EXPLORATION INTO THE FOREIGN POLICY IMPACT OF RECENT IMMIGRATION LAWS

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INTRODUCTION

"Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door." Emma Lazarus (found on the base of the Statute of Liberty).

Recent restrictive state statutes impede on human right concerns, economics, and the ability of the President and Congress to craft a comprehensive immigration policy. Legal and illegal immigrants play an important role in the United States economy. States have played a role in the enforcement of immigration policy to some extent, but federal courts have needed to step in to clarify the scope of a state’s power in the enforcement of immigration law. The Supreme Court has also addressed general concerns of state statutes interfering with foreign policy in the past.

The passage of the Arizona statute titled, “Support Our Law Enforcement and Safe Neighborhoods Act,” (S.B. 1070) is a recent example that raises questions about the validity of a state’s power in the enforcement of immigration. The statute determines the authority of local law enforcement in determining the status of illegal immigrants. The Arizona statute raises concerns about the state interfering with federal law on the matter of immigration enforcement. However, the primary purpose of this Article is to explore immigration from a foreign policy

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The Arizona statute may interfere with the power the President is given to control foreign policy.

Part I of this Article discusses trends amongst the states regarding legislation involving illegal immigrants. Part II links how some of the reaction impinges on the ability to regulate foreign policy at the federal level. The Arizona statute and the recent Ninth Circuit Court of Appeals decision ruling elements of the statute unconstitutional illustrate some of the foreign policy concerns.¹ In addition, state interference with federal foreign policy is shown in the context of the broader economic market. An international multilateral strategy is needed to address immigration policy. This could be made difficult by restrictive state measures. An exploration of the statute under a human rights context will further link the discussion to foreign policy matters in Part III. The linkage exists based on the concerns of racism and racial profiling under the statute. Numerous treaties prohibit racism, if found to exist.

I. DEVELOPMENT OF LOCAL ACTIVISM

Before evaluating the validity of restrictive state measures in immigration enforcement, the current state of affairs should be examined. The recent trend has been an increased amount of legislation at a state level regarding immigration concerns. In 2007, there were 1,059 immigration related bills proposed by state legislators with 167 of them enacted into law.² Of these, there were 364 bills dealing with employment issues, which were the most popular subject, but issues of enforcement came in second with 187 proposed bills.³ Interestingly, there were more bills expanding the rights of immigrants compared to contraction of rights. However,

¹ United States v. Alabama, 641 F.3d 339 (9th Cir. 2010).
³ Id. at 7.
lately there has been an increase in highly restrictive measures that appears to grow out of a level of frustration of certain communities. Copycat bills of Arizona have been approved by various state legislatures: Utah in March 2011, Georgia and Indiana in May 2011, and Alabama in June 2011.4

Certain factors may contribute to the enactment of restrictive statutes. The size of the Latino population in the area may impact what laws are passed. Areas that have seen rapid growth of minorities where minorities are blamed for crime and economic problems are more likely to move towards restrictive immigration laws.5 However, if there is a strong Latino population with electoral influence, there may be more measures protecting immigrants.6 Wage competition for low-skilled work might also cause a reaction towards more restrictive measures.7 It is relevant to understand what industries exist in an area, and the level of reliance on immigrant labor. Areas reliant on low cost labor to benefit the local economy may be less willing to pass strict immigration policies.8

The interplay between state officials and the federal government in enforcing immigration laws comes from the power set forth by Congress. The Attorney General (Secretary of Homeland Security after 2003) can enter into agreements with states and determine who is qualified to function as an immigration officer.9 The statute creates a mechanism by which states can cooperate with federal enforcement. These agreements are termed memorandum of

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7 Id. at 78.
8 Id. at 78.
9 8 U.S.C. § 1357(g)(1).
understanding. If a memorandum of understanding is negotiated and approved, any officer or employee of the state will undergo training in the enforcement of federal immigration laws. Local law enforcement that is not given this training should not be allowed to enforce immigration laws in their normal course of duty. Any enforcement power that is granted should be under the supervision of the Secretary of Homeland Security. As illustrated in subsection (g)(3), “in performing a function under this subsection, an officer…of a State…shall be subject to the direction and supervision of the Attorney General.” The language indicates that the authority of a state should rest on the discretion given to them.

