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## Section 9: Immigration

Institute of Bill of Rights Law at The College of William & Mary School of Law

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# IMMIGRATION

## “Justice Dept. Sues Arizona Over Its Immigration Law”

*The New York Times*  
July 6, 2010  
Julia Preston

The Justice Department filed a lawsuit on Tuesday against Arizona to challenge a new state law intended to combat illegal immigration, arguing that it would undermine the federal government’s pursuit of terrorists, gang members and other criminal immigrants.

The suit, filed in federal court in Phoenix, had been expected since mid-June, when Obama administration officials first disclosed they would contest the Arizona law, adding to several other suits seeking to have courts strike it down.

The federal government added its weight to the core argument in those suits, which contend that the Arizona law usurps powers to control immigration reserved for federal authorities. The main suit was brought by the American Civil Liberties Union, the Mexican American Legal Defense and Educational Fund and other civil rights groups.

The Justice Department argues the law would divert federal and local law enforcement officers by making them focus on people who may not have committed crimes, and by causing the “detention and harassment of authorized visitors, immigrants and citizens.”

“Arizonans are understandably frustrated with illegal immigration,” Attorney General Eric H. Holder Jr. said. “But diverting federal resources away from dangerous aliens such as terrorism suspects and aliens

with criminal records will impact the entire country’s safety.”

The Justice Department suit is also aimed at stemming a tide of similar laws under consideration in other states. “The Constitution and the federal immigration laws do not permit the development of a patchwork of state and local immigration policies throughout the country,” the suit says.

Justice Department officials are “sending an unmistakable cannon shot across the bow of any other state that might be tempted to follow Arizona’s misguided approach,” said Lucas Guttentag, director of the Immigrants’ Rights Project for the A.C.L.U.

The Justice Department asked for a court injunction to prevent the Arizona law from taking effect as scheduled on July 29. Hearings in the other cases are scheduled for July 15 and 22. The law, signed by Gov. Jan Brewer on April 23, makes it a crime to be an illegal immigrant in the state and requires officers to determine the immigration status of people they stop for another offense based on a “reasonable suspicion” that they might be illegal immigrants.

Ms. Brewer assailed the federal lawsuit. “As a direct result of failed and inconsistent federal enforcement, Arizona is under attack from violent Mexican drug and immigrant smuggling cartels,” she said. “Now, Arizona is under attack in federal court from President Obama and his Department of

Justice.”

White House officials said Mr. Obama was not involved in the Justice Department’s decision to sue. But the suit came after steps by Mr. Obama in an effort to frame the immigration debate in terms that will favor Democrats in advance of midterm elections in November, including a speech on Thursday when he restated his commitment to overhaul legislation that would give legal status to millions of illegal immigrants.

The suit deepened the controversy over the Arizona law. Representative Darrell Issa, Republican of California, said the president was wasting resources that should be spent controlling the Southwest border.

“For President Obama to stand in the way of a state which has taken action to stand up for its citizens against the daily threat of violence and fear is disgraceful and a betrayal of his Constitutional obligation to protect our citizens,” said Mr. Issa, one of 19 Republicans signing a letter criticizing

the suit.

Kris Kobach, a lawyer and consultant to Ms. Brewer who is a co-author of the Arizona statute, said it was tailored to complement federal law. The Justice Department’s suit is “unnecessary,” he said, and “the suspicion is this is more about politics than law.”

In a background call with reporters, a senior department official said the decision to file the lawsuit—and to do so on the ground that it pre-empts federal authority, rather than on civil rights grounds like racial profiling—followed extensive deliberations with the Civil Rights Division and others inside the department, and a trip to Arizona to meet with state officials.

Should the department fail to persuade the courts to block Arizona’s law, the official said, it would closely watch for signs that people of Hispanic appearance were being singled out.

*Charlie Savage contributed reporting.*

## “Courts Could Void Arizona’s New Law”

*The National Journal*

May 8, 2010

Stuart Taylor Jr.

President Obama had it about right, in my view, when he called Arizona’s new immigration law “misguided” and a threat to “basic notions of fairness” and to “trust between police and our communities.”

Similar misgivings—filtered through a legal doctrine called “field pre-emption”—seem more likely than not to persuade the courts to strike the law down.

But please, let’s can the hysteria. The problems with this law—and with copycat proposals in at least 10 other states—are a far cry from the images of Nazi Germany, apartheid, and the Jim Crow South conjured up by leftists who would denounce any effort to discourage illegal immigration.

