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The Plenary Power Immigration Doctrine: The Post 9/11 Hijacking of State Legislatures

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Abstract:
The Supreme Court has determined Congress’ authority over immigration policy to be one of its plenary powers. Classifying immigration as a plenary power effectively precludes any external involvement and/or interference from any other entity. From the early 1900s and into the 21st Century, Congressional plenary authority over immigration had come to be expected and desired in the United States. However, one event changed this, essentially rendering that power over immigration unconstitutional when taken in light of other doctrines the Court has iterated.

The event that brought about this transformation was the terrorist attacks of September 11, 2001. The attacks transformed the political and legal landscapes of immigration and security policy in the United States, and forced the citizenry to rethink the traditional roles of the state and federal governments. In the post-9/11 era, the states are precluded from creating and enacting immigration legislation, while being held accountable by residents for how they (the states) address their constituencies’ immigration demands. It is in this way, Congress is overstepping its bounds and violating the Court’s modern federalism doctrine.
**Intro:**

*Through the years,* Supreme Court decisions have granted Congress greater power over immigration policy. Eventually, that authority became plenary and regulation was solely entrusted to the federal government. Congress’ plenary immigration power has governed the nation’s immigration policy since the turn of the 19th century, when it first came under the purview of the federal government. Throughout this period, however, the citizenry of the United States accepted and believed that the federal government should have complete control over immigration, and turned to the state governments to address security and immigration issues. Congress became expected to control policy in this area, putting less pressure on the states to control immigration policy.

Gradually, Congress seized greater amounts of power in a variety of policy areas, as it did with immigration policy. The 20th century was arguably one of the most expansive interpretive periods for increased federal power in general in the history of the modern United States. Mainly, the Great Depression forced the United States to rethink where power should lie and the extent of the federal regulatory power. In the period after the New Deal until the early 1990s, Congress gained tremendous power to regulate a variety of activities. After the early 1990s when the Supreme Court finally established its modern federalism doctrine, which brought some balance back to the United States’ federal system. By clarifying the line separating federal and state powers and how the two levels interact with each other, the modern federalism doctrine began reining in the federal power. Even though this was a sharp deviation in the Court’s federalism jurisprudence, the modern federalism doctrine did not interfere nor conflict with the Plenary Power Immigration Doctrine—these doctrines remained in relative harmony for the better part of the ’90s. However, one event upset that homeostasis: September 11, 2001.
After the attacks on the World Trade Center and the Pentagon, security became the number one political issue in the United States. According to a national Quinnipiac poll published in February 2002, thirty-two percent of Americans polled stated terrorism and security were the biggest problems facing America at the time (Brown and Schwartz 2002). Terrorism and security issues even surpassed Americans’ concerns about the economy, which is usually the top issue among a plurality of citizens. As stated previously, before the attacks, security was strictly a federal concern. After the attacks, security began to permeate all levels of the political system. Citizens began to expect the state governments to get more involved in policing their borders. Security and immigration issues became especially salient in states that share a border with Mexico or Canada and act as major ports of entry. Before the attacks, constituents did not expect states to help secure the border and control immigration. However, in the post-9/11 society, immigration and security policy is just as much a priority for state governments as it is for the federal government. Both these entities are being held accountable for their ability to ensure constituents’ safety.

This now leads to one main question: Is the federal government’s plenary authority over U.S. immigration policy still agreeable with its other doctrines? Based on research data, it is clear that Congress has taken over the state governments by assuming complete control over the nation’s immigration policy, which precludes states from legislating and enforcing their own immigration policies. All the while, states are held accountable for their inaction to address the immigration and security demands of their constituents. In effect, Congress has commandeered state governments, something the Supreme Court has determined to be unconstitutional, according to its modern federalism doctrine. Many studies argue against the constitutionality of state action in the area of immigration policy, such as in the case of the Arizona immigration bill. Most of these studies fail to look beyond what the Court has
reiterated regarding Congress’ complete power to control immigration. Therefore, many of the studies conclude that state immigration bills are unconstitutional. However, none of them take into account the Court’s modern federalism doctrine, and most fail to look at the situation from the states’ perspectives. It is my goal to illuminate the conflict that has formed between the Court’s immigration and federalism jurisprudence and show that the 20th Century’s immigration doctrine, which gives Congress a monopoly to control immigration, violates other more recent Supreme Court doctrines.

The evolution of Congress’ plenary immigration power dates far back into U.S. history. The Plenary Power Immigration Doctrine was first referred to in the Chinese Exclusion Case (1889), otherwise known as CHAE CHAN PING v. U.S. (Morrison 2001). Before this case, state governments played a large role in the policy development in this area, although since its inception, the federal government had minimal influence. From roughly 1820 to 1824 the federal government was more concerned with increasing the country’s population and never created requirements for entry (Creek and Yoder 2010, 4). However, after 1824, Congress began to take greater control over this area because the Court justified Congress’ initiatives to control immigration through the commerce clause of the Constitution. Congress was largely looking to prevent state and local polities from imposing fees on people entering the country. (Creek and Yoder 2010, 4) The imposition of entry fees by the states would surely interfere with Congress’ prerogative of increasing the country’s population. After this period, the Court began to depart from its traditional commerce rationale. Instead, the Supreme Court said that the right to control who enters is inherent to any sovereign government.
Chinese Exclusion Case 1889 (CHAE CHAN PING v. U.S., 130 U.S. 581)

