Federalism and Immigration: Will the Court Choose Federal Uniformity or States' Rights in Immigration Law?

The Constitution at a Crossroads

Introduction

During the oral arguments in *Arizona v. United States*, the challenge to Arizona's aggressive immigration enforcement law, the Supreme Court's Justices displayed a keen interest in the tension between state sovereignty and the federal government's authority to set uniform naturalization and immigration law. The following exchange between Justice Antonin Scalia and Solicitor General Donald B. Verrilli, Jr., is a prime example of this immigration-federalism debate:

> JUSTICE SCALIA: [T]he government can set forth the rules concerning who belongs in this country. But if, in fact, somebody who does not belong in this country is in Arizona, Arizona has no power? What does sovereignty mean if it does not include the ability to defend your borders?
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> GENERAL VERRILLI: Your Honor, the Framers vested in the national government the authority over immigration because they understood that the way this nation treats citizens of other countries is a vital aspect of our foreign relations.[1]
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> JUSTICE SCALIA: . . . . [But] [t]he Constitution recognizes that there is such a thing as state borders, and the states can police their borders . . . .
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> GENERAL VERRILLI: But they cannot do what Arizona is seeking to do here, Your Honor, which is to elevate one consideration above all others. Arizona is pursuing a policy that—that maximizes the apprehension of unlawfully present aliens, so they can be jailed as criminals in Arizona, unless the Federal government agrees to direct its enforcement resources to remove the people that Arizona has identified.[2]

The constitutional objectives of state sovereignty and federal uniformity—and the clash between these objectives—have grown increasingly important in immigration law. Recently, a number of states, notably Arizona[3] and Alabama,[4] have enacted immigration laws that threaten to encourage

[1] *Arizona v. United States*, No. 11-182, tr. at 35 (April 25, 2011).
[2] *Id.* at 36.
[3] Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, *amended by* H.B. 2162 (Ariz. 2010).
[4] Alabama Taxpayer and Citizen Protection Act of 2011, Ala. Laws 535, *et seq.* (2011). *See also* Ga. Code §§ 16-5-46, 17-5-100 (2011); S.C. Code §§ 16-9-460, 23-6-60 (2011); Miss. Code § 71-11-3(c)(i) (2011).

racial profiling and discrimination by law enforcement officers, landlords, and businesses, as well as result in the unlawful detention of U.S. citizens "suspected" of being undocumented. The states, however, assert that they are merely stepping in to do what the federal government has failed to accomplish—namely, deter and arrest unlawful migrants—and that these "attrition through enforcement" policies mirror federal standards. More broadly, these states argue that our Constitution's system of federalism preserves an inherent state authority to enforce immigration laws and police their own borders. This spate of aggressive state immigration laws will require the Supreme Court to clarify the federal government's authority over immigration law, on the one hand, and the powers preserved for the states on the other.

Indeed, the Court is at this moment considering these issues as it crafts its decision, likely to be handed down very soon, in Arizona's appeal from the injunction against key provisions of Arizona's "show me your papers" law, SB 1070, issued by a federal district court and upheld by the U.S. Court of Appeals for the Ninth Circuit.[5] The Roberts Court has been ideologically split over the content and contours of immigrants' rights, as well as the balance of power between the states and the federal government on immigration issues. The Court recently upheld the Legal Arizona Worker's Act in *Chamber of Commerce v. Whiting*,[6] with the conservative Justices voting in favor of upholding the Act, and the more liberal Justices dissenting.[7] While *Whiting* is a relatively narrow ruling based on specific statutory language, conservatives see a broader story emerging.[8] Kris Kobach, co-author of the anti-immigrant laws in Arizona and Alabama, has claimed that, "[a]lthough the Supreme Court's decision in *Whiting* did not directly address Arizona's SB 1070, it greatly boosts the prospects of success not only for that law, but also for immigration-enforcement bills in a number of states."[9] In the wake of oral arguments in the SB 1070 case, opponents of "attrition through enforcement" laws are concerned that Kobach may be right.[10]

With the *Arizona* case, the Court has the opportunity not only to substantially affect the conditions under which immigrants live in the United States, but also to significantly reshape the way principles of federalism and preemption apply in the immigration context. The Constitution's federal/state balance of power in the context of immigration law is at a crossroads.

