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THE LEGALITY OF STATE REGULATION AND ENFORCEMENT OF FEDERAL IMMIGRATION LAW

Andy Hoffman

The preemption doctrine has long served as a basis for asserting federal power over state law. Under the Supremacy Clause of the Constitution, the Constitution and laws of the United States operate as “the supreme Law of the Land”; when state law attempts to supersede federal law, the state law is null and void. In regards to immigration, the Supremacy Clause applies in light of Congress’ sole power to “establish an uniform Rule of Naturalization.” Despite this clear jurisdiction given to Congress, states have attempted to pass reform measures claiming to be enforcing federal law in the absence of requisite federal enforcement. The constitutionality of these state statutes has served as grounds for heated political and legal debate.

While the power to regulate immigration has been “vested solely in the Federal Government,” the courts have ruled that, in certain cases, cooperative enforcement can serve as a justifiable reason for passage of state legislation. In Henderson v. Mayor of New York, the court held that there might be some “kind of neutral ground, especially that covered by the regulation of commerce, which may be occupied by the state, and its legislation be valid so long as it inter-

1 Andy Hoffman is a junior at Brigham Young University studying biochemistry with a minor in philosophy. He plans on attending law school in fall 2015. He wishes to thank the generous efforts of Bradyn Fairclough and Christopher Vosters in making this paper a reality. Furthermore, special thanks are given to the editing board and Kris Tina Carlston for their work on this review.

2 U.S. CONST. art. VI, § 2.


ferences with no act of Congress, or treaty of the United States.”

Under this banner of cooperative enforcement, states have found success in passing laws that meet the objectives of congressional legislation without preemption. However, the Supreme Court has affirmed that “whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall or how closely allied to powers conceded to belong to the states.”

This ambiguity in court opinion has, in recent years, led to an abundance of state-level reform propositions. While some of these statutes have passed through the cooperative filter, major pieces of legislation have come under extreme scrutiny. Two laws that have received intense criticism are Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act (hereafter referred to as SB 1070) and the Beason-Hammon Alabama Taxpayer and Citizen Protection Act (hereafter referred to as HB 56). Each of these laws was passed with the intention of facilitating self-deportation. While certain statutes of each bill remain intact, court cases and lawsuits have hampered what are considered to be some of the more punitive sections.


More recently, North Carolina has entered the arena of immigration legislation. In 2013, legislators introduced HB 786, the Reasonable Enactment of Comprehensive Legislation Addressing Immigration Matters in North Carolina Act. Deemed by some as “an anti-immigration law bucking the national trend,”10 HB 786 included sections mirroring those found in Arizona’s SB 1070 and Alabama’s HB 56. Like its forerunners, HB 786 was proposed with the intent for immediate change of the current immigration enforcement system. However, HB 786 has since been watered down to a bill sanctioning preliminary studies concerning the effects of changing the status quo of immigration regulation. That being said, state legislators intend to use the results of these studies to bring the full legislation back to the floor in 2014.11 Similar to its predecessors, some of the original sections of HB 786 could be labeled as constitutional. However, I contend that many of the more controversial measures proposed are likely to be deemed unconstitutional.

This review, though not a prescriptive cure for the United States’ immigration woes, will demonstrate the unconstitutionality of state immigration laws, particularly measures proposed by North Carolina’s legislature. While reform is needed, I argue that based on constitutional principles, the platform for such restructuring is not at the state level. This is not to decry state legislation as ineffective, but rather as unconstitutional. By so doing, I will reveal the need for Congress to pass meaningful immigration reform to alleviate the states’ need to substitute their own compensating laws.

In section I of this review, I consider states’ motives for passing immigration reform measures. In section II, I outline Arizona’s SB 1070 and Alabama’s HB 56, with accompanying court decisions, as specific case studies illustrating recent struggles state legislators


have confronted in attempting to pass immigration reform. In section III, I use the rulings and findings of section II to demonstrate why North Carolina’s attempts to pass wide-sweeping immigration measures are unconstitutional. In proving the legal barriers to HB 786’s success, I hope to highlight reoccurring themes that illustrate why states will continue to fail in attempts to pass effective and permissible immigration reform. By examining the plight of states and highlighting the constitutional barriers these states face when attempting to pass reform measures, the need for the federal legislation becomes apparent. While the specifics of such legislation is outside the scope of this review, I argue that by passing reform legislation, the United States can avoid shepherding aliens from state to state and address this increasingly controversial issue in a universal, decisive, and constitutional manner.

