

STATES CAN'T REGULATE IMMIGRATION,
BUT THEY CAN REGULATE ILLEGAL
IMMIGRANTS: REMARKS AT THE 2012
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Thanks very much for having me here. I haven't been to Charleston in nearly fifteen years, and I've already recognized that that's much too long for such a charming city.

Now, unlike my predecessors, I don't have a PowerPoint presentation. Indeed, I think PowerPoint is unconstitutional; as they say, power corrupts and PowerPoint corrupts absolutely. Also, I'm sure I'm going to disappoint a lot of you because I'm not going to present the anti-immigrant or restrictionist position, in part because I myself am an immigrant—indeed, a double immigrant. I was born in Russia and my family came to Canada as refugees when I was little. I like to say that we took a wrong turn at the St. Lawrence Seaway and so I had to emigrate again—from Canada to the United States—during the course of which I've come to know this system that is a complete mess.

Indeed—and this should mean something from a Cato scholar—I believe that our immigration “system” is possibly the most screwed-up part of our government. In the past few years, Dodd-Frank and endless bailouts and Obamacare and so much else have given it a run for its money, but immigration remains

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up there because our laws in this area are schizophrenic, incoherent, and don't serve anybody's interests. Far from merely advancing bad policy, our current immigration system lacks a coherent policy that it purports to implement in the first place. 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.

What's really sad is that everyone agrees what the problems are:

1. Ten to twelve million illegal aliens live in the law's shadow.¹ I'm reminded of John Candy's last movie, "Canadian Bacon," with the immortal line from a hilariously ominous public service announcement: "Canadians, they walk among us."²
2. Scientists, engineers, and researchers can't get visas. We educate them and then send them back to Russia, India, and China.³
3. Employers can't find manual laborers despite high rates of unemployment, as Alabama is finding out

1. Hope Yen, *Number of Illegal Immigrants in U.S. Steady at 11.2M*, CNSNEWS.COM (Feb. 1, 2011), <http://cnsnews.com/news/article/number-illegal-immigrants-us-steady-112m>.

2. CANADIAN BACON (Polygram Filmed Entertainment 1995). As a green-card-holding Canadian myself, I know that reasonable suspicion of illegal Canadian presence can be playing hockey below the Mason-Dixon line or displaying an unnatural affinity for maple syrup.

3. Cf. J.D. Harrison, *House Lawmakers Drafting BRAIN Act to Retain Highly Educated Immigrants*, WASH. POST (Dec. 15, 2011, 1:06 PM), http://www.washingtonpost.com/blogs/on-small-business/post/house-lawmakers-drafting-brain-act-to-retain-highly-educated-immigrants/2011/12/15/gIQAZCiGwO_blog.html.

with their crops rotting in the fields.⁴

4. Border states and counties face a disproportionate burden relating to the provision of social services and law enforcement.⁵

So we all know what the problems are, but we also all know what a realistic solution is going to look like—to those who say “get to the back of the line,” with due respect, there is no line to get into—if and when it can ever be cobbled together:

1. Greatly expanded legal opportunities for temporary and permanent residence;
2. Streamlined 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, learn English, etc.; and
3. Redirected resources from enforcing the current restrictionist policies to securing the border against terrorists and criminals.

But Congress, for various political reasons that—unlike in most 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 (George W. Bush) or not (Barack Obama), nothing has been done. Not surprisingly, this de facto benign neglect has not been a winning strategy.

Consequently, state governments, feeling tremendous

4. Ed Pilkington, *Alabama Immigration: Crops Rot as Workers Vanish to Avoid Crackdown*, GUARDIAN (Oct. 14, 2011, 2:58 PM), <http://www.guardian.co.uk/world/2011/oct/14/alabama-immigration-law-workers>.

5. US/MEXICO BORDER COUNTIES COAL., UNDOCUMENTED IMMIGRANTS IN U.S.-MEXICO BORDER COUNTIES: THE COSTS OF LAW ENFORCEMENT AND CRIMINAL JUSTICE SERVICES 1 (2007), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/223285.pdf> (“From 1999 through 2006, the 24 counties along the U.S.-Mexico border spent a cumulative \$1.23 billion on services to process criminal undocumented immigrants through the law enforcement and criminal justice system.”).