As previously stated, the Chinese Exclusion Case, also known as Chae Chan Ping 1889, was the first Supreme Court case that asserted Congress’ plenary power over immigration. The case came on appeal to the Supreme Court from the ninth circuit, involving the potentially unlawful detention of a laborer. The laborer, a Chinese national, had previously resided in San Francisco for some time, but had returned to China. When the laborer left the United States, he was given a certificate granting him the right to return to the country in accordance with the Restriction Act of 1882. When he returned and presented officials with the certificate, he was refused entry on the grounds that the act of 1882 had been amended in 1888, and that amendment voided his certificate. Taken back to the ship, where he was detained, the laborer then appealed his detention. (130 U.S. 581; 9 S. Ct.623; 32L. Ed. 1068 1889)

Justice Field gave the majority opinion of the Court, affirming the detention as lawful. Even though a treaty had been ratified between the United States and China, the treaty did not preclude Congress’ power to regulate foreigners entering the United States. According to the opinion given by Justice Field:

“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties.” (130 U.S. 581; 9 S. Ct.623; 32L. Ed. 1068 1889)

This excerpt from the opinion shows the Court’s radical departure from its previous commerce rationale. Here, Justice Field states that the power to control immigration is part of the sovereignty of the United States, and that this power is not under the influence or restraint.
of any other entity. This was the birth of a new precedent that would help dictate the future of U.S. immigration policy. This case marked the beginning of Congress’ absolute power over immigration.

Part II:

1. Anti-Commandeering: The Prohibition of State Government Co-option

The idea that the federal government is not permitted to commandeer state governments is a relatively recent creation of the Supreme Court. Federal commandeering occurs when Congress creates legislation that forces state legislatures to create laws that would further its execution and/or forces the cooperation of state officials to implement federal law. The anti-commandeering doctrine is one of the many legacies of the Rehnquist court, and has redefined our understanding of federalism in the American political system.

Federal commandeering occurs when Congress compels state governments and state officials into abiding by federal regulatory acts. At first glance this idea seems to be a right of the federal government granted by the Supremacy Clause, Article 6 Sec. II, of the Constitution.

The Supremacy Clause of the Constitution states:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” (The Constitution of the United States Article 6, Clause 2 n.d., sec. 6, Clause 2)

It is easy to see how one can mistakenly think federal co-option is constitutional under the Supremacy Clause of the Constitution. Any law created by the government of the United States is supreme. When state law and federal law butt heads on an issue, federal law is to be
upheld and the state law is to heed the will of the federal statute. However, closer examination will reveal the potential dangers of federal co-option and why it is unconstitutional.

1.2 New York v. United States

The first landmark case to establish a foothold for the anti-commandeering doctrine was New York v. United States 505 U.S. 144 (1992), which marked the beginning of the Supreme Court’s radical departure from its federalism precedent established at the time of the Great Depression and the New Deal.

New York v. United States is a case involving Congress’ Low-Level Radioactive Waste Policy Act of 1985. The purpose of the Act was to see that the states would implement a disposal policy for radioactive waste being generated within their jurisdiction. In order to see that the individual states would participate, Congress prescribed incentives that would encourage states to participate. The first set of incentives was monetary. The second set was access incentives, which would reward those states that meet federal deadlines and punish those that did not. The last incentive prescribed by Congress was a take title provision. This provision forced those states that did not participate to take ownership of all the waste. This would effectively make the state liable for any damage caused by the waste.

The opinion of the Court, given by Justice Sandra Day O’Connor, declared that the Act was constitutional, with the exception of one of the three incentive provisions previously discussed. The Court said that all but the last of the three incentives used to encourage states to participate was constitutional. O’Connor reasoned that the take title provision was a different degree of encouragement. According to the opinion, this

“type of federal action would ‘commandeer’ state governments into the service of federal regulatory purposes, and would, for this reason, be inconsistent with the
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Constitution’s division of authority between federal and state governments.” (New York v. United States 1992)

O’Connor justifies her position that this provision is unconstitutional by saying that the states are left with no other option but to comply with the federal law. The states are being forced into complying with federal law because the alternative for the states, for O’Connor, is “no choice at all,” (New York v. United States 1992).

O’Connor furthers her argument by describing the danger involved when the federal government oversteps its bounds and compels the states. She illustrates how government accountability is diluted when one level of government forces cooperation of the other. O’Connor states:

“Where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.” (New York v. United States 1992)

When the federal government compels the states, it will be state officials that pay the price for federal policy. Effectively, the federal government could mislead the public and make it think that state officials are responsible for the problems and failures of policy that they had not legislated and/or could not counter with separate legislation.


The next case that further expanded upon the anti-commandeering doctrine laid out in New York v. United States was Printz v. United States (1996). Unlike New York v. United States, the Printz case was a challenge involving the implementation of a nationwide gun control policy. The Printz case challenged the validity of the Brady Act, passed in 1993, which amended the Gun Control Act of 1968 and mandated the creation of a nationwide background check database to screen the purchasers of firearms by November 1998.
To implement this Act, Congress provided that the Attorney General should be the one to set up the new nationwide background check database. The database would be able to provide the information needed to determine if the sale of a firearm to a party is in accordance with the provisions of the Gun Control Act of 1968. However, until the database was operational, the Brady Act created certain temporal provisions, requiring the cooperation of state chief law enforcement officers. The job of the CLEOs under this Act was to make an attempt to check the backgrounds of the parties seeking to purchase a firearm.

