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# DOMINO EFFECT: HOW SCALIA LIVES ON THROUGH THE CONTROVERSIAL TEXAS IMMIGRATION LAW, AND WHICH STATES ARE ITCHING TO PULL THE SAME TRIGGER

By: Kristin Hommel<sup>1</sup>

## ABSTRACT

This article examines Texas's immigration enforcement law, SB 4, and the Supreme Court's surprising ruling overturning the injunction which prohibited its enforcement. This article posits that SB 4 is by no means a "lone wolf," but rather is the latest in a series of state laws which seek, quietly or boldly, to take immigration into the state's hands.

## INTRODUCTION

The tug of war between the states' concerns over unstemmed immigration in the U.S. and the President's perceived failure to meaningfully address what is increasingly seen as the "immigration crisis" has led frustrated states to take matters into their own hands. The Texas law made headlines across the country for its blatant seizure of the federal right to deport noncitizens, reflecting the nation's rapidly sinking tolerance for governmental ambivalence to what is colloquially referred to as "the invasion at the border."<sup>2</sup> When the Supreme Court overruled the stay on enforcement of the law (albeit temporarily), the federal plenary power suddenly found itself on shaky ground. The question has now become whether the foundation of immigration practice in the United States will stand firm against this attack, or whether its cornerstone will be plucked away by the conservative majority. Only time will tell.

## BARBED WIRE, SB 4, AND TEXAS'S CONTINUAL ATTEMPTS TO SEIZE IMMIGRATION CONTROL

Texas governor Greg Abbott has made no secret of his disdain for President Biden's border policies.<sup>3</sup> Texas's controversial statute, SB 4, outright criminalizes a noncitizen's entry into Texas if they do not enter through a designated port of entry.<sup>4</sup> Additionally – and most shockingly – the statute empowers state authorities to both arrest *and remove to Mexico* "noncitizens who enter, attempt to enter, or reside in Texas," authorizing state authorities to act in complete disregard of ongoing federal immigration proceedings for a given noncitizen.<sup>5</sup>

The statute's justifications rely heavily on the reasoning from Justice Scalia's dissent from *Arizona v. United States*, which argued that the states possess "the power to exclude from the sovereign's territory people who have no right to be there."<sup>6</sup> Through his expansive analysis of the history of immigration in the United States, Scalia posits what the Supreme Court has

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<sup>2</sup> Chris Lehmann, *Courts Clash Over Texas's Draconian Immigration Law*, THE NATION (Mar. 20, 2024), <https://www.thenation.com/article/society/texas-sb4-fifth-circuit/>.

<sup>3</sup> *Operation Lone Star*, Office of the Texas Governor, n.d., <https://gov.texas.gov/operationlonestar>.

<sup>4</sup> Senate Bill 4, 88th Legis., 4th Spec. Sess. (Tex. 2023) ("SB 4").

<sup>5</sup> *United States v. Texas*, No. 23A814, 2024 U.S. LEXIS 1382, at \*9 (U.S. Mar. 19, 2024) (Sotomayor, J., dissenting).

<sup>6</sup> *Arizona v. United States*, 567 U.S. 387, 417 (2012) (Scalia, J., dissenting).

consistently rejected for more than a century: that the states possess the power to regulate immigration, and indeed, have a “sovereign prerogative to do so.”<sup>7</sup> Abbott, by basing his law on Scalia’s dissent, claims powers which fall squarely within the federal government’s sovereign authority to regulate immigration,<sup>8</sup> manage foreign affairs,<sup>9</sup> and “speak with one voice.”<sup>10</sup>

The bill itself is blatantly unconstitutional on multiple fronts for it not only assumes authority over areas long been held to be within federal plenary power, but it also deprives noncitizens of their due process rights. Under federal immigration law, individuals who enter the country without authorization may seek affirmative relief such as asylum or protection under the regulations implementing the Convention Against Torture.<sup>11</sup> Further, immigrants in removal proceedings may challenge removability by demonstrating lawful immigration status.<sup>12</sup> Under SB 4, however, suspected illegal entrants are deprived of such rights, with the language of the bill suggesting that “they can be summarily ordered removed to Mexico without even an opportunity to speak to a lawyer.”<sup>13</sup>