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, California, and, yes, South Carolina.⁶ It's understandable that states have been passing these laws because Congress has fallen down on the job. This is a unique policy area in that sense; voters are mad and want someone to do something. Congress isn't acting, so state legislatures are. I don't blame the states, or the voters, or even illegal immigrants who are merely seeking a better life for their families. I blame elected federal elected officials from both parties. 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. It's a perfectly understandable political dynamic.

But none of this speaks to the constitutionality of all the laws these different states have been passing. I think most of them are constitutional. They are terrible policy for various reasons—from economic effects to the misuse of law enforcement resources—but that's a completely separate question from their constitutionality. Legal scholars always enjoy the opportunity to point to something that they think is legal or constitutional that they think is bad policy. It makes us feel that we're being intellectually honest and rigorous. Well, this is my area of the law in that respect. I'm going to put on my "simple constitutional lawyer" hat, without regard to policy advocacy.

Now, while immigration is a contentious and emotional policy issue, the law is very boring. We're not talking highfalutin substantive due process or First Amendment rights, or Second Amendment gun rights—nothing like that. We're dealing with preemption and the Supremacy Clause: Do these state laws conflict, either directly or impliedly—so-called "field

6. *See, e.g.*, A.B. 1018, 2011–2012 Leg., Reg. Sess. (Cal. 2011) (as amended in Assembly, Mar. 24, 2011); H.B. 87, 2011–2012 Leg., Reg. Sess. (Ga. 2011); S.B. 20, 2011–2012 Gen. Assemb., 119th Sess. (S.C. 2011); H.B. 497, 59th Leg., 2011 Gen. Sess. (Utah 2011).

preemption”—with federal law?⁷ That is the sole question.⁸

Courts deal with preemption on a case-by-case basis in a host of different fields. At the Supreme Court, you see unanimous votes one way or the other—findings of preemption and non-preemption, unusual 5-4 or 7-2 alignments, and occasionally even 5-4 “conventional” splits.⁹ The Court has shown that it goes provision-by-provision and reads all the technical language.¹⁰ Even though last term the Court upheld another Arizona regulation that pulls the business licenses of companies that employ illegal immigrants,¹¹ you can’t read the tea leaves on how the Court will treat any of the provisions that are before it now. It’s a technical and complex matter, not a policy claim. It’s not “does the government have a ‘compelling’ reason” to do something or anything subjective like that.

I’m going to focus on Arizona’s Senate Bill (“S.B.”) 1070¹² because it’s the one I know the most about and it’s the only one now before the Supreme Court with oral arguments scheduled for April 25, 2012.¹³ It also has had an appellate decision: the Ninth Circuit largely agreed with the district court 2-1.¹⁴ Interestingly,

7. See Stephen Wermiel, *SCOTUS for Law Students: Preemption and the Arizona Immigration Law*, SCOTUSBLOG (Dec. 9, 2011, 1:37 PM), <http://www.scotusblog.com/2011/12/scotus-for-law-students-preemption-and-the-arizona-immigration-law/>.

8. The Supreme Court granted certiorari on the issue of whether federal immigration laws preempt four provisions of Arizona’s immigration-related law. *United States v. Arizona*, 641 F.3d 339, 344–45 (9th Cir.), *cert. granted*, 565 U.S. ___, 132 S. Ct. 845 (Dec. 12, 2011) (No. 11-182).

9. See Eric G. Lasker, *U.S. Supreme Court Preemption Trilogy: The Sequel*, LEGAL BACKGROUNDER, Mar. 25, 2011, at 1, *available at* http://www.wlf.org/publishing/publication_detail.asp?id=2236.

10. See generally Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000); Roger Pilon, *Into the Preemption Thicket Again—Five Times!*, 2010-2011 CATO SUP. CT. REV. 263 (2011); Roger Pilon, *Into the Preemption Thicket: Wyeth v. Levine*, 2008-2009 CATO SUP. CT. REV. 85 (2009); Daniel E. Troy & Rebecca K. Wood, *Federal Preemption at the Supreme Court*, 2007-2008 CATO SUP. CT. REV. 257 (2008).