I. THE PLAGHT OF THE STATES: FACTORS PROMOTING STATE IMMIGRATION LEGISLATION

Recent years have seen an abundance of immigration legislation proposed and passed at the state level. Since the advent of Arizona’s SB 1070, thirteen other states have introduced or passed similar legislation. In the first half of 2013, 377 laws and resolutions relating to immigration were passed, an eighty-three percent increase from the first half of 2012. Certainly, rising illegal immigrant populations are contributing to the push for more legislation at the state level. As of 2011, Arizona, Alabama, and North Carolina had estimated illegal


13 See WILSON, supra note 8.
alien populations of 360,000, 120,000, and 400,000 respectively. For Arizona, this figure marked a 213 percent increase compared to the illegal alien population of 1996. For Alabama and North Carolina, the 2011 population figures, compared to 2000, marked increases of 380 and 90 percent respectively. Among the plausible problems associated with an increased illegal alien population is an increased economic burden on taxpayers. When it comes to the fiscal burden of providing for illegal immigrants, educating the children of illegal immigrants constitutes the single greatest cost to taxpayers. Direct regulation of education is a power reserved for the states under the 10th Amendment of the Constitution. Today, the federal government shares in regulation, using threats of withholding federal funding to enforce education laws. That being said, federal funding for local schools is limited. As reported by the National Center for American Progress, The 10 Numbers You Need to Know About Alabama’s Anti-Immigrant Law, (November 14, 2011), http://www.americanprogress.org/issues/immigration/news/2011/11/14/10588/the-10-numbers-you-need-to-know-about-alabamas-anti-immigrant-law/; Michael Hoefer, Nancy Rytina & Bryan Baker, OFFICE OF IMMIGRATION STATISTICS 1-7 (March 2012), https://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2011.pdf.


18 U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively.”).
for Education Statistics, the federal government contributes to about thirteen percent of all direct expenditures for state elementary and secondary schools, leaving the states to cover the rest.\footnote{19} In the case of \textit{Plyler v. Doe}, the Supreme Court struck down a Texas statute that denied education funding for illegal immigrant children.\footnote{20} As a result, states are required to absorb the associated fiscal burden. The annual national price tag for education of children of illegal aliens is estimated at fifty-two billion dollars with the majority of this cost covered by local and state governments.\footnote{21}

Aside from the cost of education, significant expenditures are made in the areas of medicine, law enforcement, and public assistance programs. Combined, these costs total to an average outlay of $1,117 per taxpaying citizen.\footnote{22} However, as this cost represents a national average, those states that harbor a larger illegal immigrant population are naturally going to inherit a greater share of the cost. Furthermore, current taxation policies contribute to the economic burden shouldered primarily by the states. Whereas the federal government receives compensation from illegal immigrants for nearly one-third of their expenditures directed towards the same population, states receive an average return of less than five percent for the public costs associated with illegal immigrants.\footnote{23} Accounting for all these factors, the estimated cumulative costs for the states of Arizona, Alabama, and North Carolina are $2.6 billion, $298 million, and $2 billion respectively.\footnote{24} Despite these statistics, some have argued

\begin{itemize}
\item \footnote{20} \textit{Plyler v. Doe}, 457 U.S. 202 (1982).
\item \footnote{22} \textit{Id.}
\item \footnote{23} \textit{Id.}
\item \footnote{24} \textit{Id.}
\end{itemize}
that illegal aliens have an overall positive impact on the economy. However, the majority of these opinions consider the overall national economic impact rather than examining the individual cost shouldered by the state.\(^{25}\)

