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SHAPING IMMIGRATION LAW THROUGH A BUSINESS-LAW MODEL

*Mitch Reber*¹

Beginning in January 2011, Aroldo Castillo-Serrano, an illegal alien from Guatemala, created a human trafficking organization that convinced Guatemalan teens to enter the United States illegally by promising them that the organization could get them into school once they were in the country.² Once Aroldo smuggled the hopeful teens into the country, he enlisted them as indentured servants at an egg farm called Trillium Farms in Marion, Ohio.³ Aroldo was able to continue this illegal organization for three years, and though he was finally caught, this story exemplifies an individual's ability to take advantage of the inefficiencies that exist in federal immigration law.⁴ The question is, does this problem stem from the federal or state level?

Traditionally, laws concerning immigration have always resided under federal jurisdiction. The Sixth Article of the U.S. Constitution includes a clause that states that the "Constitution, and the Laws of

1 Mitch Reber is a senior at Brigham Young University studying business management with an emphasis in marketing. He plans on attending law school in the fall of 2017. A special thanks goes to editors Katherine Hansen, Alyssa Nielsen, and Tyson Hutchins as well as to the editing board and Kris Tina Carlston for their work on this review.

2 *Leader of Human Trafficking Organization Sentenced to Over 15 Years for Exploiting Guatemalan Migrants at Ohio Egg Farms*, Department of Justice, (June 27, 2016), <https://www.justice.gov/opa/pr/leader-human-trafficking-organization-sentenced-over-15-years-exploiting-guatemalan-migrants>.

3 *Id.*

4 *Id.*

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.”⁵ In line with the Supremacy Clause in the Constitution, immigration law is controlled by two acts: the Immigration and Nationality Act of 1952 (INA) and the Immigration Reform and Control Act of 1986 (IRCA).⁶ These two acts guide most immigration law in the United States and are monitored under federal jurisdiction.

When functioning effectively, immigration law should regulate the processes of entering the United States from another country and define the rights of immigrants once inside the country. When these laws are followed, problems such as decreased wages, decreased national security, and increased crime rates can be avoided.⁷ However, statistics over the past ten years show that federal immigration laws have not been functioning as efficiently as they should be.⁸

Federal inefficiency leaves state governments with a heavier burden to regulate illegal immigrants. Though states have attempted to create laws that will help govern illegal immigrants within their own borders, it is not clear which laws states can and cannot pass due to Supreme Court decisions dealing with state-produced immigration laws.

5 U.S. CONST. amend. VI, § 2.

6 Immigration Reform and Control Act of 1986, 8 U.S.C § 274 (1986).

7 Tim Kane & Kirk A. Johnson, *THE REAL PROBLEM WITH IMMIGRATION . . . AND THE REAL SOLUTION*, The Heritage Foundation, No. 1913. 2006.

8 Over the past 10 years, the number of illegal immigrants in the United States has increased from 9.3 million to 11.3 million—the latter figure remaining constant over the past five years. *See* *Illegal Immigration, Population Estimates in the United States, 1969–2014 - Illegal Immigration - ProCon.org*, ProCon.org Headlines, http://immigration.procon.org/view_resource.php?resourceID=000844 (last visited Dec. 6, 2016). Additionally, about 66 percent of illegal immigrants have lived in the country for ten years or more. *See* Jens Manuel Krogstad, Jeffrey S. Passel & D’Vera Cohn, *5 facts about illegal immigration in the U.S.* Pew Research Center (2016), <http://www.pewresearch.org/fact-tank/2016/11/03/5-facts-about-illegal-immigration-in-the-u-s/> (last visited Dec. 6, 2016).

This article will show that to more efficiently solve the problem of illegal immigration the federal government should reinterpret federal immigration laws, namely IRCA, and adopt a business-type model. This business-type model would allow states to create immigration laws that are constitutionally sound and enable states to effectively regulate illegal immigration within their respective borders.

The article will proceed in the following manner. First, the article will present a brief background for each case to be discussed along with background information on business law. In Section II, an argument for state-produced immigration law will be offered. Section III will then describe how a business-type model would be beneficial. Section IV will show that only the IRCA, not the Constitution, will need to be reinterpreted. Section V will then analyze two cases, showing how the Supreme Court's rulings are too restrictive and confuse state legislations. Finally, Section VI, will describe how the business-type model could be implemented on a federal level.