11. See *Chamber of Commerce v. Whiting*, 663 U.S. ___, ___, 131 S. Ct. 1968, 1987 (2011).

12. S.B. 1070 49th Leg., 2d Reg. Sess. (Apr. 2, 2010).

13. See *Arizona v. United States*, SCOTUSblog, <http://www.scotusblog.com/case-files/cases/arizona-v-united-states/> (last visited Apr. 8, 2012).

14. *United States v. Arizona*, 641 F.3d 339, 343–44 (9th Cir.), *cert. granted*,

the dissenting judge is a Hispanic immigrant himself, the highly respected Carlos Bea.¹⁵

What most people don't realize about S.B. 1070—which kicked off this debate in constitutional circles—is that most of the law has been in place for over two years, since July 2010. Indeed, most of it was unchallenged by the Government, and the district court upheld two of the provisions that were challenged¹⁶—and the Ninth Circuit affirmed that holding¹⁷—so there are only four provisions in the Arizona law that the court enjoined.¹⁸ Other district courts ruling on other states' laws, such as in Alabama, have ruled in other ways, often setting up conflicts that I'm sure will only grow as other circuit courts start

565 U.S. ___, 132 S. Ct. 845 (Dec. 12, 2011) (No. 11-182).

15. See *id.* at 369–91 (Bea, J., concurring in part and dissenting in part); see also *Ninth Circuit Judge Carlos T. Bea Wins Graciela Olivarez Award*, U. NOTRE DAME L. SCH. (May 29, 2012), <http://law.nd.edu/news/29897-ninth-circuit-judge-carlos-t-bea-wins-graciela-olivarez-award/>.

16. *United States v. Arizona*, 703 F. Supp. 2d 980, 1000–04, 1008 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir.), *cert. granted*, 565 U.S. ___, 132 S. Ct. 845 (Dec. 12, 2011) (No. 11-182). The upheld provisions criminalize the transportation and harboring of illegal aliens (Section 5(C)(2)) and permit the impoundment of vehicles used to transport or harbor them (Section 10).

17. *United States v. Arizona*, 641 F.3d at 366.

18. *United States v. Arizona*, 703 F. Supp. 2d at 1008, *aff'd*, 641 F.3d 339, *cert. granted*, 565 U.S. ___, 132 S. Ct. 845 (Dec. 12, 2011) (No. 11-182). The four most controversial provisions in the Arizona law are the following: (1) 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)); (2) Making it a state crime to violate federal alien registration laws (Section 3); (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 (4) 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). These tend to be the most controversial ones. See Helen Kennedy, *Arizona Immigration Law SB 1070 Has Most Controversial Parts Blocked by Federal Judge*, NYDAILYNEWS.COM (July 28, 2010), http://articles.nydailynews.com/2010-07-28/news/27071057_1_immigration-law-legal-immigrants-immigration-status. In a different case, the district court subsequently enjoined, on First Amendment grounds, the provision making it a crime to stop a motor vehicle to pick up laborers and for day laborers to get into a vehicle that impedes traffic (Sections 5(A) and (B)). *Friendly House v. Whiting*, No. CV 10-1061-PHX-SRB, 2012 WL 671674, at *8 (D. Ariz. Feb. 29, 2012).

ruling.¹⁹ But of course whatever happens to the Georgia and Alabama laws in the Eleventh Circuit and the South Carolina law in the Fourth Circuit will be affected by what the Supreme Court does in the Arizona case because we're often dealing with similar provisions.

Again, though, it's important to remember that we're dealing with the same dry reading of preemption. We're not dealing with racial profiling, and we're not dealing with as-applied challenges relating to the conduct of particular law enforcement officials. Those sorts of cases will no doubt arise further down the line.

