
DEBATE

IMMIGRATION PREEMPTION AFTER *UNITED STATES v. ARIZONA*

OPENING STATEMENT

Preemption of State and Local Immigration Laws Remains Robust

KIT JOHNSON[†]

Many people, frustrated with what they believe to be a failure of the federal government to police the nation's borders, have sought to leverage state and local laws to do what the federal government has not: get tough on undocumented migrants. The primary stumbling block for these attempts is federal preemption as the “[p]ower to regulate immigration is unquestionably exclusively a federal power.” *DeCanas v. Bica*, 424 U.S. 351, 354 (1976).

This June, in a victory for local movements against undocumented immigration, the Supreme Court held that federal law did not preempt an Arizona law requiring police to “make a ‘reasonable attempt . . . to determine the immigration status of any person they stop, detain, or arrest’” whenever they reasonably believe the person is “unlawfully present in the United States.” *Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012) (quoting Ariz. Rev. Stat. Ann. § 11-1051(B) (2012)).

The task now falls to lower courts to apply *Arizona* to the myriad other state and local laws coming down the pike. The *en banc* Fifth Circuit is presently considering whether a Dallas suburb may use a scheme of “occupancy licenses” to prevent undocumented immigrants from living in rental housing within city limits. See *Villas at Parkside Partners v. City of Farmers*

[†] Associate Professor, University of Oklahoma College of Law; J.D., 2000, University of California, Berkeley, School of Law. I am very grateful to Professor Eric E. Johnson for his comments and insights and to Professor Peter Spiro for being game.

Branch, 675 F.3d 802, (5th Cir. 2012), *vacated pending review en banc*, 688 F.3d 801 (5th Cir. 2012). Both the district court and a three-judge panel of the Fifth Circuit held that the ordinance was preempted. *Id.* at 806-07, 817. But the substance and style of the questions asked during the oral argument en banc suggests that several judges would like to overturn those decisions. Oral Argument, *Villas at Parkside Partners v. City of Farmers Branch*, No. 10-10751 (5th Cir. Sept. 19, 2012) (en banc), *available at* http://www.ca5.uscourts.gov/OralArgRecordings/10/10-10751_9-19-2012.wma. They should, however, affirm.

A bit of background: Farmers Branch was an early leader in local laws aimed at undocumented immigrants. The city passed three rental housing ordinances in three years—2006, 2007, and 2008—each with the goal of keeping undocumented immigrants out of the Farmers Branch rental housing market. The 2006 ordinance was repealed after a Texas state court judge enjoined its enforcement for possible violations of the Texas Open Meetings Act. A federal court enjoined the enforcement of the 2007 ordinance on the grounds that it was preempted by federal law, violated due process, and was void for vagueness. The city hopes the third time’s the charm with the 2008 ordinance now before the Fifth Circuit.

The current Farmers Branch ordinance directs the city’s building inspector to “verify with the federal government” whether every noncitizen occupant of rental housing is “an alien lawfully present in the United States.” *Villas at Parkside Partners*, 675 F.3d at 804 (internal citations omitted). Doing so might seem simple, but in practice, it is not. While the government can inform the city about the immigration status of a noncitizen, lawful presence is a different, more complex question, and it is one the Department of Homeland Security has said it cannot or will not answer for inquiring municipalities. That being the case, under the Farmers Branch scheme, the determination of lawful presence falls to the city’s building inspector. And the current inspector in Farmers Branch has admitted, with admirable candor, that he is ill-equipped to make such a determination. Yet, under the 2008 ordinance, he must. The determination is crucial because if an occupant is deemed “not lawfully present,” the ordinance requires the inspector to revoke the occupant’s “occupancy license.” The license revocation then triggers criminal liability for both the occupant and the landlord if the occupant does not vacate.

The 2008 ordinance poses obvious and serious equal protection and due process problems. While equal protection looms large in questions of how the ordinance will be enforced, due process concerns will likely constitute a fatal flaw for the scheme. But, unfortunately for opponents of the ordinance, neither of these issues is currently before the Fifth Circuit. The sole

question presented in the en banc hearing concerns the scope of federal preemption in the immigration arena.