Texas relies on what it claims as its “constitutional right to self-defence”<sup>14</sup> to justify both SB 4 and other measures it has taken to secure the border.<sup>15</sup> Indeed, the governor asserted that, having declared an invasion and invoked the constitution, “[t]hat authority is the supreme law of the land and supersedes any federal statutes to the contrary.”<sup>16</sup> In so declaring, Abbott makes two (arguably astounding) claims: first, that the immigration crisis constitutes an invasion, and second, that “Texas can defend itself against invasions without regard to – and even in derogation of – federal laws and policies.”<sup>17</sup>

As the Supreme Court held in *Chy Lung v. Freeman*, to permit the states to implement their own regulations for immigration would open up the nation to potentially disastrous consequences on the global front.<sup>18</sup> As foreshadowed by the *Chy Lung* court, Mexico has warned the United States that “relations with the US would be strained,” and that if permitted to take effect, SB 4 would have “far-reaching consequences for US-Mexico relations.”<sup>19</sup>

When the case inevitably makes its way up to the Supreme Court, the fate of federal plenary power over immigration hangs in the balance. With the current Supreme Court makeup, it seems to be a toss-up as to how the Court will rule: will it follow Scalia’s *Arizona* dissent and find a state right to exclude undesirable aliens, or will it uphold precedent? Given this

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<sup>7</sup> *Id.* at 422.

<sup>8</sup> *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

<sup>9</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936) (finding that the right to conduct foreign affairs passed from Great Britain “to the colonies in their collective and corporate capacity as the United States of America,” and that the states, though several, “in respect of foreign affairs were one” and lacked the sovereignty to conduct foreign affairs).

<sup>10</sup> *Zivotofsky v. Kerry*, 576 U.S. 1, 79 (2015).

<sup>11</sup> See INA § 208; see also 8 CFR § 208.16 (the regulations implementing the Convention Against Torture).

<sup>12</sup> 8 USC § 1255 (e)(3) (allowing a noncitizen in removal proceedings to demonstrate their non-removability and permitting the noncitizen to adjust status if they enter into a good-faith marriage with a U.S. citizen while in removal proceedings).

<sup>13</sup> Sarah Mehta & Jonathan Blazer, *White Supremacy is Fueling Extreme Anti-Immigrant Policy in Texas*, AM. CIV. LIBERTIES UNION (Nov. 2, 2023), <https://www.aclu.org/news/immigrants-rights/white-supremacy-is-fueling-extreme-anti-immigrant-policy-in-texas>.

<sup>14</sup> U.S. CONST. art. I, § 10, cl. 3.

<sup>15</sup> Steve Vladeck, *Governor Abbott’s Perilous Efforts at Constitutional Realignment*, LAWFARE (Jan. 29, 2024), <https://www.lawfaremedia.org/article/governor-abbott-s-perilous-effort-at-constitutional-realignment>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).

<sup>19</sup> Sahar Akbarzal, Ivonne Valdes, et al., *Mexico Warns US Court of ‘Substantial tension’ if Controversial Texas Immigration Law Takes Effect*, CNN (Mar. 21, 2024), <https://www.cnn.com/2024/03/21/politics/mexico-warns-of-substantial-tension-with-the-us-if-federal-court-allows-controversial-texas-immigration-law-to-take-effect/index.html>.

court's recent proclivity towards originalist reasoning in its rulings (as the *Dobbs* court made abundantly clear), it is feasible that the Court, finding that states originally possessed exclusion power before it proved unworkable,<sup>20</sup> will turn Scalia's dissent into a binding precedent.

## ARIZONA AND FLORIDA MAY SOON FOLLOW TEXAS'S LEAD

Anti-immigrant sentiments are by no means exclusive to the Lone Star State. Arizona, for example, invited nationwide scrutiny – and ultimately, a seminal Supreme Court case upholding federal supremacy over immigration enforcement – in 2010 when it passed Arizona Senate Bill 1070.<sup>21</sup> The “Support our Law Enforcement and Safe Neighborhoods Act” encouraged discrimination against immigrants and required police officers to demand papers from detainees and arrestees whom police reasonably suspected were unlawfully present.<sup>22</sup> The law also criminalized unlawful presence in the United States at the state level and authorized warrantless arrests of noncitizens who were believed to be unlawfully present.<sup>23</sup>