That's why the United States didn't join the ethnic demagogues at La Raza and the cry-wolfers the Arizona ACLU, who filed suits alleging racial profiling.²⁰ S.B. 1070 and most of the other state laws explicitly state that they do not allow racial profiling.²¹ Even if they didn't, we know what the constitutional limits are on racial profiling²²—and obviously a state law isn't going to trump the federal Constitution.²³ Sure, a police officer or department may engage in illegal profiling, but those will be

19. See *United States v. Alabama*, No. 2:11-CV-2746-SLB, 2011 WL 4582818, at *2 (N.D. Ala. Oct. 5, 2011) (denying government's motion to enjoin enforcement of certain sections in H.B. 56); *United States v. South Carolina*, Nos. 2:11-CV-2958, 2:11-CV-2779, 2011 WL 6973241, at *23 (D.S.C. Dec. 22, 2011) (granting government's motion for preliminary injunction as to certain sections of Act 69).

20. See Complaint for Declaratory and Injunctive Relief at 47–51, *Friendly House v. Whiting*, No. CV 10-1061-PHX-SRB, 2012 WL 671674 (D. Ariz. May 17, 2010) (No. CV 10-1061).

21. See S.B. 1070 §§ 6–7; see also A.B. 1018, 2011–2012 Leg., Reg. Sess. (Cal. 2011) (as amended in Assembly, Mar. 24, 2011); *Illegal Immigration Reform and Enforcement Act 2011*, H.B. 87, 151st Gen. Assemb., Reg. Sess. (Ga); S.B. 20, 119th Gen. Assemb., Reg. Sess. (S.C. 2011); *The Illegal Immigration Enforcement Act*, H.B. 497, 59th Leg., 2011 Gen. Sess. (Utah 2011).

22. See, e.g., *United States v. Sokolow*, 490 U.S. 1 (1989) (adopting the racial profiling approach discussed extensively in *United States v. Berry*, 670 F.2d 583 (5th Cir. 1982) (en banc), which outlined seven primary characteristics law enforcement officials may use to determine if a person's conduct is sufficiently suspicious to justify a stop).

23. See, e.g., *Toll v. Moreno*, 458 U.S. 1, 16 (1982) (preempting a state from recouping indirectly from nonimmigrant aliens taxes that the federal government expressly barred the state from collecting).

dealt with on a case-by-case, “as-applied” basis.²⁴ These issues simply don’t exist on the faces of the laws.

So, what has taken effect in Arizona? Provisions such as those requiring state officials have to work with federal officials; allowing people to sue state officials for not enforcing S.B. 1070 itself; and empowering police to stop vehicles when they reasonably suspect human smuggling.²⁵ What was enjoined? First, section 2(B), the requirement that police check the immigration status of anyone they lawfully detained when they have reasonable suspicion they may be in the country illegally.²⁶ That sort of thing is in most of these state laws; the Alabama district court found that the Alabama equivalent was okay,²⁷ creating a split of authority, while the South Carolina district court enjoined it.²⁸ Second, section 3, the provision requiring immigrants to comply with federal alien registration laws and carry required paperwork.²⁹ The Alabama and South Carolina

24. *See, e.g., Sokolow*, 490 U.S. at 7 (upholding the use of racial profile characteristics in the context of articulating a reasonable suspicion for conducting an investigative stop).

25. Courts have left untouched the following S.B. 1070 provisions, which the Government did not specifically challenge: 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 (Section 2(C)-(F)); allow people to sue state officials and agencies for not enforcing immigration regulations to the full extent of federal law (Section 2(G)-(L)); empower police to stop vehicles when they reasonably suspect human smuggling (Section 4(E)); 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). *See United States v. Arizona*, 703 F. Supp. 980, 1008 (D. Ariz. 2010), *aff’d*, 641 f.3d 339 (9th Cir.), *cert. granted*, 565 U.S. ___, 132 S. Ct. 845 (Dec. 12, 2011) (No. 11-182).

26. *United States v. Arizona*, 703 F. Supp. at 1008 (enjoining S.B. 1070 § 2(B)).

