

## SWEET HOME ALABAMA? IMMIGRATION AND CIVIL RIGHTS IN THE “NEW” SOUTH

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In the next few weeks, the Supreme Court will decide whether to review the constitutionality of Arizona’s high-profile immigration enforcement effort, known popularly as S.B. 1070. Arizona’s law is simply the tip of the iceberg. State legislatures have passed immigration enforcement laws over the last few years at breakneck speed,<sup>1</sup> and, generally speaking, have attempted to make life as uncomfortable as possible for undocumented immigrants. Controversy has ensued. The Arizona law received worldwide attention, international condemnations, and calls for an economic boycott of the state. Paradoxically, these state immigration laws come at a time when the Obama administration has aggressively pressed enforcement, setting all-time records for the removal of non-citizens from the United States, with nearly 400,000 people deported in fiscal year 2011.<sup>2</sup>

Earlier this year, the Alabama legislature entered the fray by passing a tough-as-nails immigration law.<sup>3</sup> The Alabama law builds on the controversial Arizona law but goes considerably further. This piece analyzes what contributed to the passage of the Alabama law and examines what might happen to it as the legal challenges wind their way through the courts.

This essay contends that the civil rights implications for immigrants and Latinos raised by the state immigration laws are in many respects similar to the civil rights issues raised by Jim Crow for African-Americans. This is true even

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1. See NAT’L CONFERENCE OF STATE LEGISLATURES, 2010 IMMIGRATION-RELATED BILLS AND RESOLUTIONS IN THE STATES (January-March 2010) at 1 (2010) (“With federal immigration reform stalled in Congress, state legislatures continue to tackle immigration issues at an unprecedented rate.”), available at [http://www.ncsl.org/portals/1/documents/immig/immigration\\_report\\_april2010.pdf](http://www.ncsl.org/portals/1/documents/immig/immigration_report_april2010.pdf).

2. See U.S. Immigration and Customs Enforcement, *Removal Statistics*, ICE.GOV, <http://www.ice.gov/removal-statistics/> (last visited November 21, 2011) (“Over the last three years, . . . ICE has conducted record levels of enforcement. . . . In FY 2011, ICE removed 396,000 individuals.”).

3. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 65, 2011 Leg., Reg. Sess., 2011 Ala. Laws 535.

though the current litigation centers on federal preemption doctrine, as opposed to the Equal Protection Clause of the Fourteenth Amendment. The current state laws eerily bring back memories of the “states’ rights” defense of segregation. Congress could measurably help address the civil rights concerns through some form of comprehensive immigration reform. The courts and the public should realize that, until the nation grapples with the civil rights impact of its immigration laws, it will continue to generate the sort of heated controversy that surrounds Alabama’s immigration law.

#### A. *Background*

The last ten years have been a tumultuous time in United States immigration history. The tragedy of September 11, 2001 sparked a deep concern for border security. In 2005, the House of Representatives passed the Sensenbrenner Bill,<sup>4</sup> a harsh enforcement-oriented measure that, among other things, would have criminalized the mere status of being undocumented. Reminiscent of the civil rights protests of the 1960s, mass marches in cities across the country followed, with crowds demanding simple justice for undocumented immigrants. As a result, the Senate never took up the Sensenbrenner bill.

Over the next few years, Congress debated more balanced approaches to immigration reform. With the election of President Barack Obama in 2008, there was optimism about the prospects for immigration reform. To many pro-immigrant observers, however, the administration has been a disappointment for ever-increasing numbers of removals and a failure to pass comprehensive immigration reform. Others criticize President Obama from a very different prospective, alleging that his administration has failed to enforce the U.S. immigration laws and failed to protect our borders.

With Congress unable to address immigration at the national level, state and local governments moved with enthusiasm to respond to—and hopefully slow down—increased migration from Mexico and other countries in Latin America. For example, Alabama, Georgia, and South Carolina—three states that have seen dramatic increases in their Hispanic population over the last twenty years—recently passed strict immigration enforcement laws.<sup>5</sup>

Unsettling demographic change, combined with Congress’s failure to improve an immigration system that commentators on both ends of the political spectrum vigorously condemn, led us to where we are today. Alabama is the latest state to act—and act decisively it did.

