

DOUBLE TROUBLE: DOUBLE JEOPARDY'S DUAL SOVEREIGNTY EXCEPTION AND STATE IMMIGRATION STATUTES

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I. INTRODUCTION

On April 23, 2010, Arizona Governor Jan Brewer signed S.B. 1070¹ into law,² igniting a national controversy about the law and immigration generally. Arizona's new law regulated noncitizens and their movement in and through the state,³ but in this respect it was hardly unique. For example, Arizona already had a statute criminalizing transporting undocumented noncitizens,⁴ as did Colorado,⁵ Florida,⁶ Oklahoma,⁷ Missouri,⁸ South Carolina,⁹ and Utah.¹⁰ These laws all focus on making it a state crime to transport, conceal, harbor, or shield noncitizens whose presence is not authorized by federal law. These laws may be just the tip of the iceberg, because at least another seven states considered bills that contemplated similar legislative changes.¹¹ Utah just amended its statute,¹² and

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1. S.B. 1070, 49th Legis., 2d Reg. Sess. (Ariz. 2010), *amended* by H.B. 2162, 49th Legis., 2d Reg. Sess. (Ariz. 2010). The bill revised and added a number of statutes, including ARIZ. REV. STAT. ANN. §§ 13-1051, 13-1509, 13-2319, 13-2928, 13-2929, 13-3883, 23-212, 23-212.01, 23-214, 28-3511, 41-1724 (2011).

2. Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1.

3. ARIZ. REV. STAT. ANN. § 13-2929.

4. *Id.* § 13-2319. For a discussion of the operation of this law, see Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB1070*, 58 UCLA L. REV. 1749 (2011).

5. COLO. REV. STAT. § 18-13-128 (2011).

6. FLA. STAT. § 787.07 (2011).

7. OKLA. STAT. tit. 21, § 446 (2011).

8. MO. REV. STAT. § 577.675 (2011).

9. S.C. CODE ANN. § 16-9-460 (2011).

10. UTAH CODE ANN. § 76-10-2901 (2011).

11. Proposed bills patterned on S.B. 1070 include S.B. 256, 2010 Leg., Reg. Sess. (Ala. 2010); H. File No. 3830, 86th Legis., Reg. Sess. (Minn. 2010); H.B. 2479, 194th Gen. Assem., Reg. Sess. (Pa. 2010); S.B. 1303, 60th Legis., 2d Reg. Sess. (Id. 2010); H.B. 5407, 2011 Gen. Assem., Jan. Sess. (R.I. 2011); S.B. 405, 2011 Leg., Reg. Sess. (W.Va. 2011); S.B. 2179, 126th Legis., Reg. Sess. (Miss. 2011).

12. H.B. 116 Third Substitute, 2011 Leg., Reg. Sess. (Utah 2011); H.B. 497 Substitute, 2011 Leg., Reg. Sess. (Utah 2011).

Alabama,¹³ Georgia,¹⁴ Indiana,¹⁵ and South Carolina¹⁶ enacted their own copycat laws. These laws are based on the “mirror image” theory of cooperative enforcement, the idea that it is unobjectionable for states to help the federal government carry out its own laws.

It has been vigorously argued that these laws are unconstitutional in whole or substantial part,¹⁷ and they have been enjoined in part;¹⁸ but assuming their constitutionality in principle, these laws still risk constitutional problems later down the line. This article explores the possibility that these laws will frustrate federal immigration policy even if a court determines that the laws are not preempted.

Section 1 of S.B. 1070 directly explained the purpose of the law:

The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of noncitizens and economic activity by persons unlawfully present in the United States.¹⁹

Clearly, the statutory goal is to regulate conduct of noncitizens while in Arizona. But where does the Arizona legislature derive this power to regulate immigration? Professor Kris Kobach, a leading proponent of this sort of

13. H.B. 56, 2011 Leg., Reg. Sess. (Ala. 2011).

14. H.B. 87, 151st Gen. Assemb., Reg. Sess. (Ga. 2011).

15. S.B. 590, 117th Gen. Assemb., Reg. Sess. (Ind. 2011).

16. S.B. 20, 119th Gen. Assemb., Reg. Sess. (S.C. 2011).

17. As one of us has argued in another article, these laws are unconstitutional because the states have no authority to enact local criminal immigration laws. See Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251 (2011). See also, e.g., PRATHEEPAN GULASEKARAM, AM. CONST. SOC’Y, NO EXCEPTION TO THE RULE: THE UNCONSTITUTIONALITY OF STATE IMMIGRATION ENFORCEMENT LAWS (2011) available at http://www.acslaw.org/sites/default/files/Gulasekaram_-_No_Exception_to_the_Rule.pdf; Erin F. Delaney, Note, *In the Shadow of Article I: Applying a Dormant Commerce Clause Analysis to State Laws Regulating Aliens*, 82 N.Y.U. L. REV. 1821 (2007) (arguing that some state measures are invalid because of the dormant commerce clause).

18. See *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010), *aff’d*, 641 F.3d 339 (9th Cir. 2011); *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905 (S.D. Ind. 2011); *Ga. Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317 (N.D. Ga. 2011); see also *Hispanic Interest Coalition of Alabama v. Bentley*, No. 5:11-CV-2484-SLB, 2011 WL 5516953 (N.D. Ala. Sept. 28, 2011) (temporarily enjoining enforcement of portions of Alabama’s S.B. 256), *aff’d in part* by *United States v. Alabama*, Nos. 11-14532-CC & 11-14535-CC, 2011 WL 4863957 (11th Cir. Oct. 14, 2011) (upholding the district court’s injunction, pending appeal, of sections 10 and 28 of H.B. 56).