In addition to economic issues, the illegal immigrant population, particularly in Arizona, is associated with increased crime. Phoenix, Arizona, termed the “kidnapping capital of America,”\(^{26}\) witnessed 350 kidnappings in 2008.\(^{27}\) While some federal funding has helped curb that number, crime remains a burgeoning issue. In a state where illegal immigrants account for approximately six percent of the population, fifteen percent of inmates are illegal immigrants.\(^{28}\) Additionally, illegal aliens represent fourteen percent of all inmates jailed for manslaughter and murder.\(^{29}\) Drug crime, in particular, has been linked to increased illegal alien populations. According to the U.S. Drug Enforcement Administration, “The majority of drug-trafficking activity is due to an unprecedented influx of foreign nationals into the state.”\(^{30}\) While drug crimes are often associated with the southwestern states, a report from the National Drug Intelligence


\(^{29}\) *Id.*

Center linked increased retail drug distribution in North Carolina to the growing illegal alien population in the state.\textsuperscript{31} Despite these figures, some would argue that an increasing illegal immigrant population cannot and should not be associated with increased crime.\textsuperscript{32} Whether or not illegal immigrants serve as an economic and criminal burden is, for the scope of this review paper, not as fundamental as is the perceived problem in the eyes of state legislatures and their constituents.

II. Arizona’s SB 1070 and Alabama’s HB 56: Considering Attempts to Pass State Immigration Reform

Arizona’s SB 1070 and Alabama’s HB 56 are among the most recent anti-illegal immigration bills passed in state legislatures. While each of these bills includes sections designed to crack down on illegal immigrants, each has undergone significant judicial review resulting in removal of some of the more controversial sections. The limitations put on these pieces of legislation have reduced the power of each state to bring about immigration reform. Furthermore, the struggles of these two laws serve as an example that should deter states, such as North Carolina, from pursuing the passage of similar provisions.

Before outlining key legislation, a brief understanding of the preemption doctrine is necessary. In the Court’s decision of \textit{De Cana v. Bica}, three tests were put forth as a means to determine if a federal law preempts a state immigration statute.

These tests include:


\textsuperscript{32} \textit{Anecdotes to Evidence: Setting the Record Straight on Immigrants and Crime}, \textsc{Immigration Policy Center}, http://www.immigrationpolicy.org/just-facts/anecdotes-evidence-setting-record-straight-immigrants-and-crime-0 (last visited Jan. 31, 2014) (falling crime rates in the United States as the size of the immigrant population [including the unauthorized] increased dramatically [see Figures 2, 3, and 4]).
Constitutional preemption. Is the state attempting to make a determination as to who should or should not be admitted into the county or establish conditions under which an immigrant may remain?

Field preemption. Is the state attempting to legislate in a field meant to be solely occupied by the federal government (even if that law is complementary to federal law)?

Conflict preemption. Does the state statute stand in conflict with federal law (e.g. is compliance with both state and federal law unfeasible)?

In conjunction with previous rulings, this three-tier measure of preemption has served as a basis for judicial examination of the following legislation.

(i) Arizona’s Support our Law Enforcement and Safe Neighborhoods Act (SB 1070)

At its time of passage, the Support our Law Enforcement and Safe Neighborhoods Act was considered the United States’ toughest immigration law. Arizona’s SB 1070 shocked the national political scene with its harsh crackdown on illegal immigration. Among the most controversial of the sections was a provision some believed to imply racial or ethnic profiling. While the “show me your papers” provision has received intense scrutiny, on the basis of constitutionality, sections 3, 5(c), and 6 of SB 1070 have been struck down by the Court.


Section 3 of SB 1070 made failure to comply with federal alien-registration policies a state misdemeanor. However, federal law preempts such intrusion into the area of alien registration. In *Hines v. Davidowitz*, the Supreme Court ruled that federal law superseded a Pennsylvanian system of alien registration. In his decision, Justice Hugo Black reaffirmed:

That the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution, was pointed out by the authors of The Federalist in 1787, and has since been given continuous recognition by this Court. When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land.\(^{36}\)

The established federal system was meant to serve as a “single integrated and all-embracing system.”\(^{37}\) Thus, on the basis of field preemption, the Court held that as “the federal government has occupied the field of alien registration,” all state action, even if complementary to federal law, is impermissible.\(^{38}\)

Although no direct counterpart existed in federal law, the Court, on the basis of preemption, struck down Section 5(c) which criminalized applying for or holding a job without the proper immigration papers. While federal laws dealing with employers of illegal immigrants had been passed, no law made it an explicit crime for illegal aliens to seek employment.\(^{39}\) However, the Court held that the federal government’s Immigration Reform and Control Act of 1986


\(^{37}\) *Id.* at 74.


