliens when they were in possession of a removal order, when a detainer had been issued by the federal government,

²³ See *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 763 (C.D. Cal. 1995).

²⁴ See Gebe Martinez, *Learning from Proposition 187*, CTR. FOR AM. PROGRESS (May 5, 2010), <https://www.americanprogress.org/issues/immigration/news/2010/05/05/7847/learning-from-proposition-187/>.

²⁵ See *League of United Latin American Citizens*, 908 F. Supp. at 763.

²⁶ *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 555 (M.D. Pa. 2007).

²⁷ See *Utah Coal. of La Raza v. Herbert*, 2014 WL 2765195 (D. Utah June 18, 2014).

²⁸ *Id.*

or when they had probable cause to believe the alien had been indicted for or convicted of an aggravated felony. Section 18 of that law criminalized the offering of a consular document, other than a passport, issued by a foreign state as valid identification. These two sections of the law were struck down by an Indiana District Court in 2013.²⁹

South Carolina is the most recent state to pass immigration enforcement legislation along the model of Arizona's SB 1070, discussed below. South Carolina Senate Bill 20 was passed in 2011 and attempted to, among other things, criminalize the failure to carry official immigration papers and required state officials to determine the immigration status of those stopped for other lawful purposes.³⁰ The U.S. Department of Justice and several civil rights groups sued to enjoin the implementation of the law and ultimately settled for the removal of the criminal provision and clarification that an alien may not be held indefinitely while determining lawful status.³¹

III. TO PREEMPT OR NOT TO PREEMPT: THAT IS THE QUESTION

A state's general police power allows it to legislate in the areas of security, economy, and any other matter that is not controlled by federal authorities. Should there be any potential conflict between a state law and a federal law that may or may not control an issue, it is left to the courts to decide where the power lies. In these cases, the preemption doctrine of Article VI will often be referenced. The Preemption Clause of the United States Constitution stipulates that:

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.³²

"It is a basic tenet of 'Our Federalism' that where federal and state law conflict, state law must yield."³³ Courts begin their examination in preemption cases by looking at the nature and purpose of the federal law or regulatory scheme to determine its validity and potential conflicts with the state law. The Court then considers whether the federal law expressly excludes states from regulation in the field (field preemption);³⁴ whether compliance

²⁹ See *Buquer v. City of Indianapolis*, 2013 WL 1332158 (S.D. Ind. Mar. 28, 2013).

³⁰ See, e.g., *Preliminary Analysis of South Carolina's Senate Bill 20*, AM. CIVIL LIBERTIES UNION, <http://perma.cc/294H-7F73>.

³¹ See, e.g., *Justice Department Sues South Carolina Over State's Strict Immigration Law*, FOXNEWS.COM (Nov. 1, 2011), <http://perma.cc/SN9L-Z8VL>.

³² U.S. CONST. art. VI, cl. 2.

³³ *Denson v. United States*, 574 F.3d 1318, 1345 (11th Cir. 2009).

³⁴ See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 223-24 (1947).

with both the state and federal law is impossible (conflict preemption);³⁵ or whether the state law poses an obstacle to the full realization of the federal law or regulatory scheme (obstacle preemption).³⁶

Prior to the passage of the Immigration and Nationality Act (INA) in 1952,³⁷ states were restricted in their passage of laws affecting migrants due to the impact such laws may have had on foreign relations, an area largely under federal control.³⁸ In *Hines*, decided pre-INA, the high Court struck down a Pennsylvania law requiring aliens to register with the state and carry an alien ID at all times. An existing federal law (the Alien Registration Act of 1940)³⁹ had a similar provision and thus preempted the Pennsylvania law.

The INA established a comprehensive regulatory framework for immigration law enforcement and strengthened the case for preemption of state and local immigration laws. These prohibited areas include naturalization and citizenship, deportation, and any law that might affect foreign relations, which are central facets of the federal regulatory scheme outlined in the Act.⁴⁰ This regulatory scheme effectively blocked off state action in “pure” immigration issues.⁴¹ Indeed, the Supreme Court “has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”⁴²

In 1976, the Supreme Court permitted a California labor statute that prohibited employers from knowingly hiring unlawful immigrants,⁴³ concluding that the INA did not cover immigrant employment and thus states were not preempted from legislating in this area:

[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration, and thus per se preempted by this constitutional power, whether latent or exercised [T]he 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 admit-

³⁵ See, e.g., *Gibbons v. Ogden*, 22 U.S. 1, 169–70 (1824) (parties able to secure navigation license from either state or federal authorities, leading to potential conflict in use of that license).

³⁶ See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

³⁷ Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (hereinafter “INA of 1952”).

³⁸ See, e.g., *Smith v. Turner* (“The Passenger Cases”), 48 U.S. 283, 406 (1849) (“Except to guard its citizens against diseases and paupers, the municipal power of a State cannot prohibit the introduction of foreigners brought to this country under the authority of Congress.”); see also *id.* at 408 (“The police power of the State cannot draw within its jurisdiction objects which lie beyond it.”); *id.* at 409 (“[A] tax on passengers of a ship from a foreign port, in the manner provided, is a regulation of foreign commerce, which is exclusively vested in Congress; and the act is therefore void.”).

³⁹ 18 U.S.C. § 2385 (1940).

⁴⁰ See INA of 1952, *supra* note 37.

⁴¹ See, e.g., William Hochul III, Note, *Enforcement in Kind: Reexamining the Preemption Doctrine*, 87 NOTRE DAME L. REV. 2225, 2233 (2012).

