



FEDERAL PREEMPTION

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July 11, 2011

For well over a century, immigration law and its enforcement in the United States have been the near-exclusive province of the federal government. State and local governments, generally speaking, cannot directly regulate immigration. California provides a famous example of a state unsuccessfully seeking to regulate immigration comes; in 1994, the Golden State's voters overwhelmingly passed Proposition 187, which was similar in important respects to Arizona's S.B. 1070 and was struck down by a federal court for impermissibly intruding on the federal power to regulate immigration.

Despite the federal supremacy in the realm of immigration, the Supreme Court has reserved some room for states in the field. In *DeCanas v. Bica* (1976), the Court unequivocally stated that the "[p]ower to regulate immigration is unquestionably exclusively a federal power." At the same time, however, the Court rejected a federal preemption challenge to a California law imposing fines on employers of undocumented immigrants. The decision left unclear the limits of what a state can do when it comes to regulating immigration.

After *DeCanas v. Bica*, Congress provided some guidance on the role of state and local governments in regulating immigration. In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which – among other things – provides for the imposition of sanctions on employers of undocumented immigrants. The Act expressly "preempt[s] any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."

Today, observers from across the political spectrum, including President Obama, contend that the current U.S. immigration system is "broken." Despite efforts for more than a decade, Congress has been unable to agree on a comprehensive immigration reform package. Over the same general time period, Latina/o immigrant communities have emerged in parts of the United States, including in the Midwest and South, which had not previously seen relatively few Latina/o immigrants. State and local governments also have experienced tremendous budgetary pressures, especially since the onset of what has been called the "Great Recession." These developments together have contributed to the enactment of a record number of state and local immigration laws, including ones passed by the Alabama, Arizona, Georgia, and South Carolina legislatures, in just the last year or so.

Chamber of Commerce v. Whiting

Against this background, the Supreme Court in *Chamber of Commerce v. Whiting* addressed the constitutionality of one early – and, by comparison, relatively tame – state immigration law, the Legal Arizona Workers Act of 2007. The Ninth Circuit had rejected a claim that federal law preempted the Arizona law.

The Chamber of Commerce leveled preemption challenges at the provisions of the Arizona law that (1) authorized the suspension of business licenses of employers who knowingly or

intentionally employ an alien not authorized to work, with a second violation possibly resulting in license revocation — the so-called “business death penalty”; and (2) required employers in Arizona to use the federal E-Verify system, a computer database that is intended to allow for the verification of employee work eligibility, which – Congress had made clear – the federal government itself could not make mandatory.

Writing for the Court in an opinion joined by Justices Scalia, Kennedy, Thomas (who joined the holding and most of the opinion), and Alito, Chief Justice John Roberts focused on the plain meaning of IRCA’s preemption provision. The Court reasoned that, because the Arizona law is a business licensing law and IRCA allows states to use “licensing and similar laws” in immigration enforcement, it is not preempted. Nor did the Court see any conflict between Arizona and federal immigration law that justified a finding of preemption.

Justice Stephen Breyer, joined by Justice Ruth Bader Ginsburg, dissented. According to Justice Breyer, the “licensing and similar laws” language in IRCA’s preemption provision should be limited to employment-related licensing systems; employment, after all, was the primary focus of IRCA’s employer sanctions provisions. A literal interpretation of the text, Justice Breyer cautioned, would allow states to suspend or revoke automobile licenses, marriage licenses, or dog licenses based on the employment of unauthorized workers, a result that Congress could not have intended.

In addition, Justice Breyer feared an uptick in discrimination against perceived “foreigners” by cautious employers who feared violating IRCA’s employer sanctions provisions. Besides allowing employers of undocumented immigrants to be sanctioned, IRCA prohibits discrimination by employers against foreign nationals who are authorized to work. In Justice Breyer’s view, “the state statute seriously threatens the federal Act’s anti-discriminatory objectives by radically skewing the relevant penalties.”

Dissenting separately, Justice Sonia Sotomayor would have held that state penalties should only be imposed after a federal – not a state as authorized by the Arizona law – adjudication of a violation of IRCA’s employer sanctions provisions.