Given the Fifth Circuit's focus on preemption alone, supporters of the Farmers Branch ordinance were likely encouraged by the Supreme Court's decision in *Arizona*. But, while the Court upheld one part of the Arizona law, the Court also affirmed the continuing viability of immigration preemption, stating that "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona*, 132 S. Ct. at 2498. As a consequence, the Court held that Arizona could not make it a misdemeanor for non-U.S. citizens to fail to carry an alien registration document. Likewise, Arizona could not make it a misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor." *Id.* at 2503 (quoting Ariz. Rev. Stat. Ann. § 13-2928(C)). Nor, under *Arizona*, may the state authorize its officers to undertake warrantless arrests of individuals believed to have committed any public offense making them removable from the United States. *Id.* at 2507.

Federal power with respect to immigration is "exclusive" and includes the authority to determine who should and should not be allowed to remain in the United States. 8 U.S.C. § 1229a(a)(3) (2006). Thus, state and local governments may not create their own immigration policies. *Arizona*, 132 S. Ct. at 2506. They certainly cannot make their own choices about whether individuals should be allowed to remain within city limits when those decisions are based on immigration status.

Farmers Branch argues that its ordinance does not interfere with the federal removal scheme, but rather "goes to extraordinary lengths" to avoid entanglement with federal decisionmaking. Brief of Appellant, the City of Farmers Branch, Texas, on Rehearing En Banc at 31, No. 10-10751 (5th Cir. Aug. 15, 2012). While Farmers Branch admits that its ordinance provides a "disincentive" to unlawful presence in the city, it argues that the ordinance never oversteps the municipality's valid law-making authority. *Id.* at 32. Of course, this is all smoke and mirrors. The Farmers Branch ordinance offers no mere disincentive. It demands action—by the building inspector to bar, the landlord to evict, and the resident to leave. In a word, to *remove*.

Preemption analysis should not depend upon the purpose behind a state or local law. Nonetheless, it is notable that Farmers Branch has intentionally entered into the business of immigration lawmaking. According to one of the city's 2006 resolutions, Farmers Branch acted because of the federal government's failure to deal with the "influx of illegal aliens . . . estimated in the millions . . . coming in across our most southerly border." *Villas at Parkside Partners*, 675 F.3d at 805. Thus, the application of preemption to

invalidate the Farmers Branch ordinance is not lawyer-crafted legerdemain to frustrate a valid municipal purpose. Farmers Branch's own, external purpose in ordinance-making invites such analysis.

The city's motivations go beyond its self-regard as a pint-sized Congress. There is also a strong streak of nimbyism. Members of the city council have said that the goals of the enactments were to "mak[e] it difficult for illegal aliens to rent property in the City of Farmers Branch," to "sen[d] a message to people who aren't in the country legally, [that] Farmers Branch is not the place for you," and, ultimately, to "help reduce the illegal immigrant population in Farmers Branch." *Id.* at 805 n.4, 806.

During oral argument before the Fifth Circuit, one judge questioned whether housing was "somehow different" from other areas where state and local regulations governing noncitizens have been permitted, such as employment and public benefits. Indeed, housing *is* different, because it treads closer to the core of the Supreme Court's concerns about federal control of immigration. In *Truax v. Raich*, a case concerning foreigners of lawful status, the Court reasoned that "to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work." 239 U.S. 33, 42 (1915). The power to deny "entrance and abode," the Court said, is like the power to remove foreign nationals: it is purely federal. *Id.*

One might counter that this line of reasoning does not support preemption of the ordinance because Farmers Branch does not seek to repel foreign nationals generally, only those of "unlawful" status. Yet that line of argument is self-defeating. The federal government sets immigration policy, whether by conferring status on individuals or turning up or down the dials of immigration enforcement. Either way, it is not the business of state or local governments.