Justice Scalia, the author of the opinion in this case, relied heavily upon the holdings articulated by Justice O’Connor in New York v. United States. Justice Scalia determined that requiring state chief law enforcement officers, even provisionally, to perform these tasks violates the system of federalism outlined in the Tenth Amendment of the United States Constitution. Though some cite differences that distinguish Printz v. United States and New York v. United States, Justice Scalia holds that the variations in Printz are not distinguishable from New York v. United States. One of the distinctions argued by the Solicitor General was that, unlike the take title provision, the Brady Act does not force the states to make legislation. The Brady Act simply directs state officials to execute a function. In response to this argument, Justice Scalia states,

“Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than (as Judge Sneed aptly described it over two decades ago) by "reduc[ing] [them] to puppets of a ventriloquist Congress… It is no more compatible with this independence and autonomy that their [State] officers be "dragooned" (as Judge Fernandez put it in his dissent below, 66 F. 3d, at 1035) into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.” (Printz v. United States 1997)
In his statement, Scalia is saying that the federal statute is unconstitutional, regardless of whether Congress forces the states to pass legislation or simply delegating executive functions to state officials.

Scalia further elaborates in his opinion on the dangers (i.e. shifted accountability, shifted financial burden) when Congress commandeers state governments and compels them to comply with federal regulations. Scalia shows how coercing state polities shifts accountability. He states:

“By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.”  
(Printz v. United States 1997)

In New York v. United States, the issue of accountability had been a major concern as well. For Scalia in Printz, it did not matter whether Congress was trying to directly compel state legislatures or state officials. Printz v. United States applied the same rule that New York v. United States did, making the direct commandeering of state officials unconstitutional. Whether Congress tried to compel the state legislatures or state officials individually, the federal government’s accountability is diminished and shifted to the state governments.

At this point in time, it may not be clear why New York v. United States and Printz v. United States are germane to the discussion of how the Plenary Power Immigration Doctrine and Congress’ monopoly to control immigration is unconstitutional. Printz v. United States and New York v. United States provide the essential concepts and models we need to analyze the constitutionality of the Plenary Power Immigration Doctrine in the post-9/11 era. In a post-9/11 era, the Plenary Power Immigration Doctrine essentially allows Congress to
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commandeer state governments and shift some of its accountability onto the state governments, which is what happened in New York and Printz. So, what do we need to take away from this discussion? What tests do we need to apply?

In both New York v. United States and Printz v. United States, the attenuation of federal accountability for both O'Connor and Scalia was of primary concern. Both justices in the end concluded that Congress could not compel the states. However, both allowed room for Congress to encourage—for instance, offering incentives for state cooperation. The line that separates compelling and encouraging is a fine one. To compel cooperation is to force, and to encourage cooperation means offering a choice.

To illustrate the differences, let us consider some hypothetical game theory situations. Take, for instance, that Congress passes Act X, which mandates the states to perform or not to perform some action. This would be an example of what the Court has determined to be unconstitutional because it lessens the accountability of the federal government to its constituents. But how does it diminish accountability?

Let’s say that the mandated action, prescribed by Act X, is not what the constituents of the states deem to be in their best interest. Since it is the state governments that have been forced to perform, it will be the states that will have to answer for the failures, deficiencies and resulting unpopularity of Act X. As a result, the constituents of the states will hold their representatives responsible for legislation that they had no hand in drafting. At the same time, by compelling the states, the federal government is also allowed to defer the cost of Act X and to put that burden on the states. This allows Congress to take credit without having to raise taxes to pay for the Act’s execution or, for that matter, having to pay at all. The danger is that compelling allows Congress to defer responsibility when something fails and claim credit when things are going well.
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To see how legislation that encourages and that which compels are two totally different ideas, let us look to another hypothetical. Take, for instance, that Congress passes another law known as Act Y. As in the previous example, Act Y has some goal it is trying to achieve. The difference between Act Y and Act X is that Act Y contains provisions that offer the states some reward, like money, if they choose to participate. This example of monetary incentives closely parallels the first set of incentives that were deemed to be constitutional in New York v. United States because it gives the states a choice.

Now, how are monetary incentives not compelling, but the take title provision is? When it comes to the monetary incentives, the states are free to participate or to decline. If state legislators believe that the federal statute is not in the best interest of their constituents, they are free not to participate, and the state legislatures will be held accountable for that decision. This also holds true for the opposite scenario. If the state governments believe that the federal statute is in the best interest of its constituents, they can choose to participate. Whether or not the states’ constituents agree, the state governments have a choice. In either situation, Congress does not impose a financial burden upon the states, and does not allow Congress to take credit without having to finance it.

The effects of commandeering have larger implications then one might first imagine. The implications outlined and elaborated previously are the indicators that show that Congress is, in fact, commandeering state governments when it comes to the area of immigration. The telltale sign is when federal legislative accountability is deflected to state and local governments. In so doing, Congress effectively transfers some of its obligation of having to answer for the failures of immigration legislation.
Part III:

September 11th: changing expectations of Federal and State Governments.