I. BACKGROUND

During the same time that Aroldo Serrano began his human trafficking organization (January 2011), state legislations in Arizona, Utah, Alabama, Indiana, and South Carolina attempted to create immigration legislation to better regulate illegal immigrants within their respective borders.⁹ Due to intense litigation, Arizona and Utah are the only states that actually enacted their laws.¹⁰ However, the number of states that wished to create immigration laws during this time showcases the motivation amongst states to create laws regarding immigration.¹¹ This article will analyze Arizona's Legal Arizona Workers Act and SB 1070, as well as the Supreme Court cases and other litigation brought up against each law.

9 *Immigration Policy Project*, Nat'l Conference of State Legislatures, (Aug. 27, 2012), <http://www.ncsl.org/research/immigration/omnibus-immigration-legislation.aspx>.

10 *Id.*

11 *Id.*

Arizona enacted SB 1070 in 2010.¹² This law included four sections that were eventually argued before the Supreme Court: Section 2B required law enforcement officers to determine immigration status during a lawful stop; Section 3 created a state crime for the failure to apply for or carry federally issued alien registration papers; Section 5 made it unlawful for an unauthorized alien to solicit, apply for, or perform work; and Section 6 authorized the warrantless arrest of a person when there is probable cause to believe the person has committed a public offense that makes said person removable from the United States.¹³ The Supreme Court ruled on July 28, 2010, and stated that Sections 3, 5, and 6 were either precluded by federal law or unconstitutional, leaving only Section 2B to be enacted by the state.¹⁴ The court's ruling showcases one example of how the federal court's review of state laws regarding immigration greatly restricts the state's ability to freely create legislation in this area.

Arizona issued an earlier immigration law called the Legal Arizona Workers Act (LAWA) in 2007.¹⁵ This law requires businesses to verify an employee's ability to legally work in the United States through E-Verify, a program produced by Congress. Failure to comply with this law could result in the company's business license being suspended or revoked entirely. In *Chamber of Commerce v. Whiting*, the Supreme Court found that this law was constitutionally sound and did not preclude federal immigration law.¹⁶ This case exemplifies the intense litigation involved in passing a state-produced immigration law, even when the ruling is in favor of that law. This article will later show how the intensity of litigation surrounding immigration law is detrimental to the states and that a business-type model would be an effective way of improving the illegal immigration problem.

12 *Id.*

13 Ariz. S. B. 1070, 49th Leg., 2nd Sess. (Ariz. 2010).

14 Arizona v. United States, 132 U.S. 2492, 2501 (2012).

15 *Immigration Policy Project*, Nat'l Conference of State Legislatures, (Aug. 27, 2012), <http://www.ncsl.org/research/immigration/omnibus-immigration-legislation.aspx>.

16 Chamber of Commerce v. Whiting, 563 U.S. 582, 583 (2011).

Business or commerce law in the United States is governed by both federal and state jurisdiction.¹⁷ Under the Commerce Clause of the U.S. Constitution, the federal government has the power to regulate three types of commerce: commerce with Native American Tribes, foreign commerce, and interstate commerce.¹⁸ The states retain the power to regulate intrastate commerce and can enact laws that regulate the conduct of business within the state. However, states may not create business laws that “unduly burden” interstate commerce.¹⁹ So, laws that affect business conduct or processes that occur across state lines or outside state borders would be unconstitutional.

One example of a state properly using its authority to create business law is when the State of California passed Proposition 65.²⁰ The proposition holds businesses to a higher standard when producing and selling products that contain substances that cause cancer (as determined by the state).²¹ Since the proposition exists only in California and does not unduly burden interstate commerce, the proposition is justified and constitutional. This article will show that an immigration law modeled similarly to a business law would be an effective alternative to improve the illegal immigration problem that currently exists.

One key term that must be defined in this article is the aforementioned “business-type model”—also referred to as the business law model. A “business-type model” simply refers to the process in which business or commerce is regulated in the United States. Again, the federal government retains jurisdiction over interstate commerce and foreign commerce and the states retain jurisdiction over intrastate commerce.²² Immigration law modeled after business

17 Henry R. Cheeseman, *Business Law: Legal Environment, Online Commerce, Business Ethics, and International Issues* (7 ed. 2010).

18 *Id.* at 58.

19 *Id.* at 62.

20 Proposition 65 in Plain Language, OEHHA (2016), <http://oehha.ca.gov/proposition-65/general-info/proposition-65-plain-language> (last visited Dec. 6, 2016).

21 *Id.*

22 Cheeseman, *supra* note 17.

law would allow states to create better immigration laws within their own borders. The states would also be unable to create immigration law that affected immigration across states or with foreign nations.