Its primary provisions were overruled by the Supreme Court for infringing on areas of law that Congress had determined “must be regulated by its exclusive governance” such that federal interest is “so dominant that that the federal system will be assumed to preclude enforcement of state laws on the same subject.”<sup>24</sup> In short, the contested provisions of SB 1070 attempted to unconstitutionally infringe on areas of law which, through pre-emption principles and the Supremacy Clause, are regulated solely by the federal government. Nevertheless, despite its clear unconstitutionality, SB 1070 led to a flurry of “copycat” bills across other states, including in Alabama, Indiana, South Carolina, and Utah.<sup>25</sup> In 23 other states, copycat bills were considered but ultimately not passed.<sup>26</sup>

Perhaps taking a cue from the Supreme Court's reasoning in *Arizona*, Florida took a more cautious but nevertheless blatantly discriminatory approach to immigration in the state. In May 2023, Governor DeSantis signed FL 1718 into law, which importantly did not criminalize being unlawfully present within the state, nor did it empower law enforcement to use the relatively low bar of “reasonable suspicion” to apprehend and question individuals about their immigration status. Rather, the statute appears to have been carefully crafted to conform with the *Arizona* majority's reasoning by only criminalizing the transportation of undocumented individuals into Florida, requiring hospitals to acquire immigration information from patients, mandating that employers utilize E-Verify to ensure that individuals have work authorization, and allowing state officers to function as an extension of federal immigration agencies to engage in immigration enforcement activities.<sup>27</sup> Just recently, on March 15, 2024, Governor DeSantis passed three more bills in condemnation of the federal government's “failure” to stem illegal immigration.<sup>28</sup> Again carefully conforming to the holding in *Arizona*,

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<sup>20</sup> See *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 265 (1875); see also *Chy Lung*, 92 U.S. at 280 (“[T]he responsibility [of admitting noncitizens to the U.S.] belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.”).

<sup>21</sup> *SB 1070 at the Supreme Court: What's At Stake*, AM. CIV. LIBERTIES UNION (2010), <https://www.aclu.org/sb-1070-supreme-court-whats-stake>.

<sup>22</sup> Paige Newman, *Arizona's Anti-Immigration Law and the Pervasiveness of Racial Profiling*, 31 GEO. IMMIGR. L.J., 611, 611 (2017).

<sup>23</sup> See 2010 Bill Text AZ S.B. 1070; see also *Arizona v. United States*, 567 U.S. 387 (2012).

<sup>24</sup> *Arizona*, 567 U.S. at 399.

<sup>25</sup> *SB 1070 at the Supreme Court: What's At Stake*, AM. CIV. LIBERTIES UNION (2010), <https://www.aclu.org/sb-1070-supreme-court-whats-stake>.

<sup>26</sup> *Id.*

<sup>27</sup> *FL 1718: Florida Anti-Immigrant Legislation Will Affect All Florida Residents, Not Just the Undocumented*, AM. IMMIGR. LAWS. ASS'N (May 22, 2023), <https://www.aila.org/library/fl-1718-florida-anti-immigrant-legislation>.

<sup>28</sup> *Governor DeSantis Takes Further Action to Address Illegal Immigration and Criminal Activity in Florida*, Ron DeSantis, 46th Governor of Florida (Mar. 15, 2024), <https://www.flgov.com/2024/03/15/governor-desantis-takes-further-action-to-address-illegal-immigration-and-criminal-activity-in-florida/>.

the laws do not criminalize unauthorized presence in the U.S., but rather enhance penalties for crimes committed in the U.S. by former deportees who returned to the country unlawfully.<sup>29</sup>

Cumulatively, the laws stake their claims in an amorphous grey zone left untouched by the *Arizona* Court: not outright infringing on federal supremacy, but also testing the waters for how far they can go before the cries of unconstitutionality resound. Although the laws do not criminalize being undocumented, FL 1718 effectively grants authorities leave to apprehend and arrest people who merely enter the state with an undocumented noncitizen, even if the individual was not the person who smuggled the person across the U.S. border.<sup>30</sup> The effects of the bills are staggering: immigrants have been leaving construction sites ghost towns, workers have been abandoning their jobs in hospitality and on farms,<sup>31</sup> and patients are avoiding hospitals and skipping care, fearing deportation or arrest.<sup>32</sup>

## THE SECOND DOMINO HAS FALLEN IN IOWA

In an unsurprising turn of events, Governor Reynolds of Iowa just signed a Texas copycat bill into law on April 10, 2024.<sup>33</sup> Echoing Governor Abbott's sentiments, Reynolds condemned the Biden Administration for failing to stem the flow of undocumented immigrants into the country. The new bill, like SB 4, criminalizes entering the state after having been previously removed or denied admission into the U.S., and compels judges in the criminal case to "enter an order requiring the convicted person to return to the country they had come from."<sup>34</sup>

