Opinion: SB1070 Constitutional but bad policy

by Ilya Shapiro
The following is an essay for SCOTUSblog's symposium on Arizona v. United States *by Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute, where he edits the* Cato Supreme Court Review *and coordinates Cato's amicus brief program. Shapiro happens to be a Russian-born, Canadian-naturalized lawful permanent resident (green-card holder) of the United States.*

It's all Congress's fault. Everybody knows that our immigration system is a mess, quite possibly the most screwed-up part of the federal government.

That's quite a statement, I know – particularly coming from someone at Cato, and especially from a constitutional lawyer who's been spending most of his time battling Obamacare. But it's true: far from merely advancing bad policy, our current immigration system lacks a coherent policy that it purports to implement in the first place.

Because our immigration "system" is a remnant of various half-baked "reforms" going back decades, it's a schizophrenic set of laws that don't advance any particular goal or mission. If you tried to put together a set of procedures for how foreigners enter a country, how long they can stay, and what they can do while there, it would be hard to come up with something less efficient or effective than our current hodge-podge of often contra-purposive regulations.

This immigration non-policy has led us to a state of affairs that serves nobody's interest – not big business or small business, not the rich or the poor, not the most or least educated, not the economy or national security, and certainly not the average taxpayer – except perhaps immigration lawyers and bureaucrats. And all that is even before we get to questions of enforcement.

And yet most people agree on the types of problems we face from this dysfunctional situation:

- ten to twelve million illegal aliens living in the law's shadow;
- scientists/engineers/researchers/businessmen who have no path to a green card and citizenship (and often not even a path to a work visa);
- employers unable to find legal and reliable manual laborers despite high rates of unemployment; and
- border states and counties facing a disproportionate burden relating to the provision of social services and law enforcement.

And most people would also agree on the broad-brush solutions those problems require:

- greatly expand legal opportunities for temporary and permanent residence;
- streamline work and residence permits, including giving those already here a sort of temporary parole that puts them on a path to residency as long as they pay taxes, avoid criminal convictions, etc.; and
- redirect resources from enforcing the current restrictionist policies towards securing the border against terrorists and going after those who break criminal laws.

But Congress, for various political reasons that – unlike in many other policy areas – cut across party lines, has been unable to fix anything. Regardless of the party in power and whether the president has spent his own political capital to push immigration reform (Bush) or not (Obama), nothing has been done. Not surprisingly, this de facto benign neglect has not been a winning strategy.

Consequently, state governments, feeling tremendous pressure from their citizens to address the consequences of the federal failure to meet this nation's immigration needs, are acting for themselves. Arizona happens to be the "tip of the spear," but we've also seen various other immigration-related laws passed in states as different as Utah, Georgia, and California. Whether related to enforcement, expanded work permits, sanctuary cities, or other types of policy innovations, Congress's abdication of its duty to manage our immigration system has spawned a host of federalism experiments.

And so we come to S.B. 1070 (as amended by H.B. 2162), which exemplifies the crucial distinction between law and policy that both liberals and conservatives tend to forget. A law that is good policy might be unconstitutional or preempted by some higher law. Here we see the converse: while S.B. 1070 is (with the exception of one provision) constitutional, it's bad policy.

Before I quickly run through my constitutional views – which don't differ much from Judge Carlos Bea's partial dissent in the Ninth Circuit's ruling in *United States v. Arizona* – it's important to remember that, for all the brouhaha, most of S.B. 1070 has been in effect for nearly a year (since July 29, 2010). Indeed, the federal government only challenged six of its provisions, four of which thedistrict court (now affirmed on appeal) enjoined.