II. BENEFITS TO STATE IMMIGRATION LAW

The success of the Arizona laws previously mentioned demonstrate that when states are able to create and pass immigration laws, illegal immigration can be regulated more efficiently. For example, after Arizona's SB 1070 was passed, the illegal immigrant population in Arizona decreased from 470,000 to 350,000 between 2010 to 2012, according to the Department of Homeland Security.²³ Currently, there are an estimated 244,000 illegal immigrants residing in Arizona.²⁴ Though SB 1070 was heavily restricted by the U.S. Supreme Court, the law still helped decrease the overall population of illegal immigrants in the state by about 48 percent. Given the stagnant level of illegal immigrants across the United States over the past five years, the sharp decrease in Arizona can serve as one measure of the law's success.

Had the bill remained in its entirety, Arizona may have had even greater success in reducing the overall population of illegal immigrants in the state. SB 1070's Section 5, for example, made the act of soliciting or applying for work while not authorized to do so a state crime.²⁵ This section would have worked hand in hand with LAWA to highly restrict job acquisition for those seeking work illegally.

LAWA, which focused on illegal immigrants in the workplace, also helped reduce the number of illegal immigrants in the state. By requiring businesses to verify all employees through E-Verify, the

23 Bryan Baker & Nancy Rytina, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012*, 7 (2013) <https://www.dhs.gov/sites/default/files/publications/Unauthorized%20Immigrant%20Population%20Estimates%20in%20the%20US%20January%202012.pdf>.

24 Profile of the Unauthorized Population - AZ, Migration Policy Institute, <http://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/AZ>.

25 S.B. 1070, 49th Leg., 2nd Reg. Sess. (Ariz. 2010).

difficulty in acquiring a job as an illegal immigrant in Arizona has increased dramatically.²⁶ Essentially, this increased difficulty in job acquisition makes the state far less attractive to illegal immigrants, resulting in many illegal immigrants leaving the state altogether.²⁷

Additionally, LAWA works to protect against other immigration-related crimes—for example, the trafficking crimes of Aroldo Castillo-Serrano. If the farm employing the teenage boys had been subject to a law similar to LAWA, the farm would have been required to verify every employee through E-Verify. The teenage boys would have been identified as illegal immigrants and their time as indentured servants would not have occurred. LAWA is successful in both helping reduce the number of illegal immigrants within a state and in helping prevent certain crimes related to illegal immigration.

The success of SB 1070 and the LAWA does not come without costs. The two laws are attributed to negatively affecting the business market in Arizona. Generally, increasing the legal burden on firms increases operating costs as well, making Arizona a more difficult state to do business in.²⁸ This deters business owners from investing and creating new ventures in Arizona, consequently slowing economic growth across multiple industries.²⁹

Despite the economic costs of enforcing SB 1070 and LAWA, there may be greater cost in allowing illegal immigrants to remain where they are. One study performed in 2013 found that illegal immigrants cost the United States about \$113 billion—an average of

26 Magnus Lofstrom, Sarah Bohn, & Steven Raphael, *Lessons from the 2007 Legal Arizona Workers Act*, 11, (2011), http://www.ppic.org/content/pubs/report/R_311MLR.pdf.

27 *Id.*

28 Alex Nowrasteh, *The Economic Case against Arizona's Immigration Laws*, 709 POLICY ANALYSIS, 1, 1–24, (2012) (discussing economic impacts of S.B. 1070 and LAWA).

29 *Id.*

\$1,117 per household.³⁰ This means that U.S. taxpayers, both rich and poor, pay for illegal immigrants' health care, education, and public services.³¹ So, though there are certain business-related costs to enforcing Arizona's SB 1070 and LAVA, the laws seek to minimize economic costs caused by illegal immigrants and protect citizen's tax dollars. Again, the 48 percent decrease in illegal immigrant population within the state shows the success of these two laws.

III. BUSINESS LAW AS A MODEL

The success of the two laws in Arizona allows for an argument to be made for state-produced immigration law that resembles the model of U.S. business law. Under this model, states would be able to create laws that regulate immigration within their borders. Federal jurisdiction would then be reserved for immigration issues that occurred "among the several states," or across state and national borders.³²

Some of the benefits that occur under the business law model would translate over to the realm of immigration. First and foremost, competition occurs frequently between states that enact different business laws, ultimately leading to better environments for businesses to flourish. For example, more than 65 percent of Fortune 500 companies incorporate in the state of Delaware because corporate laws are simply better there.³³ The Delaware Court of Chancery considerably speeds up legal proceedings for corporations. Delaware as a state is very small and does not naturally attract as many

30 The Fiscal Burden of Illegal Immigration on United States Taxpayers (2013), Federation for American Immigration Reform, (2013), <http://www.fairus.org/publications/the-fiscal-burden-of-illegal-immigration-on-united-states-taxpayers>.