The rise of stronger state enforcement in immigration may revolve around a belief that the federal government has insufficient resources in dealing with immigration, creating a lacuna states could fill. The role that the federal government is to play in some areas of immigration is clearer and more extensive in some areas, compared to others. For example, a country’s decision of what aliens to admit is considered a central tenet to the foreign policy of that country. Of course, Congress has passed numerous laws regarding immigration beyond who to let into the country. The issue is whether states have the authority to pass laws where no authority is given. A conclusion that any state law impacting immigration where authority is not given is unconstitutional may go too far. In De Canas v. Bica, the question rested on the extent that local measures operating on local employees become inconsistent with foreign policy where

11 Id. at 99.
12 8 U.S.C. § 1357(g)(3).
15 E.g., Immigration Reform and Control Act of 1986 (addressing the source countries of illegal immigrants; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (curtailing immigrant access to public services); Immigration and Nationality Act of 1952 (amended in 1965 and 2003).
it was held the state statute did not adequately interfere. The court held that there was room for state legislation without impairing federal law, particularly the Immigration and Nationality Act (INA). More recent cases have more strictly examined local measures that conflict with foreign policy. These cases will be discussed below.

II. FOREIGN POLICY

“The peace of the whole ought not to be left at the disposal of a part.”

This section deals with the issue of what is sufficient in determining there is adequate interference of foreign policy to invalidate a state statute. A string of cases has touched on the foreign policy concerns of state enacted legislation. Preemption garners sizable attention in evaluating the legality of the Arizona immigration statute, but the foreign policy implications should not be overlooked. Preemption focuses on whether state statutory law overlaps or conflicts with federal immigration law, where federal law takes precedence under the Supremacy Clause. However, the focus of this Article is on the extent that states should be involved at the enforcement level where it may interfere with the ability of the federal government to create or implement laws because of international tensions. The Supreme Court has addressed foreign policy interference and provides guidance on whether the Arizona statute and similar statutes stand up to an attack of unconstitutionality on foreign policy grounds.

A. Overview of Case Law

The plenary power of the President to deal with foreign affairs arises out of Article II of the Constitution. This was expressed in *Youngstown Sheet & Tube Co. v. Sawyer*, where it was

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17 *Id.* at 363.
19 U.S. CONST. art. VI, cl. 2.
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held that the President has vast power in conducting foreign affairs based on an interpretation of Article II of the United States Constitution.\textsuperscript{20} The president has also been regarded as the nation’s organ in foreign affairs.\textsuperscript{21} In addition, it is clear the President can act independently without the authority of Congress in certain foreign matters.\textsuperscript{22} The ability of the federal government in the regulation of immigration is accepted and arises out of the interpretation of constitutional provisions and the status of the United States as a sovereign entity.\textsuperscript{23} As a sovereign nation, Congress is given the power to regulate the borders of the United States.\textsuperscript{24}

The \textit{Chy Lung v. Freeman} case is an early example linking federal exclusivity to the area of immigration.\textsuperscript{25} The case dealt with the power of state officials to exclude arriving passengers unless the master of the ship fulfilled certain requirements by posting a bond to indemnify California counties, towns, and cities against liability for the support of the immigrant or pay a lump sum determined by a state official.\textsuperscript{26} The statute was struck down because of its interference with the power of the federal government in conducting foreign affairs.\textsuperscript{27} \textit{Chae Chan Ping v. United States} (the Chinese Exclusion Case)\textsuperscript{28} more directly solidified the outcome of \textit{Chy Lung}. Chae Chan Ping arose out of the first Chinese Exclusion Act that prevented immigration by Chinese laborers for 10 years. Chinese laborers before this Act had the ability to make temporary trips back to China under the previous law, but the law was changed and some

\begin{itemize}
\item \textsuperscript{20} 343 U.S. 579, 610 (1952).
\item \textsuperscript{21} \textit{Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.}, 333 U.S. 103, 109 (1948).
\item \textsuperscript{22} \textit{United States v. Curtis-Wright Export Corp.}, 299 U.S. 304 (1936).
\item \textsuperscript{23} \textit{Gonzales v. City of Peoria}, 722 F.2d 468, 475 (9th Cir. 1999).
\item \textsuperscript{24} \textit{Mathews v. Diaz}, 426 U.S. 67, 85 (1976).
\item \textsuperscript{25} 92 U.S. 275 (1875).
\item \textsuperscript{26} \textit{Id.} at 278.
\item \textsuperscript{27} \textit{Id} at 281.
\item \textsuperscript{28} 130 U.S. 581 (1889).
\end{itemize}
Chinese were unable to return to the United States. A broader view of immigration was decided, founded on international law, that a sovereign nation has authority to decide who is to become citizen and to exclude those that are a threat or undesirable.

*Hines v. Davidowitz*, another immigration case, was decided based on the constitutionality of a Pennsylvania state statute called the Alien Registration Act. The Act imposed the requirement that anyone over the age of 18 had to register annually providing certain specified information as found within the statute, pay a registration fee, receive an alien identification card to be carried at all times, and other provisions. Failure to carry the identification card or show it could have resulted in fines or imprisonment. The law was challenged as being unconstitutional with the main focus being on whether it exceeds the constitutional power of mandating aliens to register without the approval of congress.