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4. See Border Protection, Antiterrorism, and Immigration Control Act, H.R. 4437, 109th Cong. (2005).

5. See *United States v. Bentley*, 2011 U.S. Dist. LEXIS 112362 (N.D. Ala. Sept. 28, 2011); *Georgia Latino Alliance for Human Rights v. Deal*, 2011 U.S. Dist. LEXIS 69600 (N.D. Ga. June 27, 2011); Complaint, *United States v. Haley*, No. 2:11-CV-02779 (D.S.C., Oct. 31, 2011), available at <http://lawprofessors.typepad.com/files/usvsccomplaint.pdf>.

### B. *Alabama's Immigration Enforcement Law*

Many critics, as well as many supporters, proclaim that Alabama's law is the toughest of all modern state immigration enforcement measures. Like Arizona's law, the Alabama law required state and local law enforcement officials to verify the immigration status of any person with whom they have lawful contact and have a "reasonable suspicion" the person is undocumented. But it doesn't stop there.

Section 28 of Alabama law would require school districts to check the immigration status of students and parents. (The Eleventh Circuit stayed implementation of this provision, and a few others, pending the appeal.) The stated purpose of Section 28 is to allow the collection of data necessary to challenge the Supreme Court's holding in *Plyler v. Doe*.<sup>6</sup> *Plyler* invalidated a Texas law that effectively barred undocumented students from receiving a public education from kindergarten through high school. This section of the law implicates access to education; it reportedly has already "chilled" undocumented parents and students from exercising a right to primary and secondary education recognized by the Supreme Court. Accordingly, this section has provoked a request for information from the U.S. Department of Justice, which will likely follow up by initiating an investigation.

Moreover, the nation for a number of years had been debating various incarnations of the DREAM Act, which would benefit undocumented college students, and has led to a mass movement for its passage on college campuses across the country. In contrast, Alabama's law could aptly be dubbed the anti-DREAM Act. In a section later enjoined from going into effect by the district court, the law would have barred undocumented students from the state's public colleges and universities.

### C. *Legal Challenges to Recent Immigration Laws*

Conflict is brewing in the lower courts over the constitutionality of the recent state immigration laws. The U.S. government challenged the Alabama immigration law, as well as its Arizona, South Carolina, and Utah counterparts. The challenges are founded on the U.S. Constitution's Supremacy Clause, which makes federal law the "supreme law of the land,"<sup>7</sup> with the argument being that the state laws intrude on the federal power to regulate immigration. To

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6. 457 U.S. 202 (1982). The Court stated that Texas had failed to provide evidence that the cost of educating undocumented students diminished the education received by other students. Keeping information about the number of undocumented students in school would allow for better documentation of the cost of educating undocumented students in future litigation involving the education of undocumented students. For further explanation, see Kevin R. Johnson, *Alabama Highlights Civil Rights Concerns in State Immigration Laws*, JURIST, Nov. 12, 2011, available at <http://jurist.law.pitt.edu/forum/2011/11/kevin-johnson-alabama-immigration.php>.

7. U.S. CONST., ART. VI, CL. 2.

this point, however, the Supreme Court has not been altogether clear on the relative distribution of federal and state power over immigration enforcement.

The Court has stated that the U.S. government has primary authority over immigration regulation. It has, however, been at best opaque regarding what room remains for the states in the field. For example, in *DeCanas v. Bica*, the Supreme Court stated that the “[p]ower to regulate immigration is unquestionably exclusively a federal power,” but upheld a California law sanctioning employers of undocumented immigrants.<sup>8</sup> Similarly, earlier this year, in *Chamber of Commerce v. Whiting*,<sup>9</sup> the Court reiterated federal supremacy over immigration regulation but upheld an Arizona law that allowed the state to strip the licenses of businesses that employ undocumented immigrants. Both decisions left vague the proper parameters of state involvement in immigration enforcement.