(IRCA) was passed to serve as a holistic framework for, “combating the employment of illegal aliens.”

The intended purpose of Section 6 was to empower local officers to arrest illegal immigrants in carrying out federal law. While federal law allows state officers to “cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States,” Section 6 of SB 1070 attempts to provide state officers with authority to act without instruction from the Attorney General; as such, the court enforced the removal of Section 6. The passage of SB 1070 and consequential lawsuits changed the landscape for the immigration debate while providing states, such as Alabama, a legislative framework for reform.

(ii) The Beason-Hammon Alabama Taxpayer and Citizen Protection Act (HB 56)

Described by some as the “Arizona law on steroids,” the Beason-Hammon Alabama Taxpayer and Citizen Protection Act was passed for the stated purpose of, “attack[ing] every aspect of an illegal alien’s life . . . so that they will deport themselves.” Senator Scott Beason (R-AL) spoke further concerning the passage of a bill he helped draft and pass:

Alabama has passed a law that is being decried as draconian, racist, outrageous, inhumane, harsh, cruel, too far reaching, etc. People are surprised to find that most of Alabama’s new law mirrors current United States immigration law. The state of Alabama and

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the federal government now have similar laws, but Alabama plans to enforce them.\textsuperscript{44}

In a state where illegal immigrants make up approximately 2.5% of the population,\textsuperscript{45} thousands of immigrants have left the state since the law’s induction in June 2011.\textsuperscript{46} Copycat sections from preceding state laws and unique provisions have led to the fear-driven exodus.

One of the driving purposes of HB 56 was to fix a state economy ranked amongst the worst in per capita GDP.\textsuperscript{47} As stated in HB 56:

The State of Alabama finds that illegal immigration is causing economic hardship and lawlessness in this state and that illegal immigration is encouraged when public agencies within this state provide public benefits without verifying immigration status.\textsuperscript{48}

To curb the economic hardship created by illegal immigration and to more fully enforce federal law, HB 56 suggested the need for the State of Alabama to implement “other measures” to “ensure the integrity of various governmental programs and services.”\textsuperscript{49} Among those measures were included provisions limiting state benefits, postsecondary education at state institutions, and employment opportunities. Additionally, like Arizona’s SB 1070, state law enforcement, upon a lawful stop and on the basis of “reasonable suspicion,”\textsuperscript{50} were required to determine citizenship status.

\begin{footnotes}

\item[45] See Blazer, supra note 44.


\end{footnotes}
As of October 29, 2013, (pending court approval) many controversial sections have been dismissed.\textsuperscript{51} Each of these sections was deemed either unconstitutional or preempted by federal law. Section 10 violated the Supremacy Clause of the constitution by making violation of federal law a state crime.\textsuperscript{52} As stated in Section 11, “It is unlawful for a person who is an unauthorized alien to knowingly apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor in this state.” Solicitation for financial means is a protected activity under the 1st amendment.\textsuperscript{53} Thus, Section 11 was removed. Sections 10, 11, and 13 also imply that an individual’s immigration status would be admissible in court proceedings. Exclusive reliance on the Law Enforcement Support Center’s response as evidence of unlawful immigration status violates the 6th Amendment right to “compulsory process for obtaining witnesses in [a defendant’s] favor.”\textsuperscript{54} Violation of the 6th Amendment served as constitutional reasoning for the removal of these sections. Stripped of much of its reform power, civil rights attorney Cecillia Wang refers to HB 56 as a “failed experiment.”\textsuperscript{55}

The failures of Arizona’s SB 1070 and Alabama’s HB 56 exemplify the struggles states are likely to face when attempting to legislate in an area under the jurisdiction of the federal government. Despite these poor results, states, such as North Carolina, continue to propose immigration reform legislation. Consideration of the court rulings in the cases of SB 1070 and HB 56 allows for examination of the constitutionality of North Carolina’s recently proposed bill.