The court ruled against the government on provisions criminalizing the transportation and harboring of illegal aliens (Section 5(C)(2)) and permitting the impoundment of vehicles used to transport or harbor them (Section 10). And it left untouched the unchallenged provisions: the "purpose statement" (Section 1) and sections that prohibit any state subdivision from adopting any policy that "limits or restricts the enforcement of federal immigration laws less than the full extent permitted by federal law" (Section 2(A)); require state officials to work with federal officials in this area (Sections 2(C)-(F)); allow people to sue state officials and agencies for not enforcing immigration regulations to the full extent of federal law (Sections 2(G)-(L)); empower police to stop vehicles when they reasonably suspect human smuggling (Section 4); criminalize stopping to pick up day laborers when it impedes traffic (Sections 5 (A)-(B)); sharpen the definitions of the preexisting crimes of "knowing employment of unauthorized aliens" (Section 7) and "intentional employment of unauthorized aliens" (Section 8); amend the requirements for checking employment eligibility (Section 9); and create a "gang and immigration intelligence enforcement mission fund" (Section 11).

Note also that racial profiling is not at issue here. S.B. 1070 bends over backwards to make clear that it does not allow (let alone require) any use of race not permitted under federal law – which is why the federal government declined to join the stalled ACLU/La Raza lawsuits.

Now, the provisions that have been enjoined – and which will therefore be at the heart of the case before the Supreme Court – are generally considered to be the most controversial ones: requiring police to check the immigration status of anyone they have lawfully detained whom they have reasonable suspicion to believe may be in the country illegally (Section 2(B)); making it a state crime to violate federal alien registration laws (Section 3); making it a state crime for illegal aliens to apply for work, solicit work in a public place, or work as an independent contractor (Section 5(C)(1)); and permitting warrantless arrests where the police have probable cause to believe that a suspect has committed a crime that makes him subject to deportation (Section 6).

Much ink has been spilled applying the necessarily technical preemption analysis to each of these four provisions – see, for example, this highly readable point-counterpoint in the Federalist Society's policy journal. I won't belabor those arguments because my focus is on contextualizing S.B. 1070 in the larger immigration policy landscape. What I will say about the four disputed provisions is the following:

First, the government's argument regarding Section 2(B) boils down to a bizarre claim of preemption by what is essentially executive whim. As Judge Bea points out, it cannot be the case that the legality of a state law

turns on a given set of enforcement policies or practices, as opposed to the text of the allegedly preemptive federal law itself.

Second, Section 3 does not to me seem to add any additional registration requirements that would violate the applicable conflict preemption standards (*see Hines v. Davidowitz* (1941)), but rather mirrors federal law. I thus disagree with Judge Bea, but agree with him that the Ninth Circuit majority's foreign-relations rationale is in any event flawed: "We do not grant other nations' foreign ministries a 'heckler's veto.'"

Third, it seems pretty clear that Section 5(C)(1) conflicts with the comprehensive regulatory scheme Congress enacted in the field of employment-related immigration law – with a focus on penalizing employers, not employees. This past Term's *Chamber of Commerce v. Whiting* decision might at first glance belie this view, but the regulations at issue there fit neatly within an explicit exemption in federal law. With preemption analysis perhaps more than anything else on the Supreme Court docket, text matters.

Fourth and finally, a challenge to Section 6 must fail because, as Judge Bea details in some depth (noting among other factors the government's concessions at oral argument and in memos from the Office of Legal Counsel), state officials already have full authority to enforce federal immigration laws. For example, Rhode Island law enforcement officers have long been checking immigration status during traffic stops as a matter of policy. As-applied challenges are still possible in future, of course, depending on the policies and practices of particular law enforcement agencies and officers.

But a law's constitutionality is, again, not synonymous with its wisdom. As I said above, S.B. 1070 is an unsurprising reaction to the federal government's failure to both enforce existing law and reform that law in a manner that would make sense for economic, security, and civic-cultural interests. But noble – or at least understandable – goals are neither a necessary nor sufficient condition for good public policy.

S.B. 1070 is not good policy because it deprives Arizona of low-skilled workers that are a net economic benefit and shifts law enforcement resources away from higher-value uses, whether those be violent crime, the drug trade, terrorism, or other local priorities (the relative importance of which is beyond the scope of this essay). The law's proponents tend to invoke the deleterious effects illegal immigrants have on our economy by way of taxing federal, state, and local social services and engaging in a disproportionate amount of criminal activity. Research on these issues shows otherwise.

