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TEXAS'S "OPERATION LONE STAR": THE SUPREMACY CLAUSE AND DUAL FEDERALISM IN LIGHT OF *ARIZONA V. UNITED STATES*

By: Reynaldo Ramirez, Jr.*

I. INTRODUCTION

The Supremacy Clause of Article Six of the United States Constitution was enacted to remedy the failures of the Articles of Confederation.¹ Initially, the states enjoyed near-boundless state sovereignty in nearly all aspects of the first federalist government.² However, in practice, the necessity of federal supremacy for conducting the business of governing obligated the states to prioritize national interests above the states' sovereignty.³ To do so required revision of the Articles of Confederation.⁴ This drafting culminated in the contentious ratification of the Constitution in 1788, including the Supremacy Clause and the Tenth Amendment.⁵ That said, ratifying the Supremacy Clause and establishing the demarcations of state sovereignty as provided by the Tenth Amendment was antagonistic, while state and federal laws each explored the margins of the other's authority.⁶ The first challenge commenced with *McCulloch v. Maryland* and the Necessary and Proper Clause, which established the implicit powers necessary to exercise those powers enumerated in the Constitution.⁷ Commencing with the Naturalization Act of 1790, immigration became a matter for the federal government to regulate.⁸ Since the Naturalization Act's enactment, the U.S. Supreme Court has consistently held that the federal government has broad and exclusive authority in immigration.⁹

Additionally, immigration significantly affects the United States economy, implicating the Commerce Clause.¹⁰ Approximately 27 million permanent, temporary, and undocumented immigrants make up almost 17 percent of the U.S. labor force.¹¹ Immigrants currently represent a larger percentage of the U.S. labor force than they have at any other point in the nation's history, and immigrants' labor market participation rate is far higher than

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¹ See generally U.S. CONST. art. IV, cl. 2.

² See ARTICLES OF CONFEDERATION OF 1777, art. II. But see Vasan Kesavan, *When Did the Articles of Confederation Cease to Be Law?*, 78 NOTRE DAME L. REV. 35, 46–47 (2002).

³ Cf. Ronald D. Rotunda, *Life Under the Articles of Confederation*, 75 ILL. BAR J. 544, 545 (1987).

⁴ Cf. *id.* at 546.

⁵ See generally Kesavan, *supra* note 2, at 36 (explaining that the U.S. Constitution was ratified in 1788).

⁶ See, e.g., *infra* notes 7–13 and accompanying text.

⁷ See generally *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411–12 (1819).

⁸ See generally Naturalization Act of 1790, 1 Stat. 103 (Mar. 26, 1790).

⁹ See, e.g., *Arizona v. United States*, 567 U.S. 387, 394–95 (2012).

¹⁰ See Press Release, Bureau of Labor Statistics, U.S. Dep't of Lab., *Foreign-Born Workers: Labor Force Characteristics—2021* (May 18, 2023), <https://www.bls.gov/news.release/pdf/forbrn.pdf> [<https://perma.cc/ZQ85-N6D4>].

¹¹ *Id.*

nonimmigrants' participation rate.¹² Beginning with *United States v. Lopez* in 1995, the U.S. Supreme Court has sought to rein in Congress's power under the Commerce Clause.¹³ Yet, the Supreme Court's jurisprudence allows the Commerce Clause to encompass federal action on immigration.¹⁴

II. "OPERATION LONE STAR"

In March of 2021, Texas Governor Greg Abbott, in an effort to curb the undocumented migration of thousands of individuals across the southern border of Texas, implemented "Operation Lone Star."¹⁵ This program, as publicly declared, enforced state criminal law, specifically criminal trespass law, to deter the entry of undocumented aliens into Texas.¹⁶ This program specifically focused on male, non-family unit individuals who trespass upon private property.¹⁷ To that end, Governor Abbott remarked, "We launched Operation Lone Star to do the job that Washington would not."¹⁸ This action included the combined efforts of the Texas National Guard, sheriffs, and the Texas Department of Public Safety.¹⁹