A concern of the Act was that it would negatively impact international relations. Treaties and agreements may be reached at an international level where broad rights and protections might be in place for aliens. The treatment of foreigners in one state of the United States could have an impact on how American citizens may be treated if they travel internationally. Furthermore, aliens should not be bothered by public officials of a state where the federal government has not spoken on the matter. Specifically, the court quoted the Chinese Exclusion Cases in stating: “Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation,

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29 Id. at 609-610.
30 Id. at 604-605.
31 312 U.S. 52 (1941).
32 Id. at 53.
33 Id. at 74.
34 Id. at 64.
35 Id. at 64.
36 Id. at 66.
imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.”  

The case has similar parallels to the Arizona statute, as we are dealing with a state immigration statute. There could be a similar concern that the strict enforcement of state immigration law could impact Americans traveling abroad.

There are various cases outside of the immigration context regarding foreign relations that are applicable. Understanding the international concerns of the cases provides guidance to the strength and importance of the foreign policy implications of the Arizona statute and similar state policies. In Zschering v. Miller, the Court dealt with an Oregon statute that imposes on foreign aliens who acquire property through succession or testamentary disposition that their native country has reciprocal policies regarding the disposition of property to citizens of the United States. 

The Court held that the statute was an intrusion by a state into the field of foreign affairs of the United States. The purpose of the statute was to incentivize foreign nations to create similar inheritance laws for Oregon citizens who take property abroad. The statute was not created with the intention of having a direct impact on foreign relations. However, there could be an impact in that it may affect the ability of the United States government to shape policy on the matter, and foreign countries may react negatively. The Court establishes a lower threshold that even subtle state interference with foreign policy may cause a state statute to be invalidated.

A more direct example of state law impacting foreign policy is seen in Crosby v. National

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37 Id. at 62.
39 Id. at 441.
40 Id. at 439.
41 Id. at 440.
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Foreign Trade Council. A statute known as the Burma Law was passed by Massachusetts that restricted state agencies from purchasing goods or services connected to Burma: such as businesses with headquarters or operations in Burma, any financial services provided to the government of Burma, or the importation or sale of various natural resources. Shortly afterwards, Congress passed the Foreign Operations, Export Financing, and Related Programs Appropriations Act. There were certain specific sanctions imposed, and the federal Act gave authorization to the President to impose other possible sanctions subject to certain conditions. The federal Act specifically gives authority to the President to develop “a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma.” Through an Executive Order describing Burma as a national security and foreign policy threat, a further sanction limiting investment in Burma was issued.

The action challenging the Massachusetts law was done by a nonprofit corporation that represented numerous companies engaged in foreign commerce, some of whom were on a restricted purchase list because of ties with Burma. Three challenges were argued against the state law. They were that the law infringed on federal foreign affairs power, interfered with the Foreign Commerce Clause, and was preempted by the recent federal Act. The Court held that the state statute was preempted by the federal Act in that it limited the ability of Congress and

43 Changed to Myanmar in 1989.
44 Id. at 367.
45 Id. at 368.
46 Id. at 368-369.
47 Id. at 364.
48 Order No. 13047, 3 CFR 202 (1997 Comp.).
49 Crosby, 530 U.S. at 370.
50 U.S. CONST. art. I, § 8, cl. 3.
the President to mandate policy. Congress gave discretion to the Executive to shape a policy amongst numerous nations to address the events occurring in Burma. The President would have the ability to use the threat of sanctions as diplomatic leverage or a bargaining chip in trying to influence the hostile dictatorship existing in Burma. The individual actions of states imposing sanctions would undermine the ability of the United States through the President to speak with a unified voice.

The Supreme Court further adds to the foreign policy discussion in the case of *American Insurance Association v. Garamendi*. The subject was the embezzlement of Jewish assets, particularly life insurance policies taken by the Nazi Government. The Nazi’s forced the Jewish people to liquidate insurance policies or otherwise to face forced seizure. Policies that managed to escape seizure were often dishonored. Early efforts after the war for reparations of the seized assets of the Jews were attempted, but despite more than 100 billion in Deutsch marks paid out, there were numerous claims that still existed.

An agreement was reached between President Clinton and German Chancellor Schröeder in 2000, to create a Foundation of 10 billion Deutsch marks funded by both the German Government and German corporations for compensatory purposes in the form of reparations.