19. S.B. 1070, 49th Legis., 2d Reg. Sess. (Ariz. 2010), amended by H.B. 2162, 49th Legis., 2d Reg. Sess. (Ariz. 2010).

legislation conceded that “immigration is a field in which the federal government enjoys plenary authority,” and state statutes therefore “must be carefully drafted to avoid federal preemption.”²⁰

The theory seems to be that state legislation that mirrors federal legislation on particular issues will not face preemption.²¹ Assuming *arguendo* that this could be right, this article examines the effects that states enacting “crimes that mirror federal immigration crimes”²² will have on the federal government’s ability to set immigration policy. Neither Professor Kobach’s work nor prior jurisprudence on this question has addressed the double jeopardy issue.²³

Part I explains the dual sovereignty exception to double jeopardy, which allows jurisdictions to initiate prosecutions even if another entity has already done so. The key to applicability of the dual sovereignty doctrine is whether each jurisdiction draws its power to regulate the area from a separate source. Thus, in general, states and cities are the “same sovereign” because cities get their authority from the state, but states and Indian tribes are separate sovereigns because the authority of the tribe is not drawn from the state and vice versa.

Part II proposes that states have no independent, sovereign authority to enact laws regulating immigration. Examination of the Supreme Court jurisprudence as well as congressional enactments in the area show that although states normally have broad and independent powers over criminal laws, in the immigration area, they do not have their own independent source of regulatory authority.

Part III analyzes the plausible effects of states enforcing their local immigration crimes with the federal government’s power. The federal government would be barred from prosecuting immigration crimes after the states had enforced their own laws, because they would have done so based on the federal government’s jurisdictional authority. We then discuss the problems inherent in a system where fifty states have varying levels of enforcement and sentences, a system that would inherently undermine the federal power to set uniform immigration policy.

Part IV explores the nuances of some of these state laws, specifically the ones prohibiting smuggling or harboring of noncitizens. Analysis of the varying sentences these laws contemplate and comparison with the relevant federal statutes show that the state measures differ in important ways from federal law.

20. Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 *GEO. IMMIGR. L.J.* 459, 464 (2008).

21. *Id.* at 465 (listing the enactment of “state-level crimes that mirror federal immigration crimes” as a constitutional way for states to act in the field of immigration).

22. *Id.*

23. *See* *State v. Barragan-Sierra*, 196 P.3d 879 (Ariz. Ct. App. 2008) (Arizona’s human smuggling law, *ARIZ. REV. STAT. ANN.* § 13-2319 (2011), not preempted by federal law; double jeopardy not addressed); *State v. Flores*, 188 P.3d 706 (Ariz. Ct. App. 2008) (same).

II. THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY

The Fifth Amendment to the Constitution provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb[.]”²⁴ The roots of this provision stem back to ancient Greece and Rome.²⁵ It is a principle of fairness that has endured for centuries, and nearly 800 years ago, it was already considered a “universal maxim of the common law.”²⁶ This principle was easier to apply when there were fewer criminal laws, and most people lived in one place and were subject to one absolute sovereign. However, the American form of government created a “fundamental question” for a society now governed by the principles of federalism.²⁷ Because the “Framers split the atom of sovereignty,”²⁸ an individual could much more readily violate the laws of two sovereigns—those of a state and the federal government—with one criminal act.

Because the United States and individual states are sovereign, a single act can affect the interests of both jurisdictions. A federal officer might be assaulted while performing duties in a state; a crime might be planned in one jurisdiction and carried out in another; an act of speeding might take place simultaneously within the boundaries of a city, county, state, and Indian reservation. If one jurisdiction prosecutes an offender, the question becomes whether the double jeopardy clause of the Fifth Amendment restricts the ability of another jurisdiction to prosecute for the same crime. The answer, right or wrong, is that each jurisdiction has the power to prosecute, based on its own interest in punishing the offender. Under the “dual sovereignty” exception to double jeopardy, this power to prosecute exists even if another jurisdiction has already prosecuted the defendant. The critical question is whether each jurisdiction has its own independent source of authority to criminalize the conduct at issue.

The Supreme Court began dealing with this situation, albeit in dicta, in cases starting in 1820. In *Houston v. Moore*,²⁹ a Pennsylvania statute made it illegal for militiamen to fail to report for federal service.³⁰ Houston refused to report, and was tried and convicted under the statute.³¹ Houston argued that Congress had exclusive power over the militia under Article I, section 8 of the

24. U.S. CONST. amend. V, cl. 2. See generally Gabriel J. Chin, *Double Jeopardy Violations as “Plain Error” Under Federal Rule of Criminal Procedure 52(B)*, 21 PEPP. L. REV. 1161, 1165–71 (1994) (discussing general principles of double jeopardy).

25. Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769, 778–79 (2009); *Bartkus v. Illinois*, 359 U.S. 121, 151–52 (1959) (Black, J., dissenting).

26. *Bartkus*, 359 U.S. at 152–53 (quoting 2 COOLEY’S BLACKSTONE 335–36 (4th ed. 1899)).

27. Colangelo, *supra* note 25, at 779.

28. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

29. *Houston v. Moore*, 18 U.S. 1 (1820).

30. *Id.* at 2.

31. *Id.* at 3.

Constitution, and therefore any state law regulating the militia was void.³² The six-member Supreme Court could not agree on the reasoning but concluded that there was no error in the state trying and convicting Houston.³³

Justice William Johnson's concurring opinion began laying the groundwork for the dual sovereignty exception. He opined: "Why may not the same offence be made punishable both under the laws of the States, and of the United States? Every citizen of a State owes a double allegiance; he enjoys the protection and participates in the government of both the State and the United States."³⁴ He then theorized what would happen in the case of successive prosecutions. He recognized that states would thwart federal control over an area of law if a state's acquittal barred a subsequent federal prosecution.³⁵ However, such a bar would not occur in any instance "but those in which jurisdiction is vested in the State Courts by statutory provisions of the United States."³⁶

At least as early as 1907, the Court established the critical principle. In *Grafton v. United States*, a soldier was acquitted by a court-martial but subsequently tried and convicted of assassination in a civil tribunal in the Philippines during the era when it was a territory of the United States.³⁷ In *Grafton*, the Court concluded that because the court-martial and the Philippine civil court derived their authority from the same government—the United States—the subsequent prosecution was barred.³⁸ The Court rested its decision on the "broad ground that the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government."³⁹

In 1922, the Supreme Court decided the converse case. *United States v. Lanza*⁴⁰ explored the concurrent jurisdiction of the states and the federal government to enforce the Eighteenth Amendment (the prohibition amendment). Lanza was convicted of a prohibition offense in Washington State, which

32. *Id.* at 4–5.