Recusing herself, the newest Justice on the Court, Elena Kagan, did not participate in the consideration or decision in *Chamber of Commerce v. Whiting*. Even though she was not Solicitor General when the U.S. government’s brief was filed, Justice Kagan had been Solicitor General when the Court had invited the United States to provide its views about the constitutionality of the Legal Arizona Workers Act (and may well have been deeply involved in deliberations in the office about the government’s position).

Arizona’s S.B. 1070

Before considering *Whiting’s* impact on the Arizona S.B. 1070, let us consider the court of appeals decision in *United States v. Arizona*. Judge Richard Paez, with a forceful concurrence by Judge John Noonan, introduced the court’s decision:

[I]n response to a serious problem of unauthorized immigration along the Arizona-Mexico border, the State of Arizona enacted its own immigration law enforcement policy. Support Our Law Enforcement and Safe Neighborhoods Act (“S.B. 1070”), “make[s] attrition through enforcement the public policy of all state and local government agencies in Arizona.” S.B. 1070 § 1. The provisions of S.B. 1070 are distinct from federal immigration laws. To achieve this policy of attrition, S.B. 1070 establishes a variety of immigration-related state offenses and defines the immigration-enforcement authority of Arizona’s state and local law enforcement officers.

The Ninth Circuit held that the district court did not abuse its discretion in enjoining the implementation of four sections of S.B. 1070. A review of those sections highlights the differences between it and the much narrower Arizona law addressed by the Court in *Whiting*:

1. Section 2(B), which requires law enforcement to verify the immigration status of persons subject to a lawful stop, detention, or arrest when the officers have a “reasonable suspicion . . . that the person is an alien and unlawfully in the United States”;
2. Section 3, which would make it a crime under Arizona law, in addition to a violation of federal law, to fail to complete or carry an “alien registration document”;
3. Section 5(C), which would make it a crime for a person to apply for, solicit, or perform work without proper immigration authorization; and
4. Section 6, which would allow police to arrest a person without a warrant if the officer has “probable cause to believe . . . [t]he person to be arrested has committed a crime that makes the person removable from the United States.”

The Ninth Circuit unanimously invalidated Sections 3 and 5(c). Judge Carlos Bea dissented from the majority’s holding with respect to Sections 2(B) and 6.

In explaining the court’s holding, Judge Paez repeatedly observed that state and local governments are authorized to assist the federal government in enforcing the U.S. immigration laws through memoranda of understanding and training of state and local law enforcement in the U.S. immigration laws.

How might *Chamber of Commerce v. Whiting* affect the Court’s decision [A2] in *United States v. Arizona* (assuming, of course, that the Court grants review in the latter)? Both cases involve the question of federal preemption of state efforts to regulate immigration. However, in my estimation, the Court’s decision in *Whiting* to uphold the constitutionality of the Legal Arizona Workers Act does not necessarily mean that the Court will uphold S.B. 1070.

Several distinctions are readily apparent between *United States v. Arizona* and *Chamber of Commerce v. Whiting*. The court of appeals characterized S.B. 1070 as Arizona’s “own immigration law enforcement policy,” which sounds ominously like the law may well intrude on the “unquestionably exclusively federal power” to regulate immigration as declared in *DeCanas v. Bica*. S.B. 1070 most definitely is not a narrow business licensing statute (even with the mandatory use of E-Verify thrown in) like the Legal Arizona Workers Act, but is a much broader omnibus immigration enforcement law.

Another distinction between *United States v. Arizona* and *Chamber of Commerce v. Whiting* may figure in determining the fate of S.B. 1070. The U.S. government, not a private party, challenged S.B. 1070 and contended that the state of Arizona is intruding on *its* power to regulate immigration. The fact that the U.S. government made a claim of federal supremacy puts the case in a very different position than *Whiting*, in which the Chamber of Commerce contended that Arizona had usurped the immigration power of the federal government. Indeed, the majority in *Whiting* pointed to several points about which the U.S. government agreed with certain of Arizona’s contentions in that case, including that,

contrary to the contentions of the Chamber of Commerce, the U.S. government stated that the E-Verify system could accommodate increased usage as required by Arizona law. At bottom, the Supreme Court is more likely to take seriously the federal government's claim of federal supremacy than that of the Chamber of Commerce.