Not only does the Farmers Branch ordinance interfere with the federal removal scheme, it also implicates foreign relations in a way the approved law in *Arizona* did not. The ordinance demands that foreign nationals identify themselves to the city and be subject to registration, investigation, and potentially, expulsion and conviction. Municipal authority is used to extend legal unwelcomeness to foreign nationals. Thus, within its city limits, Farmers Branch is pursuing a distinct foreign relations policy, something it may not do because federal control of foreign policy is absolute. The Supreme Court has repeatedly stated that the federal government must be able to speak "with one voice." *Arizona*, 132 S. Ct. at 2506-07. There is no room for local interference because "[e]xperience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or

imagined wrongs to another's subjects inflicted, or permitted, by a government." *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941).

There remains the question of how to categorize the particular species of federal preemption that should be brought to bear against Farmers Branch. Making such a categorization is complicated by the fact that preemption doctrine is, in the words of Professor Caleb Nelson, something of "a muddle." Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000). The question is not greatly significant, however, because multiple preemption theories apply to the 2008 ordinance. The law may be considered subject to "express preemption" on account of the federal statutory language regarding removal. See 8 U.S.C. § 1229a(a)(3). The ordinance can also be viewed as subject to "field preemption" since the scheme of federal regulation governing removal and foreign relations is so pervasive that it allows no room for states to have their own removal policies. Finally, the theory of "conflict preemption" may be applied as the ordinance represents as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in the areas of removal and foreign policy. *Hines*, 312 U.S. at 67; see also Nelson, *supra*, at 226-31 (providing a concise summary of express, field, and conflict preemption).

Whatever line of preemption analysis applies, the bottom line is the same. Farmers Branch, like Arizona, "may have understandable frustrations with the problems caused by illegal immigration," but that does not entitle it to "pursue policies that undermine federal law." *Arizona*, 132 S. Ct. at 2510. The Fifth Circuit should affirm the panel's decision and call the Farmers Branch ordinance what it is: an unconstitutional usurpation of the federal government's exclusive authority over immigration law and policy.

REBUTTAL

State Action on Immigration (Bad and Good) After Arizona v. United States

PETER J. SPIRO[†]

Arizona v. United States sounds deeply in the conventional wisdom that immigration regulation is an exclusively federal domain. But query whether that reasoning is sound. States and localities must continue to have some discretion in the immigration context as their officials interact with immigrants in myriad ways. “Subfederal” action unfriendly to immigrants in this arena will mostly be self-correcting as political and economic pressures are brought to bear. Perhaps more interesting is the possibility that cities and states will depart from federal policy in a way that benefits undocumented immigrants. *Arizona* establishes a regime of negotiated federalism. While reaffirming the axiom that immigration policy is an exclusively federal enterprise, *Arizona* also allows the federal government to validate increasing levels of subfederal discretion in the immigration arena.

I agree with Professor Johnson that measures like the Farmers Branch ordinance currently before the Fifth Circuit are preempted under *Arizona*. When it struck down three of the four challenged sections of S.B. 1070, the Court set a low threshold for preemption. Some immigration restrictionists hailed the Court’s acceptance of the law’s controversial “papers please” provision, under which state law enforcement officials must make a determination of immigration status where there is reasonable suspicion to believe that a person is illegally present in the United States. But the Court appeared to do so only insofar as the requirement is meaningless on the ground. It was careful to interpret the “papers please” provision such that it did not supply a basis for detention by state authorities, and it left the door open to subsequent as-applied challenges on civil rights grounds. See *Arizona v. United States*, 132 S. Ct. 2492, 2509-10 (2012). The Court struck down other provisions that criminalized the failure to carry federal alien registration documents and the pursuit of unauthorized employment as interfering with federal enforcement priorities. See *id.* at 2501-08. Unlike the “papers please” provision, these measures would have had teeth.

So too would the kind of rental occupancy measure contemplated by Farmers Branch, Hazelton, and other localities. Compare *Villas at Parkside Partners v. City of Farmers Branch*, 675 F.3d 802 (5th Cir. 2012), *vacated pending review en banc*, 688

[†] Charles R. Weiner Professor of Law, Temple University Law School.