33. *Id.* at 32 ("The other judges are of opinion, that the judgment ought to be affirmed; but they do not concur in all respects in the reasons which influence my opinion."). See also David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 702 (1982).

34. *Houston*, 18 U.S. at 33.

35. *Id.* at 35.

36. *Id.* Professor Colangelo has understood Justice Johnson to have articulated the principle that any government with prescriptive jurisdiction (the power to legislate) would also have the power to prosecute, even if some other government with jurisdiction had prosecuted the offender. See Colangelo, *supra* note 25, at 784–85.

37. *Grafton v. United States*, 206 U.S. 333, 348–49 (1907).

38. *Id.* at 349, 351–52.

39. *Id.* at 352.

40. *United States v. Lanza*, 260 U.S. 377 (1922).

provided for relatively minor punishment.⁴¹ When charged in federal court, Lanza successfully pleaded double jeopardy.⁴² The Supreme Court reversed, stating that “[i]f a state were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that state to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect.”⁴³ The Court also noted that Congress could, if it wished, bar subsequent prosecutions by appropriate legislation.⁴⁴ Finding no such legislation, the Court allowed the subsequent prosecution to proceed, notwithstanding the state conviction.⁴⁵

The Court reasoned that the subsequent prosecutions were acceptable because the state and federal government derived their jurisdiction from separate sources of power: “Save for some restrictions arising out of the federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the amendment[.]”⁴⁶ The states always had the power to regulate

41. *Id.* at 379 (describing a \$250 fine against the defendants for each of three counts: manufacturing, transporting, and possessing intoxicating liquor). In contrast, the National Prohibition Act called for a \$1,000 fine or six months imprisonment for the first offense, and subsequent offenses called for up to a \$2,000 fine or five years imprisonment. Act of Jan. 16, 1920, 41 Stat. 316 § 29, *invalidated by* U.S. CONST. amend. XXI.

42. *Lanza*, 260 U.S. at 378–79.

43. *Id.* at 385.

44. *Id.*

45. *Id.* The dual sovereignty doctrine has been the subject of intense scholarly criticism since its inception in 1922. See Colangelo, *supra* note 25, at 773 n.5, which collects the following history of criticism: Ronald J. Allen & John P. Ratnaswamy, *Heath v. Alabama: A Case Study of Doctrine and Rationality in the Supreme Court*, 76 J. CRIM. L. & CRIMINOLOGY 801, 818 (1985); Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 4–28 (1995); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1 (1992); Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986); George C. Thomas III, *Islands in the Stream of History: An Institutional Archeology of Dual Sovereignty*, 1 OHIO ST. J. CRIM. L. 345 (2003); see also Walter T. Fisher, *Double Jeopardy, Two Sovereigns, and the Intruding Constitution*, 28 U. CHI. L. REV. 591 (1961); Thomas Franck, *An International Lawyer Looks at the Bartkus Rule*, 34 N.Y.U. L. REV. 1096 (1959); J. A. C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1 (1956); J. A. C. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309 (1932); Lawrence Newman, *Double Jeopardy and the Problem of Successive Prosecutions: A Suggested Solution*, 34 S. CAL. L. REV. 252 (1961); George C. Pontikes, *Dual Sovereignty and Double Jeopardy: A Critique of Bartkus v. Illinois and Abbate v. United States*, 14 CASE W. RES. L. REV. 700 (1963). As Professor Colangelo has noted, “[I]t is hard to find any commentary that is not critical.” Colangelo, *supra* note 25, at 773.

46. *Lanza*, 260 U.S. at 381.

sales of intoxicating liquor; the second section of the Eighteenth Amendment merely affirmed their power to continue regulating it.⁴⁷

In a pair of cases from 1959, the Court resoundingly reaffirmed the dual sovereignty exception and its rationale. In *Abbate v. United States*,⁴⁸ the Court held that a conviction in Illinois state court would not bar a subsequent federal prosecution even when both prosecutions were based on the same acts.⁴⁹ The court reasoned that “if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered.”⁵⁰ The Court further explained that not allowing the successive prosecutions “would bring about a marked change in the distribution of powers to administer criminal justice, for the States under our federal system have the principal responsibility for defining and prosecuting crimes.”⁵¹ Repeating an idea mentioned as early as *Houston v. Moore*, the Court noted that “the efficiency of federal law enforcement must suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions.”⁵²

In *Bartkus v. Illinois*,⁵³ the Court considered successive prosecutions going in the other direction. In that case, the defendant was acquitted in federal

47. *Id.* at 381–82. This aspect of the Court’s decision has been roundly criticized. Professor Kenneth M. Murchison has argued that Congress specifically discussed successive prosecutions and came to the consensus that they would not be allowed. Murchison, *supra* note 45, at 390. He explains:

Despite this confusion over the meaning of concurrent power, the chairman was clear with respect to one point: the committee language was not designed to permit both federal and state governments to prosecute offenders for a single act! When Representative Denison specifically asked the chairman whether the concurrent jurisdiction language would permit successive prosecutions by state and federal authorities for the same act, he replied that he did ‘not think the punishment of the offense by the state government would be followed by the punishment of the same offense by the federal government or vice versa.’ An earlier proposal, which ‘provided that the State and Federal Governments might jointly or separately exercise jurisdiction and punish,’ would, he declared, have allowed federal and state prosecutions ‘for the same offense.’ By contrast he interpreted the concurrent power language as meaning that ‘the Federal Government cannot do it if the State government does it, and vice versa.’

Id. at 390. This congressional history, Murchison explains, creates a substantial problem for the Supreme Court’s interpretation of the Eighteenth Amendment in *Lanza*. *Id.* at 398.

48. *Abbate v. United States*, 359 U.S. 187 (1959).

49. *Id.* at 189.

50. *Id.* at 195.