⁴² *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

⁴³ See *De Canas v. Bica*, 424 U.S. 351, 361–63 (1976).

ted into the country, and the conditions under which a legal entrant may remain.⁴⁴

In subsequent cases, this authority stretched into more ambiguous areas of immigration regulation, including education, employment, and even contract enforcement. In the 1982 case of *Plyler v. Doe*, the high Court struck down a Texas law charging unlawful immigrant children \$1,000 in tuition to attend public schools and also denying state education funding to those children.⁴⁵ In the Court's reasoning, the law would lead to "the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."⁴⁶

States lost the ability to regulate widely in employment matters when Congress passed the Immigration Reform and Control Act (IRCA) in 1986, where Congress established a comprehensive framework for the regulation of alien employment.⁴⁷ Congress established civil penalties for the employees and employers for violations of these provisions. When Arizona attempted to pass its own law criminalizing the hiring of unlawful aliens, the Court struck that provision down, concluding that Congress had made it clear that this created a conflict between state and federal rules.⁴⁸ IRCA expressly prohibited state issuance of civil or criminal penalties for the employment of unlawful workers. IRCA expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."⁴⁹

More recent cases have attempted to reach into private transactions involving unlawful immigrants. Most of these attempts at regulation have been predictably struck down. In 2008, the city of Farmer's Branch, Texas passed a rigid ordinance that required landlords to assess the immigration status of potential tenants when they did not declare themselves citizens or nationals of the United States.⁵⁰ The ordinance required the building inspector to verify with the federal government that the prospective tenant was "lawfully present," a term not equated with legal immigration status.⁵¹

The Fifth Circuit Court of Appeals concluded that the ordinance was preempted by federal law.⁵² "[T]he fact of a common end hardly neutralizes

⁴⁴ *Id.* at 355.

⁴⁵ 457 U.S. 202, 230 (1982).

⁴⁶ *Id.*

⁴⁷ See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 [hereinafter IRCA of 1986].

⁴⁸ *United States v. Arizona*, 132 S. Ct. 2492, 2510 (2012).

⁴⁹ IRCA of 1986, *supra* note 47, at § 1324a(h)(2).

⁵⁰ Farmer's Branch, Tex., Ordinance 2952 (Jan. 22, 2008). Note that a similar ordinance had been passed in the previous two years, which was struck down by Texas courts. See, e.g., *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858 (N.D. Tex. 2008).

⁵¹ Farmer's Branch, Tex., Ordinance 2952 (Jan. 22, 2008).

⁵² See *Villas at Parkside v. City of Farmer's Branch*, 726 F.3d 524, 528 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1491 (2014).

conflicting means.”⁵³ “By setting forth criminal offenses that ‘discourage illegal immigration or otherwise reinforce federal immigration law,’ and by providing for state judicial review of a non-citizen’s lawful or unlawful presence, the Ordinance creates such conflict.”⁵⁴ In its analysis, the court concluded that the ordinance conflicted with the federal government’s power of foreign relations by criminalizing housing for non-citizens, and that the city was field preempted in its attempt to require building inspectors to determine lawful status by designating a local official with an exclusively federal duty, namely, the determination of legal status.

In *Lozano v. City of Hazleton*,⁵⁵ the Third Circuit Court of Appeals considered a local Pennsylvania ordinance attempting to regulate the employment and housing of unlawfully present aliens. The court had no trouble finding the ordinance preempted in 2010, and the city filed a petition for a writ of certiorari. Thereafter, the U.S. Supreme Court decided both *United States v. Arizona* and *Chamber of Commerce v. Whiting*,⁵⁶ each of which addressed similar issues. The U.S. Supreme Court remanded the case to the Fifth Circuit to reconsider in light of those decisions. The Fifth Circuit reiterated their original position, finding the local laws preempted by federal law in 2013.

The most far-reaching effort to date by a state to exercise state police power over immigration is Alabama’s Beason-Hammon Alabama Taxpayer and Citizen Protection Act, enacted in June 2011 (HB 56). The Act went into effect in September 2011, though it has since been gutted by numerous legal challenges.

The Eleventh Circuit Court of Appeals enjoined two sections of the Act. Section 10 made the willful failure to carry an alien registration document a misdemeanor. Section 28 required all public elementary and secondary schools to assess every incoming student as to whether they were born outside the United States or whether they were children of unlawful aliens.⁵⁷

In March 2012, the court expanded the injunction to enjoin sections 27 and 30.⁵⁸ Section 27 blocked the enforcement of contracts with unlawfully present aliens, except for narrow exceptions such as hotel contracts for one night and transportation contracts enroute to deportation. Section 30 made it a felony for an unlawfully present alien to enter into any business transaction with a state entity, such as requesting a driver’s license or non-driver identification card.

In a settlement agreement between the United States and Alabama in October 2013, Alabama agreed to permanently enjoin sections of HB 56 that attempted to:

⁵³ *Id.* at 528 (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 379 (2000)) (internal quotation marks omitted).

⁵⁴ *Id.* at 528–29 (quoting *Farmer’s Branch, Tex.*, Ordinance 2952 (Jan. 22, 2008)).

⁵⁵ 724 F.3d 297 (3d Cir. 2013).

⁵⁶ 131 S. Ct. 1968 (2011).

⁵⁷ See *United States v. Alabama*, 443 F. App’x 411, 414–16 (11th Cir. 2011).

⁵⁸ *United States v. Alabama*, No. 11-14532-CC (11th Cir. Mar. 8, 2012); *United States v. Alabama*, 691 F.3d 1269, 1277–78 (11th Cir. 2012).

- make it unlawful for unlawful aliens to apply for work in the state;⁵⁹
- make it unlawful for any person to harbor, transport or hide an unlawful alien, including by renting property to them;⁶⁰
- prohibit tax deductions for service payments to unlawful aliens (including a 10x penalty for attempted deductions);⁶¹
- make it a civil offense for an employer to dismiss a lawful worker while retaining an unlawful alien worker.⁶²

The settlement agreement also permanently enjoined sections 10, 27, and 28, discussed above. The United States agreed to allow the following sections to take effect:

- A state law enforcement officer is permitted to inquire into the immigration status of an individual already stopped for other violations of law if the officer has reason to believe the individual is not lawfully present. There will be a presumption of lawful status made (like in Arizona's SB 1070);⁶³
- All valid driver's license holders must have their license present with them at all times when operating a motor vehicle;⁶⁴
- Section 30 (discussed above), which criminalized an attempt by an unlawfully present alien to enter into a business transaction with the state.⁶⁵

It is worth noting that the Eleventh Circuit decision also affirmed similar preemption rulings over Georgia's HB 87, which similarly was modeled on Arizona's SB 1070 law.⁶⁶

What we can discern from the review of HB 56 and the court's conclusions, which the U.S. Supreme Court declined to review in April 2013, is that the courts are willing to allow state law enforcement officers to apply their police powers to enforce federal immigration laws, but not to expand beyond the bounds of those federal laws into areas that create new criminal penalties or risk infringing on the civil rights of any individual.