F.3d 801 (5th Cir. 2012), *with Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011). The doctrinal equation in these latter cases is not as simple as with Arizona's registration and employment provisions. Both of those invalidated provisions of S.B. 1070 had clear federal cognates; federal immigration law regulates both alien registration and unauthorized employment, and Arizona's laws had the potential to interfere with each. By contrast, there is no federal regime regulating the rental of property by undocumented aliens. But that wouldn't stand in the way of a preemption finding. Prohibiting rental occupancy constitutes at least as great a "harassment of some aliens . . . whom federal officials determine should not be removed" as was confronted by the Court in *Arizona*. *Arizona*, 132 S. Ct. at 2517. The Farmers Branch ordinance may not undermine a particular strain of federal immigration enforcement, but it would interfere with federal enforcement as a "harmonious whole." *Id.* at 2502 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 72 (1941)).

That logic is reinforced by Justice Kennedy's strong emphasis on the foreign relations implications of immigration policy. "Immigration policy," he observed, "can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. . . . Decisions of this nature touch on foreign relations and must be made with one voice." *Id.* at 2506-07. By playing on the foreign relations theme, Kennedy telegraphed the exceptional, hair-trigger preemption standard that applies to other state activities implicating foreign relations. By situating immigration policy within the federal government's broad power over foreign affairs, the Court reversed its typical preemption analysis, which, as part of a broader federalism agenda, has been increasingly protective of state action. This framing of the issue bodes poorly for measures like the Farmers Branch ordinance. It puts a heavy thumb on the scale in favor of preemption.

Justice Kennedy's approach enjoys a polished judicial pedigree, beginning with the Court's 1876 decision in *Chy Lung v. Freeman* and reinforced in 1941 in *Hines v. Davidowitz* (a case striking down a state measure which, like the Arizona law, imposed a registration-related regime). But the political times have changed. 2012 is not 1876, or even 1941, and Arizona's immigration-related laws are not going to lead us down the road to World War III. The dormant foreign affairs power is only justified insofar as state action results in significant externalities for the rest of the nation. That may once have been the case; if Arizona did something to offend Mexico, Mexico might retaliate in such a way as to injure, say, North Carolina, whose citizens had no say in Arizona's lawmaking. But Mexico now understands that S.B. 1070 is Arizona's responsibility alone and is unlikely to retaliate against the United States as a whole. The new global dynamic eliminates the need for foreign affairs exceptionalism, as well as its immigration subtheorem.

Even in *Arizona*'s wake, there remains significant room for state action relating to immigration. Nothing in the *Arizona* decision or the dormant foreign affairs power constrains the power of the federal political branches to affirmatively validate state action relating to immigration. In the lead-up to *Arizona*, the Court upheld an earlier *Arizona* law that mandated the revocation of business licenses for employers who hire unauthorized workers. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011). *Whiting* applied a 1986 federal law that expressly preempted state measures relating to employer sanctions except in the context of business licensing. The *Whiting* Court generously interpreted the licensing exception. *Id.* at 1984-85. By "preserving to the States the authority to impose sanctions through licensing laws, Congress did not intend to preserve only those state laws that would have no effect." *Id.* Rather, Congress had included the states in the enforcement scheme.

The states can manifest hostility to aliens in other ways. For example, they have discretion under federal law to extend or deny various public benefits to noncitizens (including legal immigrants). Although not without controversy, state and local jurisdictions can participate in immigration enforcement in partnership with the federal government through the 287(g) program. And even without federal approval, states have other tools in their anti-immigration tool kit. States get to decide whether to grant in-state tuition to undocumented immigrants. States appear to have discretion to decide whether so-called "childhood arrivals" recently granted deferred action status by the Obama Administration will be eligible for driver's licenses and other benefits. And although the "papers please" device may lack teeth—federal immigration authorities have no obligation to respond to state-provided information that a particular individual is in the United States unlawfully—it unequivocally expresses anti-"illegals" sentiment.

The political branches may well expand this room for state action. There is an understanding (reflected in Justice Kennedy's opinion as well) that the burdens of undocumented immigration fall more heavily on some states than on others. Delegating decisionmaking to the state level may represent a workable compromise on a polarized issue. In the absence of comprehensive immigration reform legislation, one can expect some level of discretion to be conceded by the executive branch. When comprehensive immigration reform comes, it is likely to include provisions giving a longer leash to the states on certain immigration-related questions.