51. *Id.*

52. *Id.*

53. *Bartkus*, 359 U.S. at 121.

court of bank robbery.⁵⁴ He was subsequently convicted in state court and sentenced to life imprisonment.⁵⁵ The Court reasoned that the Double Jeopardy Clause did not apply to the states, citing with approval Justice Cardozo's opinion in *Palko v. Connecticut*⁵⁶ for the conclusion that freedom from successive prosecutions was not fundamental to ordered liberty.⁵⁷ The only support the Court found for barring successive state prosecutions was in *Houston v. Moore*,⁵⁸ but it described that case as standing "only for the presence of a bar in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question."⁵⁹ The Court explained its conclusion in familiar language, stating:

Were the federal prosecution of a comparatively minor offense to prevent state prosecution of so grave an infraction of state law, the result would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines. It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States.⁶⁰

54. *Id.* at 121–22.

55. *Id.* at 122.

56. *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937).

57. *Bartkus*, 359 U.S. at 126. Professor Murchison also finds *Abbate* and *Bartkus* unpersuasive. In these cases he finds a doctrinal inconsistency that began when the Court started incorporating the Fourth and Fifth Amendments to the Constitution. Murchison, *supra* note 45, at 417. He points to *Benton v. Maryland*, 395 U.S. 784 (1969), which concluded that the Double Jeopardy Clause of the Fifth Amendment was applicable to the states. *Id.* This would seem naturally to call into question the holding of *Bartkus*, but the Court did not find that problematic in the cases that followed. In addition, he points out that when the Court rejected the silver-platter doctrine in *Elkins v. United States*, 364 U.S. 206 (1960)—which allowed federal prosecutors to use evidence obtained in violation of the Fourth Amendment by state agents—it was necessarily rejecting a dual sovereignty theory. *Id.* at 417–18. Since that doctrine was premised on the understanding that the Fourth Amendment did not apply to the states, it could no longer stand after the Fourth Amendment was incorporated. *Id.* at 418. In other words, now that the Court considered many of the rights listed in the Bill of Rights to be applicable to the states, substantive due process demanded a uniform rule. It did not matter whether a state or the federal government had violated the Fourth Amendment. Because a violation had occurred, due process demanded that the other sovereign be precluded from using the fruits of the illegal conduct.

58. 18 U.S. 1 (1820).

59. *Bartkus*, 359 U.S. at 130.

60. *Id.* at 137. Another scholar criticizes this aspect of the dual sovereignty doctrine as shirking reality in an age of cooperative federalism. See Braun, *supra* note 45, at 5–6. As federal statutes began to encompass more and more types of criminal conduct, there

Although the Court overruled *Palko* in *Benton v. Maryland*,⁶¹ *Bartkus* remains good law on the dual sovereignty exception.⁶²

In *Waller v. Florida*,⁶³ the Court found, as in *Grafton*, that two nominally distinct jurisdictions actually drew on the same source of power.⁶⁴ Waller had been convicted by a city court and then also by the state. The state argued that the relationship between a state and a municipality was analogous to the relationship between the federal government and the states, and therefore the dual sovereignty exception applied. The Court rejected the argument, explaining that “the judicial power to try [the defendant] on the first charges in municipal court springs from the same organic law that created the state court of general jurisdiction in which petitioner was tried and convicted for a felony.”⁶⁵ The Court found that the more appropriate analogy was between the “government of a Territory and the Government of the United States” because “both are arms of the same sovereign.”⁶⁶

became little area where the state and federal governments did not share concurrent jurisdiction over the same conduct. *Id.* at 5. Thus, Braun concludes, the “best hope an individual might have to avoid successive prosecutions by the state and federal governments may in fact be the ‘benignant spirit’ of a prosecutor’s office.” *Id.* at 6–7 (quoting *Fox v. Ohio*, 46 U.S. 410, 435 (1847)).

61. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

62. *See, e.g.*, *Heath v. Alabama*, 474 U.S. 82, 89, 93 (1985) (citing *Bartkus* with approval). Relying on the language from *Bartkus* that the exception might not apply when the state “was merely a tool of the federal authorities” or when “the state prosecution was a sham and a cover for a federal prosecution,” 359 U.S. at 123–24, a number of the Courts of Appeals have endorsed an exception to the court’s dual sovereignty doctrine. *See, e.g.*, *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 494 (2d Cir. 1995) (collecting cases from the 4th, 7th, 8th, 9th and D.C. Circuits). Although the Supreme Court has never adopted it, the exception to the doctrine will uphold a bar to a subsequent sovereign’s prosecution “when one ‘prosecuting sovereign can be said to be acting as the tool of another.’” *Id.* (quoting *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 38 (2d Cir. 1992)). The exception is quite narrow and “applies only in an ‘extraordinary type of case,’ perhaps only when one sovereign has essentially manipulated another sovereign into prosecuting.” *Id.* at 495 (quoting *United States v. Davis*, 906 F.2d 829, 832 (2d Cir. 1990)). Mere cooperation between states and the federal government is not enough, nor is designating a state district attorney as a federal official to assist with a federal prosecution. *Id.* However, the Second Circuit concluded that when a state, after prosecuting its own case, “prevails upon the federal prosecutor to deputize a state district attorney to bring a forfeiture, ostensibly in the name of the United States, but for the sole benefit of the state,” then the rationale for the exception to the dual sovereignty doctrine would seem to apply. *Id.* at 496.

63. *Waller v. Florida*, 397 U.S. 387 (1973).

64. *Id.* at 394–95.

65. *Id.* at 393.

66. *Id.*

In 1985, the Court applied the dual sovereignty exception to successive prosecutions conducted by separate states for the same criminal act.⁶⁷ The Court again emphasized that the “crucial determination is whether the two entities that seek to successively prosecute a defendant for the same course of conduct can be termed separate sovereigns. This determination turns on whether the two entities draw their authority to punish the offender from distinct sources of power.”⁶⁸ The court found that each state’s power to prosecute was “derived from its own ‘inherent sovereignty,’ not from the Federal government.”⁶⁹ The Court explained that “it is the presence of independent sovereign authority to prosecute, *not* the relation between States and the Federal Government in our federalist system, that constitutes the basis for the dual sovereignty doctrine.”⁷⁰

III. FEDERAL BASIS OF IMMIGRATION POWER

The dual sovereignty exception, the cases make clear, applies only when each jurisdiction has independent legislative and regulatory authority. Accordingly, the critical question is whether the states have an independent source of authority to regulate immigration or whether, instead, their laws are drawing from the federal well of power. Precedent makes clear that the federal government possesses the only source of power to regulate immigration.