As my colleague Dan Griswold found in a 2009 report, even though the number of legal and illegal immigrants in the United States has risen strongly since the early 1990s, the size of the economic underclass has not. By several measures the number of Americans living on the bottom rungs of the economic ladder – those who presumably most burden the social safety net (though of course illegal aliens cannot access most of such benefits) – has been in a long-term decline, even as the number of immigrants continues to climb. From 1993 through 2007, the number of people living below the poverty line declined by 2 million, from 39.3 million to 37.3 million. Similarly, a 1 million increase in immigrants living in poverty was more than matched by a 3 million drop in native-born Americans under the poverty line. (These figures might be less rosy now, but the immigration-related effects – holding constant for the Great Recession – would no doubt remain the same.) As the title of Dan's study suggests, "As Immigrants Move In, Americans Move Up": the poorer, most-recent immigrants take the lowest-paying jobs and allow others to move up the income ladder in a more dynamic economy.

Stated another way, most studies find that Americans without high school diplomas and recent immigrants are the only groups to see their wages negatively affected by illegal immigration, and only very slightly. A 2006 National Bureau of Economic Research study estimated that while immigration from 1990 to 2004 reduced the wages of Americans without a high school diploma by one to two percent, it has boosted the wages of the more than 90 percent of American adults with a high-school education by more than that in the long run. And a recent Cato study by two well-respected Australian economists showed that a policy that reduces the number of low-skilled immigrants by 28.6 percent compared to projected levels would reduce U.S. household welfare by about 0.5 percent, or $80 billion. It would also reduce capital stock, labor input, and output of goods and services. At the other end of the skills scale, a Duke University study found that a quarter of all American engineering and technology companies launched between 1995 and 2005 had at

least one key foreign-born founder. In 2005 alone, those companies with at least one immigrant co-founder produced $52 billion in sales and employed 450,000 workers.

What's more, states with higher immigration rates tend to have lower unemployment rates than those with low immigration rates. As Michigan economics professor Mark Perry (quoted in yet another Cato study) says, "There is no fixed pie or fixed number of jobs, so there is no way for immigrants to take away jobs from Americans. Immigrants expand the economic pie." In other words, immigration is a boon to native-born American workers up and down the income ladder. Restrictionist measures – including those aimed at the unskilled workers who represent the majority of illegal immigrants – hurt state economies.

Arguments relating to crime rates are of similarly little help to S.B. 1070 proponents; strong empirical evidence points to the fact that immigrants are less likely to commit crimes than native-born Americans. For example, in testimony before Congress in 2007, Rutgers criminologist Anne Morrison Piehl concluded from census data that "immigrants have much lower institutionalization rates than the native born – on the order of one-fifth the rate of natives. More-recently arrived immigrants had the lowest relative institutionalization rates, and the gap with natives increased from 1980 to 2000." Piehl found no evidence that the immigrant crime rate was lower because of the deportation of illegal immigrants who might otherwise be in American prisons. Indeed, as illegal immigrants were drawn in record numbers by the housing boom of the 2000s, the rate of violent crimes in both Phoenix and the entire state of Arizona fell by more than 20 percent, a steeper drop than in the overall U.S. crime rate.

In short, even though S.B. 1070 is (almost entirely) a lawful use of state power, I would not have voted for it had I been in the Arizona legislature. I would, however, vote for a fundamental immigration overhaul in Congress that includes stricter enforcement of what would be a more liberal system. And so the silver lining from this litigation is that it raises the salience of immigration policy in the national political debate.

Even if nothing will be done as we enter a presidential election year – though of course immigration reform should be part of the debate over how to help the economy – it is important to have the issue around. Republicans and Democrats, Tea Partiers and Net Rooters alike take note: S.B. 1070 is not the way to go, but taking the lead on fixing immigration once and for all – making good, constitutional policy – is good politics.

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