Eventually, one of the U.S. government’s challenges to the state immigration laws is likely to end up in the U.S. Supreme Court. That could happen very soon. A petition for certiorari filed by the state is pending in *United States v. Arizona*,<sup>10</sup> a Ninth Circuit decision striking down core immigration provisions of Arizona’s S.B. 1070, including the provision requiring local police to check the immigration statuses of suspected undocumented immigrants. If the Court grants review in the case (and we should hear in a matter of weeks), it will have the opportunity to offer guidance to the nation on the contours of state power over immigration.

In Alabama, the district court addressed two major legal challenges<sup>11</sup> and upheld the bulk of the Alabama immigration law, but struck down several provisions. The court, importantly, reached a different conclusion from the Ninth Circuit in upholding the immigration status checks by local police. The district court upheld the reporting requirements of local school districts but enjoined the implementation of the provision barring undocumented students from public colleges and universities. The United States is currently appealing the district court decision to the Eleventh Circuit.

In sum, there is ferment in the lower courts—and a clear conflict between the legal treatment to this point of the Arizona and Alabama laws—about the extent of the power of the states to participate in immigration enforcement. It is unclear whether the Supreme Court will weigh in now or will wait for more lower court decisions to rule on this issue. Particularly interesting is that the legal debate centers on the relative state versus federal power over immigration, while much of the public sees it in terms of the civil rights of immigrants and Latinos.

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8. 424 U.S. 351, 354 (1976).

9. 131 S. Ct. 1968 (2011).

10. 641 F.3d 339 (9th Cir. 2011).

11. *United States v. Bentley*, 2011 U.S. Dist. LEXIS 112362 (N.D. Ala. Sept. 28, 2011); *Hispanic Interest Coalition of Alabama v. Bentley*, Case No. 5:11-CV-2484-SLB (N.D. Ala. Sept. 28, 2011).

#### D. *Civil Rights Implications of Immigration Enforcement*

Federal preemption law aside, many people believe that these state immigration laws violate the civil rights of immigrants and U.S. citizens of particular national origin ancestries. For instance, the provision in both the Arizona and Alabama laws requiring police to verify the immigration status of persons about whom they have a “reasonable suspicion” of being undocumented raises serious concerns over possible racial profiling by police. Racial profiling in law enforcement is an evil that the nation has sought to remedy for many years. The obvious question is whether “foreign-looking” people, including Latinos, will bear the brunt of the immigration checks. Additionally, the school data collection requirement in the Alabama law placed in its crosshairs one of the few Supreme Court decisions, *Plyler v. Doe*, that recognizes that undocumented persons in the United States have civil rights.

It should be troubling that Alabama, ground zero in the civil rights movement of the 1960s, gave birth to the harshest immigration law to date. Many famous incidents in that state—from Birmingham Police Chief Bull Connor unleashing fire hoses on peaceful civil rights marchers to Governor George Wallace proclaiming “segregation now, segregation forever” in his 1963 inaugural address—remain indelibly imprinted on the national imagination. As in the days when segregationists championed “states’ rights,” we again hear objections to the intervention of the federal government as it attempts to defend immigrants’ civil rights through lawsuits challenging state immigration laws. Alabama now risks going down in history for its intolerance toward undocumented immigrants and Latinos as well as African-Americans.

Importantly, the civil rights implications of immigration enforcement exist regardless of whether the states or the federal government takes charge. The Alabama law is striking in terms of its civil rights consequences. However, that immigrants are being detained and deported at record numbers *by the federal government* has also provoked public outcry, as did the U.S. government’s response to September 11 and the Sensenbrenner bill. Basic civil rights concerns largely fueled the controversies. The Obama administration claims to have focused its removal efforts on “criminals,”<sup>12</sup> when in fact many of those removed have been petty offenders deported for traffic violations. Similarly, the administration has imposed the Secure Communities program on state and local law enforcement agencies, facilitating the removal of many immigrants arrested for only minor crimes. As a result, families have been torn apart and children who are U.S. citizens have been effectively deported with their immigrant parents.