The case law explaining the exclusive nature of the federal immigration power has a long history. Beginning in the late 1800s, as the states attempted to regulate the tide of immigrants flowing into their borders, the Supreme Court began delineating the role of the federal government in immigration regulation—even before Congress had enacted a comprehensive regulatory scheme.⁷¹ The rules the Court developed left little room for the states.

In *Chy Lung v. Freeman*,⁷² the Court invalidated a California statute that provided for a local “Commissioner of Immigration” to determine whether any

67. *Heath*, 474 U.S. at 88.

68. *Id.*

69. *Id.* at 89 (quoting *United States v. Wheeler*, 435 U.S. 313, 320 n.4 (1978)).

70. *Id.* at 90–91. One critic has argued that the Court’s emphasis on requiring separate sovereigns as between the several states or the states and the federal government is misguided because the Court misunderstands the principle of “popular sovereignty” upon which the Fifth Amendment and the Constitution were founded. Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 *YALE L.J.* 281, 282 (1992). Dawson argues that in our federal system, the people are the ultimate sovereign authority, and, though they may delegate power to the federal and state governments, they “possess the final check on government authority.” *Id.* at 283. Therefore, once the people in any jury—federal or state—have spoken on a crime, their sovereignty cannot be questioned through the means of another trial conducted by a different government that also derives its power from the people of the United States. *Id.*

71. *See, e.g., Chy Lung v. Freeman*, 92 U.S. 275 (1875).

72. *Id.*

passenger arriving by a vessel from a foreign place was likely to become a public charge or was a criminal or a whore.⁷³ If the Commissioner found any such person on the vessel, he could require the person responsible for the ship to give a bond for each person to protect the state from any expense incurred from the person's indigence.⁷⁴ The Commissioner could set a flat fee that he thought "proper to exact," and of which he also retained twenty percent.⁷⁵ The Supreme Court lambasted California's local system for regulating immigration:

It is hardly possible to conceive a statute more skillfully framed, to place in the hands of a single man the power to prevent entirely vessels engaged in a foreign trade, say with China, from carrying passengers, or to compel them to submit to systematic extortion of the grossest kind.⁷⁶

The Court went on to note that the statute allowed for a "silly, an obstinate or a wicked commissioner [to] bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful ally."⁷⁷

Perhaps the absurdity of the state statute contributed to the Court's conclusion about federal power in immigration: that the states should have nothing to do with it. The Court explained that because the ebb and flow of foreign citizens through the ports of the United States implicated important international relations, and therefore national security, allowing the states to regulate it would contravene federal authority.⁷⁸ The Court stated:

The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government.⁷⁹

In a companion case from the same term, the Court considered a New York law requiring the master of each vessel to pay a fee of \$1.50 or give a \$300 bond for each passenger.⁸⁰ Failure to do one or the other resulted in a \$500 penalty for each passenger.⁸¹ Again, the Court rejected this statute as usurping the

73. *Id.* at 277.

74. *Id.*

75. *Id.* at 278.

76. *Chy Lung*, 92 U.S. at 278.

77. *Id.* at 279.

78. *Id.* at 280.

79. *Id.*

80. *Henderson v. Mayor of New York*, 92 U.S. 259, 267 (1875).

81. *Id.*

exclusive federal power in regulating immigration, stating that “no definition of [State police power], and no urgency for its use, can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.”⁸²

In 1976, the Court allowed state regulation of the economic activities of noncitizens, while reaffirming exclusive federal authority over immigration itself. A California law made it illegal for an employer to hire an undocumented noncitizen if doing so would have an adverse effect on lawful resident workers.⁸³ The California courts struck down the statute as unconstitutional, holding that the law was preempted by a comprehensive federal regulatory scheme enacted with Congress’s exclusive power over immigration.⁸⁴ Yet the Supreme Court reversed, noting that although the “[p]ower to regulate immigration is unquestionably exclusively a federal power . . . the Court has never held that every state enactment which in any way deals with noncitizens is a regulation of immigration and thus per se pre-empted by this constitutional power.”⁸⁵ It explained that noncitizens, particularly those who were undocumented, could legitimately be the subject of state statutes, so long as they refrained from “regulating immigration,” which the Court defined as “essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”⁸⁶

The Court found the California statute addressed a matter of traditional state regulation: employment relations.⁸⁷ The Court reasoned that employing undocumented noncitizens in times of high unemployment deprived legal residents and citizens of work; that undocumented noncitizens often accepted jobs with substandard wages and working conditions, thus deflating wage scales and conditions for citizens; and that the employment of undocumented noncitizens could undermine the power of unions.⁸⁸ Because Congress had enacted no law proscribing the employment of undocumented noncitizens generally and had not explicitly occupied the field of employment of noncitizens, the Court concluded that Congress had not intended to oust state authority in the area, and further that that states could enact regulation consistent with federal law.⁸⁹ However, the Court has limited its holding to the conclusion that the law was not preempted. It left open the question of whether the law was “nevertheless unconstitutional because it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”⁹⁰ In other words, the statute was not explicitly

82. *Id.* at 271.

83. *See DeCanas v. Bica*, 424 U.S. 351, 352 (1976).

84. *Id.* at 353.

85. *Id.* at 354–55.

86. *Id.* at 355.

87. *Id.* at 356.

88. *DeCanas*, 424 U.S. at 356–57.

89. *Id.* at 357–58.