31 Robert Rector & Jason Richwine, The Fiscal Cost of Unlawful Immigrants and Amnesty to the U.S. Taxpayer, The Heritage Foundation, (2013), <http://www.heritage.org/immigration/report/the-fiscal-cost-unlawful-immigrants-and-amnesty-the-us-taxpayer>.

32 U.S. CONST. art. 1, § 8, cl. 3.

33 Delaware Corporation, BENEFITS OF A DELAWARE CORPORATION, Harvard Business Services. Inc., <https://www.delawareinc.com/corporation/> (last visited Jan 26, 2017).

businesses as larger states such as Texas. So, to influence business growth within the state, Delaware made it easier for businesses to exist and operate.³⁴

The existence of competition between states created a great environment for corporations in the state of Delaware. Similarly, competition between states could also solve immigration problems more efficiently. Competition between states will force states to look for the best solution regarding illegal immigrants within their borders.

Second, if immigration law took on a model similar to business law, the states would be able to better create immigration laws that are more state-specific. Different industries vary from state to state depending on geography, resources, and a number of other factors. The technology industry in California is vastly different from the oil and gas industry in Texas; the laws surrounding these industries are very specific and complex.³⁵ To compensate for these major differences, laws are passed that are specific to each state and industry. Similarly, immigration issues differ from state to state and may be best served by state-specific immigration laws rather than all-encompassing federal laws. The severity of immigration issues also differs from state to state and, under a business law model, so could state immigration policies.

IV. REINTERPRETING IRCA

One potential counterargument to implementing a model similar to the business law model derives from the Supremacy Clause of the Constitution, which allows Congress to preempt most state law and typically includes immigration.³⁶ However, the Supremacy Clause simply states that federal law is the supreme law of the land.³⁷ The clause does not explicitly state that the federal government reserves

34 *Id.*

35 This may be why neither state uses the Uniform Bar Examination. Uniform Bar Examination, NCBE, <http://www.ncbex.org/exams/ube/> (last visited Jan 26, 2017).

36 U.S. CONST. art. VI, § 2, cl. 2.

37 *Id.*

all power over immigration law.³⁸ Congress does have the power to “withdraw specified powers from the States by enacting a statute containing an express preemption provision”—which is the case with IRCA.³⁹ Thus, to enact a business law immigration model, it would not be the Constitution that would need reinterpreting, just IRCA, which currently withholds power from the states.

Due to the number of states wishing to create immigration law, it may in fact be time for a reinterpretation of IRCA. In *Arizona v. United States*, the majority opinion states, “Although [Section] 5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement.”⁴⁰ The opinion says that the conflict of enforcement “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁴¹ As stated, the objective of Congress—at least in part—is to deter unlawful employment.

However, this goal has not been achieved to the satisfaction of the states; this can be seen through the dramatic increase of illegal immigrants who have entered the country since the creation of IRCA in 1986.⁴² Since illegal immigrants are not entering the country for leisure or vacation time, it is safe to assume that they are entering for the prospect of better work; thus, the goal to deter unlawful employment has not been achieved. Hence, the states are seeking to elaborate on federal laws to achieve this goal, and this situation thereby calls for reinterpretation of IRCA.

38 *Id.*

39 *Arizona v. United States*, 567 U.S. 2492, 2501 (2012).

40 *Id.* at 2505.

41 *Id.* at 2515.

42 Illegal Immigration, Population Estimates in the United States, 1969-2014 - Illegal Immigration - ProCon.org, ProCon.org Headlines, <http://immigration.procon.org/view.resource.php?resourceID=000844> (last visited Dec. 6, 2016).

V. RESTRICTION AND CONFUSION FROM SUPREME COURT CASES

Another variable that could delay a business-type model from being implemented stems from recent Supreme Court rulings on state-produced immigration law. Since federal law currently preempts state law with regard to immigration, any immigration-related law produced by a state is subject to litigation on the ground that it is preempted by federal law.⁴³ Additionally, the Supreme Court cases *Arizona v. United States* and *Chamber of Commerce v. Whiting* present two different problems created by the rulings in each case. Namely, *Arizona v. United States* showcases the restrictive environment established by Congress and the Supreme Court in deciding immigration related cases and *Chamber of Commerce v. Whiting* elicits an incoherent ruling that creates confusion for states seeking to create immigration law.

