State and Local Government / State Immigration Laws / Do states have a right to pass anti-immigration laws?

In March 2010, U.S. senators Charles Schumer of New York and Lindsey Graham of South Carolina outlined a bipartisan plan to reform the U.S. government's immigration policy. The senators' plan called for biometric Social Security cards for all workers, strengthened border security, procedures for temporary workers, and a path to legalization for illegal immigrants already present in the United States. As partisan tensions remained high in the months following the senators' proposal, however, an actual immigration bill failed to materialize in Congress. While economic and social tensions over immigration continue, this type of impasse at the federal level have prompted individual states to pursue their own courses of action.

The following Perspectives elaborate on the question of the extent to which immigration policies fall under the jurisdiction of local or national legislators. In the first Perspective, James Jay Carafano argues that it is well within a state's jurisdiction to write its own immigration law, so long as that law does not violate the U.S. Constitution. While the constitution's supremacy clause does give federal law the power to preempt state law, Carafano suggests, the Tenth Amendment also enshrines state sovereignty as a fundamental principle of U.S. government. Arguing that such state laws as Arizona's SB 1070 (2010) enforce rather than violate federal immigration laws, Carafano contends that Arizona and other states have not preempted the federal government. And as the federal government has agreed that states have an essential role to play in serving local communities, he concludes, a state immigration policy that does not violate federal statutes is free to be decided upon by that state's residents.

By contrast, Oliver Rosales argues in the second Perspective that recent state laws to deter illegal immigration have overstepped their boundaries into the jurisdiction of the federal government, which is ultimately responsible for controlling immigration and citizenship. Noting the presence of xenophobic influences on U.S. policies throughout history, he views recent state restrictions placed on illegal immigrants as a continuation of an exclusionary mindset, which violates U.S. democratic ideals and constitutional principles of fairness and equality. Rosales notes that state measures that place undue burdens on certain individuals, including Arizona SB 1070's requirement that immigrants carry proof of legal residency, lead to racial profiling and may be unconstitutional because they violate the Fourteenth Amendment's Equal Protection Clause, as well as federal and state civil rights law. In Rosales's opinion, state and local governments overstep their jurisdiction when they implement policies that infringe on the rights of others, regardless of whether or not they are U.S. citizens.

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State and Local Government / State Immigration Laws / Recognizing States' Roles in Immigration Enforcement

The power of a state to deal with people who are unlawfully present in the United States, like most public policy issues, is bounded by the U.S. Constitution and the state's own constitution and laws. Embodied in the U.S. Constitution, the imperatives of limited government and federalism give citizens and local communities the greatest role in shaping their lives. As a practical matter, local law enforcement is the front line of most law enforcement activities in a community. The Constitution and federal laws generally recognize this principle. Individual states, if they elect can play a role in the enforcement of immigration matters, where such enforcement is consistent with federal law. States, for example, could not abrogate civil liberties guaranteed under the Constitution.

Two amendments to the U.S. Constitution, the Ninth and Tenth, establish the federalist system, stating the rights contained in the Bill of Rights should "not be construed to deny or disparage others retained by the people" and adding "powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people."

On the other hand, the Constitution's Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Preemption can be specifically in the statutory language of an Act of Congress stating that federal law preempts state action, or implicitly through intent to regulate an entire field.

Managing immigration is one area where the federal government has reserved a power to preempt. Immigration law is mostly covered in the Immigration and Nationality Act (INA) of 1952, the Immigration Reform and Control Act of 1986, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which amended the INA. These laws would displace any state or local law that conflicted with federal statutes.

In the past, the federal government has recognized an appropriate role for state and local governments in addressing public safety concerns related to border security and immigration and workplace law enforcement. In 2009, for example, the federal government spent $60 million on grants to state, local, and tribal law enforcement in 13 states. Homeland Security Secretary Napolitano declared, "I am proud to announce that the 2009 funding provides additional flexibility to ensure that our first responders are equipped with the resources they need to confront the complex and dynamic challenges that exist along our borders." The administration also encourages state and local governments to participate in "Secure Communities," a program that promotes identifying and removing criminal aliens. Likewise, the Department of Homeland Security funds Border Enforcement Security Teams, which include state and local law enforcement.

The issue of federal preemption came to the fore in April 2010 when the state of Arizona passed a law that directs that when law enforcement officers engage in a lawful stop, detention, or arrest, a reasonable attempt shall be
made, when practicable, to ask about a person's legal status if reasonable suspicion exists that the person is unlawfully present in the United States.