The new law will take effect on July 1,<sup>35</sup> but it is highly likely that immigrants' rights organizations and the U.S. Department of Justice will sue to enjoin enforcement of the law. Similar to SB 4, the Iowa law is unconstitutional because it goes beyond state police powers by seeking "to carve out a state role in policing illegal immigration."<sup>36</sup>

Far from being the last state to pass such a bill, it appears that other states are poised to pass similar copycat bills, including Louisiana, Kansas, Oklahoma, and Missouri.<sup>37</sup> Doubtless, the Eighth Circuit, Iowa, and the border states will be closely monitoring the outcome of the Texas litigation to get a feel for how the future of state enforcement of immigration law might take shape.

## THE GREAT WALL OF IMMIGRATION PLENARY POWER IS UNLIKELY TO FALL TO SB 4

Border states such as Arizona and Florida in particular will likely be deeply invested in SB 4's progress through the appellate court system, eager to determine whether the lines once drawn so deeply in the sand may begin to erode. If the principle of immigration pre-emption were to crumble, Florida and Arizona would likely be the next in line to enact copycat laws regulating unlawful entry into the country. Given Scalia's dissent in *Arizona*, the headache of

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<sup>29</sup> *Id.*

<sup>30</sup> Arek Sarkissian, 'There was a Lot of Anxiety': Florida's Immigration Crackdown is Causing Patients to Skip Care, *POLITICO* (Feb. 14, 2024), <https://www.politico.com/news/2024/02/14/florida-immigration-crackdown-healthcare-00141022>.

<sup>31</sup> Miriam Jordan, *New Florida Immigration Rules Start to Strain Some Businesses*, *N.Y. TIMES* (Aug. 4, 2023), <https://www.nytimes.com/2023/08/04/us/florida-immigration-law-businesses.html>.

<sup>32</sup> Sarkissian, *supra* note 30.

<sup>33</sup> Stephen Gruber-Miller, *Kim Reynolds Signs Texas-Style Immigration Law Criminalizing 'Illegal Reentry' Into Iowa*, *DES MOINES REG.* (Apr. 10, 2024), <https://www.desmoinesregister.com/story/news/politics/2024/04/10/reynolds-signs-law-letting-iowa-police-arrest-undocumented-immigrants-texas-illegal-reentry/73279222007/>.

<sup>34</sup> *Id.*

<sup>35</sup> Mitch Smith, *Joining Texas, Iowa Enacts Law for State Immigration Enforcement*, *N.Y. TIMES* (Apr. 10, 2024), <https://www.nytimes.com/2024/04/10/us/iowa-immigration-law.html>.

<sup>36</sup> *Id.*

<sup>37</sup> David W. Chen, *Inspired by Texas, Republicans in Other States Eye Immigration Bills*, *N.Y. TIMES*, (Mar. 20, 2024), <https://www.nytimes.com/2024/03/20/us/texas-immigration-republican-states.html>.

immigration would transform into a lobotomizing procedure if states were permitted to create a patchwork system of immigration laws. Foreign affairs would suffer, and an entire revamp of U.S. international treaties and agreements would inexorably need to be undertaken.

Indeed, given the well-reasoned concerns Justice Sotomayor raised in her scathing (and well-deserved) dissent in the *Texas* decision,<sup>38</sup> and even given the current Supreme Court's makeup, the unconstitutionality of the bill, its blatant infringement on well-settled principles of immigration law, and the long-reaching effects of SB 4 are simply impossible to ignore. While it is unlikely therefore that SB 4 will be the straw that breaks the camel's back, it may just be that Scalia's originalist voice will come back to haunt the Supreme Court one last time.

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<sup>38</sup> *Texas*, 2024 U.S. LEXIS 1382 at \*5-6 (arguing that SB 4 “immediately disrupt[s] sensitive foreign affairs agreements,” “frustrates the United States’ efforts and obligations to protect individuals fleeing from persecution or torture,” “hampers active federal immigration enforcement efforts,” “disrupt[s] DHS’s ability to . . . monitor illicit drug trades, human trafficking, and imminent threats,” and imposes immediate “criminal liability on thousands of noncitizens who re-entered the state.”).