90. *Id.* at 363.

preempted, but still might conflict with Congress's regulatory scheme, depending on how the California courts construed the statute and if it could be enforced "without impairing the federal superintendence of the field."⁹¹

Six years later, in *Plyler v. Doe*, the Court considered a Texas statute that excluded undocumented noncitizens from K-12 education unless they paid tuition.⁹² The Court reserved the question of whether the statute was preempted,⁹³ instead deciding that the statute violated the Equal Protection Clause.⁹⁴ However, the Court did consider a number of points from its cases dealing with preemption and the federal power over immigration. The Court recognized that states have some authority over noncitizens even where Congress has acted, so long as the state law meets two conditions: 1) the state action mirrors federal objectives, and 2) it furthers a legitimate state goal.⁹⁵ But it seemed clear that this state regulation had to address something other than immigration itself. The majority opinion explained that a "state has no direct interest in controlling immigration in to this country, that interest being one reserved by the Constitution to the Federal Government."⁹⁶ Chief Justice Burger, joined by Justices White, Rehnquist, and O'Connor dissented because they concluded Texas could deny access to public schools. However, they agreed that "[a] state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive."⁹⁷

IV. ONE POWER, INFINITE PROBLEMS: THE TROUBLE WITH STATES ENFORCING THEIR STATUTES WITH FEDERAL POWER

The federal power over immigration has long been described as an exclusive power tied to the sovereignty of the United States.⁹⁸ The Supreme Court has allowed state regulation of immigrants only in the narrow circumstances

91. *Id.* Professor Eagly's work explains the subsequent history of the case. See Eagly, *supra* note 4, 1805–10.

92. *Plyler v. Doe*, 457 U.S. 202 (1982).

93. *Id.* at 210 n.8.

94. *Id.* at 230.

95. *Id.* at 225.

96. *Id.* at 228 n.23.

97. *Plyler*, 457 U.S. at 242 n.1 (Burger, C.J., dissenting).

98. See, e.g., *Henderson*, 92 U.S. at 271 ("This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.").

when states are enforcing powers traditionally recognized as within their domain⁹⁹ and that also do not conflict with federal immigration law.¹⁰⁰ Although the states may assist with physical enforcement of federal immigration regulations, they have no independent, inherent authority to enact their own regulations of immigration.¹⁰¹ Therefore, any state law criminalizing the transportation or harboring of undocumented noncitizens must draw from the federal well of power.¹⁰²

If the states are not sovereigns in the area of immigration, if the states do not have independent prescriptive power to enact immigration laws, then enactment and enforcement of such laws risks frustrating federal goals in immigration. If they do not have the power to regulate immigration, then a state prosecution will stand to bar a subsequent federal one. If this is the case, then there are significant problems with the states enacting these laws. The states, of course, have a “historic right and obligation . . . to maintain peace and order within their confines.”¹⁰³ There is no question that states can prosecute ordinary crimes or breaches of the peace even if they happen to have been committed by noncitizens. But if states prosecute conduct not otherwise criminal that is related to immigration, using borrowed federal authority, then there is a double jeopardy problem.

Unlike in *Lanza*, no constitutional provision grants the states “concurrent jurisdiction” to enforce immigration laws—their own or the federal government’s. Since 1820, at least some Justices have recognized that a state prosecution could bar a subsequent federal prosecution when “jurisdiction is vested in the State Courts by statutory provisions of the United States.”¹⁰⁴ In *Bartkus*, the Court recognized that the dual sovereignty exception would not apply “in a case in which the second trial is for a violation of the very statute whose violation by the same conduct has already been tried in the courts of another government empowered to try that question.”¹⁰⁵ That would seem to be the situation here, if

99. *DeCanas*, 424 U.S. at 357 (describing the regulation of employment of undocumented noncitizens as within the “mainstream” of state police power).

100. *Id.* at 357–58 (finding no federal law that precludes states from regulating employment).

101. *Plyler*, 457 U.S. at 219 n.19 (“But if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction.”).

102. Professor Kobach says that enforcing state immigration crimes will serve to “[reinforce] the efforts of federal law enforcement agencies,” but does not say that states are donating to the federal enforcement efforts explicitly. Kobach, *supra* note 20, at 475. But other than claiming that states “possess the authority” to enact and enforce these laws, he does not elaborate on whether that power ultimately derives from power inherent to the state government, or is derived from the federal government. *Id.*

103. *Bartkus*, 359 U.S. at 137.

104. *Houston*, 18 U.S. at 35.

105. *Bartkus*, 359 U.S. at 130.

the states are in fact authorized to enact state laws based on federal law.¹⁰⁶ If the power over immigration “springs from the same organic law,”¹⁰⁷ as was the case in *Waller*, or is derived from the federal government’s power, not a state’s own inherent sovereignty (the inverse of the situation in *Heath*¹⁰⁸), then there can be no subsequent federal prosecution.

None of this is to say that it is impossible for a government to be structured in a way that divides prosecutorial authority. The people may choose, for example, to create states and cities with the power to initiate prosecutions that will bar each other. The federal government can divide its prosecutorial powers among territories, the District of Columbia, the armed forces, and regional U.S. Attorney’s Offices. If governments choose to do this, it is not necessarily unconstitutional.

The problem is that prosecution by one may preclude another from acting. Accordingly, a court evaluating a claim, like that of proponents of S.B. 1070, that the federal government has shared its power must recognize that the real claim is that the federal government has given its power away.¹⁰⁹ The dual sovereignty exception to double jeopardy will not apply to these state-level immigration crimes, because the states do not share concurrent jurisdiction with the federal government in immigration. As discussed above, the federal power over immigration is “exclusive.”¹¹⁰ Without its own source of authority from which to regulate, the only logical conclusion is that when a state prosecutes one of its new, local “immigration crimes,”¹¹¹ it is enforcing this law from federal, not state, authority. This situation recalls the fundamental rationale behind the dual sovereignty exception to double jeopardy. According to the Supreme Court: “[I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered.”¹¹²

106. Even absent this borrowing of power, it is probable that the *Bartkus* exception to the dual sovereignty doctrine, *see supra* note 62, would still bar a subsequent prosecution because the states are merely acting as a tool of the federal government—indeed this seems to be the essence of the argument that promoters of this theory of state immigration enforcement make. *See supra* notes 20–23 and accompanying text; John C. Eastman, *The States Enter the Illegal Immigration Fray* 15 (Feb. 20, 2012) (unpublished manuscript) (on file with authors) (arguing that the *Bartkus* exception might bar subsequent federal prosecutions).

107. *Waller*, 397 U.S. at 393.

108. *Heath*, 474 U.S. at 89.

109. Again, neither Professor Kobach nor the Arizona courts upholding state immigration smuggling laws addressed the double jeopardy question. *See supra* notes 20–23 and accompanying text.