First, the Supreme Court ruling in *Arizona v. United States* highlights the substantial restriction placed on states that wish to create immigration law. This restriction stems from Congress's all-encompassing power with regard to immigration. For example, in the Opinion of the Court for this case, Section 3 of SB 1070 was declined because the section was preempted by federal laws governing alien registration.⁴⁴ The opinion states that "[w]here Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible. Field pre-emption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards."⁴⁵ Even when a state is creating immigration law that is "complementary" and "parallel" to federal standards, the law is considered impermissible if Congress occupies an entire field. This example proves the restrictive environment in

43 The notion that any immigration related law produced by a state may be subject to litigation can be seen from both cases spoken of in this article. The argument against these cases, *Arizona v. United States* and *Chamber of Commerce v. Whiting*, stem from the opinion that federal law preempts both laws.

44 *Arizona v. United States*, 567 U.S. 2492, 2501 (2012).

45 *Id.* at 2502.

which states must maneuver when attempting to better regulate illegal immigrants.

Second, *Chamber of Commerce v. Whiting* produced a ruling that may cause confusion and create problems moving forward in state-produced immigration law. In this case, the Supreme Court upheld LAWAs because “the Court reads IRCA’s saving clause—which preserves from pre-emption state ‘licensing and similar laws,’ 8 U. S. C. §1324a(h)(2)—to permit States to determine for themselves whether someone has employed an unauthorized alien so long as they do so in conjunction with licensing sanctions.”⁴⁶ Under IRCA, states are permitted to pass laws as long as they fall under “licensing” guidelines. This provides an undesirable caveat in state-produced immigration law.

Though IRCA may inhibit states from producing some immigration law, as long as the state punishes businesses, specifically their business licenses, then the state will be able to pass immigration-related law. The ability to create licensing law takes the focus off of those in the country illegally and places a heavy burden on corporations. However, some states that face severe immigration problems may use this ambiguity to control rising illegal-immigration populations.⁴⁷

The issues and confusion raised by the discussed Supreme Court rulings can be avoided through reinterpretation of IRCA. Once IRCA has been rewritten or replaced, the states will be able to produce immigration laws without the threat of litigation on the grounds that the law is preempted by federal jurisdiction. Ultimately, the rulings in *Arizona v. United States* and *Chamber of Commerce v. Whiting* will have little to no effect on the new business-type model.

46 *Chamber of Commerce v. Whiting* 563 U.S. 582, 630 (2011).

47 *Immigrant Policy Project*, Nat’l Conference of State Legislatures, (Aug. 27, 2012), http://www.ncsl.org/research/immigration/omnibus-immigration-legislation.aspx#State_Omnibus.

VI. ENACTMENT OF STATE-LED IMMIGRATION LAW

There are a few different options to implement this business-type model into federal and state laws. First, the Supreme Court could come together and vote in favor of state-produced laws, thus changing the courts' outlook on such laws and presenting states with greater maneuverability in immigration law. Second, the Executive Branch could push to reform immigration law. Third, Congress could address IRCA and reform the statute to allow for state-produced immigration law as long as it is deemed constitutional. This may be a quicker method of implementing the business-type model and avoids litigation costs to each state attempting to produce immigration law.

The quickest way to implement the business model would be through the third option listed above: Congress should address IRCA and reform the statute. This option is quicker than option two because Congress currently holds the keys to immigration law; Congress can quickly turn over the keys to the states through a reinterpretation of present federal immigration law—namely IRCA.⁴⁸ This option also avoids the litigation that would take place when undertaking the first option. States would not need laws to make their way all the way up to the Supreme Court before being approved.

VII. CONCLUSION

The stagnant illegal immigration population, Aroldo's trafficking case, and individual state desire to create immigration law call for a new model of immigration law in the United States. Under the current model, Congress must account for varying problems in each of the 50 states. Congress must devise a system that works across the board and, so far, it has been unable to do so.

A business-type model for immigration law could be easily implemented without requiring reinterpretation of the Constitution. It would allow for the states to compete, and would create laws that address state-specific problems. The success of reducing the illegal immigrant population to an adequate amount would be more efficiently

48 Immigration Reform and Control Act of 1986, 8 U.S.C § 274 (1986).

achieved. Immigration law should be modeled after business law; the states should have the ability to create laws that govern within their respective borders, while the federal government retains power over interstate and foreign occurrences.