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51 *Crosby*, 530 U.S. at 388.
52 See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 673 (1981) (recognizing that exclusive power may be given to President as a “bargaining chip.”)
53 *Id.* at 381.
55 *Id.* at 402
56 *Id.* at 402.
57 *Id.* at 404.
58 *Id.* at 405.
they would be subject to a flood of litigation in United States Courts.\textsuperscript{59} Thus, President Clinton agreed that the Foundation would “be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II.”\textsuperscript{60} In addition, the United States government promised to help assure that state and local governments respect the Foundation in being the exclusive mechanism. The Foundation partnered with the International Commission on Holocaust Era Insurance Claims (ICHEIC). The ICHEIC was formed of several European insurance companies, the State of Israel, Jewish and Holocaust survivor associations, and the National Association of Insurance Commissioners.\textsuperscript{61}

California began enquiring into the issue and passed the Holocaust Victim Insurance Relief Act of 1999 (HVIRA). The Act imposes requirements on any insurer doing business within California to disclose information\textsuperscript{62} relating to policies sold in Europe from the period of 1920 to 1945. The penalty of not disclosing could have lead to loss of state business license.\textsuperscript{63} In addition, the Act allowed residents to bring suit in state courts regarding claims occurring during the Holocaust.\textsuperscript{64} The Act was meant to impose tougher enforcement in determining insurance claims.\textsuperscript{65} This contradicted the reason that Germany and the insurance companies agreed to the creation of the Foundation for reparations. Germany entered into the agreement to form ICHEIC, because ICHEIC would be the exclusive remedy in order to avoid litigation in various state courts.

\textsuperscript{59} Id. at 405.
\textsuperscript{60} 39 Int’l Legal Materials 1298, 1303 (2000).
\textsuperscript{61} Id. at 406.
\textsuperscript{62} Required details of life, property, liability, health, annuities, dowry, educational, or casualty insurance policies. In addition, requirement applied to all related companies. E.g. parent, subsidiary, or affiliate company.
\textsuperscript{63} Giramendi, 539 U.S. at 409.
\textsuperscript{64} Id. at 410-411.
\textsuperscript{65} Id. at 410.
American and European insurance companies and the American Insurance Association brought the original claim challenging the constitutionality of HVRA in that it violates foreign affairs powers and the Commerce Clause. The Supreme Court focused on the foreign affairs doctrine regarding interference with the executive branch. As has been generally accepted, the President is to dictate foreign policy matters, and there is no issue that President Clinton had the authority to create the foundation with the support of the United States, as well as administration. Therefore, the issue was whether the State of California and states with similar statutes were interfering with an executive agreement and foreign policy.

One issue that the Court had to address was that there was no expressed congressional authority. Instead, the analysis would have to show adequate interference within a foreign policy context. The case turned to guidance from the previously mentioned Zschernig case in that even though it was denied by the State Department that the statute “unduly interfered with the United States’ conduct of foreign relations,” the Court still invalidated the law as an “intrusion by the State into the field of foreign affairs which the constitution entrusts to the President and the Congress.” Therefore, the Court seems to accept the holding in Zschernig that even incidental effects on foreign affairs may be sufficient in invalidating a conflicting state statute. For the following reasons, the courts found that the state had interfered with foreign policy and was viewed as unconstitutional.

B. Arizona Statute and Court Response

The Arizona statute merits attention, because the outcome of the statute may impact

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66 Id. at 423-424.
67 Id. at 423-424.
68 Id. at 424.
69 Id. at 434.
70 Id. at 432.
similar state statutes if the Supreme Court decides to grant the petition for certiorari filed by Arizona. The most relevant part of the statute is Section 2(b) which states:

For any contact made by a law enforcement official or a law enforcement agency…in the enforcement of any other law or ordinance of a county, city or town or other political subdivision of this state where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person’s immigration status determined before the person is released.

The statute was challenged in the United States District Court of Arizona where a preliminary injunction was granted against Arizona in enforcement of the major provisions of the statute.71 The state appealed the judgment, and the preliminary judgment was affirmed by the Ninth Circuit Court of Appeals.72 One of the issues raised on appeal was whether the statutory language requires a mandatory determination of the immigration status of arrestees.73 Mandatory provisions make the statute appear less flexible and possibly more likely to interfere with federal authority. The Court of Appeals found the language to be sufficiently clear in that the statute states: “Any person who is arrested shall have the person’s immigration status determined before the person is released.”74 The use of discretion appears to be more evident when determining reasonable suspicion during a lawful stop, compared to the mandatory status check of arrested individuals. There is indication that suspected illegal immigrants unable to

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72 Alabama, 641 F.3d at 366
73 Id. at 347.
74 Id. at 347.
prove citizenship would be detained until a final determination of immigration status is made with notice and help from federal authorities.⁷⁵

