In Efforts to Regulate Immigration, States Test Limits of Their Authority

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Who should regulate immigration? The federal government? The states? Or both?

Let's start with the feds. According to the standard litany, the federal government is a government of "limited" and "enumerated" powers. So Congress can regulate immigration only if the Constitution says it can. Presumably, then, we can just crack open the Constitution, see if Congress has the power to regulate immigration, and find our answer.

Unfortunately, however, the Constitution is rarely so easily accommodating. If we examine the text, we'll find that there is no express power for Congress to regulate immigration. But there are other powers—such as the power to set up rules for who shall become a citizen and the power to regulate foreign commerce—that may indirectly relate to immigration. So can Congress regulate immigration or not?

A strict constructionist might say that if there's no express power, Congress can't do it. Instead, any immigration regulation is left to the states, which under the 10th Amendment are given any powers not delegated to the feds.

That's certainly a reasonable interpretation. It just produces a lousy result.

Think about it. Would you really want Delaware and Pennsylvania deciding separately who could emigrate from France or Somalia? And what would happen if someone admitted to Delaware moved to Pennsylvania? Could he or she be deported back to Wilmington?

Perhaps anticipating these problems, the Supreme Court long ago held that Congress has implied power to regulate immigration. But does the existence of this federal power mean that states can't also regulate immigration?

It's not necessarily. There are many areas that are regulated by both the feds and the states. Federal civil rights laws, for instance, forbid employers to discriminate based on race and gender but not sexual orientation. Yet many states, including Delaware, forbid discrimination against homosexuals.

So may be states can regulate immigration. Indeed, many states and municipalities have tried. Hazleton, Pa., for example, famously enacted a law punishing employers for hiring illegal immigrants, and Elsmere, Delaware, considered such a law. Arizona likewise passed a similar law long before its more recent and more controversial law authorizing police to stop and question suspected illegal immigrants.

The constitutionality of these laws depends upon Congress. For once Congress has the power to regulate an area, it also has the power to declare that any state regulation in the area is unenforceable (or, as a lawyer would say, "preempted"). This follows from the Constitution's Supremacy Clause which provides that federal law "shall be the supreme Law of the Land."

Congress' power to preempt state regulation might sound oppressive, but sometimes it's best to have just one layer of regulation. It's more efficient, for instance, to have a single national copyright law protecting authors' works than to have fifty state regimes. So Congress preempted state copyright laws.

But what about state laws regulating immigration? Has Congress decided to pre-empt those laws, or is that an area where there can be concurrent state and federal regulation?

That very issue will be before the Supreme Court on Wednesday when it considers the constitutionality of the first-generation Arizona immigration law. That law allows Arizona to revoke the business licenses of employers who knowingly hire illegal aliens.

The problem is that Congress' intent to pre-empt this law is unclear. Congress does explicitly say in its immigration laws that any sanctions for hiring illegal aliens shall come only from the federal government, not the state or local law. But that same provision says Congress did not intend to pre-empt state "licensing and similar laws."

So there's the rub. Arizona says it may revoke the license of an employer that hires illegal immigrants because Congress specifically said state "licensing" laws are not pre-empted. But the law's opponents say this flouts Congress' clear intent that only federal laws should punish the hiring of illegal aliens. The licensing exception, opponents say, is for limited situations where an employer has previously been found in violation of federal immigration law.

Depending on whom you believe, the Arizona law is a measured response by state legislators frustrated over Congressional failure to enact comprehensive immigration reform. Or, it is the product of state legislators pandering to xenophobic constituents who will use the law to discriminate against anyone who looks or sounds foreign.

Clearly, the law's desirability can't help but loom large in the background. The Supreme Court's job, however, is not to decide whether the law is desirable, but only whether Congress meant to pre-empt it. Alan Garfield is a professor at Widener University School of Law.