September 11th, 2001, is arguably the single most significant event in the recent history of the United States. Ten years after the attacks on the World Trade Center and the Pentagon, scholars are still uncovering the effects they had on politics. This paper is attempting to expose another inconspicuous effect of 9/11: How the attacks are now calling into question a centuries-old immigration doctrine because it conflicts with more recent U.S. Supreme Court jurisprudence. The implications of this could have astronomical consequences for U.S. immigration law and policy, and could revamp the United States’ immigration and security systems. Is immigration and security policy in a post-9/11 United States a matter strictly reserved to the will of the federal government? The actions of the citizenry of the United States tell all: their answer is unequivocally no.

The events of September 11th changed United States politics in two ways. The first, security and immigration were shoved into the limelight and, as a consequence, immigration, especially illegal immigration, became the top issue. Before September 11th, security and immigration policy were of minimal concern to the American public. Largely, the American public saw the United States protected by two vast oceans, with the largest and most technologically-advanced army and sophisticated intelligence. Social issues such as education, healthcare and social security reform were of top priority at the time. The second change ushered in by 9/11 was that citizens thought that the states should have a more active role in policing and securing the borders of the United States.

One does not need to look far to realize that in a post-9/11 era, United States citizens no longer expect the federal government to act as the sole authority over immigration and national security issues. Almost immediately after the attacks of 9/11, we see United States
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citizens beginning to turn to their respective state legislators to help solve immigration and security issues. The heightened security awareness coupled with increased illegal immigration brought immigration policy to the forefront. The attacks of September 11th essentially called into question the federal government’s ability to protect the country. The upshot of this is that U.S. citizens have come to expect their respective state and local governments to take a more prominent role in securing the safety of the United States to external threats. For citizens to turn to their state and local governments in the aftermath of 9/11 was the most logical progression of action, because the one level that had been entrusted to protect had failed to deliver. For many founders of the United States, the creation of an alternative outlet for citizens to seek redress for deficiencies in one level of government was imperative to the sustainability of the union. The reaction of United States citizens in the aftermath of 9/11 was the United States’ federal system operating in the way it was designed to work. This is what makes this situation unique. Traditionally, United States citizens had previously turned to the federal government in times of crisis—just look at any crisis the United States has endured. Whom did the people turn to when the Lusitania was sunk? Or when the Japanese bombed Pearl Harbor? And during the Cuban Missile Crisis, to whom did the people look to ensure their safety? The answer is the federal government. I can think of only one other time in United States history when citizens turned away from the national government and looked to the states for redress to correct the federal government’s deficiencies during a crisis, that time being southern secession, which was the start of the American Civil War.

Today, there are many events that indicate that a good number of citizens expect their respective state and local representatives to take more of an active role in securing the borders and controlling immigration, especially illegal immigration. There are many states, especially those that border Mexico and those that serve as sanctuaries for illegal immigrants, that are
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crafting and enforcing legislation designed to influence illegal immigration in an effort to
better police their borders. The issues involving illegal immigration and the security risks that
it poses to the general public have become salient issues in states like Texas, Arizona and
New Mexico. The issue even has spread to places as far as Long Island, New York. Though
Arizona has largely been the impetus for much of the debate and controversy surrounding
state involvement in the United States’ immigration system. The constitutionality of Arizona’s
immigration bill is outside the purview of this paper. In this paper I am merely trying to show
that the states should have the ability to legislate in the area of immigration. The question of
whether any resulting legislation (i.e. Arizona’s immigration bill) is in accordance with the
Constitution is another interesting topic for another paper. For now let’s focus on the issue at
hand.

Arizona Governor Jan Brewer passed arguably one of the most radical, comprehensive
and nationally influential state immigration laws in April 2010. The bill was so influential
nationally that “20 other states are already clamoring to follow in its footsteps.” (“Ariz.
Immigration Law Sought in 18 Other States - CBS News” 2010). The CBS article also talks
about how other state legislatures have begun to introduce similar legislation for consideration
in their own respective states. Among those states are Rhode Island, Pennsylvania, Michigan
and South Carolina. The purpose of the Arizona immigration law, and those other state
immigration laws being considered all over the United States, is to give state authorities the
ability to inquire into the immigration/citizenship statuses of suspected illegal aliens detained
by state authorities. This seizure of power has brought the Arizona law under much criticism
among many Americans and the Obama administration. There is so much outrage, in fact, that
people across the country are calling for boycotts on Arizonian goods. Most of the law’s
criticism stems from the potential discrimination and civil rights violations the bill poses to
citizens of the United States, especially among the Hispanic/Latino community. According to the law’s critics, it allows state authorities to racially profile when inquiring into a detainee’s citizenship status. However, even though critics of the bill raise very important points and moral issues with the law, its supporters have a different perspective.