Lastly, as mentioned in the introduction, the Supreme Court in November 2014 let stand a Ninth Circuit decision overturning Arizona's Proposition 100, which denied bail to unlawful immigrants, contending that their status was a probable cause basis for flight risk,⁶⁷ and an *en banc* panel of Ninth Circuit judges struck down Arizona's anti-immigrant smuggling law.

It is becoming clearer than ever that states are preempted from passing any legislation that criminalizes undocumented immigrant acts. Regulations

⁵⁹ ALA. LAW ACT 2011-535, § 11(a) (2011) [hereinafter HB 56].

⁶⁰ *Id.* at § 13.

⁶¹ *Id.* at § 16.

⁶² *Id.* at § 17.

⁶³ *Id.* at § 12(a).

⁶⁴ *Id.* at § 18.

⁶⁵ *Id.* at § 30.

⁶⁶ *United States v. Alabama*, 691 F.3d 1269, 1286 (11th Cir. 2012).

⁶⁷ *Maricopa County v. Angel Lopez-Valenzuela*, 135 S. Ct. 428, 428 (2014). Note that this decision was not based on federalism but rather a violation of substantive due process rights.

that are strictly limited to the security of the state, such as restrictions on the issuance of driver's licenses to lawful residents, have been upheld. However, courts have been clear in their interpretation of the division of power between states and the federal government with respect to the regulation of immigration itself through the issuance of criminal laws that target only immigrants. Violating an immigration law or regulation is a crime against the United States, not against the state. Accordingly, states must refrain from usurping the enforcement agenda of the federal government when it comes to immigration crimes.

IV. A DELICATE BALANCE: STATE AND FEDERAL COOPERATION

The discussion above appears to suggest that the federal government is intent on keeping states out of the business of immigration law enforcement. This is simply not the case. In fact, given the scope of the immigration enforcement "problem" and the limited resources that federal law enforcement agencies possess to comply with their obligations, the executive branch is scrambling to find more ways to bring state and local law enforcement agencies into the program, albeit with a few caveats.

Given their limited resources, federal enforcement authorities, principally U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection, rely heavily on the information that state and local authorities collect about arrestees. And given that criminal alien deportations are one of the three priorities for the Department of Homeland Security (DHS), which ICE is a part of, knowing when an alien is arrested is critical in producing results.⁶⁸ However, DHS is hesitant to cede too much power to states and localities for fear that they will abuse this power or that it will interfere with federal enforcement priorities.⁶⁹ Some prominent cases have placed DHS in hot water for allowing state and local agencies to take on more expansive enforcement authority.⁷⁰

In a 2006 article, Daniel Booth argued that the federal government could not commandeer states to act as immigration enforcement authorities.⁷¹ That piece referred to the then-proposed CLEAR Act of 2005, which

⁶⁸ *Immigration Enforcement Overview*, U.S. DEP'T OF HOMELAND SEC., <http://perma.cc/K4RW-SAMF>.

⁶⁹ *See generally*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (2009), <http://perma.cc/8LBK-C97J>.

⁷⁰ *See, e.g.*, Press Release, Dep't of Justice Office of Public Affairs, Dep't of Justice Releases Investigative Findings on the Maricopa County Sheriff's Office (Dec. 15, 2011), <http://perma.cc/7TW4-MYSD> (alleging a range of serious abuses toward immigrants in Maricopa County, Arizona); Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice Civil Rights Div., to Clyde B. Albright, Cnty. Att'y for Alamance Cnty. (Sept. 18, 2012), <http://perma.cc/7375-QG5L> (alleging racial profiling by § 287(g)-authorized law enforcement officers).

⁷¹ *See* Daniel Booth, Note, *Federalism on ICE: State and Local Law Enforcement of Federal Immigration Law*, 29 HARV. J.L. & PUB. POL'Y 1063, 1073 (2006).

would have provided authority for state and local assistance to federal immigration authorities as well as funding to enforce immigration laws. The Act died in Congress, but the debate over shared enforcement authorities continued. Booth wisely predicted that additional reliance on state and local authorities would be required to combat the growing problem of unlawful immigration; however, he may not have anticipated the ultimate approach DHS chose.

In 1996 Congress passed H.R. 2703, which added § 1252c to Title 8 of the U.S. Code. This section, commonly referred to by its designation in the Code of Federal Regulations as § 287(g), explicitly permits state and local law enforcement authorities to arrest and detain an individual who has been confirmed by federal immigration authorities to be an illegal immigrant and who has been convicted of a felony.⁷² This statute sets out a cooperative approach whereby federal authorities enter into memoranda of agreement with states to “deputize” their law enforcement officers to investigate immigration violations. Yet it does not create any new law enforcement authorities and still requires the federal government to confirm unlawful status before initiating deportation (removal) proceedings.⁷³

The first major case challenging this legislation was *United States v. Vasquez-Alvarez* in 1999.⁷⁴ In that case, the Tenth Circuit simply clarified that the 287(g) authority only confirmed what state authorities already had the ability to do as part of their police powers under the Tenth Amendment to the U.S. Constitution. “[T]his court has long held that state and local law enforcement officers are empowered to arrest for violations of federal law, as long as such arrest is authorized by state law. In fact, this court has held that state law-enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws.”⁷⁵

ICE only entered its first agreement with a state law enforcement entity under the authority of § 287(g) in 2002.⁷⁶ The program got off to a slow start with only eight total agreements between states and ICE finalized by the end of 2006. But after that, interest at the state level grew and sixty-six agreements were signed by May 2009.⁷⁷

The 287(g) program relied to a significant degree on the cooperation of local jurisdictions in the enforcement of federal immigration law. In many

⁷² See 8 U.S.C. § 1252c(a) (1996).