Text and History: Immigration and Citizenship

Through several provisions, the Constitution delegates the power to regulate immigration and naturalization to the federal government. First, the Constitution provides that "Congress shall have

[5] *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011).
[6] 131 S. Ct. 1968 (2011).
[7] The vote was 5-3; Justice Elena Kagan recused.
[8] Kris Kobach, *Law and Border*, National Review, July 4, 2011, available at http://www.nationalreview.com/articles/271090/law-and-border-kris-w-kobach?pg=2
[9] *Id*.
[10] *See, e.g.*, Adam Liptak, *Justices Seem Sympathetic to Central Part of Arizona Law*, April 25, 2012, available at http://www.nytimes.com/2012/04/26/us/considering-arizona-immigration-law-justices-are-again-in-political-storm.html?_r=1&ref=arizonaimmigrationlawsb1070

Power To . . . . establish an uniform Rule of Naturalization . . . throughout the United States."[11] As James Madison explained, this provision was included in the Constitution to improve upon the flawed Articles of Confederation:

> The dissimilarity in the rules of naturalization has long been remarked as a fault in our system, and as laying a foundation for intricate and delicate questions. . . . The new Constitution has accordingly, with great propriety, made provision against them, and all others proceeding from the defect of the Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States.[12]

Significantly, Alexander Hamilton specifically used the federal power over immigration and naturalization to illustrate a constitutional authority granted to the federal government that would be "repugnant" and "contradictory" if exercised by a state.[13] Referring specifically to the "clause which declares that Congress shall have power 'to establish an UNIFORM RULE of naturalization throughout the United States,'" Hamilton explained that "[t]his must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE."[14]

Furthermore, because immigration laws affect foreign nationals within U.S. borders, they are also a component of foreign affairs. Congress has authority to "regulate Commerce with foreign Nations" under the Commerce Clause,[15] and the federal government has broad power under the Foreign Affairs Clauses.[16] As the Supreme Court has held, "the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution," its history, and precedent.[17] From our Constitution's very beginnings, then, it was

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[11] U.S. CONST. art. I., § 8, cl. 4.

[12] *Federalist* No. 42, 265-66, 267 (James Madison). *See also* THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand, ed.) (1911), Aug. 9, 1787 (statement of James Madison) (acknowledging that "the [National Legislature] is to have the right of regulating naturalization"); *id*., Aug. 13, 1787 (statement of Alexander Hamilton) ("The right of determining the rule of naturalization will then leave a discretion [sic] to the Legislature on this subject which will answer every purpose.").

[13] *Federalist* No. 32, at 194. *See also Hines v. Davidowitz*, 312 U.S. 52, 68 & n.22 (1941) (distinguishing between the more robust preemption of state regulation regarding the rights and liberties of aliens, where power has been exclusively granted to the federal government under the Constitution, and state regulation in areas "where the Constitution does not of itself prohibit state action, as in matters related to interstate commerce," such as "state pure food laws regulating the labels on cans").

[14] *Federalist* No. 32, 195 (emphasis in original).

[15] U.S. CONST. art. I, § 8, cl. 3.

[16] These Clauses include the power to declare war, found in Article I, Section 8, Clause 11, the Senate's power to advise and consent to the appointment of ambassadors, found in Article II, Section 2, Clause 2, and, finally, the presidential power to make treaties with the advice and consent of the Senate, found in Article II, Section 2, Clause 2.