The law’s supporters argue that the issue of illegal immigration has gotten out of hand and that they are fed up with the federal government’s inaction when it comes to controlling illegal immigration. This is not to say that those who oppose the law are content with the current immigration system in the United States, but the supporters of the law feel that this law is a “necessary evil” – the benefits of the law outweigh the shortfalls. Supporters claim that this bill is necessary because firstly, and perhaps most importantly, it will help improve the state’s security and crime rates. Secondly, supporters claim that the law might increase the supply of jobs in the market because fewer illegal immigrants would be filling jobs in the United States. Lastly, they argue there might be some positive economic effects because less money would be leaving the country in the form of remittances. As has been proven in many cases, illegal immigrants send most of the money they earn in their host country back to their countries of origin. Because the intentions of the bill are to reduce the number of illegal immigrants residing in the state’s jurisdiction, less money will be leaving the United States in the form of remittances. Thus, more American dollars will stay in the United States, boosting American economic activity, or at least the regional economy. Both sides to these issues have valid arguments and repudiations. The situation taking place in Arizona has heavily divided the United States. Like it or hate it, we can draw the conclusion that constituents are holding their state and local representatives accountable for immigration and security issues.
Empirical Data

To show empirically that United States citizens have come to expect that their state and local officials should participate in immigration and security policy (security as it relates to immigration), I will utilize various polls taken over a period from the 9/11 attacks until present day. However, I noticed there to be some limitations and drawbacks when I was researching and gathering this data. The first limitation is that the polls measure public opinion on state-level involvement on immigration policy have been conducted only recently. The earliest polls that I have been able to uncover that touch upon immigration issues at the state level are specifically the 2006 gubernatorial exit polls. However, these polls merely seek to measure constituent attitudes regarding the United States’ immigration issue in general, not specifically constituent attitudes regarding state and local action in legislating and implementing immigration policies. Not until 2010 do we see public opinion polls conducted that seek to measure constituent attitudes regarding state government immigration legislation.

The 2006 gubernatorial exit polls conducted by CNN.com in Arizona, Texas and Nevada attempt to gauge how constituents felt about the country’s immigration problems. In each of these gubernatorial races, a large majority of about two thousand respondents in each exit poll were very concerned with America’s illegal immigration problem. Referring to figure 1.1 in the appendix, an overwhelming majority of constituents in Arizona, Texas and Nevada thought that the importance of the illegal immigration problem was either very important (as indicated by the areas shaded red) or extremely important (as indicated by the areas shaded blue). In Arizona and Nevada, the number of those voters that saw the illegal immigration problem to be extremely important or very important was close to seventy-one percent
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(“CNN.com- Elections 2006 (Arizona)” n.d.) In Texas, the number of those that saw the problem of illegal immigration to be extremely important or very important was just under seventy percent (“CNN.com- Elections 2006 (Texas)” 2006). The areas of the graph represented by the green sections are the percentages of voters that believe the illegal immigration problem to be somewhat important or not important at all. The data set clearly shows that when constituents in Arizona, Texas and Nevada went to the polls in 2006 to cast their votes for governor, the issue of illegal immigration played an important role in whom the voters decided to support. Unfortunately, these were the only gubernatorial exit polls that inquired about the issue of illegal immigration. Because of this, we can only guess that the issue of illegal immigration was less of an issue farther north of the border. But, CNN.com’s national House of Representatives exit poll gives some indication as to how important the issue of illegal immigration was to constituents nationally in 2006, when they voted for their respective congressmen. When asked the question, “How important is the issue of illegal immigration?” sixty-two percent of those respondents polled (13,251 respondents) saw the issue either as very important or extremely important when deciding whom they wanted to represent them (“CNN.com (House of Representative)- Elections 2006” 2006). It is clear that United States citizens saw the issue of illegal immigration to be a very big deal. However, remember that this is a national exit poll conducted to see how people decided to vote when it came to their House representatives, not their state governors. I can only hypothesize that had this poll been tailored to determine how important illegal immigration was to constituent voting habits at the micro-governmental level, those numbers would be at least slightly lower. All of this information only indirectly indicates that constituents are thinking about illegal

1 Also refer to (“CNN.com- Elections 2006 (Nevada)” n.d.)
immigration when they are casting their vote[s] for governor. These polls do not indicate with any certainty that constituents want their local and state representatives to take an active role in immigration policy.

In order to determine constituents’ attitudes toward their state government taking action to control illegal immigration, we are forced to fast-forward two years to polls that were specifically tailored to measure this. I will first introduce polls taken in Arizona that specifically measure how constituents feel about state immigration legislation. The first poll is a gubernatorial exit poll taken in the 2010 governor’s race between Jan Brewer (R) and Terry Goddard (D). This exit poll posted by CNN.com asked voters three questions that I believe measures public opinion of states taking action in the area of immigration and illegal immigration. The first result from the exit poll, represented in figure 1.2 in the appendix, is a measure of Arizona constituents’ attitudes toward its new immigration legislation. The results show that out of a 2,413-person sample of Arizona voters, about sixty-eight percent indicated that they favored Arizona’s immigration legislation (“Senate, House, Governor Races - Election Center 2010 - Elections & Politics from CNN.com” 2010, Arizona). Only thirty percent of those polled opposed the immigration legislation (“Senate, House, Governor Races - Election Center 2010 - Elections & Politics from CNN.com” 2010). It is clear that Arizona citizens are overwhelmingly in favor of the new state immigration law. The large amount of political legitimacy for the new state law makes sense to Arizonans because illegal immigration is a larger problem in Arizona than it might be in other states. Immigration is a greater concern for Arizona because it directly borders Mexico, making it the perfect place for illegal immigrants to come and find work. As a result, the consequences of such a sanctuary state impacts the prosperity of that region. For instance, extra strain is put onto the state’s social welfare programs, its economy and its health care system. It would only be logical that
citizens of Arizona would be in favor stricter immigration policies, and therefore more receptive to the idea of state representatives stepping in to help solve the state’s immigration problem. While this poll is a good indication of Arizona constituents’ attitudes toward their state and local representatives stepping in to help solve this issue, it may be misleading. This information could mean nothing if all of those who said they were in favor of the state’s immigration bill turned out to only somewhat like it. What is important, however, in validating the veracity of my conclusions is to measure to what degree the constituents like or dislike this policy.