110. *Henderson*, 92 U.S. at 271; *supra* Parts I, II.

111. *E.g.*, ARIZ. REV. STAT. ANN. § 13-1509 (2010) (criminalizing failing to apply for or carry alien registration papers).

112. *Abbate*, 359 U.S. at 195.

V. THE PATCHWORK OF STATE LAWS REGULATING IMMIGRATION

Professor Kobach proposed that states enact immigration statutes that “mirror the terms of federal law” and proposed that “alien smuggling and alien harboring” were “most suited to duplication at the state level.”¹¹³ But “mirroring” and “duplication” did not happen. Although there are a number of state statutes based on federal law, none of them are functionally the same as federal law, nor, for that matter, is the immigration law in any one state identical to the law in any other. Thus, another factor courts evaluating state immigration laws must consider is the multiplicity of state approaches; the question is not only whether the federal government invited state participation, but also whether it invited state participation in implementing whatever policy the state chose. Accordingly, these state laws are valid only if a court concludes that Congress and the Constitution contemplate a patchwork of approaches to immigration regulation, varying from state to state, and, perhaps, from town to town.

The federal statute criminalizing harboring or smuggling undocumented noncitizens provides for a wide range of penalties, depending on the circumstances of the offense. Under federal law, when a person 1) transports, 2) harbors, or 3) encourages an alien to enter the country illegally, that person is generally subject to a fine or five years imprisonment.¹¹⁴ However, when those actions are done for commercial gain, or they also involve physically smuggling someone across the border, the term of imprisonment is ten years.¹¹⁵ If, during the commission of any of these acts, the person causes serious bodily injury, the minimum sentence increases to twenty years.¹¹⁶ Finally, if the act of committing these offenses results in the death of another person, the punishment increases to any term of years, life imprisonment, or even death.¹¹⁷ In addition, each noncitizen involved in the offense constitutes a separate unit of prosecution.¹¹⁸

The states have significantly different standards. Four states have enacted laws that call for one-year imprisonment, a \$1,000 fine, or both.¹¹⁹ However, of these, only Florida has called for each noncitizen to constitute a separate unit of prosecution.¹²⁰ These four states also vary in the depth of the law. Florida’s law, for instance, simply states the offense as “transport[ing] into this

113. Kobach, *supra* note 20, at 475–78.

114. 8 U.S.C. § 1324(B)(ii) (2006).

115. *Id.* § 1324(B)(i).

116. *Id.* § 1324(B)(iii).

117. *Id.* § 1324(B)(iv).

118. *Id.* § 1324(B).

119. FLA. STAT. § 787.07 (2011); MO. REV. STAT. § 577.675 (2011); OKLA. STAT. tit. 21, § 446 (2011); GA. CODE ANN. § 16-11-200(c) (2011). In Georgia, if the person has the intent of making a profit, the penalties are higher: between one to five years imprisonment and/or a fine of \$5,000 to \$20,000. GA. CODE ANN. § 16-11-200(c).

120. FLA. STAT. § 787.07(2).

state an individual who . . . is illegally entering the United States from another country[.]”¹²¹ Missouri also focuses on moving or transporting, but requires it to be connected to smuggling for forced labor, drug trafficking, prostitution, or employment.¹²² Oklahoma uses the broadest brush, criminalizing both transporting and harboring undocumented noncitizens, but also widens criminal conduct to destroying, hiding, or altering documents used to verify immigration status.¹²³ In any event, the conduct in each state warrants the same penalty: one year in state prison, a \$1,000 fine, or both.

Alabama and Indiana have come up with a slightly different sentencing scheme. For violations involving nine or fewer noncitizens, both states categorize the crime as the highest level of misdemeanor.¹²⁴ But, if the harboring involves more than nine noncitizens, the crime jumps up to the lowest grade felony.¹²⁵ For the misdemeanor level crimes, both states call for a maximum of one year imprisonment. But they also allow a fine of between \$5,000 and \$6,000.¹²⁶ For felonies, the penalties jump significantly, subjecting violators in Alabama to up to ten years imprisonment coupled with a \$15,000 fine,¹²⁷ and those in Indiana to up to three years imprisonment.¹²⁸

Another group of three states generally considers the conduct to warrant a bit stiffer penalty; these states call for penalties ranging from one to five years imprisonment, and fines ranging from \$2,500 all the way up to \$150,000.¹²⁹ Utah sits at the bottom of this range, calling for up to five years or \$5,000 in fines if the offender transports or moves a noncitizen for financial gain.¹³⁰ On the other hand, if the offender only conceals, harbors, or shelters a noncitizen from detection, Utah calls for a maximum of one year imprisonment, a \$2,500 fine, or both.¹³¹ Slightly more serious about its immigration enforcement, Arizona calls for a presumptive sentence of 2.5 years.¹³² However, if certain exceptional circumstances exist, such as the transported noncitizen being under 18 and unaccompanied by a parent, the penalty goes up to a presumptive sentence of five

121. *Id.* § 787.07(1).

122. MO. REV. STAT. § 577.675(1).

123. OKLA. STAT. tit. 21, § 446(A)–(C).

124. ALA. CODE § 31-13-13(b) (2011); IND. CODE § 35-44-5-3(a)(2) (2011).

125. ALA. CODE § 31-13-13(c); IND. CODE § 35-44-5-3(b).

126. ALA. CODE § 13A-5-12; IND. CODE § 35-50-3-2.

127. ALA. CODE §§ 13A-5-6, -11.

128. IND. CODE § 35-50-2-1(c)(4).

129. ARIZ. REV. STAT. ANN. § 13-2319 (2011); S.C. CODE ANN. § 16-9-460 (2011); UTAH CODE ANN. § 76-10-2901 (2011).

130. UTAH CODE ANN. § 76-10-2901(3)(a); *id.* §§ 76-3-203(3), -301(b). The amendments to the harboring and transporting law from Utah H.B. 497 appear to have left the sentencing scheme intact but have expanded the scope of conduct covered by the statute. *See* H.B. 497 Substitute, 59th Leg., Gen. Sess. (Utah 2011).