⁷³ See *id.*

⁷⁴ See 176 F.3d 1294 (10th Cir. 1999).

⁷⁵ *Id.* at 1296 (citations omitted); see *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301–02 (10th Cir. 1984); see also *Gonzales v. City of Peoria*, 722 F.2d 468, 477 (9th Cir. 1983).

⁷⁶ The first state was Florida. A. ELENA LACAYO, NAT’L COUNCIL OF LA RAZA, THE IMPACT OF SECTION 287(G) OF THE IMMIGRATION AND NATIONALITY ACT ON THE LATINO COMMUNITY 24 (2010), <http://perma.cc/39JM-4QMM>.

⁷⁷ CRISTINA RODRIGUEZ, ET AL., MIGRATION POLICY INST., A PROGRAM IN FLUX: NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(G) 3 (Mar. 2010), <http://perma.cc/M9LF-VBVV>.

instances, jurisdictions raised concerns about both the costs of enforcement and the reduced cooperation from immigrant communities in criminal investigations that would result if they feared arrest for immigration violations.⁷⁸ Additionally, ICE expressed skepticism over the tactics used in immigration law enforcement in some jurisdictions, most prominently, those of Sheriff Joe Arpaio in Maricopa County, Arizona, where ICE ultimately rescinded its agreement.⁷⁹

Civil rights groups, immigrant communities, and even some law enforcement departments raised alarm about the impact that the 287(g) program was having on local communities.⁸⁰ Their central concerns focused on the risk of racial profiling by “deputized” state or local law enforcement agents, the resources necessary to weave federal immigration enforcement into officers’ daily duties, and the risk of harm to community policing models that prioritized information sharing between immigrant communities and law enforcement.⁸¹

As objections to the 287(g) program mounted, DHS began rethinking the program. In its budget justification for FY 2013, the agency sought \$17 million *less* in funding for the 287(g) program.⁸² In that justification, DHS noted that in light of the expansion of Secure Communities, “it will no longer be necessary to maintain the more costly and less effective 287(g) program.”⁸³ Despite objections from some of the more radical law enforcement agencies,⁸⁴ the program has begun to fade in significance, due to concerns over civil rights and the ability of police to do their job effectively.⁸⁵

⁷⁸ See e.g., Press Release, Justice for Immigrants Coalition of Inland Southern California, 287-G Program Suspended in San Bernadino County (May 15, 2014), <http://perma.cc/T9LQ-ADLY> (referring to the decision of San Bernardino County to terminate their 287(g) agreement with ICE).

⁷⁹ See Michel Marizco, *Homeland Security Strips Arpaio of Immigration Powers*, KNAU (Dec. 16, 2011), <http://perma.cc/BN4S-9NQZ> (where the Sheriff of Maricopa County reiterated that, “[n]ow with the cancellation of this agreement, illegal criminal offenders arrested and brought into my jails will go undetected and ultimately dumped back onto a street near you. For that, you can thank your federal government.”).

⁸⁰ See, e.g., Abdi Soltani & Joanne Lin, *Petitions, Sign-on Letter Sent to Administration Calling for End to Controversial Immigration Program*, AM. CIVIL LIBERTIES UNION (Dec. 13, 2012), <http://perma.cc/95CM-74L6>.

⁸¹ See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 68; Lacayo, *supra* note 75; AM. CIVIL LIBERTIES UNION OF TENN., *287(g) Side-by-Side Brief*, <http://perma.cc/UV4P-6PHH>.

⁸² U.S. DEP’T OF HOMELAND SEC., ANNUAL PERFORMANCE REPORT 77, <http://perma.cc/TS2X-KZUA>.

⁸³ *Id.*

⁸⁴ See, e.g., Press Release, Dep’t of Homeland Sec., Statement by Secretary Napolitano on DOJ’s Findings of Discriminatory Policing in Maricopa County (Dec. 15, 2011), <http://perma.cc/585X-ET4A> (explaining revocation of Maricopa County’s 287(g) authority, despite protest by Sheriff Joe Arpaio).

⁸⁵ Press Release, Immigration and Customs Enforcement, FY 2012: ICE Announces Year-end Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources (Dec. 20, 2012), <http://perma.cc/7CWZ-CNKE> (announcing that existing 287(g) agreements will not be renewed).

First piloted in 2008, the Secure Communities program is not the replacement to the 287(g) program, but a more automated and less intrusive way to keep the federal immigration authorities apprised of when an unlawful immigrant is arrested, with little or no action on the part of the local or state authority.⁸⁶

The Secure Communities program, which was initiated by the George W. Bush Administration and expanded dramatically under the Obama Administration, requires state and local law enforcement to report the criminal arrest of any potentially unlawful alien. That report is bounced off several databases to confirm the unlawful status of the individual and their criminal history, allowing DHS to decide if they want to place a “detainer” on the individual. A detainer asks the state or local authorities to hold the individual while ICE conducts a more thorough investigation and decides whether to take custody of the offender and initiate deportation proceedings. That decision is based on the gravity of the crimes committed and the corresponding removal priority according to ICE guidelines.

Though DHS hails the program as a success that has led to the deportation of 288,000 criminal aliens, some researchers have expressed skepticism about its results.⁸⁷ Secure Communities has served as a mechanism to involve state and local law enforcement in the immigration enforcement process without conveying enforcement powers directly to them. Partially as a reaction to states that expressed concern over the chilling effect of 287(g) on local communities’ interaction with law enforcement officials, Secure Communities emerged as a streamlined way for federal authorities to target their priority removals.

With Secure Communities in place, federal immigration authorities have everything they need to identify and remove unlawful criminal aliens in accordance with their established priorities. They have no need to enlist state or local law enforcement beyond requesting temporary detention of criminal aliens. But this also means that states are left to depend almost entirely on the actions of these federal authorities to manage their unlawful immigrant populations. Reacting to both the lack of local control and the perceived unwillingness of federal authorities to address state immigration enforcement priorities, states have more aggressively pursued their own enforcement legislation.