The information in figure 1.3 in the appendix shows just how strongly Arizona voters support or oppose their state’s immigration legislation. The results overwhelming indicate strong support for the state’s illegal immigration bill. Close to seventy percent of the sample either strongly favor or are somewhat in favor of the immigration law (¨Senate, House, Governor Races - Election Center 2010 - Elections & Politics from CNN.com¨ 2010, Arizona). Even within that seventy percent of those voters that show support for the law, seventy-seven percent indicated that they are strongly in favor of the bill (¨Senate, House, Governor Races - Election Center 2010 - Elections & Politics from CNN.com¨ 2010).

Taken together, Figure 1.2 and 1.3 tell us that a large majority of Arizona constituents favor the bill and see it as being legitimate. Because we are able to conclude that Arizona citizens believe the state law to be legitimate, we can also see that they believe that the state should be involved in making and implementing immigration laws. If you refer to figure 1.4 in the appendix, the graph illustrates the responses of Arizona voters when asked the question, “Who do you think should determine immigration laws?” According to the graph, forty-nine percent believe that it is the job of the federal government to create immigration legislation, while
forty-four percent believe that the state should determine immigration laws ("Senate, House, Governor Races - Election Center 2010 - Elections & Politics from CNN.com" n.d., Arizona).

Though a plurality of voters preferred that the federal government control this policy area, the margin that separates it from the runner-up is extremely close. Forty-four percent approval is a large proportion of the constituency that believes states ought to determine immigration laws.

This is not a trivial portion of the population that has little to no pull in the voting block, but a group that could have a large effect on who gets elected and who does not. Still, this information is not sufficient by itself to conclude that Americans today, in the post-9/11 era, expect their state representatives to create immigration legislation. Therefore, we cannot conclude at this time that the Plenary Power Immigration Doctrine, which does not allow for states to legislate or regulate immigration, is essentially unconstitutional. We need to remember that the information depicted in the graphs merely show the opinions of Arizona constituents. As we determined before, the issue of illegal immigration is a much larger political issue in Arizona then it might be in another state. Therefore, all this information may be the exception, and the American public at large may have a different opinion when it comes to who should handle immigration policy.

In order to gauge American public opinion overall on the idea of states taking action to create and implement immigration legislation, we will need to look at polls taken at the national level. The renowned Quinnipiac University conducts regular national polls that gauge America’s temperature regarding political issues. Quinnipiac University’s Polling Institute, during June and July 2010, conducted two national issue polls designed to gauge the nation’s temperature regarding President Obama’s performance and the controversial Arizona immigration bill. From my analysis of the data reported in the Polling Institute’s report, a large part of America shared similar opinions to those constituents in Arizona. Quinnipiac
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University’s Polling Institute reported that its study sampled about two thousand American citizens nation-wide with a margin of error measuring +2 percent. The results Quinnipiac reported were shocking. One of the questions asked in the poll was, “Based on what you’ve heard or read, do you approve or disapprove of Arizona's new immigration law?” (Brown and Schwartz Douglas n.d.). Figure 1.5 in the appendix shows the results of this question being asked in the two polls conducted one after the other. In the chart, notice how from June 2010 to July 2010 the portion of those who said that they disapprove of Arizona’s immigration bill remained constant while the number who stated they approve of the Arizona bill jumped four percentage points in the course of thirty days. Clearly, the poll taken by Quinnipiac University shows that the United States has a favorable attitude toward the Arizona immigration law. As time progressed, more and more people came to favor the law rather than being ambivalent or opposed to it. From this one can infer that a majority of Americans believe that the states should have some say in controlling immigration, especially when it comes to policy regarding illegal immigration. One can deduce this conclusion because if constituents believed that the states should not have a say in controlling immigration policy, a majority of those polled would not have said that they approved of the state's law in the first place. Those polled that stated that they agreed with Arizona’s immigration bill are not only communicating their favor for the principal policies outlined in the bill, but also agree with the state taking the initiative to enact and enforce the provisions of the bill. To further substantiate this conclusion, Quinnipiac University asked the same groups of people from the June and July 2010 polls the question, "Would you want your state to pass a law similar to Arizona's new immigration law or not?" (Brown and Schwartz Douglas n.d.). This unquestionably would determine whether United States citizens across the country want their state officials to regulate immigration. Figure 1.6 in the appendix illustrates the findings of
Quinnipiac University’s poll when they posed that question. Looking at the chart, many of the people who participated in the poll indicated that they would like to see a similar immigration law passed in their respective state. In the first poll taken in June 2010, a large plurality of people polled wanted their state to pass a similar immigration bill to the one passed in Arizona (Brown and Schwartz Douglas n.d.). Thirty days later, the plurality of forty-eight percent of United States citizens polled grew to a majority of about fifty-one percent, saying that they would be in favor of their state passing immigration legislation similar to what passed in Arizona. The increase in those favoring similar legislation being passed in their own state came from the group of people that did not originally know if they were in favor or against similar legislation being passed in their state. Those that were against their state passing immigration legislation similar to what had passed in Arizona remained constant over the thirty-day period. With all of this information taken together, it is impossible to deny the fact that today, United States citizens expect their state representatives to create and implement immigration laws. Therefore, those state representatives could be held accountable for not responding to the expectations and demands of their constituencies. This is unequivocally the reason why the states have only now begun to create and enact immigration legislation. As previously discussed, the states have not controlled immigration since the early founding of the modern United States. so why is it that we are now seeing states, in 2010, taking matters into their own hands and creating immigration laws? Something has caused a change in the constituents’ expectations of their state governments. The only plausible explanation for this radical change is the attacks of September 11th.