27. *Hispanic Interest Coal. of Ala. v. Bentley*, No. 5:11-CV-2484-SLB, 2011 WL 5516953, at *40 (N.D. Ala. Sept. 28, 2011).

28. *United States v. South Carolina*, Nos. 2:11-CV-2958, 2:11-CV-2779, 2011 WL 6973241, at *23 (D.S.C. Dec. 22, 2011)

29. *United States v. Arizona*, 703 F. Supp. at 1008 (enjoining S.B. 1070).

district courts ruled the same way.³⁰ Third, making it a crime as an illegal to work or solicit work, section 5(C)(1), was enjoined—and also in Alabama.³¹ Finally, section 6, allowing warrantless arrests if there is probable cause to believe that the person has committed a deportable offense.³²

On that first issue, checking the status of people lawfully detained, the Government’s argument—which the Ninth Circuit majority upheld³³—boils down to a bizarre claim of preemption by what I call “executive whim.” That is, the Government has said that its enforcement priorities and resources are burdened if it has to keep dealing with requests by local cops and state officials about verifying the immigration statuses of all of the people they detain.³⁴ Well, you know what? Too bad. Federal agents are there to comply with the law. You can’t just say your resources are going to be burdened—that’s a discretionary call. Tomorrow, we could have a change of policy from Homeland Security Secretary Janet Napolitano or from President Obama—or we could have a new president and a new secretary of Homeland Security, and all of a sudden the enforcement priorities and resource allocations change. Would that mean that the state law is no longer preempted?

That’s not how preemption works. There has to be a conflict between the laws—and the state law mirrors the federal law here.

Next, on the registration requirements, Carlos Bea was part

30. *Compare Bentley*, 2011 WL 5516953, at *53 (affirming that Alabama citizens must comply with federal registration laws), *with United States v. South Carolina*, 2011 WL 6973241, at *23–24 (applying the same compliance requirement to South Carolina citizens).

31. *United States v. Arizona*, 703 F. Supp. at 1008 (enjoining S.B. 1070 § 5(C)(1)); *Bentley*, 2011 WL 5516953, at *54 (enjoining the Alabama house bill, which outlawed motor vehicles stopped on streets from attempting to hire or hiring passengers off the street).

32. *United States v. Arizona*, 703 F. Supp. at 1008 (enjoining S.B. 1070 § 6).

33. *United States v. Arizona*, 641 F.3d 339 (9th Cir.), *cert. granted*, 565 U.S. ___, 132 S. Ct. 845 (Dec. 12, 2011) (No. 11-182).

34. *See generally* LISA M. SEGHETTI ET AL., CONG. RESEARCH SERV., RL 32270, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 3 (2009) (outlining the government’s position).

of the majority—he said that this provision is preempted³⁵—but I find that hard to see. This is the only point on which I disagree with Judge Bea, because the registration and document rules in Arizona and elsewhere don’t add additional requirements or create some sort of state green card. They merely add state *punishments*—which all of these different laws do—adding state penalties for violating federal law. So I find it hard to see how these other things are okay but the equally parallel registration requirement is not.

Where I probably agree with the Ninth Circuit and Judge Bea and where I think the Supreme Court is most likely to find preemption is the “solicitation of work” or “being a day laborer while illegal” provision.³⁶ That’s because there’s a federal comprehensive regulatory scheme that Congress put in to sanction employers but not employees.³⁷ There was a conscious decision not go after people who are seeking work while illegal, so I think there is fairly clear field preemption here on the employment issue—though Arizona’s argument to the contrary is hardly frivolous.³⁸

Finally, the warrantless arrests should be upheld pending as-applied challenges. State and local law enforcement officers already have authority to enforce federal immigration law, and they make all sorts of arrests before they are completely sure what the scope of an offense might be.³⁹ Rhode Island cops have long been checking immigration status during traffic stops as a matter of policy rather than legislative enactment.⁴⁰ So this claim should definitely be put off until and unless particular agencies and officials go rogue.

Moving across the country, Alabama has a bunch of

35. *United States v. Arizona*, 641 F.3d at 383 (Bea, J., concurring in part and dissenting in part).