Even if the leash is let out, the states will not necessarily use it to the detriment of immigrants, at least if they care about their bottom lines. That is a key lesson of *Arizona*'s experience and that of a half dozen other states. These states have taken an economic hit after passing tough-on-

immigration laws: lost convention and tourist dollars, crops left to rot in the fields for want of immigrant labor, and tarnished state brands. If Arizona had been left to its own devices, there is a good chance that S.B. 1070 would have been scaled back or repealed. Anti-immigrant legislation is not good for business in the hyper-competitive global economy, and states have strong incentives to shy away from anti-immigrant measures that are anything more than symbolic.

Of course, *Arizona's* logic would also seem to apply to state and local actions that benefit immigrants. Immigration federalism is a two-way street. Where cities and states have resisted federal immigration enforcement, the federal government has pushed back. The sanctuary movement of the 1980s and 1990s was snuffed out by federal legislation forbidding subfederal constraints on cooperation with federal immigration authorities. More recently, prominent subfederal leaders have pushed back on "Secure Communities," a federal program that requires local law enforcement to report the criminal arrests of noncitizens and has sometimes resulted in the deportation of long-present aliens for minor crimes. Chicago passed an ordinance mandating nonparticipation with the program, and California would have followed suit but for a veto of the so-called Trust Act by Governor Jerry Brown.

One might distinguish immigrant-friendly measures from hostile ones insofar as the former are unlikely to offend foreign sovereigns. Nevertheless, the political branches are unlikely to tolerate anything that looks like outright resistance to immigration enforcement. So long as they don't go too far, then, the states can roll out something like a welcome mat by opting for more generous benefits for immigrants. For instance, several states give the children of immigrants in-state tuition rates at state colleges and universities.

Combining the good and the bad, there is also the possibility for partnership in advancing immigration reform on a staggered basis. Legislators in Utah enacted a package that couples enhanced enforcement measures with a state-initiated guest worker program, under which some undocumented immigrants would be eligible for state-approved work authorization. The package followed in the wake of the Utah Compact, a balanced "declaration of principles," supported by state civic, religious, and business leaders, to guide the state on immigration issues. The guest-worker component is almost surely invalid under *Arizona* in the absence of federal approval, which to date has not been forthcoming. Perhaps the second Obama Administration should give this initiative a closer look, especially if comprehensive immigration reform remains a nonstarter on Capitol Hill. Legislation at the state level might even help build momentum for action in Washington.

In short, in *Arizona*, the Supreme Court constricted the possibilities for unilateral state innovation on immigration, both good and bad. That does not stop the federal government from affirming state discretion. On balance, there is good reason to suspect that state policymaking can and should benefit immigrants over the long run. State activity relating to immigration is often decried as creating an unacceptable “patchwork.” But that’s an inherent feature of federalism, and there’s no obvious reason why immigration should be treated differently than other areas of regulation. In other strong, federal systems, Canada and Germany included, subfederal actors are key participants in immigration decisionmaking. *Arizona* notwithstanding, we would be well served to undertake broader experimentation with immigration federalism. The Farmers Branch ordinance is likely to be struck down, but it is not clear that it should be. In any case, cities and states will continue to be important players on the immigration stage.

CLOSING STATEMENT

The Benefits of a Tight Leash in a Field of Scapegoats

KIT JOHNSON

I agree with Professor Spiro that when Congress undertakes comprehensive immigration reform, it should give a close look to states' ideas about immigration. I say *when* and not *if* because, in the week following the presidential election, representatives from both political parties have indicated that immigration reform is going to be a priority for the 113th Congress. As House Speaker John Boehner put it, "[A] comprehensive approach is long overdue, and I'm confident that [we] can find the common ground to take care of this issue once and for all." Jennifer Steinhauer, *Speaker 'Confident' of Deal With White House on Immigration*, N.Y. TIMES (Nov. 8, 2012), <http://www.nytimes.com/2012/11/09/us/politics/boehner-confident-of-deal-with-white-house-on-immigration.html>.