\textsuperscript{53} See Vill. of Schaumburg v. Citizens for a Better Env’t, 444 U.S. 620 (1980); see also Smith v. City of Ft. Lauderdale Fla., 177 F.3d 954 (1999).

\textsuperscript{54} U.S. \textit{Const.} amend. VI.

\textsuperscript{55} Cecillia Wang, Twitter (Oct. 29, 2013, 1:49 PM EST), https://twitter.com/WangCecillia/status/395291375622574080.
III. UNCONSTITUTIONALITY OF NORTH CAROLINA’S PROPOSITIONS

From the opening of the North Carolina’s HB 786, legislators acknowledge that the issue of immigration is the federal government’s responsibility.\textsuperscript{56} However, like several states before them, the bill also announces the failures of the federal government and the resultant responsibility to compensate that state legislators feel mandated to assume. Based on the cause of supporting their constituency, legislators authorized state agencies to study the potential impact of adopting policies such as requiring undocumented immigrant prisoners to reimburse the state for the cost of their incarceration after conviction of a crime, establishing standards of reasonable suspicion to guide law enforcement officers in conducting immigration status checks when conducting a lawful stop, prohibiting the use of consular documents from being considered a valid means of establishing a person’s identity by a justice, judge, clerk, magistrate, law enforcement officer, or other State official, and broadly adopting measures that have been implemented in other states to combat the problem of illegal immigration.\textsuperscript{57} As proposed, these measures—if adopted—could easily be labeled as unconstitutional, spelling a similar fate for HB 786 as seen in previous state bills.

In the bill’s introduction, state legislators outline their grievances and reasoning for the legislation. Those complaints include the federal government’s failure to enforce existing policies and correct current law, illegal alien entitlements based on unfunded mandates, and increasing strain on state law enforcement agencies. As a result of these burdens incurred by the state, legislators are currently evaluating the potential impact of adopting state-led policies. Though these propositions are put forth with good intentions, not all pass through the filter of constitutionality. The failures of both SB 1070 and HB 56 serve as examples in demonstrating this point.

The first measure proposed by North Carolina increases the penalties for crimes related to the possession, manufacture, or sale of false identification documents. As stated in 18 U.S.C. § 1028, cre-

\textsuperscript{56} H.R. 786, 2013 Leg., Gen. Assembly (N.C. 2013).

\textsuperscript{57} H.R. 786 § 1, 2013 Leg., Gen. Assembly (N.C. 2013).
ation of false identification documents is a federal crime accompanied by federal punishment.\textsuperscript{58} Furthermore, in the case of \textit{Martin v. Hunter’s Lessee}, the Court ruled that, “No part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to State tribunals.”\textsuperscript{59} Returning to Section 10 of HB 56, violation of federal law cannot be deemed a state crime under the Supremacy Clause. Consequently, when considering federal documents, the false identification proposition cannot pass as constitutional.

The original writing of HB 786 allowed for an illegal immigrant’s status to be brought forth in state courts. Returning to Alabama’s HB 56, Section 10(e) reads,

\begin{quote}
Any record that relates to the immigration status of a person is admissible in any court of this state without further foundation or testimony from a custodian of records if the record is certified as authentic by the federal government agency that is responsible for maintaining the record.\textsuperscript{60}
\end{quote}

Immigration status is admissible when it is pertinent to a judiciary decision (e.g. deportation court); however, when irrelevant to the decision, illegal alien status is not permitted in the court. In the case of \textit{Salas v. Hi-Tech Erectors}, Alex Salas was injured on the job and sued for negligence on the part of Hi-Tech. At trial, evidence of Mr. Salas’ immigration status was brought forth and ultimately contributed to the jury’s decision. Reviewing the case for abuse of discretion, the court found that Mr. Salas’ status as an illegal immigrant didn’t pertain to the case and thus was “manifestly unreasonable or based upon untenable grounds or reasons.”\textsuperscript{61} The admissibility of an illegal alien’s status in court places them in a place of extreme vulnerability as their status may unjustly influence a jury’s verdict.