III. PENDING CLASS ACTION LAWSUIT BACKGROUND

After being charged and arrested for trespass under Operation Lone Star, Erasto Barcenas, and other similarly situated undocumented aliens, filed a federal class action lawsuit against state law enforcement officials.²⁰ At the core of Barcenas's allegations, he argues that the Supremacy Clause preempts Operation Lone Star's prosecution of undocumented aliens.²¹

In the pending suit, the Plaintiffs allege, as is procedurally permissible, that, as prosecuted, Texas's criminal trespass law infringes upon federal immigration law through field preemption principles.²² It is well-settled law that "[j]ust as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or checks-and-balances constraints, so too may a litigant, in a

¹² *Id.*

¹³ *See, e.g., United States v. Lopez*, 514 U.S. 549, 551 (1995). Since 1995, the boundaries of the Commerce Clause have remained somewhat fluid, with cases such as *United States v. Morrison*, 529 U.S. 598, 602 (2000), and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 558 (2012), reinforcing the limits of interstate commerce, and cases such as *Gonzalez v. Raich*, 545 U.S. 1, 22 (2005), suggesting a return to openness.

¹⁴ Jennifer Gordon, *Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution*, 93 IND. L.J. 653, 657 (2018).

¹⁵ Press Release, Office of the Texas Governor, *Governor Abbott, DPS, Texas National Guard Mark One Year Anniversary of Operation Lone Star* (Mar. 4, 2022), <https://gov.texas.gov/news/post/governor-abbott-dps-texas-national-guard-mark-one-year-anniversary-of-operation-lone-star> [<https://perma.cc/TFT5-TUW4>] [hereinafter *Operation Lone Star*].

¹⁶ *See* J. David Goodman, *Texas Patrols Its Own Border, Pushing Legal Limits*, N.Y. TIMES (May 9, 2023); *see also* TEX. PENAL CODE ANN. § 30.05 (West, Westlaw through legis. effective July 1, 2023, of 2023 Reg. Sess. of 88th Leg.).

¹⁷ *See* Plaintiffs' First Am. Compl. at 10, *Barcenas*, No. 1:22-cv-00397 (W.D. Tex. Jun. 23, 2022). *But cf. Operation Lone Star*, *supra* note 15 ("Members of notorious gangs like the Texas Chicano Brotherhood, Bloods, Mexican Mafia, MS-13, and others have been taken off the streets. DPS has arrested sex offenders, weapons traffickers, previously convicted and deported criminal immigrants, drug dealers, and other wanted criminals.").

¹⁸ *Operation Lone Star*, *supra* note 15.

¹⁹ *Id.*

²⁰ Plaintiffs' First Am. Compl., *supra* note 17, at 2, 50.

²¹ *Id.* at 56–58.

²² *Cf. id.* at 76. Criminal defendants may challenge the constitutionality of laws under which they are indicted if those laws violate the Tenth Amendment. *United States v. Louper-Morris*, 672 F.3d 539, 562 (8th Cir. 2012).

proper case, challenge a law as enacted in contravention of constitutional principles of federalism.”²³ In *Arizona v. United States*, the U.S. Supreme Court held that an Arizona immigration statute was preempted because the statute made it a state crime to commit the federal offense of being in the United States unlawfully or to seek employment while being in the United States unlawfully.²⁴ The state law at issue in *Arizona v. United States* expanded the authority of state officers to handle undocumented aliens.²⁵ In contrast, Operation Lone Star aggressively prosecutes alleged violations of Texas law. Operation Lone Star aggressively prosecutes alleged violations of a long-standing state trespass statute intended to protect the private property interests of individuals.²⁶ Not only do the Plaintiffs claim Supremacy Clause violations, but they also raise various Due Process and Equal Protection violations associated with the Plaintiffs’ arrests, detentions, trials, and lack of legal representation.²⁷ Specifically, the Plaintiffs allege that Texas had ulterior motives and encroached upon a field preempted by federal laws.²⁸