The sudden interest in federal immigration reform is driven, of course, by the election results and accompanying polls. More than 70% of Latinos favored President Obama over Mitt Romney, in no small part because of differences between the candidates on immigration. And 65% of voters, including 37% of Republican voters, indicated their support for giving undocumented workers in the United States a path toward legalizing their immigration status. See Angela Maria Kelley & Ann Garcia, *A Post-Election Look at Immigration Reform*, CENTER FOR AM. PROGRESS (Nov. 9, 2012), <http://www.americanprogress.org/issues/immigration/news/2012/11/09/44676/a-post-election-look-at-immigration-reform/>.

My disagreement with Professor Spiro lies with the idea that states should be given a "longer leash" on immigration-related questions to allow "broader experimentation with immigration federalism." Spiro, *infra*, at 108-09.

State and local governments do not have a lot of bankable credit in the immigration context. To the contrary, they have accumulated well over 100 years of experience in passing largely reactionary anti-immigrant legislation. There have been many state laws that explicitly restrict the freedom of noncitizens. Limitations on ownership of land by noncitizens, for example, can be found in thirty-two states today. Other laws have been facially neutral but applied to disadvantage noncitizens, such as the 1880 San Francisco ordinance prohibiting persons from operating a laundry in a wooden building without a permit (the subject of *Yick Wo v. Hopkins*, 118

U.S. 356 (1886)). In this sense, the Farmers Branch ordinance currently before the Fifth Circuit has a long pedigree.

The impetus for state-based anti-immigrant laws is not hard to discern. As the Supreme Court quietly acknowledged in *Arizona*, some states disproportionately bear the consequences of unauthorized immigration. See *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012). And since noncitizens do not vote, they make convenient scapegoats for politicians, regardless of whether their presence in a given state or locality *truly* creates a burden.

Do states and localities sometimes try to enact *pro*-immigrant legislation? Yes, but such ventures are atypical. Overwhelmingly, state and local lawmaking is politically lopsided *against* immigrants. In 2011, when the spike of anti-immigration fervor led state legislators to introduce 1607 bills and resolutions relating to immigrants and refugees in all fifty states and Puerto Rico. Of these, 306 were enacted. The majority of those passed involved increasing local law enforcement efforts to identify undocumented immigrants, restricting the availability of identification and/or driver's licenses for undocumented immigrants, and strengthening obligations for employers to limit the hiring of undocumented workers—all with an eye toward getting rid of immigrants. See BROOKE MEYER ET AL., NAT'L CONFERENCE OF STATE LEGISLATURES, 2011 IMMIGRATION-RELATED LAWS AND RESOLUTIONS IN THE STATES (JAN. 1–DEC. 7, 2011) 1 (2011), available at <http://www.ncsl.org/documents/immig/2011ImmFinalReportDec.pdf>.

And therein lies the problem. States and localities have a strong tendency to pass laws that benefit, or simply appeal to, their voting constituents. Yet immigration problems are national ones involving a nonvoting population whose protection is a matter of national interest. Thus, these issues demand national solutions.

The Supreme Court recognized this in *Arizona* when it emphasized how state and local laws on immigration could affect foreign relations. See *Arizona*, 132 S. Ct. at 2506-07. Professor Spiro argues that Arizona's immigration laws are "not going to lead us down the road to World War III." Spiro, *infra* at 107. Perhaps. But could harsh treatment of Latin American immigrants undermine the State Department's ability to gain foreign cooperation in the drug wars? Could the systematic oppression of Chinese immigrants push China toward calling in its chits on foreign debt? Could American inhospitality to refugees erode our moral authority in dealing with African dictators? To all: plausibly, yes. And the consequences could be dire for people in every state.

Federal preemption plays an important role in curbing state and local efforts at regulating immigration. That is as it should be, because the federal government alone should make decisions about who will be allowed to

remain in the country. Immigration law must take into account myriad national issues, including economics, foreign relations, national security, human rights, and the fundamental cultural question of how America sees itself in the global community. Nimbyism should not chart our course.