[17] *Hines*, 312 U.S. at 62 & n.9 (noting how "[t]he importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field are clearly developed in Federalist papers No. 3, 4, 5, 42 and 80").

understood that the federal government's power over immigration would preempt efforts by the states to regulate immigration and naturalization.[18]

Of course, our constitutional structure of government also holds fast to the idea that, as James Madison explained, "[t]he powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."[19] This residual sovereignty in the states preserves state authority over the public health and safety of the states' citizens, unless the federal government has displaced state authority pursuant to the Supremacy Clause. Indeed, in the absence of a strong federal presence in the immigration field, some states directly regulated immigration and citizenship within their borders during the early years of the nation.[20]

However, the changes made to the Constitution by the Fourteenth Amendment underscored the federal government's exclusive power over immigration, naturalization, and citizenship. Drafted in 1866 and ratified in 1868, the Fourteenth Amendment made national and state citizenship a right of all persons born or naturalized in the United States and extended to all persons residing in the United States guarantees of equal protection of the laws and due process of law. Operating in tandem with the Naturalization Clause, the Fourteenth Amendment took away the power of states to decide whether persons—either native or foreign-born—would become citizens.[21]

While the Fourteenth Amendment clarified that the states had no power over citizenship, the debate over how the Constitution's principles of federalism interact with expressly delegated immigration authority has continued. Even in areas where the Constitution clearly delegates authority to the federal government, supporters of the recent wave of state immigration laws point to evidence that the drafters of our Constitution expected local law enforcement officers to carry out federal law—even if the states do not have the constitutional authority over the substance of the law. For example, Madison suggested in *Federalist* 45 that federal tax collection "will generally be made by the officers,

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[18] While the Constitution refers to "naturalization," not immigration specifically, the Supreme Court has long recognized that the Naturalization Clause also gives Congress exclusive authority to enact the "specialized regulation of the conduct of an alien before naturalization," and that "the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution." *Hines*, 312 U.S. at 62. Justice Scalia acknowledged during the argument over Arizona's SB 1070 that the Constitution's reference to "naturalization" has been interpreted to encompass immigration policy more generally. *Arizona*, tr. at 35.

[19] *Federalist* No. 45, 292-93.

[20] *See* Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (1996).

[21] Other aspects of the Fourteenth Amendment further extended Congress's power over immigration at the expense of the states. The Fourteenth Amendment specifically grants Congress the power to enforce its guarantees. U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."). Within two years of the Amendment's ratification, Congress used its enforcement power to protect the constitutional rights of resident aliens, rejecting charges that Congress was improperly "strik[ing] entirely at the police power of the States over the subject of immigration." Cong. Globe, 41st Cong., 2nd Sess. 1536 (1870) (Sen. Casserly). States could not use their police power "to rob" immigrants "of their ordinary civil rights." Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870). *See also In re Ah Fong*, 1 F. Cas. 213, 218 (C.C.D. Cal. 1874) (holding California statute regulating arrival of Chinese immigrants preempted by the federal Enforcement Act of 1870) (opinion of Field, J.).

and according to the rules, appointed by the several States." States even played a role in immigration law during the early years of our nation, with the federal government relying on state courts to "record applications for citizenship" and "to register aliens seeking naturalization."[22] The federal government, however, reads the Constitution as prohibiting states from second-guessing Congress's chosen method of how—and through whom—it implements its delegated powers.[23]

Federal Power, Immigrants' Rights, and the Supreme Court

In several early cases, the Supreme Court recognized the exclusive authority of the federal government on matters of immigration and naturalization. In *Chirac v. Chirac,*[24] for example, Chief Justice John Marshall declared that "the power of naturalization is exclusively in Congress," and held that a federal treaty between France and the United States defining the property rights of French immigrants residing in the United States preempted a Maryland law to the contrary. Six decades later, in *Chy Lung v. Freeman,* a unanimous Court affirmed that "[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belong to Congress, not the States."[25] In the Court's view, this specifically delegated federal authority, together with guarantees of the Fourteenth Amendment, sharply limit the authority of states to "deny [aliens] entrance and abode."[26] While *Chy Lung* was unanimous, in other cases a minority of Justices rejected this broad view of congressional power and insisted that each of the states "had the sole and exclusive right to judge for herself whether any evil was to be apprehended from the introduction of alien passengers from foreign countries" and "had a right to exclude them if she thought proper to do so."[27]