Hopefully, Alabama’s immigration law will help the country place the civil rights implications of the nation’s immigration laws in the appropriate context.

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12. See Robert Farley, *Obama Says Deportation of Criminals Up 70 Percent Under His Administration*, ST. PETERSBURG TIMES POLITIFACT.COM (May 11, 2011, 12:07 PM), <http://www.politifact.com/truth-o-meter/statements/2011/may/11/barack-obama/obama-says-deportation-criminals-70-percent-under-/>.

After all, approximately 11-12 million undocumented immigrants<sup>13</sup> live in the “shadows of American life.”<sup>14</sup> They labor in fields, restaurants, hotels, construction sites, garment factories, and homes, with many immigrant workers today caring for our children (just as African-Americans in Jim Crow did). The nation has left these millions of people in legal limbo, facing uncertainty about what rights, if any, they have in this country. Even such a mundane event as being pulled over for a broken taillight places their entire lives in this country in jeopardy.

#### CONCLUSION

So where does this leave us? In my estimation, the United States, much as it was in the 1960s, is at a civil rights crossroads. Millions of immigrants and undocumented immigrants live in the United States. Employers value their labor. Consumers gain from lower prices. The economy as a whole benefits. But legally, the nation has been at best ambivalent about how to treat immigrants, especially undocumented ones, in the eyes of the law. Most fundamentally, what rights do they possess? We as a nation must address these civil rights questions. Until we do, we can expect more turmoil in the states and, consequently, continued threats to the civil rights of immigrants and U.S. citizens of particular national origins. Ultimately, the civil rights of immigrants and Latinos are at the core of the debate over the state immigration laws.

At the same time, the rationale for enacting state laws regarding immigration enforcement crumbles if the U.S. Congress acts to reform basic U.S. immigration law in a meaningful way. Indeed, state political leaders have repeatedly emphasized that the states are acting because the Obama administration and Congress have failed to address immigration enforcement. As a co-sponsor of the Alabama immigration law stated,

[t]o me the federal government ignoring this problem is putting an unfunded mandate on the states. The federal government’s job is to enforce immigration law. . . . We are hoping through this [law] that people who do need immigrant labor . . . will put pressure on Washington now to correct the broken immigration system.<sup>15</sup>

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13. See JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CENTER, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, at i (Apr. 14, 2009), *available at* <http://pewhispanic.org/files/reports/107.pdf>; JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CENTER, U.S. UNAUTHORIZED IMMIGRATION FLOWS ARE DOWN SHARPLY SINCE MID-DECADE, at iii (Sept. 1, 2010), *available at* <http://pewhispanic.org/files/reports/126.pdf>.

14. President George W. Bush, Remarks by the President on Immigration Policy (Jan. 7, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html> (stating that undocumented immigrants “who seek only to earn a living end up in the shadows of American life—fearful, often abused and exploited.”).

15. See Deborah Barfield Berry, *Congress’ Inaction on Immigration Reform Fuels States’ Actions*, MONTGOMERY ADVERTISER Oct. 10, 2011 (quoting House Majority Leader Micky Hammon, R-Decatur, a co-sponsor of the law).

Congress enacted the omnibus Immigration & Nationality Act in 1952,<sup>16</sup> during the Cold War, and has only amended it on a piecemeal basis since then. The last major effort at anything approaching “comprehensive” immigration reform was in 1986 with the Immigration Reform and Control Act.<sup>17</sup> If Congress could act to address the current issues of immigration, it could address the civil rights concerns afflicting immigrants today. Unfortunately, with a presidential election upcoming in 2012, it appears that immigration reform is dead in its tracks.

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16. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

17. Pub. L. No. 99-603, 100 Stat. 359 (1986).