In summary, the 98-page original complaint claims that Texas implemented a separate criminal docket, public defender assignments, and jail and migrant booking facility.²⁹ In support of their accusations, the Plaintiffs presented numerical data from a Briscoe/Segovia census that indicates that as many as 5,000 individuals were incarcerated at the Briscoe and Segovia Units of the Texas Department of Criminal Justice for criminal trespass as a direct result of Operation Lone Star.³⁰

IV. UNDOCUMENTED ALIENS ARE NOT IMMUNE FROM TEXAS CRIMINAL LAWS

Federal law is clear that one sovereign government (e.g. a state) may, without infringing on another sovereign government (e.g. the United States), enforce its own criminal laws.³¹ Additionally, the “Court has uniformly held that the States are separate sovereigns with respect to the Federal Government because each State’s power to prosecute is derived from its own ‘inherent sovereignty,’ not from the Federal Government.”³² However, indirectly, the Plaintiffs raised an inference of immunity to state prosecution by relying upon a theory that field preemption regarding federal unlawful entry laws prohibit the Texas trespass statute. Under Barcenas’s view, it appears undocumented aliens unlawfully entering the United States violate federal immigration law and simultaneously obtain immunity from state trespass law.³³ However, the prohibition of double prosecution, as contained in the amendments to the Constitution, as well as others with which it is associated in those articles, are not designed as limits upon the state governments in reference to their citizens.³⁴ To be clear, Barcenas and the class allegedly trespassed upon a specific private individual or entity’s property and were subsequently arrested as part of Operation Lone Star.³⁵

²³ *Bond v. United States*, 564 U.S. 211, 223–24 (2011).

²⁴ See generally *Arizona v. United States*, 567 U.S. 387 (2012); S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

²⁵ The law was created by Arizona S.B. 1070 and was known as the “Support our Law Enforcement and Safe Neighborhoods Act.”

²⁶ See *Operation Lone Star*, *supra* note 15.

²⁷ See Plaintiffs’ First Am. Compl., *supra* note 17, at 67–73.

²⁸ See Plaintiffs’ Original Compl. at 29–34, *Barcenas*, No. 1:22-cv-00397 (W.D. Tex. Apr. 27, 2022).

²⁹ See generally *id.* at 8–26.

³⁰ *Id.* at 4.

³¹ *United States v. Lanza*, 260 U.S. 377, 382 (1922).

³² *Heath v. Alabama*, 474 U.S. 82, 89 (1985).

³³ 8 U.S.C. § 1325(a).

³⁴ *Fox v. Ohio*, 46 U.S. (5 How.) 410, 434 (1847).

³⁵ Plaintiffs’ First Am. Compl., *supra* note 17, at 26.

As such, a clear distinction exists where Texas is prosecuting a private citizen's property right under the laws of Texas. It is well settled that "[e]ach government in determining what shall be an offense against its peace and dignity, is exercising its own sovereignty, not that of the other."³⁶ The court also ruled that when a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offenses."³⁷

In the Barcenas matter, the Plaintiffs allege standing as a result of being "arrested and incarcerated based upon race, immigration status and/or national origin;" along with due process violations.³⁸ The Plaintiffs do not allege harm to lawful migrants and do not present an example of such a class in the complaint.³⁹ As such, it is axiomatic that redress for alleged state overreach, into the federal field of immigration, appears limited to those claimants specifically identified in the complaint, and whose illegal or unlawful status has been detrimentally affected by Texas's enforcement of its long-standing state trespass laws.⁴⁰