CLOSING STATEMENT

Pivoting to Immigration Federalism

PETER J. SPIRO

Thanks to Professor Johnson for her thoughtful reply. She may have history on her side: the immigrant experience at the crossroads of federalism has not always been a happy one. Prop. 187 in California, S.B. 1070 in Arizona, H.B. 56 in Alabama, and the local ordinances passed by Hazleton and Farmers Branch have captured the modern understanding of the issue. Questioning this understanding runs the risk of looking friendly to restrictionist constituencies whose motives have not always been rights-respecting. As Professor Johnson puts it, state and local governments do not have much “bankable credit” in the immigration context. *Supra* at 111. In this context, however, past performance may no longer be a predictor of future results. The tectonics have shifted. If state and local governments are given space in which to modulate immigration enforcement, there are forces at play to deter them from degrading immigrant interests.

The key shift is economic globalization, which facilitates the internalization of costs associated with anti-immigrant legislation. In the past, cracking down on undocumented immigrants may have presented a largely cost-free proposition for state and local politicians. As Professor Johnson points out, states and localities have “a strong tendency to pass laws that benefit or simply appeal to their voting constituents.” *Id.*

Today, it’s not so clear that passing anti-immigrant legislation will benefit voting constituencies, even restrictionist ones. A recent Cato Institute study concluded that while Arizona’s S.B. 1070 and mandatory e-Verify legislation “succeeded in driving unauthorized immigrants from Arizona . . . they also succeeded in driving out economic growth,” contributing to declines in the agriculture and construction industries, and to a depressed housing market in the state. Alex Nowrasteh, *The Economic Case Against Arizona’s Immigration Laws*, CATO INSTITUTE POLICY ANALYSIS, no. 702, Sept. 25, 2012, at 12-13, available at <http://www.cato.org/pubs/pas/PA709.pdf>. One study pegs Alabama’s losses from H.B. 56 in the billions of dollars. See SAMUEL ADDY, CTR. FOR BUS. AND ECON. RESEARCH, UNIV. OF ALA., A COST-BENEFIT ANALYSIS OF THE NEW ALABAMA IMMIGRATION LAW 1 (2012), available at <http://cber.cba.ua.edu/New%20AL%20Immigration%20Law%20-%20Costs%20and%20Benefits.pdf>.

Even before the Supreme Court gutted the Arizona law, other states were standing down from copycat laws in the face of these rising costs. In Mississippi and Tennessee (prime candidates for the anti-undocumented immigrant

bandwagon), a powerful alliance of immigrant advocates and business interests successfully headed off Arizona-type enactments. Professor Johnson notes that over fifteen hundred immigration-related bills were introduced in state legislatures last year. Of the two hundred and fifty enacted, the majority were actually favorable to immigrant interests on such issues as refugee assistance, human trafficking, immigrant education, and healthcare. See NAT'L CONFERENCE OF STATE LEGISLATURES, 2011 IMMIGRATION-RELATED LAWS AND RESOLUTIONS IN THE STATES (JANUARY-JUNE) (2011), available at http://www.ncsl.org/documents/statedfed/IMMIG_REPORT_FINALAUG9.pdf.