To correct some misconceptions:

- The solid majority support for the law among Arizonans—and the 51 percent support among other Americans who told Gallup pollsters that they had heard of the Arizona law—is not driven by racism. It’s driven by frustration with the federal government’s failure to protect Arizona and other border states from seeing their neighborhoods, schools, hospitals, and prisons flooded by illegal immigrants. Worse, “It’s terrifying to live next door to homes filled with human traffickers, drug smugglers, AK-47s, pit bulls, and desperate laborers stuffed 30 to a room, shoes removed to hinder escape,” as Eve Conant reported in *Newsweek*.

- Although it’s true, and most unfortunate, that absent robust administrative safeguards the Arizona law could lead to racial

profiling by police, it certainly does not require racial profiling. Indeed, a package of revisions signed on April 30 by Arizona Gov. Jan Brewer seeks to prohibit racial profiling. The revisions did this by deleting the word “solely” from the original, April 23, law’s provision barring investigation of “complaints that are based solely on race, color, or national origin.”

- Nor does the new law, as revised, empower police officers to stop anyone they choose and demand to see their papers. Rather, it authorizes such demands only after “any lawful stop, detention, or arrest made by a law enforcement official,” and only if “reasonable suspicion exists”—apart from ethnicity—that the person “is an alien and is unlawfully present in the United States.” Some of the law’s language could tempt police to demand papers from people suspected of petty violations of civil ordinances such as having an overgrown lawn, but it’s unclear how that will play out in practice.

- Neither is it fair to say—as did a *New York Times* editorial—that Arizona’s “defining the act of [an alien’s] standing on its soil without papers as a criminal act is repellant.” In fact, since 1952, the law of the United States has defined the act of an alien’s standing on its soil without papers as a criminal act.

So is there a problem with Arizona stepping in to enforce its own identical copy of a federal law that the feds barely attempt to enforce?

The problems with this law are a far cry

from the images of Nazi Germany, apartheid, and the Jim Crow South conjured up by leftists who would denounce any effort to discourage illegal immigration.

Actually, there is a problem. It's more subtle than suggested by the dependably hyperbolic *Times* editorial page. But it may well persuade the courts to find the new Arizona law unconstitutional.

The Supreme Court has long held that by adopting a comprehensive regulatory regime for immigration matters, Congress has manifested an intent to "pre-empt the field" and thus to sweep away state laws addressing the same issues.

To be sure, federal immigration laws do not specify that states may not do what Arizona has done. Nor do they conflict directly with the Arizona law. So the pre-emption challenges now being prepared by civil-rights groups and others are not sure to succeed.

But they aren't sure to lose, either. The Supreme Court has held that federal law regulates immigration so comprehensively as to pre-empt any state law—even one purporting to help enforce federal law—that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." So said the justices, in *Hines v. Davidowitz*, in 1941.

The strongest argument for federal pre-emption of the Arizona law is that Congress has carefully balanced the need to pursue the most-dangerous criminals among the estimated 12 million to 20 million illegal immigrants in the U.S. against the risk of harm from overly aggressive or arbitrary pursuit of hard-working people who immigrated—legally or illegally—years ago.

The justices may well hold that "Congress would prefer to have U.S. agents making the decisions about what individuals are realistic suspects," says a leading Supreme Court litigator who declined to speak for attribution, "and not having potential vigilante groups (even if they are wearing a badge) running around sweeping up individuals, many of whom are here legally."

Another consideration is the pre-eminence of the federal government in matters touching on foreign affairs. Mexican President Felipe Calderon, among others, has sharply condemned Arizona's action.

Although a 1976 decision, *De Canas v. Bica*, recognized an exception to the pre-emption doctrine for state laws regulating conduct of only "peripheral concern" to the federal immigration laws, the issues raised by the new Arizona law seem more than peripheral.

All of this may sound rather technical and abstract, and you may wonder: Is that really the way that judges and justices think? Don't they worry about how the Arizona law will affect the lives of real people?

Of course they do. But that begs the question of which real people have the best claim on what Obama used to call judicial "empathy." The hard-working Mexicans and Central Americans whose crime (a misdemeanor, under both federal and Arizona law) was sneaking across the border long ago to seek a piece of the American dream? The legal immigrants and children of immigrants who fear being hassled by racial-profiling police? The other Arizonans who feel that they are being overrun by illegal immigrants and fear that the murderous Mexican drug lords' reign of terror is starting to spread across the border?