131. UTAH CODE ANN. §§ 76-10-2901(3)(b), -3-204(1), -3-301(1)(c).

132. ARIZ. REV. STAT. ANN. §§ 13-2319(B), 13-702(D) (2011).

years.¹³³ In any case, since Arizona considers any variation of this crime to be a felony, a fine of up to \$150,000 is allowed.¹³⁴ South Carolina limits its statute to transporting or harboring noncitizens, but calls for a mandatory \$5,000 fine, up to five years imprisonment, or both.¹³⁵ These states present the mid-range of state-level immigration crimes and punishments.

Colorado, the harshest of the states, also has one of the simplest statutes. Its statute criminalizes simply transporting a person traveling through Colorado “in violation of immigration laws” in exchange for money or anything else of value.¹³⁶ Colorado follows the federal standard here, making each transported or assisted noncitizen cause for a separate unit of prosecution against the offender.¹³⁷ For each violation, Colorado calls for a presumptive sentencing range of four to twelve years, a fine ranging from \$3,000 to \$750,000, or both.¹³⁸

Taken together (shown in summary in Table 1), these ten states and the federal government present a broad and varied spectrum of penological judgments. It appears most states consider immigration offenses to be much less serious than the federal government. Only Colorado approaches the federal level of seriousness. Apparently states are mostly trying to use short-term fines and imprisonment, which presumably could be plea bargained down to something even less serious, as a way of acting on the “attrition through enforcement” ideology without requiring a significant amount of state resources that longer prison sentences would necessarily entail. In addition to their variation, these statutes replicate only one part of the federal structure.¹³⁹

133. *Id.* §§ 13-2319(C)(1), 13-702(D).

134. *Id.* § 13-801(A).

135. S.C. CODE ANN. § 16-9-460(C) (2011).

136. COLO. REV. STAT. § 18-13-128(1) (2011).

137. *Id.* § 18-13-128(3).

138. *Id.* § 18-1.3-401(III)(A) & (V)(A).

139. The national government has wide spectrum of options with respect to any undocumented alien:

With respect to any given undocumented person, the national government can elect: 1) criminal prosecution; 2) civil removal of the alien from the United States; 3) to exercise prosecutorial discretion to allow the non-citizen to stay and work, e.g., 8 C.F.R. § 274a. 12(c)(14) (2010); 4) to grant formal relief under some treaty or statute, such as withholding of removal under INA § 241(b)(3) that would allow the alien to live in the United States and work; or asylum, or 5) granting some form of temporary or permanent relief, such as through registry under INA § 249, or a T-1 visa available to a person who has been trafficked.

Table 1

State	Prison Term	Fine
Florida	1 year	\$1,000
Oklahoma	1 year	\$1,000
Missouri	1 year	\$1,000
Georgia ¹⁴⁰	1 year	\$1,000
Indiana	1–3 years	\$5,000
Utah	1–5 years	\$2,500–\$5,000
Alabama	1–10 years	\$6,000–\$15,000
Arizona	2.5–5 years	Up to \$150,000
South Carolina	5 years	\$5,000
Colorado	4–12 years	\$3,000–\$750,000
Federal	5–20 years; life; death	\$3,000–\$250,000

Further, the state crimes have a wide variety of punishments, ranging from as little as one year to as much as twelve, with equally wide varieties in fines.¹⁴¹ Such a diverse scheme of punishments cannot really be said to represent a uniform national policy toward noncitizens or immigration. Congress has regulated noncitizens and immigration for over 200 years, leaving little room for the states to participate.¹⁴² The federal interest in immigration is so dominant that it should preclude state intervention.¹⁴³ The treatment of noncitizens within the borders of the United States is a national concern—not a concern just for Utah or Oklahoma or Arizona. There is a danger here that these state regulations will cause national problems, allowing a “silly, an obstinate or a wicked [state to] bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful ally.”¹⁴⁴ Allowing these state statutes to stand will effectively remove the decision to prosecute from the hands of the federal prosecutor, eviscerating the federal government’s opportunity to make important policy decisions regarding immigration and international diplomacy.

140. With the added element of intent, Georgia’s penalties increase to be more aligned with Utah’s. *See supra* notes 119, 130 and accompanying text.

141. *See supra* text accompanying notes 119–40.

142. *See generally* E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798–1965 (1981); *see also supra* Part II.

143. Apart from the need to have a uniform national policy on immigration enforcement and punishment, these variations in state crimes also disrupt the tremendous effort that went into the United States Sentencing Guidelines, which were designed to bring consistency to the sentences meted out for federal crimes. *See* UNITED STATES SENTENCING GUIDELINES MANUAL 2 (2010).

144. *Chy Lung v. Freeman*, 92 U.S. 275 (1875).

VI. CONCLUSION

People from all over the world pay exorbitant sums of money to human smugglers to get them into the United States.¹⁴⁵ What stories do these people have, what do they have to offer to the United States—what do we have to offer them? These are questions that demand uniform national policy, not a haphazard undertaking on a state-by-state basis. The federal government has exclusive power over immigration, and this power preempts any attempt a state might make to meaningfully regulate immigration. Without a separate source of power, these state-level crimes can stem only from the federal power in immigration. By enforcing their own immigration laws, the states will substantially diminish federal power in immigration and in essence be making policy choices of national and international magnitude—a radical change in the traditional notion that these are choices for the federal government to make.

Although immigration problems abound, and there are no easy answers, it is at least clear that a single state enacting laws of this character and magnitude creates significant complications for uniform immigration policy. Thomas Jefferson wrote in 1787: “My own general idea was, that the States should severally preserve their sovereignty in whatever concerns themselves alone, and that whatever may concern another State, or any foreign nation, should be made a part of the federal sovereignty.”¹⁴⁶ We should not stray from his vision now.



145. See, e.g., Randal C. Archibold, *Improvements at Land Border Push Smugglers West, to the Pacific*, N.Y. TIMES, Mar. 15, 2008, at A10 (describing a \$4,500 fee per person to be smuggled into the United States).

146. *Hines v. Davidowitz*, 312 U.S. 52, 63 n.11 (1941) (citing Letter from Thomas Jefferson to Mr. Wythe, in 2 MEMOIR, CORRESPONDENCE AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 230 (Thomas Jefferson Randolph ed., 1829)).