Despite claims to the contrary, it is difficult to say how this new Arizona law actually preempts federal law. Some applications of the law may raise novel issues that have not been definitively resolved by the federal courts one way or the other, but most provisions simply build on existing laws and do not plow much, if any, new ground. For example, the law makes it a misdemeanor for aliens to fail to carry registration documents on their person. As Kris Kobach, an immigration law expert who assisted in drafting the Arizona law, points out, stated in an interview with the National Law Journal on April 29, 2010, these provisions "have been around since 1940... [A] person can only be guilty under the state statute if he is guilty under the federal statute. The principle that protects the Arizona law is the legal principle of concurrent enforcement." Nor is Arizona the first state to take action on immigration enforcement. For example, in 2006 the House Research Organization for the Texas State House of Representatives cited a report identifying 22 other states that had "considered proposals relating to illegal immigration." The proposals included "workplace requirements, access to public benefits, driver's license and identification card requirements, voter registration requirements, college tuition standards, and law enforcement issues."

Where states cannot most likely act is in undertaking efforts to require proof of citizenship for providing essential services. For example, the Emergency Medical Treatment and Active Labor Act of 1985 requires hospitals to provide emergency health care treatment regardless of citizenship. Likewise, the 1982 Supreme Court decision Plyer v. Doe struck down a Texas statute to deny public education to children who were unlawfully present. The Court ruled that the provision violated the Equal Protection Clause of the Fourteenth Amendment.

In short, as long as states are not preempted by federal law it is up to them to decide what is the best interest of their state. The role of the federal court system in determining whether what the states have done is appropriate is limited. The federal courts up to and including the Supreme Court do not decide whether a particular state or local law is good public policy; it is the task of the courts, as the Supreme Court found in South Carolina State Highway Department v. Barnwell Brothers, Inc. (1938), to recognize that "debatable questions as to its [the state law's] reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision."

States should, of course, be wise in their choices. But in many cases these are their choices.

About the Author

James Jay Carafano

James Jay Carafano is a senior research fellow at the Heritage Foundation with expertise in defense and homeland security issues. He currently serves as assistant director of the Heritage Foundation’s Kathryn and Shelby Cullom Davis Institute for International Studies and is a senior research fellow at the foundation’s Douglas and Sarah Allison Center for Foreign Policy Studies. Carafano is a graduate of the U.S. Military Academy at West Point, and has a master's degree and doctorate from Georgetown University and a master's degree in strategy from the U.S. Army War College. He served 25 years in the U.S. Army, rising to the rank of lieutenant colonel. Carafano is coauthor of the textbook Homeland Security, published by McGraw-Hill.

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State and Local Government / State Immigration Laws / Citizenship, Nativism, and America’s So-Called Immigrant Problem

The federal government has traditionally formulated and executed public policy toward immigration and citizenship in the United States. State jurisdiction over illegal immigration has influenced federal policy, but also has been limited as the federal government and judiciary have assumed more power in regulating and codifying immigration and citizenship laws. The responsibility to create, maintain, and ultimately change policy toward immigration and citizenship rests with the federal government, not the states. Individual state and local responses toward illegal immigration can often be characterized as misguided, xenophobic, and racist toward immigrants. While state efforts to adjudicate illegal immigration are cloaked in the rhetoric of prudence and justice for American citizens, a macroeconomic analysis of the causes of human migration reveals the parochialism of state efforts to enforce illegal immigration laws. The state, broadly defined, traditionally has created and maintained a large supply of cheap immigrant labor through public policy. Only comprehensive immigration policies at the federal level can rectify America’s chaotic immigration system and bring a semblance of sensibility and justice for all of America’s denizens, documented or otherwise.

America is often referred to as a nation of immigrants. Newcomers have made and re-made American towns and cities from the earliest Atlantic seaboard colonies to the larger German and Irish settlements of the mid-19th century. Scholars estimate that in the last quarter of the 19th century nearly 16 million immigrants (many Southern and Eastern European) came to the United States seeking a new economic life. In the 20th century, the United States received periodic migration waves from Central and South America and Southeast Asia. American history demonstrates that some immigrant groups have, however, received preferential treatment over others, depending on country of origin and racial heritage.

America’s founding fathers concerned themselves with conflicting state citizenship laws and the racial qualities of American citizenship. During the colonial period, the colonies had a plethora of variant state stipulations regarding citizenship. Desiring to create a comprehensive approach toward naturalization, the framers of the Constitution granted the federal government power under Article I, Section 8 to "establish an Uniform Rule of Naturalization." The Naturalization Act of 1790 established that any free white person of good moral character who had resided in the United States for at least two years was authorized for naturalization. Scholars argue this emphasis on white privilege established a racial citizenship caste that endured well into the 20th century.