In addition, some states have fought the implementation of Secure Communities, arguing that it takes away state and local decision-making power when an unlawful alien is detained, and that it burdens their jails when they are issued detainers requiring them to hold unlawful aliens. Many of these states have refused to cooperate with the federal program, and some

⁸⁶ See generally, *Immigration Enforcement: Secure Communities Program*, DEP’T OF HOMELAND SECURITY, <http://perma.cc/BS94-J9CD>.

⁸⁷ See, e.g., Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from Secure Communities*, 57 J.L. & ECON. 937 (2014).

federal judges in some states have supported their decisions.⁸⁸ Though the program itself operated behind-the-scenes, the impact was felt at the state and local level.

Accordingly, in November 2014, the Secretary of Homeland Security shut down the Secure Communities program.⁸⁹ He instead proposed a new fingerprint-based program that automatically reviews the immigration and criminal records of aliens arrested by state and local law enforcement but that focuses on federal priorities, such as national security threats and perpetrators of serious crimes. The intent of this new program, not yet implemented at the time of this article, appears to focus on unlawful aliens who pose a significant threat to society due to their past criminal history—a much narrower net than has previously been cast.

V. WHAT REMAINS FOR THE STATES?

Where does this leave state power in the realm of immigration? “Where state enforcement activities do not impair federal regulatory interests concurrent enforcement activity is authorized.”⁹⁰ States maintain general police powers to protect the interests of their state, which can include protection against the ill effects of unlawful immigration in some cases. These powers include the ability to arrest individuals for violations of existing federal law, but not necessarily the creation of new law.⁹¹

It is well established that a police officer is free to ask a person for identification without implicating the Fourth Amendment.⁹² These questions can relate to immigration status, but cannot force an individual to produce any particular immigration document.⁹³ Interrogation relating to one’s identity or a request for identification does not, by itself, constitute a Fourth Amendment seizure.⁹⁴ Unless the circumstances of the encounter are so intimidating that a reasonable person would have believed he was not free to leave unless he responded, such questioning does not result in a Fourth Amendment seizure.⁹⁵

In the 1983 *Gonzalez* case, Arizona state law enforcement officers were permitted to temporarily detain suspected unlawful immigrants while contacting border patrol to pursue an investigation.⁹⁶ *Gonzalez* challenged the

⁸⁸ See Memorandum from DHS Sec’y Jeh Charles Johnson to Thomas S. Winkowski, Acting Dir. of U.S. Immigration and Customs Enforcement (Nov. 20, 2014), <http://perma.cc/S8Z3-KUVL>.

⁸⁹ See, e.g., *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014).

⁹⁰ *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983).

⁹¹ See *Ker v. California*, 374 U.S. 23, 31–32 (1963).

⁹² See *Hiibel v. Sixth Jud. Dist. Court*, 542 U.S. 177, 185 (2004).

⁹³ See *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301–02 (10th Cir. 1984).

⁹⁴ *Id.*

⁹⁵ See *Immigration and Naturalization Serv. v. Delgado*, 466 U.S. 210, 216 (1984).

⁹⁶ *Gonzales v. Peoria*, 722 F.2d 468, 477 (9th Cir. 1983).

state's right to enforce the criminal aspects of federal immigration law, but the court concluded that "[i]t therefore cannot be inferred that the federal government has occupied the field of criminal immigration enforcement."⁹⁷ The court highlighted the fact that there are few criminal immigration statutes and they are "simple in their terms."⁹⁸ Later statutes, including the Illegal Immigrant Reform and Immigrant Responsibility Act of 1986, expanded federal control over criminal immigration law.⁹⁹

State power over criminal immigration law enforcement was at the heart of the most significant recent immigration case addressing state enforcement powers. In *United States v. Arizona* in 2012, the Supreme Court upheld a single clause¹⁰⁰ of the otherwise preempted Senate Bill 1070. The surviving clause required officers to determine immigration status if they had reason to believe the individual was an alien. The clause survived because it explicitly requires state officers to presume legal status when a valid Arizona driver's license is produced and not to use race or other discriminatory factors in making their assessment, which the Court found to be consistent with federal law. A similar provision was upheld in Alabama's HB 56 law.¹⁰¹

Arizona's SB 1070 was intended to serve as a model law that other states could adopt to take more aggressive control over their immigration law enforcement practices.¹⁰² The law attempted to set forth a model for "concurrent enforcement" of state and federal law affecting immigrants.¹⁰³ To achieve this goal, it focused on four powers for state and local law enforcement: 1) the ability to arrest immigrants for failure to carry proper immigration documentation; 2) the ability to arrest immigrants without a warrant; 3) the ability to arrest for attempts to secure unlawful employment, and; 4) a mandate to inquire about immigration status during lawful stops.

Failure to carry proper immigrant documentation or applying for unlawful employment were already federal misdemeanors. Arizona's law made them state misdemeanors as well. By adopting equivalent legislation in state law, Arizona sought the ability to enforce the spirit of the federal law without waiting for federal officials to take action. But their self-designation as federal sidekicks was short-lived.

⁹⁷ *Id.* at 475.

⁹⁸ *Id.*

⁹⁹ See Illegal Immigrant Reform and Immigrant Responsibility Act of 1986, Pub. L. 104-208, 110 Stat. 3009-546 (1986).

¹⁰⁰ Ariz. Rev. Stat. Ann. § 11-1051 [hereinafter S.B. 1070], 2010 Leg., 49th Sess. (Ariz. 2010).

¹⁰¹ See *United States v. Alabama*, 443 F. App'x 411, 420 (11th Cir. 2011).

¹⁰² See, e.g., Alex Seitz-Wald, *Man Behind Arizona Immigration Law: Romney 'Absolutely' Called SB-1070 A National 'Model'*, THINKPROGRESS (Apr. 24, 2012), <http://perma.cc/RXG9-TGRL>.