Though the earliest polls that I utilized to prove my conclusions date back only as far as 2004, the documentary film “Farmingville,” directed by Carlos Sandoval and Catherine
Tambini shows that this issue does indeed date back further than what these polls can show. “Farmingville” provides an idea of constituents’ expectations toward their local and state officials regarding illegal immigration policy dating to the time around the September 11th attacks. The documentary is a portrayal of a Long Island, New York town’s struggle in dealing with a large influx of illegal migrants moving into the community. According to the film, the citizens of Farmingville state that the large Mexican migrant population appeared in their town toward the end of the late 1990s (Tambini and Sandoval 2004). The large influx of undocumented migrants troubled many of the town’s citizens and became the top issue for many of them. Most of the residents’ concerns focused on how the undocumented migrant population might be contributing to the town’s crime rate, making the residents feel that they were no longer safe in their own town. The residents were also outraged by how the migrants were affecting the general atmosphere of the community. In the film, the residents documented that there were construction vehicles constantly driving through their neighborhoods, at all hours of the day, that thirty-plus migrants were renting family homes at one time, and that the conspicuous presence of the migrants on street corners was significantly affecting the town’s atmosphere (Tambini and Sandoval 2004). What makes the Farmingville case germane to the topic of whether United States citizens have come to expect their local representatives to control immigration is the residents’ response to their inundation with the illegal migrant population.

The response of the community is the most intriguing aspect of the documentary. The town of Farmingville handled the illegal immigration problem different from anyone in the past. Throughout the film, the citizens of Farmingville articulated their demands to their local and state representatives, encouraging them to take action. Surprisingly, there was no attempt to encourage their federal senators and representatives to take action. The residents of
Farmingville **clearly** thought that their town and state officials were better equipped to deal with this problem **than** the federal government. Had they thought the opposite, the documentary would have showed the residents of Farmingville voicing their concerns and demands to the appropriate federal officials and representatives. This further confirms the role the 9/11 attacks had in changing the expectations United States’ citizens had of their state and local governments regarding the creation and implementation of immigration policy.

**C&C: Criticisms and Conclusions**

Now some of you might be asking yourself the question “how can something, specifically Congress’s plenary immigration power, which the United States Supreme Court has affirmed time and time again, possibly be unconstitutional? Isn’t it de facto Constitutional if the Court says something is Constitutional?” After all that is what the Constitution says. For the purposes of this paper, when I say that the Plenary Powers Immigration Doctrine is unconstitutional, I mean that it can be seen as being unconstitutional when taken in light of other doctrines that the Court has also stated. I am not trying to override the opinion of the Supreme Court with my own humble interpretations. I am merely illuminating, what seems to me, to be a blatant inconsistency between two governing Supreme Court doctrines. Now given this explanation, some may still not be satisfied with how I may allude to the fact that constituent expectations can affect the constitutionality of congressional legislation and authority. This is a very good point, however I am not saying that public opinion and constituent expectations can sway the constitutionality of congressional legislation and its powers. The Supreme Court itself has alluded to this fact with its anti-commandeering jurisprudence. The basis of this doctrine is that the states are being held responsible for legislation that they have absolutely no control or say in whatsoever. Public opinion and constituent expectations are the foundations for determining governmental responsibility.
When the Court talks about shifting the federal government’s accountability onto the states, there must be someone who accounts. So who does the Court think are the accountants? In a democracy, like our own, the people account for the actions of the government. So, absolutely, public opinion and constituent expectations can affect the constitutionality of some power or legislation. As I stated before in the analysis of New York and Printz, accountability was the whole point behind the anti-commandeering doctrine.