America has a long history of creating and destroying what Mae Ngai has called "impossible subjects," or what popular political vernacular dubs the "illegal alien." The case law precedent for verifying the legal status of immigrants for removal was granted in Fong Yue Ting v. U.S. et. al. in 1893. A decade prior, the United States had excluded Chinese immigration altogether with the passage of the Chinese Exclusion Act. In 1924, the Johnson-Reed Act severely restricted immigration from southern and eastern Europe, while offering preferential treatment for western and northern European immigrants in the then emergent national quota system. Not until 1965 did the United States finally eliminate national (racial) quotas from federal immigration policy.
The ebb and flow of America's desire for cheap labor has determined in great measure enforcement policy toward America's racially diverse immigrant labor force, many of whom legal status fluctuated depending on the changing winds of federal/state policy, or agriculture's "picking" season. The economic crisis following the stock market crash of 1929 two decades prior witnessed the deportation of Mexican nationals, as well as many American citizens of Mexican descent during repatriation campaigns. In the 1950s, the federal government carried out the deportation of Mexican nationals during the pejoratively named program "Operation Wetback."

Scholars argue that recent developments in state immigration law continue to be driven by the needs of the labor market, the need to protect national borders, as well as from the so-called "Mexicanization" of the American southwest. Since 2004, local and state governments have adopted approximately 300 laws requiring local police and public servants to verify the legal status of residents. This movement to protect the integrity of the nation's porous borders achieved legal priority following the September 11, 2001, terrorist attacks in New York City. Ensuring that illegal aliens do not enjoy the privileges of American citizenship is central in the modern immigration restrictionist movement. State enforcement strategies toward illegal immigration originated largely with Proposition 187 in California, the popular 1994 anti-immigrant legislation designed to punish undocumented immigrants by denying them access to medical care and public education. Samuel Huntington's 2004 article "The Hispanic Challenge" articulated the sentiments of many modern restrictionists, namely, that Hispanic immigration to the United States poses a unique challenge to white-Protestant values given the perceived unassimilability of Hispanic immigrants.

Arizona's approval of the controversial state immigration enforcement law SB 1070 in 2010 re-ignited questions regarding federal versus state adjudicative authority over immigration law. The Arizona legislation effectively empowers local authorities to demand proof of legal residency from individuals whom law enforcement "reasonably suspect" of residing in the United States illegally. Critics argue SB 1070 grants law enforcement the authority to racially profile in violation of the civil and constitutional protections of native and legally documented residents. Racial profiling violates a number of constitutional and civil rights laws, specifically the Fourth Amendment's protection from unreasonable search and seizure and the Fourteenth Amendment's Equal Protection Clause. The law does not establish clear criteria for identifying an illegal alien, but leaves such evaluation to the personal judgment of law enforcement.

Cultural diversity is an asset to America, not a detriment. Criminalizing the undocumented hearkens back to some of the worst periods in American history. State laws designed to enforce "illegal immigration" are at best an infringement on federal authority and at worst, reactionary and nativist impulses, neither desirable qualities in the American character nor reflective of the notion of fairness inherent in American democracy.

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Oliver A. Rosales is a Ph.D. candidate in the History Department at the University of California, Santa Barbara. He earned a bachelor's degree in History from the University of California, Berkeley, and a master's degree in History from California State University, Bakersfield. A fourth-generation Mexican-American from Bakersfield, California, Oliver is interested in the history of ethnic Mexicans in the United States, and is currently writing his dissertation entitled "The Origins of a Rural Crisis: Race, Segregation, and Civil Rights in California's Central Valley, 1920–1980." He has taught United States and Chicano history at Bakersfield College and at Santa Barbara City College.

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Before signing SB 1070 into law on April 23, 2010, Arizona governor Jan Brewer stated that the law "represents another tool for our state to use as we work to solve a crisis we did not create and the federal government has refused to fix." While Governor Brewer's comments relate specifically to Arizona's 2010 immigration legislation, her statement points to an important point of contention between state and federal immigration agencies: who is ultimately responsible for "fixing" the immigration system? Though both state and federal governments seek cooperation in enforcing immigration policy, precisely what kind of "tools" an individual state may use to regulate immigration remains a subject of debate.

Though they may agree on some of the obstacles facing both state and national legislators, James Jay Carafano and Oliver Rosales offer different interpretations of states' roles in creating immigration policy. Arguing that the U.S. Constitution supports a balance of power between state and federal governments, Carafano suggests that a state like Arizona has the authority to pass any immigration act that does not defy the federal government. States should be judicious in their actions, he cautions, but only a state law that explicitly violates federal law can be rejected on jurisdictional grounds. Rosales, on the other hand, argues that Arizona's SB 1070 goes further than federal immigration law allows by violating the constitutional right to equal protection under the law. Moreover, he contends, the Arizona law suggests a hazard of leaving immigration policy to individual states: local communities may decide that illegal immigrants are not welcome and may further the exclusionary attitude that has characterized periods of U.S. history. It is the federal government's responsibility, he concludes, to protect citizens and non-citizens alike from any policies that would violate their civil rights.

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