The primary issue that Arizona presented was whether the state was acting outside its authorized discretion in determining the power to be given to their local authority in enforcement of the INA and the actions that may be taken. The court viewed Section 2(B) as a fixed mandate to be followed by Arizona’s law enforcement.⁷⁶ By removing the cooperation of the federal immigration law framework, the intended legislative purpose of federal cooperation is removed.⁷⁷ The removal of federal influence could have negative effects on foreign policy. In fact, the court felt that this was not just likely, but was actually occurring based on the reaction of Hispanic countries after the passage of the Arizona statute.⁷⁸ The Court of Appeals further looked at many of the Supreme Court decisions previously mentioned in reaching the conclusion that the Arizona statute was unconstitutional and affirming the preliminary injunction.⁷⁹

The dissent of the Court of Appeals merits attention, as some of the points may factor into the decision of the Supreme Court if they decide to consider the issue. The Arizona statute was facially challenged in that the preliminary injunction was granted before the law went into effect.⁸⁰ For a successful facial challenge, it should be shown that there are no circumstances in which the act could be valid.⁸¹ Some of the arguments against facial preemption are that it violates judicial restraint, and it is speculating on what the actual outcome will be before it

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⁷⁵ Id. at 349-351.
⁷⁶ Id. at 352.
⁷⁷ Id. at 352.
⁷⁸ Id. at 353.
⁷⁹ Id. at 366.
⁸⁰ Id. at 370.
The dissent arrives at the conclusion that the Arizona statute does not conflict with federal law, because the majority minimized the importance of 8 U.S.C. § 1373(c) of the INA that focuses on state officials assisting federal officers in determining the immigration status of aliens. Moreover, 8 U.S.C. § 1357(g) states that “Nothing in this subsection shall be construed to require an agreement…to communicate with the Attorney General regarding the immigration status of any individual.” Therefore, there is indication that state and local officers may have authority in implementing immigration laws to some extent outside written agreements. The dissent argues that Section 2(B) of the statute does not override federal authority, because it is limited in scope where it just requires an inquiry into the immigration status of individuals lawfully stopped. In addition, there is uncertainty in how the statute would be actually enforced. Finally, the dissent criticizes the foreign policy arguments that there is not established foreign policy goal, and there needs to be a clearer effect of how the statute would interfere with foreign policy.

Comparing the previous mentioned cases puts the Arizona ruling in perspective. If Zschernig is strictly followed where even incidental effect on foreign policy is sufficient for a state statute to be in violation, it would weigh heavily that the court was correct in viewing the statute as unconstitutional. This seems to be indicated in Garamendi, but the dissent disagreed. Both Garamendi and the Arizona statute arise in areas where some may consider the federal

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83 Alabama, 641 F.3d at 372.
84 Id. at 374.
85 Id. at 379.
86 Id. at 381.
87 Garamendi, 539 U.S. at 420.
response to be inefficient. However, irrelevant of the federal response in *Garamendi*, it was still found that the state could not interfere. In addition, *Garamendi* dealt with an executive agreement where it was not explicitly clear the role that states should play, if at all. The Court had to make a determination where there was not extensive law on the matter. This differs from the Arizona matter where INA provides guidance to a state’s role in the enforcement of immigration.

Similar concerns exist between the reasoning of the court in *Crosby* and the issues in *Arizona*. Allowing states to implement policy within the central authority of the federal government causes fractures in establishing a unified immigration policy, assuming a unified federal approach is the goal. However, there are differences between the two cases. *Crosby* directly dealt with a state that was imposing sanctions against a foreign nation where the impact on international relations is clear. Determining the impact of immigration policy on international relations may be less obvious. In addition, dealing with Burma required a multilateral approach of numerous countries, and there was explicit authority from Congress that the President would have such authority. However, a comprehensive immigration strategy may have to be multilateral.

*Crosby* had a more direct foreign dimension in a state dealing with a foreign country. There is a similar concern between a state law dealing with relations with Burma and a law dealing with immigration in that it interferes with foreign relations. This is especially true if immigration policy is viewed as needing international cooperation for effective enforcement. This was the view espoused by the Department of Homeland Security that the immigration law of Arizona “is affecting DHS’s ongoing efforts to secure international cooperation in carrying
out its mission to safeguard America’s people, borders, and infrastructure." Crosby along similar grounds called into question the ability of the United States to generate a multilateral strategy regarding the events occurring in Burma. The Arizona statute has been criticized by officials of various countries, thus evidencing how it may interfere with attempts at dealing with immigration from an international perspective.

Immigration is linked to foreign policy regarding who is let in or expelled, but there is another dynamic in how such decisions may affect the relationship with the countries where a significant amount of the immigrants originate. After George W. Bush and Mexican President Vicente Fox were elected, there was substantial conversation about a bilateral agreement on migration. The hope of Fox was that Mexicans already in the United States would be able to gain legal status, and there would be agreement of greater labor migration. However, the attack of 9/11 led to a greater restriction of immigration rather than expansion. The failure of Fox, in being able to reach an agreement with Bush, hurt him politically. In an attempt to regain support Fox voted against military action in Iraq as a member of the U.N. Security Council. Relations between the two countries became strained after the vote. Similarly, the Arizona statute could cool relations with Mexico and other Central and South American countries. Mexico has outright protested the statute, and the Mexican Senate decided to postpone the review of an agreement that dealt with emergency management cooperation in dealing with natural disasters.