V. FIELD PREEMPTION

Central to the constitutional design, Federalism adopts the principle that national and state Governments have elements of sovereignty that the other is bound to respect.⁴¹ However, in *Arizona v. United States*, the U.S. Supreme Court reaffirmed its long-standing position decided in *Chamber of Commerce v. Whiting* that federal law supersedes state law where federal law contains an express preemption, in fields that Congress has determined necessitate exclusive regulation, and where state law conflicts with federal law.⁴²

In general, preemptions are classified as express or implied. Express preemption occurs when the language of the statutes leaves little room for contrary interpretation.⁴³ Additionally, field preemption can be inferred from regulations so extensive or dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.⁴⁴ State conflict with federal law includes cases where compliance with federal and state regulations is a genuine impossibility and where the challenged state law stands as an obstacle to the accomplishment and execution of Congress's full purposes and objectives.⁴⁵ In preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was Congress's clear and manifest purpose.⁴⁶

Unlike *Arizona v. United States*, the long-standing Texas trespass statute does not grant quasi-immigration authority to its officers to arrest suspected undocumented aliens.⁴⁷ On the contrary, Operation Lone Star aggressively prosecutes all violators under the state offense of criminal trespass.⁴⁸ Consequently, the officers are not encroaching upon federal procedures or authority. Under Operation Lone Star, once an individual is arrested under valid probable cause,

³⁶ *Lanza*, 260 U.S. at 382 (1922).

³⁷ *Id.*

³⁸ Plaintiffs' First Am. Compl., *supra* note 17, at 50.

³⁹ See Plaintiffs' First Am. Compl., *supra* note 17.

⁴⁰ *Id.*

⁴¹ *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

⁴² *Arizona v. United States*, 567 U.S. 387, 399 (citing *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 587 (2011)).

⁴³ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

⁴⁴ *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941).

⁴⁵ *Id.*

⁴⁶ *Rice*, 331 U.S. at 230.

⁴⁷ *Operation Lone Star*, *supra* note 15.

⁴⁸ *Id.*

the officers will inquire into the identifying aspects of the defendant.⁴⁹ As it pertains to immigration, state officers are required to contact their federal counterparts.⁵⁰ It is important to note that Congress has done nothing to suggest it is inappropriate to communicate with U.S. Immigration Customs and Enforcement (“ICE”). Indeed, the Federal Government has encouraged the sharing of information about possible immigration violations.⁵¹ Additionally, Congress has made clear that no formal agreement or special training needs to be in place for state officers to “communicate with the [Federal Government] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States.”⁵² Further, Congress has obligated ICE by way of Title 8 of the United States Code section 1357(g)(10)(A) to respond to any request made by state officials for verification of a person’s citizenship or immigration status.⁵³

VI. TEXAS STATE TRESPASS AND THE SUPREMACY CLAUSE

In commencing an analysis, the Plaintiffs have difficulty challenging the State of Texas trespass statute as facially invalid. Under the *Salerno* standard, as applied to preemption challenges, the movant “must establish that no set of circumstances exists under which the Act would be valid.”⁵⁴ Here, Texas may raise a multitude of legitimate purposes for the statute’s existence. Moreover, the U.S. Supreme Court previously ruled that the administration of criminal justice rests with states except as Congress, acting within the scope of delegated powers, has created offenses against the United States.⁵⁵ Based on a litany of claims raised by Barcenas and presently before the federal court, no alleged evidence demonstrates a field intrusion into immigration issues by the State of Texas. Even if an impingement on federal jurisdiction existed, a state may prosecute an offense that constitutes both a federal offense and a state offense under the police power.⁵⁶ In *Arizona v. United States*, the court echoed that sentiment by ruling “that a State may make a violation of federal law a violation of state law as well.”⁵⁷ To that end, nothing in the Texas criminal trespass statute raises language-specific or implicit immigration field overreach.