¹⁰³ See, e.g., John Schwartz & Randal C. Archibold, *A Law Facing a Tough Road Through the Courts*, N.Y. TIMES (Apr. 27, 2010), <http://www.nytimes.com/2010/04/28/us/28legal.html>, <http://perma.cc/5VSU-5X8U>.

The U.S. Supreme Court, in a 5-3 decision, ruled in June 2012 that the “concurrent” laws were preempted by federal law. Relying on both the Naturalization Clause and foreign relations as the bases for broad federal power over immigration, Justice Kennedy affirmed that it is up to federal immigration authorities to determine if and when to enforce federal immigration laws. Giving states equivalent powers would take away that federal discretion and negatively impact federal policy regarding non-citizens. As a model law, Arizona’s SB 1070 fell far short of what the federal courts were willing to allow.

The Arizona and Alabama cases highlight the expanding efforts of states to control their immigrant populations through enforcement legislation, and the courts’ consistent unwillingness to allow such actions.¹⁰⁴ Importantly, states do have a role to play in protecting their state and economic security from the alleged impact of immigrants; however, it is not through the creation of new or collateral enforcement provisions that might hinder federal immigration law enforcement efforts. Rather, it is through the use of their own police power to enforce federal laws in a way that accords with federal intent.

VI. FALSE PRETENSES: SECURITY AND JOBS

States have raised legitimate concerns about the negative effects of unlawful immigration on their economies, including increased emergency healthcare costs and education of unlawful immigrant children. States have also raised less legitimate concerns, such as an increase in violent crime, which studies have shown not to be the case,¹⁰⁵ and a more competitive work environment, which many studies have also discredited.¹⁰⁶ Yet it is the latter justifications that states assert when passing enforcement provisions as these draw the most public outrage—legislation that protects jobs and reduces crime resonates better than legislation that blocks people from classrooms and emergency rooms.

The logic behind federal control of immigration is straightforward: unlawful entry is an offense against the United States, not any particular state.

¹⁰⁴ See generally, Kit Johnson & Peter J. Spiro, *Immigration Preemption after United States v. Arizona*, 161 U. PA. L. REV. 100 (2012).

¹⁰⁵ See, e.g., Jorg L. Spenkuch, *Understanding the Impact of Immigration on Crime*, 16 AM. L. & ECON. REV. 2 (2014) (indicating that there is a correlation between immigration and property crime, but not between immigration and violent crime); Pia M. Orrenius & Roberto Coronado, *The Effect of Illegal Immigration and Border Enforcement on Crime Rates along the U.S.-Mexico Border* (Center for Comparative Immigration Studies, Working Paper No. 131, Dec. 2005), <http://perma.cc/MN25-SPVR>.

¹⁰⁶ See, e.g., George J. Borjas, *The Economic Benefits from Immigration*, 9 J. OF ECON. PERSPECTIVES 3 (1995) (suggesting while the native population will see gains from immigrant labor, many of these gains may be captured by native capitalists and not necessarily by native workers); RAUL HINOJOSA-OJEDA, CENTER FOR AM. PROGRESS, RAISING THE FLOOR FOR AMERICAN WORKERS: THE ECONOMIC BENEFITS OF COMPREHENSIVE IMMIGRATION REFORM (2010).

Yet it is the states that feel the impact of increasing unlawful immigration. It is their job markets, schools, and communities that are affected by rising immigration. But allowing this argument to control the debate over whether to allow states more control over immigration law enforcement takes us back to the nineteenth century era of patchwork state immigration control, which risks arbitrary and inconsistent application of the law as well as incursion into U.S. foreign affairs powers.

Maintaining federal control over immigration legislation allows the United States to determine the economic sectors most amenable to immigrant workers; establish limits for intending immigrants from countries based upon foreign relations with those countries; respond to crises abroad by offering temporary protections to intending immigrants; and determine the most significant threats to the security and economy of the United States as a whole. A state is positioned only to respond to its own economic and security situation and it has little role to play in maintaining effective foreign relations or responding to crises abroad. Accordingly, allowing a state to impose its own immigration enforcement regime separate and apart from those already existing in federal law would be harmful public policy.

Arizona's approach went too far in creating new immigration enforcement powers that created potential conflicts with the federal enforcement regime. And even though "a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act,"¹⁰⁷ the broad impact of immigration regulation, from civil rights to foreign affairs, leaves little room for states to protect their interests against unlawful immigrants. But it may also be that their rationale for passing new enforcement regulations is *prima facie* unreasonable.

State concerns tend to focus on two key impact areas—security (crime) and the economy. The security issue is largely associated with questionable assertions made by political pundits, who often source their information from conservative think tanks such as the Federation for American Immigration Reform (FAIR)¹⁰⁸ and the Center for Immigration Studies (CIS),¹⁰⁹ which go to lengths to highlight criminal activity committed by unlawful aliens.¹¹⁰ And though many studies discount unlawful presence as a factor in criminality¹¹¹ (some suggesting that unlawful immigrants stay out of the pub-

¹⁰⁷ *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 110 (1992).

¹⁰⁸ See, e.g., *Examples of Serious Crimes of Illegal Aliens*, FED'N FOR AM. IMMIGRATION REFORM, <http://perma.cc/G73N-S885>.

¹⁰⁹ See, e.g., *ICE Document Details 36,000 Criminal Alien Releases in 2013*, CTR. FOR IMMIGRATION STUDIES, <http://perma.cc/ED6B-6HJK>.

¹¹⁰ Note that these organizations, as well as NumbersUSA, are funded by largely the same donors. See Jason DeParle, *The Anti-Immigrant Crusader*, N.Y. TIMES (Apr. 17, 2011), <http://www.nytimes.com/2011/04/17/us/17immig.html>, <http://perma.cc/823L-6GL2>.

¹¹¹ See Ruben G. Rumbaut & Walter A. Ewing, *The Myth of Immigrant Criminality and the Paradox of Assimilation*, IMMIGRATION POLICY CENTER (Feb. 21, 2007), <http://perma.cc/CFD8-JDD6>.

lic eye intentionally),¹¹² state assertions that they should be authorized to prevent crimes committed by unlawful immigrants have never been questioned by federal authorities.