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88 United States v. Arizona, 641 F.3d 339, 353 (9th Cir. 2010).
89 Crosby, 530 U.S. at 364.
90 Arizona, 641 F.3d at 353.
91 Pham, supra note 13, at 993.
93 Pham, supra note 13, at 993.
between the United States and Mexico.\textsuperscript{94}

A successful plan to deal with immigration may function best through a multilateral strategy involving the countries where most illegal immigrants originate. Resentment from source countries would only make the process more difficult. The need for cooperation is also relevant regarding national security concerns. For example, drug and people smuggling routes could be used by terrorists.\textsuperscript{95} Furthermore, there is the need for cooperation to address the violence arising from the drug cartels, which overflow into the United States.\textsuperscript{96} Allowance of statutes like Arizona could impact the ability of the United States to work with countries and is another reason to uphold the unconstitutionality of such statutes on foreign policy grounds.

Finally, there is merit in having an immigration policy that is uniform. A lack of uniform enforcement will result in what is termed the “thousand borders” problems.\textsuperscript{97} Every state would interpret and enforce immigration policies differently causing uncertainty. Disparate treatment in one state compared to another state would lead to unnecessary confusion, especially when immigration policy is found to be within the sphere of federal authority. In addition, the likely reaction would be movement of immigrants from areas of more restrictive measures to less restrictive.\textsuperscript{98}

\textbf{C. Economic Concerns}

The term “useful invaders” summarizes a common view of illegal immigrants in that they

\textsuperscript{94} Arizona, 641 F.3d at 353.
\textsuperscript{96} Id. at 680.
\textsuperscript{97} Pham, supra note 13, at 995.
\textsuperscript{98} Id. at 1000.
provide economic benefits, but they are also seen as a threat to dominant cultural values. Historically, the immigration debate focused on the extent of legal immigration that should occur. However, since the 1990’s the focus has been on illegal immigrants often tied to increases and decreases of business cycles. For example, a weak economy in Mexico may increase illegal immigration because of insufficient jobs. This is the opposite of countries such as Costa Rica and Chile where more economic opportunities exist and less illegal immigrants from those countries are found in the United States. The current situation creates a problem where there is a strong need for unskilled labor, yet there is also pressure by some that there needs to be more maintenance of the borders and enforcement against illegal immigrants.

The North American Free Trade Agreement (NAFTA) removed tariffs between Canada, Mexico, and the United States in the hopes of liberalizing trade. However, subsidies still existed in the United States, making Mexicans unable to compete because of cheap subsidized products flooding into Mexico. There was the upheaval of millions of farmers who were no longer able to make a living, and migration across the border became the only viable option. This inability of Mexico and Latin America to provide sufficient jobs may be a contributing factor to the movement of migrants. Because of the need for labor in the United States in certain areas, a solution should be reached.

101 Chachere, supra note 95, at 665-673
102 Id. at 687.
103 Holifield, supra note 100, at 83.
105 Chachere, supra note 95, at 664.
106 Id. at 664.
Evidence supports the need for immigrants, whether legal or illegal in the United States. One concern is that there is an aging population in the United States, where fewer people are having children to support the aging population.\textsuperscript{107} This differs from the rapidly expanding younger generation in Mexico and Latin America.\textsuperscript{108} However, the stronger argument for why immigrants are needed is because of numerous jobs in the United States that Americans are unwilling to take. In order to entice Americans to take certain jobs in the construction or agriculture sector, minimum wage would have to be higher, causing an inefficient market where prices would increase and businesses would not be able to compete in the globalized world.\textsuperscript{109} The filling of jobs that Americans are unwilling to take helps industries in the United States to be competitive and helps support growth. Illegal immigrants from Mexico alone add more than 220 billion to the U.S. Gross Domestic Product each year.\textsuperscript{110} A misconceived myth is that immigrants are taking the jobs of native born citizens, but research indicates that immigrants do not displace native workers.\textsuperscript{111}

Agriculture is an industry that requires a large amount of labor that tends to be done by immigrants. California produces nearly half of all the fruits, nuts, and vegetables in the United States.\textsuperscript{112} In 2006, when there was increased border patrol, not all fruit and vegetables could be picked because of inadequate labor.\textsuperscript{113} The entire agricultural industry in California requires


\textsuperscript{108} Id. at 267.


\textsuperscript{110} Chachere , supra note 95, at 674.


\textsuperscript{112} Id. at 667.