An exodus of undocumented immigrants accounts for short-term economic losses as it constricts the labor supply. But a tarnished state brand is also part of the picture, which poses the threat of redirected foreign investment. Among those first arrested under the "papers please" provision of H.B. 56 in Alabama was a German Mercedes-Benz executive, an episode unlikely to help Alabama the next time it is courting foreign manufacturers for future multibillion-dollar undertakings in the state. (One of Germany's major newspapers sarcastically recounted a similar story involving a Honda executive visiting from Japan who was briefly jailed even though he had his passport in hand: "Maybe the Alabama police couldn't make anything out of the Japanese characters." Eva C. Schweitzer, *Latinos Trauen Sich Nicht Mehr in die Kirche*, DIE ZEIT ONLINE (Dec. 28, 2011), <http://www.zeit.de/gesellschaft/zeitgeschehen/2011-12/alabama-auslaendergesetz>.) In the wake of S.B. 1070, the Mexican government issued a travel advisory for its nationals in Arizona warning that "every Mexican citizen may be harassed and questioned without further cause at any time." Secretaría de Relaciones Exteriores, Travel Alert (Apr. 27, 2010), available at http://www.sre.gob.mx/social_viejo/contenido/comunicados/2010/abr/cp_121eng.html. As the head of Tucson's Convention and Visitors Bureau reported after a recent trade mission to Mexico, "Arizona's reputation after passage of SB 1070 . . . [is] negatively impacting Mexican investment in Arizona." Brent DeRaad, *Fostering Trade and Tourism Relations with Mexico*, TUCSON BUSINESS JOURNAL (Sept. 14, 2012), http://www.insidetucsonbusiness.com/news/inside_business_travel/fostering-trade-and-tourism-relationswith-mexico/article_42a5eb50-fdd7-11e1-b97c-001a4bcf887a.html. See also Danielle Kurtzleben, *Arizona Businesses Hope to Put SB 1070 Behind Them*, U.S. NEWS & WORLD REP. (June 25, 2012), <http://www.usnews.com/news/articles/2012/06/25/arizona-businesses-hope-to-put-sb-1070-behind-them>.

It is no surprise that the harm is targeted at Arizona and not the United States as a whole. Mexican and other foreign policymakers have a sophisticated understanding of U.S. politics and constitutional structure. They know that when Arizona or Alabama enacts a misguided immigration

measure, the state is responsible and there is often little the federal government can do about it. Mexico denounced S.B. 1070, but that denunciation was directed at the state, not the federal government. When Mexican President Felipe Calderón paid a state visit to Washington in May 2010, he and President Obama expressed united opposition to the measure.

To answer Professor Johnson's question, then, to the extent the consequences of such measures are dire, they are likely to be dire for the acting state or locality, not the United States as a nation. That reality erodes the foundation of the broad preemption doctrine of cases like *Chy Lung*, *Hines*, and *Arizona* itself. To the extent that foreign responses are targeted at acting states, those states will suffer the consequences, not the rest of us. Targeted retaliation raises the probability of self-correction. Even if the states were given free rein, in other words, we would see very few enacting consequential anti-immigrant measures. And those that would enact such laws would be unlikely to keep them for very long.

But before we try to stamp out subfederal policymaking altogether, consider the costs. If immigrant interests alone could dictate immigration reform, it might make sense to stamp out subfederal discretion. But those interests are not the only ones that will govern when Congress takes up comprehensive immigration reform in the new year. Even if the Republican Party's presidential nominee suffered because of his views on immigration, it's not so clear that GOP House members did. Ensnared in safe districts, many of them are more anxious about primary challenges from the right than about winning over Hispanic voters. They will have to be dragged into immigration reform, and they will not sign off on any package that does not include enforcement-related provisions.

Validating state and local co-activity on the enforcement side might suffice to buy off restrictionist interests—a way for Republican legislators to deliver on their promises to their restrictionist constituencies without taking comprehensive reform down with them. (There is already a “junior varsity” version of this kind of trade in place in the so-called 287(g) program, under which states and localities can be deputized to undertake enforcement under federal supervision.) See *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, IMMIG. AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Jan. 12, 2013.) In the long run, states and cities won't take advantage of the discretion Congress affords them very often—or for very long—now that the costs are clear. By making federalism a part of immigration reform, and by letting restrictionists blow off a little steam in the process, Congress and the courts could help seal an immigration deal that better serves immigrant interests. At the same time, assimilating a

place for subfederal discretion would validate pro-immigrant local experimentation that could inform national reform efforts. By losing a battle here and there, pro-immigrant reformers might win the war.

The Fifth Circuit will surely stick with the foreign affairs reasoning of *Arizona* in striking down the Farmers Branch ordinance at issue in *Villas Partners*. But this will hardly be the last chapter in the story of immigration federalism.

Preferred Citation: Kit Johnson, Peter J. Spiro, Debate, *Immigration Preemption After United States v. Arizona*, 161 U. PA. L. REV. ONLINE 100 (2012), <http://www.pennlawreview.com/debates/12-2012/Arizona.pdf>.