Arizona Governor Brewer, in anticipation of passing SB 1070, told Fox News, “[w]e’ve been inundated with criminal activity. It’s just—it’s been outrageous.”¹¹³ But what type of crime was she referring to? States can always use their existing police powers to arrest individuals—lawfully present or not—for the commission of crimes. However, this does not include crimes against the United States, such as unlawful alien re-entry, which is not a crime against an individual state.¹¹⁴ Crimes related to the entry of immigrants should be categorized as crimes against the nation and thus out of the scope of state immigration enforcement authority.

Similarly, the co-author of Arizona’s SB 1070, state Rep. John Kavanaugh, asserted his state’s right to defend itself against the influx of unlawful immigrants across the southern border. Believing that the federal government was not doing enough to stem the influx of immigrants, he said, “[w]e’ll do whatever is necessary to protect ourselves.”¹¹⁵ The sponsor of the bill, Russell Pearce, who wanted to stop “[i]nvaders on the American sovereignty,”¹¹⁶ worked closely with HB 56 author Kris Kobach in the development of SB 1070.¹¹⁷ A member of Sheriff Arpaio’s immigration enforcement group discussing SB 1070 said, “[i]t’s going to be a help to the county Illegal immigrants are getting everything that, in my estimation, they should not get. We’re being overrun by these people. If the federal government is not going to do it, the sheriff is going to do it.”¹¹⁸

Immigrant crimes fall into one of two categories—crimes against the state and crimes against the nation. States have enforcement power over the first category, and there is no apparent effort to change this. The latter category is outside the scope of state powers, but that does not mean that it is being ignored by federal authorities. The implementation of the Secure Communities program ensured that ICE was made aware of crimes commit-

¹¹² See Joel Rose, *Does Crime Drop When Immigrants Move In?*, NAT’L PUB. RADIO (Mar. 8, 2013), <http://perma.cc/BJB2-VLHS>; see also Rich Morin, *Crime Rises Among Second-Generation Immigrants as They Assimilate*, PEW RESEARCH CENTER (Oct. 15, 2013), <http://perma.cc/7Y29-HME6>.

¹¹³ *Border States Deal With More Illegal Immigrant Crime than Most, Data Suggest*, FOXNEWS.COM (Apr. 30, 2010), <http://perma.cc/HJX4-2SJU>.

¹¹⁴ Consider New Hampshire’s recent efforts to prosecute unlawful migrants for “criminal trespass” by being unlawfully present in the state, which courts struck down. See Pam Belluck, *Town Uses Trespass Law to Fight Illegal Immigrants*, N.Y. TIMES (July 13, 2005), <http://www.nytimes.com/2005/07/13/national/13immigrants.html>, <http://perma.cc/BWU8-QJDA>.

¹¹⁵ See Dan Nowicki, *Arizona Immigration Law Ripples through History, U.S. Politics*, THE ARIZONA REP. (July 25, 2010), <http://perma.cc/M8KF-UHQD>.

¹¹⁶ Ted Robbins, *The Man Behind Arizona’s Toughest Immigration Laws*, NAT’L PUB. RADIO (March 12, 2008), <http://perma.cc/8FZZ-N6MS>.

¹¹⁷ ANTI-DEFAMATION LEAGUE, ARIZONA: THE KEY PLAYERS IN THE ANTI-IMMIGRANT MOVEMENT (2012), <http://perma.cc/MYY3-Z8F9>.

¹¹⁸ *Arizona Sheriff Uses Anti-Smuggling Law to Target Illegal Immigrants*, FOXNEWS.COM (May 11, 2006), <http://perma.cc/4SKD-KKJ9> (internal quotation marks omitted).

ted by unlawful immigrants in order to determine whether immigrants were *additionally* subject to deportation.¹¹⁹ Accordingly, state attempts to criminalize acts in the latter category are unnecessary and conflict with the federal government's ability to set deportation priorities and allocate resources according to those goals.

Some authors have suggested that the criminalization of immigration law is a politically palatable way to discriminate against unwanted aliens. Despite extensive data showing that immigrants rarely engage in more and often engage in less crime than citizens, state and local governments have used the rhetoric of criminality to justify increasingly restrictive laws against immigrants. University of California-Irvine professor Jennifer Chacón argues that "myth of migrant criminality" is often a façade for racism or nativism.¹²⁰ Separating out a segment of the population based upon their national origin might be seen as discriminatory in the absence of the perception of criminal activity, even when that criminal activity may be nothing more than entering the country unlawfully.

The even more spurious state concern over the state and local economy can equally be dismissed. Consider Kris Kobach, who authored Alabama's HB 56. He asserted that "[w]e're displacing the illegal workers. That may cause short-term pain for some, but the markets will adjust [Y]ou've got something like 200,000 unemployed people in Alabama, and many of them are going to find jobs as a result of this."¹²¹ The negative economic impact has been used throughout history as a justification for discrimination against non-native workers.¹²² But again, the data show otherwise.

Most major research institutions across the political spectrum agree that immigrants, on average, have a positive effect on wages and economic growth. Some conclude that there is a negative impact on low-skill workers,¹²³ while others find across the board positive effects on the labor market (at least in the long run).¹²⁴ Immigrants, both lawful and unlawful, are active participants in the economy, buying goods and services as consumers, contributing labor in the job market, and often paying taxes to maintain at least some compliance with the law. Though their arrival can have negative short-

¹¹⁹ Note that some jurisdictions have refused to issue detainers to hold aliens following a request to do so by ICE. *See, e.g.,* *Miranda-Olivares v. Clackamas Cnty.*, 2014 WL 1414305 (D. Or. Apr. 11, 2014).

¹²⁰ *See* Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 629 (2013).

¹²¹ George Talbot, *Kris Kobach, The Kansas Lawyer Behind Alabama's Immigration Law*, AL.COM (Oct. 16, 2011), <http://perma.cc/2952-UW9N> (internal quotation marks omitted).