\textsuperscript{113} Id. at 667.
around 225,000 workers the full year and twice that amount in the summer.\textsuperscript{114} The restaurant industry is the largest employer of immigrants and is highly reliant on this labor force.\textsuperscript{115} Additionally, the construction industry would experience great difficulties without an immigrant workforce, which in some areas constitutes 25\% of all workers.\textsuperscript{116} This a sector of the economy that will need workers as housing and commercial construction improves.

There is an unmerited belief that illegal immigrants are using up government services like welfare.\textsuperscript{117} The passage of the Welfare Reform Bill of 1996 limits illegal immigrants from the majority of federal public assistance besides emergency medical care and public education.\textsuperscript{118} In addition, immigrants are paying sales tax and consumption taxes. It is true that some of the money earned by immigrants is often sent back to their families in their country of origin. Nevertheless, the sending of money can help stabilize the economy, and family members are able to survive while staying in the country of origin.\textsuperscript{119}

The Arizona Statute is short-sighted in that enforcement alone is not going to fix the problem. Increased deportation will have no sizable impact on the illegal immigration. Similarly, tighter border enforcement has had limited impact on immigration, because alternative routes will be found in less patrolled areas.\textsuperscript{120} A comprehensive solution is needed from the President working with Congress. Overly restrictive state measures, such as the Arizona statute, may only strain foreign relations while having minimal impact on fixing the underlying reasons

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\textsuperscript{114} Id. at 667.
\textsuperscript{115} Id. at 668.
\textsuperscript{116} Id. at 669.
\textsuperscript{118} Chachere, \textit{supra} note 95, at 674.
\textsuperscript{120} Cachere, \textit{supra} note 95, at 683.
driving illegal immigration.

One strategy to address the problem is to increase development and jobs in source countries to slow down the amount of migrants moving to the United States. Movements of illegal immigrants are linked to the push and pull of market forces in the originating country and the destination country.\textsuperscript{121} Another solution is expansion of temporary work programs where potential employees from outside the United States can be linked to employers looking for workers on a temporary basis. After a set period, these employees would return to their country.

The purpose of this article is not to endorse any one option of how to deal with immigration. The point is to show that there are broader economic concerns to dealing with immigration and states going beyond the power given to them may interfere with economic growth. Currently, there is an H-2A Visa Program that farmers can utilize for temporary help.\textsuperscript{122} Georgia recently passed an immigration reform act that caused migrants to leave the state or avoid Georgia causing a tremendous shortage of labor.\textsuperscript{123} It is being argued that the current H-2A Visa system is too cumbersome and needs to be more efficient, but state restrictions can be shown to further exacerbate the situation.\textsuperscript{124}

\textit{Garamendi} and \textit{Crosby} both discuss foreign policy, which can be connected to economic relations with foreign countries. The Constitution grants the President power to regulate commerce in dealing with foreign nations.\textsuperscript{125} One of the criticisms by the Supreme Court in \textit{Crosby} was that it interfered with the President’s ability to control economic sanctions or trade

\begin{thebibliography}{9}
\bibitem{121} Hollifield, \textit{supra} note 100, at 67.
\bibitem{123} \textit{Id}.
\bibitem{124} \textit{Id}.
\bibitem{125} U.S. \textit{CONST.} art. 1, § 8, cl. 3.
\end{thebibliography}
that could occur with Burma.\footnote{Crosby, 530 U.S. at 363.} Similar to the Arizona Statute, there could be interference in structuring a multilateral solution. The difference in immigration policy is that it is unclear the extent that the President needs to be involved in creating a comprehensive immigration policy from a foreign policy standpoint. However, immigration is a global issue where cooperation from numerous countries will be needed. States will need to play a role, but state actions that hinder international cooperation should be disallowed as interfering with foreign policy. NAFTA addressed the global trend of the free movement of goods, services, and investment, yet the movement of people will have to be resolved.\footnote{Chachere, supra note 95, at 662.}

III. HUMAN RIGHTS ISSUES

Another international element of the implications of the Arizona statute and similar statutes are the human rights implications. The United States is a signatory to various treaties and may be looked at by other countries. Concerns of racism and racial profiling are addressed under international law, and these concerns are existent in how immigration statutes like Arizona will be implemented. At the very least, the considerations of racism and racial profiling should help frame the debate of the implications of allowing states to pass restrictive and mandatory measures regarding immigration enforcement.