\begin{itemize}
\item \textsuperscript{58} 18 U.S.C. § 1028 (1984).
\item \textsuperscript{59} Martin v. Hunter’s Lessee, 14 U.S. 304 (1816).
\item \textsuperscript{60} H.R. 56 § 10, 2011 Leg., Gen. Assemb. (Ala. 2011).
\end{itemize}
Thus, the courts have ruled that, unless pertinent, an alien’s status is not admissible as evidence in the courts.

While these examples prove the illegality of some parts of North Carolina’s HB 786, one of the most controversial aspects of the law has the potential to remain intact. Like both SB 1070 and HB 56, HB 786 contains the “show me your papers” provision that has received significant backlash from civil rights groups. In June 2012, in the case of Arizona v. United States, the Supreme Court upheld this controversial section on the grounds that it doesn’t conflict with federal law. As read in the decision, “If the law only requires state officers to conduct a status check during the course of an authorized, lawful detention or after a detainee has been released, the provision would *likely* survive preemption.” Although section 2(B) of SB 1070 has been put into practice, U.S. District Judge Susan Bolton approved the implementation with the warning that constitutional challenges could be brought forth in the future. Time has proven Judge Bolton’s concerns as the ACLU recently brought forth a lawsuit attacking the constitutionality of section 2(B). Concerned with the ambiguity of the Court’s ruling and the potential failings of SB 1070 § 2(B), Alabama decided to narrow its interpretation of its “show me your papers” provision to “neither require nor authorize state or local law enforcement officers to stop, detain, arrest or prolong the detention of any person for the purpose of ascertaining that person’s immigration status or because of a belief that the person lacks law-

ful immigration status.’”66 These recent happenings foretell controversy and possible preemption if North Carolina is to adopt a similar “show me your papers” provision.

All things considered, the likelihood that North Carolina’s HB 786 passes through the filter of cooperative enforcement is minimal. If passed, the discussed statutes will likely be struck down on the basis of constitutionality.

IV. Conclusion

While few would debate that immigration reform is needed, perhaps the more pertinent discussion is whether that reform should be passed at the state or federal level. Although Congress has the sole right to regulate immigration and naturalization,67 the power of states to enforce federal law has received considerable attention in the wake of controversial state anti-illegal immigration legislation. While certain sections of these state laws have been upheld, the majority of propositions seeking to make real, effectual change to the immigration system have been dismissed. The more meaningful reform measures of Arizona’s SB 1070 and Alabama’s HB 56 (altered by Arizona v. United States and the settlement in the case of Hispanic Interest Coalition of Alabama v. Bentley respectively) that have been removed from the laws speak to the inability of states to legislate on a matter that the Court has deemed strictly a federal power. Yet state legislatures are still forced to deal with the issues created by an abundance of illegal aliens residing in their states. Thus, states like North Carolina continue to propose and pass immigration reform measures.

While these propositions may send a message of reform to Congress, the reality of meaningful immigration reform will not be realized at the state level. Though some components of North Carolina’s HB 786 may withstand the test of time, measures with the power to


67 Fiallo v. Bell, 430 U.S. 787 (1977) (“[O]ver no conceivable subject is the legislative power of Congress more complete.”).
bring about significant change, if codified into law, should and will be struck down by the courts on the basis of constitutionality.

Kristi Gaunke, an attorney for the Southern Poverty Law Center, fought against enforcement of Alabama’s HB 56. After the settlement, Gaunke stated, “I know there is a lot of frustration that the federal government hasn’t dealt with [immigration]. I think one of the things we’re hoping comes out at the end of this case and cases like it is that we really need to make a renewed effort at the federal level to introduce immigration reform.”68 North Carolina has appropriately pled for Congress and the Executive office to work in unity to pass necessary reform.69 It is through this channel that legislative reform needs to be pursued.
