



Giving Power Over Immigration Back to the States

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Executive Summary

Unlike today, where the federal government has almost unchallenged authority over immigration policy, in years past, states often had more control over immigration than the United States. That changed in the late 1800s when the U.S. Supreme Court greatly expanded federal power through an expansive interpretation of Congress's enumerated power "to establish a uniform Rule of Naturalization" in Article I Section 8 of the U.S. Constitution.

Texas has rightly sought to expand its ability to deal with illegal aliens. Even though it has failed in the face of federal assertions of questionable power, Texas should not give up this approach. Texas should assert its authority under Article 1, Section 10 of the Constitution to declare the current flood of illegal aliens crossing our border an invasion and shut down illegal border crossings itself.

Yet Texas should not give up hope of changing federal law on this issue. As immigration reform legislation works its way through Congress, Texas should push its representatives in Congress to expand the power of states to deal directly with illegal immigration. This would include allowing states to fully enforce federal immigration laws, make a violation of federal immigration law a state crime, and make it illegal for illegal immigrants to apply for, solicit, or perform work.

The U.S. government is radically changing the nature of our country through its open borders policy. Returning more authority to the states would restore some of the balance of our system of federalism and make significant progress in getting our immigration problem under control.

The Federal Government's Centralization of Power Over Immigration

One of the core concepts built into the structure of governance of the United States of America was decentralization. As James Madison wrote in [Federalist 51](#), “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.” But we are governed by men, not angels, and thus, our Founding Fathers took deliberate steps to decentralize power in multiple ways, including by limiting the power of the federal government by reserving powers “to the States respectively, or to the people.”

Unfortunately, the federal government has worked diligently over the last 230 years to reclaim many of those powers. One of those powers that has been re-centralized in Washington, D.C., is immigration. Until 1889, states had significant control over the immigration policies of the United States. The U.S. Supreme Court ruled several times in ways that affirmed state involvement in immigration policies ([Corfield v. Coryell \(1823\)](#), [New York v. Miln \(1837\)](#)). One reason for this is that Congress had no enumerated power to regulate immigration; Article 1 Section 8 of the U.S. Constitution only grants Congress the power to “establish an uniform Rule of Naturalization,”

i.e., determining how immigrants can become U.S. citizens. Even the Constitution’s Commerce Clause was not deemed by the court sufficient to allow full federal control of immigration policy. This changed with *Chae Chan Ping v. United States* in 1889 when the Court decided that “Congress had extra-constitutional plenary power over immigration based on the “incident of sovereignty” rather than any specifically enumerated power. The Court reached this conclusion despite the fact that the Constitution explicitly enumerates other powers that are unquestionably an “incident of sovereignty” ([Cato Institute](#)).

The centralization of power over immigration has had the consequences that our Founders feared. The federal government today has purposely abandoned control of the border to suit the interests of the national government. While there is debate over what those interests might be, they are clearly not the interests of Texas and other states along the U.S.-Mexico border. The cost of illegal immigration in Texas likely exceeds \$13 billion a year ([Huffines Liberty Foundation](#)). Much of that is due to the cost of educating illegal immigrants in Texas schools. Yet when Texas tried to recoup those costs, the U.S. Supreme Court further centralized federal power by telling Texas it had to educate illegal immigrants for free. And the federal government has

refused to reimburse Texas for the cost ([Huffines Liberty Foundation](#)).

Reclaiming Power over Immigration by the States

There are two primary ways that Texas and other border states can regain some of their lost power over immigration. One way is by exercising its authority under the U.S. Constitution. This could be done using the Tenth Amendment to reclaim the power of immigration, which was not delegated to Congress. Or by using its authority under Article 1, Section 10 of the Constitution to “enter into an[] Agreement or Compact with another State, or with a foreign Power, or engage in War, [if] actually invaded, or in such imminent Danger as will not admit of delay.”

Such actions would certainly result in conflict with the federal government. An example of this is *Arizona v. U.S.* (2012), where the Court:

invalidated most of Arizona’s controversial S.B. 1070 law. It struck down provisions making a failure to comply with federal alien-registration requirements a state misdemeanor, making it a misdemeanor for unauthorized aliens to seek or engage in work in the state, and authorizing arrests for federal offenses under which an illegal immigrant can be removed from the country. The Court held

that those provisions interfered with federal immigration policy and enforcement. However, it upheld a provision requiring police officers who have a reasonable suspicion that a suspect is in the country illegally to verify citizenship status during a stop, detention, or arrest ([Texas Public Policy Foundation, 7](#)).

Despite the potential of a showdown with the U.S. government, the Huffines Liberty Foundation has recommended Texas reclaim its powers under the Constitution. Texas should declare an invasion, use state troops to repel the invasion at the border and deport those who make it through illegally, put economic pressure on Mexico by stopping, searching, and, if necessary, seizing all trucks and other shipments transiting the US-Mexico border through Texas, and pass laws that remove the financial incentives that bring illegal immigrants to Texas.

The Texas Legislature has passed a bill that Governor Abbott is expected to sign into law that exerts state power over immigration and will almost certainly make its way to the Supreme Court. [Senate Bill 4](#) would make it a crime if a “person enters or attempts to enter this state directly from a foreign nation at any location other than a lawful port of entry.” A person violating this law could be arrested by

local and state police. Punishment for violating this law could range from a Class B misdemeanor to a felony of the third degree, depending on circumstances.