A. Human Rights Treaties

The historical view of countries having the sole right of regulation, and how aliens are to be treated, still exists. However, there has been a continuous shift since WWII in the development of obligations that a country owes to its citizens, as well as to noncitizens.\footnote{Motomura, supra note 14, at 1376.} The
Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ratified by the U.S. in 1992) represents fundamental human rights concerns and mirrors the Bill of Rights of the U.S. Constitution. The UDHR is not legally binding, but it influences subsequent treaties and lays out basic rights. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) which the United States is a party to is narrower and better addresses the racial concerns of local statutes, such as Arizona’s S.B. 1070. Article 1 of the ICERD defines racial discrimination in the following terms:

1. …any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

2. This Convention shall not apply to distinctions, exclusions, restrictions, or preferences made by a State party to this convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of State Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.…

The article provides exceptions in granting the ability of a country to regulate its immigration policy, but the purpose of the statute is not to provide a pass for countries to discriminate against non-citizens. The committee of the ICERD monitoring the implementation of the Convention has stated that countries have full control in monitoring their borders, but

129 U.S. Senate ratification included the declaration that Article 1 to 27 are not self-executing.
countries still have basic obligations to citizens and non-citizens in ensuring general rights recognized under international law.\textsuperscript{131} Nothing in the language in ICERD provides an exception to individuals within the borders of the United States who are stopped and detained because of their race. Furthermore, the Committee on the Elimination of Racial Discrimination in interpreting the ICERD came to the conclusion that “differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”\textsuperscript{132}

When dealing with immigration it may be applicable to consider international law in determining the rights and protections of citizens and non-citizens. Immigration policy also needs to be viewed regarding the objectives of the country as a whole, which is more difficult to do when states are overstepping that authority. In determining an immigration policy for the United States international cooperation is needed and would be frustrated if the enforcement policy is seen as racially targeting certain individuals.

B. Racial Concerns

Racism and racial profiling are arguments against local enforcement, and they run afoul of human rights issues. Proper training may alleviate these concerns, but it will probably still exist at an unconscious level. Being stopped and questioned solely because of race is against the law, but being able to show that a system is in place where this practice occurs can be difficult.

\textsuperscript{131} Id. at 290.

However, mistakes and discrimination leading to costly litigation have occurred. Some local enforcement agencies are open in admitting that their officers are inadequately trained to be making determinations because of the likelihood of racial profiling. Agencies are concerned of civil rights violations that would cost them money and have moved towards not making determinations of who is illegal because officers are ill equipped to do so. An example of racism and improper discretion was found in the City of Chandler, Arizona, where a $400,000 verdict was rendered because of abuses of the local police in harassing and detaining Hispanics walking on the street, sitting in their cars, or sitting at their homes. Similar allegations arose in City of Rogers, Arkansas where Latinos were being improperly stopped based on ethnicity and believed unlawful immigration status.

These concerns are present in S.B. 1070 in that it will promote racial discrimination and profiling. While the statute itself states that it will be enforced without considerations of race or national origin, there are no specifications of how that would occur. Most problematic is that the statute allows certain actions by local authorities if there exists “reasonable suspicion” that a person is an unauthorized alien. However, a determination of reasonable suspicion will be based on subjective beliefs of an officer due to the lack of guidance. Undoubtedly, there is an issue of Latinos being specifically targeted.

Finally, a broader concern is the distrust that may be created between local law enforcement and minority communities. This may be true of illegal immigrants, as well as non illegal immigrants. Certainly, there is a strong justification for illegal immigrants to not report

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133 Waslin, supra note 10 , at 104.
134 Id. at 104.
135 Id. at 104.
crimes or assist in criminal investigations because of a fear of deportation.\textsuperscript{136} However, even immigrants with legal status may not want to implicate people they know, or they may have general trust issues with local law enforcement because of perceived or actual treatment based on race.

The extent that international human rights treaties become a part of the immigration question is uncertain. However, they shed light on the extent that states may run afoul of human rights in immigration law. Furthermore, international human rights provide another link to why the issue is a foreign one. The power of regulating foreign issues goes beyond state power and is found at the federal level. Consideration must be given to the extent that states should infringe on foreign matters.

CONCLUSION

The decision of the court of appeals in holding the Arizona statute unconstitutional was rightly decided. The dissent is unconvincing that there needs to be established foreign relation goals that are interfered with and try to place a high bar in determining whether a state statute frustrates foreign policy considerations. Incidental effects on foreign policy should be sufficient, especially when there is uncertainty about the authority of Arizona to pass the statute. If Congress wishes to mandate more authority to states in enforcement this should be done, but there is no indication that this is their intent besides the current cooperation that currently exists. No matter the standard used there are several reasons why the Arizona statute could interfere with foreign policy. Cooperation in developing a comprehensive immigration policy for the United States is of importance, especially with the economic reasons for needing immigrants.

\textsuperscript{136} Pham, \textit{supra} note 13, at 983.
Criticism of the statute by countries may also prevent cooperation on a range of other matters. Criticism may be strong because of the possibility that the statute will lead to enforcement based on racism and racial profiling.