¹²² *See* Kevin J. Fandl, *Taxing Migrants: A Smart and Humane Approach to Immigration Reform*, 7 Nw. U. INTERDISC. L. REV. 127 (Spring 2014).

¹²³ *See* George J. Borjas et al., *How Much do Immigration and Trade Affect Labor Market Outcomes?*, BROOKINGS PAPERS ON ECON. ACTIVITY 62 (1997).

¹²⁴ *See* Gianmarco I.P. Ottoviano & Giovanni Peri, *Immigration and National Wages: Clarifying the Theory and the Empirics* 32–35 (Nat'l Bureau of Econ. Research, Working Paper No. 14188, 2008).

term effects on some, the data widely shows a positive overall impact of immigrants on the economy.

But again, this argument is not convincing to those directly affected by increased immigration. Accordingly, states made efforts to block unlawful immigrants from seeking employment and these laws were initially upheld. But this state power was short-lived. Since the passage of IRCA in 1986, the federal government expanded its control over immigrants in the job market. IRCA established the E-Verify program,¹²⁵ which allows private employers to electronically verify the employment eligibility of job applicants and to benefit from an affirmative defense to any later charge of employing unlawful alien workers. The program is voluntary, but following the decision in *Chamber of Commerce v. Whiting*, states have been permitted to mandate compliance for private employers.¹²⁶

Thus, policy arguments suggesting that states should be entitled to more immigration law enforcement authority due to the criminal nature of immigrants or their impact on state economies fall short of reality. And, considering that the federal government has taken affirmative steps to mitigate potential threats from criminal aliens through the *Secure Communities* program and threats from unlawful workers through the E-Verify program, there appears to be no reasonable justification for states to expand enforcement authorities beyond the use of existing federal powers on these grounds.

CONCLUSION AND RECOMMENDATIONS

The courts have clearly established that a state is preempted from passing laws inconsistent with federal mandates in the areas of employment (preempted by IRCA), education (preempted by *Plyler v. Doe*), housing (preempted by *Lozano v. Hazleton*), and private contracts (preempted by *United States v. Alabama*), among other things. States are also prohibited from criminalizing immigrant acts, which both Alabama's HB 56 and Arizona's SB 1070 attempted to do.

The courts have upheld and the federal government has not generally challenged legislation that uses state police powers consistently with federal immigration laws. The principal area in which states have succeeded here is in the requirement that their law enforcement officials inquire about the immigration status of individuals lawfully stopped for other reasons. This is the only provision of SB 1070 that the Supreme Court allowed to stand, and it was also one of the provisions left unchallenged by the United States in their case against HB 56.

The recent trend in court decisions restricting state power to regulate immigration independently of the federal government reflects their recognition of broad federal control over nearly the entire field of immigration. This

¹²⁵ See IRCA of 1986, *supra* note 47.

¹²⁶ See 131 S. Ct. 1968, 1985 (2011).

consolidation of power helps to ensure consistent practices across individual states and reaffirms immigration's position as a foreign affairs matter. Given this increasingly narrow environment in which to legislate, states will face great difficulty in their efforts to flex their police powers over immigration law. While they maintain concurrent powers to enforce federal immigration laws to the extent that they are able, new regulatory powers beyond licensing regulations and other tangential laws will likely face quick preemption challenges.

It is important to note at this point that some prominent immigration law scholars believe that devolution of some immigration enforcement authority to states and localities would result in a positive balance of power between pro-immigrant and more restrictionist parties.¹²⁷ They argue that the federal government has proved itself largely incompetent in the management of immigration policy and enforcement and states have a better grasp of their particular needs and a better ability to address them. I maintain that, with respect to matters of national immigration policy, as well as the social and economic impact of immigration on the country as a whole, the federal government has a critical role to play. This role cannot be transferred to the states without a substantial loss of uniformity that our courts have established through 200 years of cases.

Our founding fathers recognized that the power to determine how a foreigner becomes a U.S. citizen was one of primary importance to the federal government and one that should not be allocated to the states. When states took it upon themselves to regulate immigrant entries and exits, the Supreme Court took the opportunity to centralize all pure immigration powers—entry, naturalization, and deportation—within the expanding federal government. When states continued to implement discriminatory laws affecting immigrants in the early 20th century, Congress acted several times to provide a centralized regulatory regime for immigration, culminating in the 1952 Immigration and Naturalization Act. Subsequent statutes and regulations have pushed out almost all opportunities for states to take immigration law enforcement matters into their own hands. Yet they will continue to try.

The effects of immigration are felt at the community level. The job losses and crimes caused by immigrants lead to calls for action at the state and federal level. But leaving immigration policy to states risks international consequences, including retaliation in the form of more restrictive visa practices for Americans wishing to travel overseas. As the Supreme Court observed: if immigration law were not exclusively held by Congress, “a Single state can, at her pleasure, embroil us in disastrous quarrels with other nations.”¹²⁸

To avoid the catastrophe the Court predicted in 1875, states should focus their enforcement legislation on economic and safety measures without

¹²⁷ See, e.g., Johnson & Spiro, *supra* note 103; Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

¹²⁸ *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).

discriminating between immigrant and non-immigrant actors. States have a legitimate concern over the preservation of their economic growth trends, the cultural shifts taking place in their communities, and the resources directed toward the education and health of their population. Immigrants, whether lawful or unlawful, affect all of these things. History has shown us that most matters are better handled by states than the federal government. But history has also shown us that immigration is a national matter that is more effectively, though not necessarily more efficiently, managed by a single federal government.

State power under the Tenth Amendment to regulate affairs of the state remains unchanged. If immigrants overcrowd schools and hospitals, states can pass laws creating user fees or raise taxes, so long as they do so for all of their constituents. If immigrants undercut the job market, states can be more aggressive in requiring licenses to operate a business or in shutting down unsafe or unlawful firms. But they must apply these laws to all of their constituents. States already have the power to insulate their communities from any potential negative externalities from an expanding immigrant population. Usurping federal enforcement authority to target their immigrant communities is unnecessary and harmful to immigrants and to the nation.