36. *Id.* at 358; S.B. 1070 § 5(C).

37. Immigration Reform and Control Act (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified at 8 U.S.C. § 1324(a) (2005)).

38. *See United States v. Arizona*, 641 F.3d at 358–59.

39. *See ARIZ. REV. STAT. ANN.* § 13-3883 (2010) (listing circumstances for which an arresting officer need not obtain a warrant).

40. *Estrada v. Rhode Island*, 594 F.3d 56, 63–64 (1st Cir. 2010) (citing *Muehler v. Mena*, 544 U.S. 93 (2005)).

interesting provisions, with more that were enjoined by the district court.⁴¹ Despite the publicity surrounding Arizona’s law, Alabama’s is the strictest—and the provisions that have been enjoined there create entirely new state crimes going far beyond federal law.⁴² That’s why many of them have been preempted: They are not simply parallel to federal law, as most of S.B. 1070 is. For example, no post-secondary education for illegal immigrants,⁴³ a much harsher harboring provision,⁴⁴ and no tax deductions for wages paid to illegals.⁴⁵

A really interesting provision that survived the district court’s evaluation was that courts are not to enforce contracts made with illegal immigrants when the other party knows that the person is here illegally.⁴⁶ Basically, this law gives illegal immigrants the status of a minor or incapacitated person. I have to think about it more, but this sort of action may fall under the power of states to determine the ability to consent as they do in other circumstances—so it might be a categorical distinction that is valid. In any event, it’s a unique aspect to the Alabama law that merits further review.

Similarly, most of South Carolina’s and Georgia’s provisions are unchallenged, while most of those that have been enjoined are the same as were enjoined in Arizona’s case.⁴⁷ There is one particularly interesting difference between South Carolina and Georgia: Georgia has a “safe harbor” for victims of crimes and those who report crime, where South Carolina does not—which is

41. *Hispanic Interest Coal. of Ala. v. Bentley*, No. 5:11-CV-2484-SLB, 2011 WL 5516953, at *53–54 (N.D. Ala. Sept. 28, 2011); *see also* Jeremy Redman, *Court Puts Parts of Alabama’s Anti-Illegal Immigration Law on Hold*, ATLANTA J.-CONST. (Mar. 8, 2012, 7:35 PM), <http://www.ajc.com/news/georgia-politics-elections/court-puts-parts-of-1378018.html>.

42. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, 2011 Leg., Reg. Sess. §§ 8, 13, 16 (Ala. 2011).

43. H.B. 56 § 8.

44. *Id.* § 13.

45. *Id.* § 16.

46. *Id.* § 27 (upheld by *Bentley*, 2011 WL 5516953, at *46–48).

47. *See, e.g.*, *United States v. South Carolina*, Nos. 2:11-CV-2958, 2:11-CV-2779, 2011 WL 6973241, at* 23 (D.S.C. Dec. 22, 2011) (reviewing the sections of the bill that were challenged).

a flaw in the South Carolina law.⁴⁸ Putting in such a safe harbor would make for a stronger case constitutionally, not to mention the obvious policy arguments.

Finally, I should mention that I'm not discussing South Carolina's voter-ID law here, the legal analysis of which does not concern preemption or the Supremacy Clause.⁴⁹ Instead, voter-ID laws are evaluated under the Voting Rights Act (VRA), which is itself hugely problematic and controversial.⁵⁰ I think the VRA is no longer constitutional in its modern application for reasons that you can read in my brief in the Texas redistricting case.⁵¹ It really has nothing to do with immigration and is, instead, more about how we run elections, protect voting rights, and combat voter fraud.

At the end of the day, these state immigration-related laws are counterproductive. Alabama has already seen harm to business—arresting a Mercedes executive and a Hyundai executive,⁵² crops rotting,⁵³ separating law enforcement from the communities they're trying to police,⁵⁴ and distracting enforcement efforts from what I like to call “real crime”—or national security issues. South Carolina might not have as many national security issues as some other states because it does not share a border through which al-Qaeda or MS-13 might come but

48. *Compare* Illegal Immigration Reform and Enforcement Act of 2011, H.B. 87, 151st Gen. Assemb., Reg. Sess. (Ga.), *with* H.B. 3003, 119th Gen. Assemb., Reg. Sess. (S.C. 2011).