At this point it should be clear that today’s federal government CAN BE SEEN AS commandeering various state governments by forcing them to comply with federal immigration laws. On one hand, you have the Court stating that it is unconstitutional for the federal government to co-opt state governments and force them to enact and implement federal legislation that they are then held accountable for. But on the other hand, the Court is concurrently saying that it is perfectly constitutional for Congress to have absolute authority over the United States’ immigration policy when the people want the states to take action in the arena of immigration policy. Remember the issue of accountability is key; in the post-9/11 era citizens have come to expect their state governments to take part in addressing some of their immigration concerns. It is important to remember that this commandeering regarding immigration policy is strictly a product of the 9/11 era. As previously discussed, the states have largely been precluded from interfering with federal immigration legislation for the past century, but that was perfectly constitutional because nobody before 9/11 really expected or believed that the states should have the ability to participate. However, after 9/11, United States constituents expect and want their state governments to legislate and enforce individual immigration policies, and as a result, the states are now being commandeered because they are prohibited from addressing their constituents’ immigration concerns. Prohibiting the states from addressing the demands of their constituencies is in itself compelling, just as forcing the
states to enact and implement regulations exemplified in New York v. United States and Printz v. United States forced the states to cooperate with federal regulations. The changed expectations among state constituencies and how they view their state government’s role in immigration policy serves as a plausible explanation why we are now seeing states going solo, tackling their individual immigration issues.

There cannot be any doubt that the role states are expected to play in the United States’ immigration system has changed, and therefore states are “going rogue” beginning to fashion localized immigration legislation. The very fact that states, such as Arizona, are creating immigration legislation serves as the proof. Simply, what government chooses to address is a result of what its constituency articulates to it. This idea plays along perfectly with what David Easton suggested in his input/output government model. Easton theorized that the output must address what was demanded or put into the system for it to survive. And if this new role is not the driving force behind states crafting localized immigration legislation, why are the states only beginning to do this today, and not fifty years ago? The answer is that nobody in the past wanted or expected the states to participate in making or implementing immigration policy. Government instinctively operates to address the needs that its constituents specifically communicate to it. For governments to address issues their constituents do not specifically care to communicate defies all logic. Firstly, for government to address issues that constituents do not demand of it is a waste of time and resources. Secondly, addressing things that are not communicated could negatively impact the government’s legitimacy because the people may be content with the status quo or may not see something as an issue. The fact that states today are enacting legislation, despite state governments being aware it would be unconstitutional for them to create immigration legislation (as articulated by the Supreme Court), illuminates the high level of accountability
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to which the states are being held. It is clear that state governments are not creating this legislation because they simply feel they ought to, but because they have to. I think state governments could not care less whether the immigration legislation they write passes constitutional muster, but this is merely a way for those in power to save face for when they are up for re-election.

This “going rogue” phenomenon is what I like to refer to as the “blown gasket” in Robert Sedler’s federalism safety valve model (Sedler n.d., 420). By trying to enact a nationwide immigration policy, pressure inevitably builds, upsetting the equilibrium in the system (pipe) because it is difficult to satisfy the demands of everyone. When Congress fails to devolve power to the states (engaging the safety valve), the excess pressure build-up is allowed to go unchecked, and therefore puts stress on the entire system. Eventually, the pressure becomes so great that the states then take matters into their own hands (the blown gasket), which relieves the stress and pressure in the system.

In closing, I am not advocating for a “devolutionized” national immigration policy where each state has radically different immigration polices. What I am trying to convey is that immigration policy reform is unlikely to be effective until there is a major shift in the Supreme Court’s doctrine regarding immigration policy. Congress is unlikely to create comprehensive immigration reform in the near future. According to a paper presented by Rey Koslowski at the Conference on United States Immigration Reform, hosted by the center for migration studies, “comprehensive immigration reform is unlikely in the near future, stand-alone immigration enforcement and border security legislation is more likely and a mini-immigration reform package is a possible scenario that is more possible than comprehensive immigration reform” (Kowslowski 2011). If a solution to the immigration problem in the United States is not likely to be found by Congress, why should it be left solely to Congress to
solve? Giving a monopoly, to create immigration legislation, to the institution that is not willing to address the issue is ludicrous. Dr. Koslowski was correct when he said that Congress is unlikely to create comprehensive immigration reform (Kowslowski 2011). Comprehensive immigration reform is only possible through cooperation (not cooperation by force) among the echelons of the United States government. This cooperation, where the states are free to create immigration legislation that suits their specific needs, is only possible if there is an extreme divergence in the Supreme Court’s immigration jurisprudence away from the Plenary Power Immigration Doctrine. For the United States’ federal and state governments to be fighting over who should control immigration policy is futile. Hopefully, I have proven that both, federal and state governments, should share control and that it is unconstitutional for one echelon to have absolute authority over the other when it comes to creating immigration legislation. What they should be doing instead is discussing how they are going to work together to solve the problem. After all, both levels are on the same side— or at least they should be.
Appendix

Figure 1.1

Importance of Illegal Immigration

<table>
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<th>Importance</th>
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<tr>
<td>Very Important</td>
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<tr>
<td>Extremely Important</td>
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<td>710.6</td>
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Figure 1.2

Arizona Immigration Bill (2413 sample)

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<th>Oppose</th>
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<tr>
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<td>1619.96</td>
<td>723.0</td>
<td>48.26</td>
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</table>


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Appendix

Figure 1.3
Constituent Temp. Regarding Arizona Immigration Bill

Figure 1.4
Who should determine Immigration laws

Figure 1.5
National Public Opinion on Arizona Immigration Bill

Figure 1.6
NATIONAL POLL
"Would you want your state to pass a law similar to Arizona’s new Immigration law or not?"
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Printz v. United States. 1997. (United States Supreme Court).


The Constitution of the United States Article 6, Clause 2.