VII. THE FOURTH, FOURTEENTH, AND EQUAL PROTECTION ISSUES

Among various allegations presented, Plaintiffs raise Fourth Amendment, Fourteenth Amendment, and Equal Protection assertions involving unlawful pretextual stops.⁵⁸ However, the Plaintiffs do not allege that the state trespass statute was not violated—quite the opposite.⁵⁹ The Plaintiffs are redressing the ulterior motives of state officers to stop, arrest, and detain them for state criminal trespass.⁶⁰ Within pretextual stops, legally-based stops and arrests, even if only to

⁴⁹ Plaintiffs’ First Am. Compl., *supra* note 17, at 26–30.

⁵⁰ *Id.* at 76.

⁵¹ 8 U.S.C. § 1357(g)(1).

⁵² *Id.* § 1357(g)(10)(A).

⁵³ *Id.*

⁵⁴ *United States v. Salerno*, 481 U.S. 739, 745 (1987).

⁵⁵ *Screws v. United States*, 325 U.S. 91, 109 (1945).

⁵⁶ *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

⁵⁷ *Arizona v. United States*, 567 U.S. 387, 429 (Scalia, J., concurring).

⁵⁸ *See* Plaintiffs’ First Am. Compl., *supra* note 17.

⁵⁹ *Id.*

⁶⁰ *Id.* at 12–15.

question the individual about an offense that the person may have committed, are not Fourth Amendment violations “so long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry.”⁶¹ Furthermore, it is well settled that temporary detention of individuals during a stop by police, even for a brief period and for a limited purpose, constitutes a “seizure” of “persons” within the meaning of this provision.⁶² That said, the federal courts have also been clear under a series of bright-line cases that it is permissible for states to impose greater restrictions on police activity than those the U.S. Supreme Court holds to be necessary upon related federal constitutional standards.⁶³ The Plaintiffs do not present evidence of a higher level of protection under Texas law.⁶⁴ Texas did not expand officer limitations and, by doing so, increase a suspect’s rights beyond those presently identified by federal law.

Consequently, in *United States v. Villamonte-Marquez*, the Court held that valid warrantless detention, even with ulterior motives, does not strip an officer of his legal justification.⁶⁵ As such, Texas officers, even if motivated to quell undocumented entry into the United States, maintain legal justification under valid warrantless detention for criminal trespass. Barcenas’s complaints relating to a consequential finding of a person’s undocumented immigration status as a result of a subsequent administrative or inventory incident to an arrest would not prevail under present federal rulings.

VIII. CONCLUSION

Immigration policy and subsequent applications of federal laws to accomplish that schema have historically raised political, national, and interstate fervor. In recent years this topic has certainly not seen a decline in contention. The Barcenas case recites many common allegations of the State overreaching into the preempted territory of immigration. Is there a distinction between Arizona and Texas? Both states flexed sovereign authority to mitigate the undesired effects of national immigration policies on state interests. However, each took a distinct approach to do so. On the one hand, Arizona enacted laws that expanded state officer authority regarding undocumented aliens. On the other, Texas aggressively prosecuted violations of state trespass laws on behalf of willing third-party landowners without expanding state officer authority. By so doing, Texas defended the personal interests of the property owner and the general welfare of the citizenry of Texas. It appears the State remained within the limits of state-reserved powers of the Tenth Amendment. Consequently, without clear evidence of “unnecessary harassment” of some aliens, it is constitutionally permissible for Texas to exercise its sovereignty. The federal Supremacy Clause and subsequent state-reserved rights prescribed by the Constitution remain a perpetual cauldron of reexamination and assessment for the courts. Since its inception, this symbiotic relationship we call American Federalism remains an inherently debatable and litigious topic. Whether maintaining theories of originalism or judicial pragmatism, the Supremacy Clause and the Tenth Amendment remain at the forefront of trending constitutional issues.

⁶¹ *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987).

⁶² *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

⁶³ *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001).

⁶⁴ See Plaintiffs’ First Am. Compl., *supra* note 17.

⁶⁵ *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983).