Principled judges and justices are less comfortable making such open-ended value judgments—or, to be precise, making them overtly—than they are following precedents that weigh such apparent abstractions as whether an admittedly failed federal regulatory regime should pre-empt a chaotic collection of inconsistent state laws that might, or might not, deepen the dysfunction.

The bottom line is that it's a pretty good bet that the four more-liberal justices, including any successor to retiring Justice John Paul Stevens, would vote to strike down the Arizona law. And even if all of the four more-conservative justices went the other way—no sure bet—swing-voting Justice Anthony Kennedy might well vote with the liberals.

A Supreme Court decision striking down the Arizona law would be most likely if there were evidence by the time the case reached the justices of police abuses so serious and widespread that the only effective remedy would be wholesale invalidation.

And therein lies a paradox: If civil-rights groups and other plaintiffs succeed in persuading lower federal courts to block the law from taking effect—and thus from spawning any police abuses—they may well hurt their own chances of prevailing in the Supreme Court.

So they might be wise to wait for evidence of real police abuses rather than rushing to sue over potential abuses—which seem somewhat less likely after the April 30 revisions than before. But the race to raise funds by piling lawsuits atop hyperbolic rhetoric is on.

The Obama administration faces a similar quandary, and others, in deciding whether to file its own court challenge.

Homeland Security Secretary Janet Napolitano testified on April 27 that the Arizona law will “detract from and siphon [federal] resources that we need to concentrate on those . . . who have committed the most serious crimes.” But she could avoid that outcome—while taking some political heat—simply by instructing federal agents not to cooperate with Arizona police in enforcing the new law.

Meanwhile, an extraordinarily broad coalition of immigrant, civil-liberties, business, and other groups—including virtually all of those attacking the new Arizona law—has urged the Supreme Court to review and strike down another Arizona immigration law, which was adopted in 2007 to punish employers of illegal immigrants.

The justices asked Solicitor General Elena Kagan more than six months ago to take a position on the plaintiffs' petition. She has not yet responded.

Might the delay have something to do with the fact that it was Napolitano, then governor of Arizona, who signed the 2007 law? Or the fact that Kagan, a leading contender to fill Stevens's seat, will be savaged by many conservatives if she attacks either Arizona law and by many liberals if she defends either of them?

Inquiring minds in Congress will want to know.

## “Answers Found in the 10th Amendment”

*Los Angeles Times*  
July 30, 2010  
Ruthann Robson

The words of the Constitution do not change whether they are being applied to immigration or same-sex marriage, or whether the statute is from California, Massachusetts or Arizona. The 10th Amendment is often cited to support the constitutionality of Arizona’s immigration law as a matter of “states’ rights.” That same 10th Amendment is cited to support the unconstitutionality of the Defense of Marriage Act, which prohibits federal recognition of Massachusetts’ same-sex marriages. To agree with one outcome and not the other can be misconstrued as partisan. If the 10th Amendment is good for the goose, it must be good for the gander, although whether conservatives or liberals are ganders is a bit unclear.

But though it may seem that the neutral principles expressed in the 10th Amendment demand uniform results, this isn’t quite true. The amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” And therein lies the rub. What powers are delegated to the federal government by the Constitution? And which are not? And how do we decide?

The text of the Constitution is the obvious place to start. The Constitution provides that the federal government has powers of “naturalization” and regulating commerce with foreign nations (Article I, Section 8). It also prohibits states from entering treaties (Article I, Section 10). Though immigration (as opposed to citizenship after immigration)

is not specifically mentioned in the Constitution, there is a provision that comes close. Article I, Section 9 specifically limits congressional power: “The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.”

The provision is, of course, rooted in the slave trade. But by limiting congressional power until a certain date—1808—the implication is clear that migration of persons was intended to be an ordinary federal, rather than state, power.

In addition to the text, the history of constitutional interpretation is another guidepost to who has what powers. The DOMA litigation is not the first time Massachusetts has relied on the 10th Amendment. Massachusetts passed a statute barring state vendors from doing business with Myanmar (previously Burma). The U.S. Supreme Court unanimously struck down the statute under the “supremacy clause,” not even mentioning the 10th Amendment. It was sufficient that there were presidential and congressional powers to develop a comprehensive national and international strategy.