49. H.B. 3003.

50. *See* Voting Rights Act of 1965, 42 U.S.C. § 1973 (1965).

51. *See* Brief for Cato Institute as Amicus Curiae Supporting Neither Party, *Perry v. Perez*, 565 U.S. ___, 132 S. Ct. 934 (2012) (Nos. 11-713, -714, -715), 2011 WL 6851353, *available at* <http://www.cato.org/pubs/legalbriefs/PerryvPerez-brief.pdf>; *see also* Ilya Shapiro, *The Voting Rights Act Is Outmoded, Unworkable*, NAT'L L.J. (Feb. 27, 2012), *available at* <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202543328611&slreturn=1>.

52. *See* Patrik Jonsson, *Second Foreign Auto Worker Hassled: Will Alabama Immigration Law Cost State?*, ABC NEWS (Dec. 3, 2011), <http://abcnews.go.com/US/foreign-auto-worker-hassled-alabama-immigration-law-cost/story?id=15073131#.T3XyZ01Mty5>.

53. Pilkington, *supra* note 4.

54. Adam Smith, *Police Officials Say Immigration Law Causing Few Issues*, THE NEWS COURIER (Nov. 27, 2011), <http://enewscourier.com/local/x1938325799/Police-officials-say-immigration-law-causing-few-issues>.

that's obviously a huge concern for Arizona, Texas, California, and New Mexico. Come to think of it, it's also a concern to the northern states because the Canadian border is much easier to cross than the Mexican—and most of it is unguarded.⁵⁵

This mess is properly in Congress's lap. If anything good comes from these bad state policies, regardless of whether they are held constitutional—and you really need to go provision-by-provision because no competent lawyer can summarily say they're all unconstitutional—they elevate the issue of immigration in our public discourse. Obviously, nothing is going to get done in a presidential election year, but hopefully it will at some point in the near future—maybe if President Obama decides to spend his political capital on this as he has promised to do in his second term, or under a Republican president who takes advantage of a “Nixon to China” opportunity.

What the states are doing is just nibbling around the edges: mirroring federal law and amending their own laws to regulate business transactions and other activities but not immigration. These statutes aren't preempted because they leave the traditional immigration prerogatives, such as determining who can enter the country or be naturalized, to the federal government.⁵⁶

When we have a much more liberal system and stricter enforcement of the illegalities that remain after you create that sensible system, we'll be able to go after the real criminals and national security violators rather than people who are just here to make an honest living. (And note that native-born Americans commit crimes at a higher rate than immigrants, legal or otherwise.)⁵⁷ But until such changes are made, these

55. Julian Sher, *Senate Probe Reveals Serious Gaps in Canada-U.S. Border Security*, GLOBE AND MAIL (Dec. 7, 2011, 2:26 PM), <http://www.theglobeandmail.com/news/politics/senate-probe-reveals-serious-gaps-in-canada-us-border-security/article2263381/>.

56. See, e.g., U.S. CONST. art. I, § 8 (“The Congress shall have power . . . [t]o establish a uniform rule at naturalization.”).

57. See, e.g., *The Connection between Immigration and Crime: Hearing on Comprehensive Immigration Reform: Impact of Immigration on States and Localities Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. 81–83 (2007) (statement of Anne Morrison Piehl, Dep't of Econ. Programming Criminal

immigration-federalism issues are going to keep coming up, remaining on the front burner of our national political debates. That is the Pyrrhic victory that we get from all these constitutional but bad public policies.

Thank you.

Justice). Moreover, 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 twenty percent, a steeper drop than in the overall U.S. crime rate. *See* Daniel Griswold, *Unfounded Fear of Immigrant Crime Grips Arizona*, WASH. TIMES (May 25, 2010), <http://www.cato.org/publications/commentary/unfounded-fear-immigrant-crime-grips-arizona>.