Conviction under the law could result in time in jail or prison. However, a judge could dismiss the charge against the person if the offender agrees to abide by a written order that “require[s] the person to return to the foreign nation from which the person entered.” Unlike the Arizona law invalidated by the Supreme Court, this law would have state law enforcement officials enforcing state law rather than federal law. It will almost certainly wind up in the Court again. But that should not stop Texas from passing and enforcing it—regardless of what the Court thinks of it.

Returning Power Over Immigration to the States

It seems unlikely that the federal government will return much power over immigration to the states anytime soon. However, we should not abandon hope. Rather, states should pursue reclaiming power over immigration through every means, including reform through Congress. In fact, immigration reform legislation now making its way through Congress may provide an opportunity for the states.

H.R.2 by Rep. Diaz-Balart passed the

U.S. House of Representatives on May 11 by a vote of 219-213. While the bill focuses mainly on changing what the federal government is doing, those changes are good. According to the [Heritage Foundation](#), provisions in H.R.2 would:

fortify border security by ending “welcome and release;” end the illegal use of mass immigration parole (a “temporary” end-run around requiring an alien to get a visa); expand penalties for visa overstays; reduce incentives for illegal immigration by mandating nationwide E-Verify; and close longstanding loopholes in the processing of both accompanied and unaccompanied alien children. The bill also would resume construction of the border wall, provide essential support for Customs and Border Protection (CBP), and prohibit the Biden Administration’s reliance on non-governmental organizations to process and transport illegal aliens into American communities.

Now that H.R.2 is in the U.S. Senate, it should be amended to specifically increase the ability of states to deal with immigration under federal law. **These changes should include:**

- In 2012, in [Arizona v. the United States](#), the U.S. Supreme Court inval-

idated several provisions in an Arizona law attempting to allow Arizona law enforcement officials to exercise their lawful authority under the U.S. Constitution. The Court supported its decision, finding that the provisions were preempted by federal law. In their dissents, both Justices Thomas and Alito explained why this was not the case for some of the provisions. However, nothing in the decision stops Congress from changing federal law to give states explicit authority in these areas. **Congress should:**

- *allow states to make a violation of federal immigration law a state crime.* This would support efforts of states to charge illegal aliens under state law, such as what Texas is trying to do under SB 4.
- *authorize state “law enforcement officers to make warrantless arrests when there is probable cause to believe that an arrestee has committed a public offense that renders him removable under federal immigration law.”*
- *allow states to make it illegal for illegal immigrants to apply for, solicit, or perform work.*
- In 1982, in [Plyler v. Doe](#), the U.S. Supreme Court decided, in a 5-4 decision, that a Texas law allowing school districts to charge tuition for illegal aliens was unconstitutional. The majority’s opinion was based on the equal

protection clause in the Fourteenth Amendment. Since then, Texas has been forced to pay billions of dollars to educate illegal aliens; in the school year 2022-23, that cost exceeded \$6 billion ([Huffines Liberty Foundation](#)). To remedy this, Congress should declare, “for purposes of allocating its finite resources [related to public education], a state has a legitimate reason to differentiate between persons who are lawfully within the state and those who are unlawfully there” ([Burger Dissent](#), *Plyler v. Doe*). Since this addresses a decision of the Supreme Court, it will be challenged in court, but it provides another opportunity to bring this problem to light. Alternatively, the federal government should appropriate funds to reimburse states for the full cost of educating illegal aliens. However, this would have to be done in a funding bill, not in H.R.2.

Conclusion

The only way to get illegal immigration under control is to expand the ability of states to address the problem independently of the federal government. This doesn’t mean, though, that there would be no state and federal cooperation. Cooperation and the sharing of power between the state and the federal government was one of the primary features of the government adopted by our founders in the U.S. Constitution. Returning to the original design and intent of our structure of govern-

ment would significantly reduce illegal immigration in our nation and restore the separation of government powers which increases liberty for everyone.



About the Founder

Don Huffines

Former Texas State Senator Donald B. Huffines is a strong Christian, proud fifth-generation Texan, husband, father, grandfather, and self-made businessman.

Don Huffines fought fearlessly for fiscal restraint and government accountability in the Texas State Senate while representing Dallas County.

During his time in the Senate from 2015 to 2019, Senator Huffines served as the Vice-Chair of the Texas Senate Border Security, Veteran Affairs, and Transportation committees. Huffines also earned a reputation as one of Texas's most conservative lawmakers.

Don Huffines founded the Huffines Liberty Foundation to promote the values we all cherish that make Texas great.

The Huffines Liberty Foundation is a 501(c)(3) non-profit, non-partisan research institute.

Our mission is to advance the cause of liberty, prosperity, and virtue in the State of Texas by educating citizens so they may hold their elected officials accountable.

We look beyond the obvious and develop researched solutions based upon the common sense liberty principles of individual rights, fiscal restraint, personal responsibility, limited government, and social conservatism.

The Huffines Liberty Foundation encourages and educates citizens so they are better informed to tackle the toughest challenges.