Marriage, of course, does not appear in the Constitution, so judicial interpretation is where we find guidance on this issue. The federal courts shy away from family law.

The U.S. Supreme Court has declared only a handful of state marriage laws unconstitutional, the most famous example being the Virginia statute criminalizing interracial marriage. But when striking down congressional statutes, the high court has repeatedly touted marriage and family law as the unquestionable domain of state, rather than federal, power. No matter how contentious they may seem, divorces and child custody disputes rarely become federal cases.

Finally, there are also our common practices and understandings about the difference between immigration and marriage. If you have a passport, its navy blue cover bears the seal “United States of America,” not, for example, Colorado or California. You need

not present your passport when you cross the George Washington Bridge or the Hoover Dam. On the other hand, if you have a marriage certificate, it is embossed with the name of the state in which you obtained the license, rather than “the United States.” If you have a divorce decree, it likewise bears the name of the state court in which you obtained the judgment.

By constitutional text, established interpretation and everyday practice, immigration is a federal matter and marriage is a state concern. When it comes to applying a neutral principle such as the 10th Amendment—powers not given to the federal government are reserved for the states or people—the very impartiality of the principle may yield inconsistent outcomes.



## **“Arizona Immigration Law Battle May Go to the Top”**

*Chicago Tribune*

July 30, 2010

David G. Savage

The U.S. Supreme Court, where the legal controversy over Arizona's immigration law is likely to be decided, has taken a dim view in recent years of judges striking down state laws based on broad challenges like the one an Arizona federal judge sided with Wednesday.

U.S. District Judge Susan Bolton agreed with the Obama administration that much of the Arizona law was unconstitutional “on its face,” without waiting for evidence that individuals were hurt or had their rights violated by state officials.

Bolton read the Arizona law broadly to apply to “all arrestees” in the state, not just those for whom there is a “reasonable suspicion” they are in the country illegally, which is how the state's lawyers interpreted the law. Relying on her broad understanding of its scope, Bolton said the law was unconstitutional because legal immigrants and U.S. citizens “will necessarily be swept up” by it.

Some legal experts say that approach leaves the ruling vulnerable to reversal on appeal.

“She rejected the state's own interpretation of its statute, which is fundamental error in my view,” said John Eastman, a law professor and former dean at Chapman University law school in California. “And she struck it down on a facial challenge, which is another significant error.”

Yale law professor Peter Schuck agreed the judge might have acted too soon. “By

entertaining a facial challenge rather than waiting for an ‘as applied’ challenge, she jumped the gun,” he said. Doing so left her without “the benefit of a real set of facts to use in assessing the statute's meaning and constitutionality,” he said. “She also gave short shrift to the presumption of constitutionality that federal judges are supposed to bring to any challenge to state statutes.”

However, Bolton's decision may stand if the Supreme Court follows its precedents on immigration, which have held that immigration law rests entirely with the federal government. Her opinion relied heavily on a 1941 ruling in which the justices struck down a Pennsylvania law that required immigrants to carry an identification card. She quoted Justice Hugo Black's comment that such a state identification system would infringe “the personal liberties of law-abiding aliens” and subject them to threat of “police surveillance.”

Immigration law experts generally gave Bolton high marks for following the court's precedents. The judge focused on one sentence of the Arizona law that said: “Any person who is arrested shall have the person's immigration status determined before the person is released.” Even though the state said it was targeting illegal immigrants, Bolton said the law as written would affect “the lives of legally present aliens and even United States citizens.”

On Thursday, Arizona Gov. Jan Brewer

asked the 9th U.S. Circuit Court of Appeals to lift the judge's order in early September.

If the state loses before the 9th Circuit, it is almost sure to appeal to the Supreme Court.

The outcome there may depend on whether the justices follow their more recent skepticism toward broad challenges to state laws.

The court in the past five years has insisted on narrower, targeted suits that challenge how laws work in actual practice.

The Supreme Court will hear a different Arizona immigration case this fall. The state wants to take away the business licenses of employers that knowingly hire illegal immigrants. The U.S. Chamber of Commerce and the Obama administration say that regulatory measure conflicts with federal immigration law.

“There's a good chance the court will use this lower-profile case to make a broad pronouncement” on the state's authority to enforce immigration, said Temple University law professor Peter Spiro.