This tension between Justices who seek to preserve federal uniformity in the area of immigration and naturalization, and those who are just as, if not more, concerned with protecting state sovereignty, continues to this day. In modern cases, this tension has mainly played out in cases dealing with how the Court's rules for preemption of state law are applied in the immigration context. Justices favoring federal uniformity have argued for broad preemption of state immigration laws and imposed a burden on the states to show that state laws are harmonious with federal laws in this area. Justices favoring state sovereignty have insisted that it is the federal government's burden to show that state laws are incompatible with federal statutes.

For example, in 1941, in *Hines v. Davidowitz*, the Supreme Court struck down a Pennsylvania statute that required aliens to register with the state, carry a state identification card, and pay a nominal annual fee. Writing for a six-Justice majority, Justice Hugo Black stated that "specialized regulation of the conduct of an alien before naturalization is a matter which Congress must consider in discharging its constitutional duty 'To establish an Uniform Rule of Naturalization . . . .'"[28] The Court concluded that

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[22] *Printz v. United States*, 521 U.S. 898, 905-06 (1997) (discussing laws).
[23] Brief for the United States, *Arizona v. United States*, at 24.
[24] *Chirac v. Chirac*, 15 U.S. 259, 269 (1817).
[25] *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876).
[26] *Truax v. Raich*, 239 U.S. 33, 42 (1915).
[27] *Passenger Cases*, 48 U.S. 283, 468 (1849) (Taney, C.J., dissenting).
[28] 312 U.S. 52, 66 (1941).

"the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law." Dissenting in *Hines*, Justice Harlan Stone argued that the Court had erred by broadly interpreting federal immigration law to preempt state regulation in this area and by failing to recognize that "after entry, an alien resident within a state . . . is subject to the police powers of the state . . . ."[29] Stone argued that the Court should have followed "the long established principle of constitutional interpretation that an exercise by the state of its police power . . . is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be fairly reconciled or consistently stand together.'"[30]

In his opinion for a unanimous Court in the 1976 case *DeCanas v. Bica*,[31] Justice William Brennan attempted to stitch together the various threads of the majority and dissent in *Hines.* The Court reiterated that the "[p]ower to regulate immigration is unquestionably exclusively a federal power,"[32] which includes authority over who "shall be admitted," the "period they may remain," "regulation of their conduct before naturalization," and the "conditions of their naturalization."[33] At the same time, however, the Court explained that it "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted."[34] Reconciling these competing state-federal interests, the *DeCanas* Court noted that Congress had not enacted legislation addressing sanctions against employers who knowingly hire unauthorized migrants, and thus upheld California's statute imposing such sanctions as "harmonious with federal regulation."[35]

The "harmony" on the Court in *DeCanas* did not last long. Six years later, in *Toll v. Moreno*, the Court struck down a Maryland policy that denied in-state tuition benefits to certain classes of aliens resident in the state. Justice Brennan, again writing for the majority, reaffirmed the "preeminent role of the Federal Government with respect to the regulation of aliens within our borders," and found that a discriminatory state tuition policy was preempted in the absence of evidence that "Congress ever contemplated that a State . . . might impose discriminatory tuition charges and fees solely on account of the federal immigration classification."[36] In a long and spirited dissent, then-Justice William Rehnquist, joined by Chief Justice Warren Burger, criticized the majority for failing to apply a "presumption against preemption" and observed that "neither Congress' unexercised constitutional power over immigration and naturalization, nor its exercise of that power in passing the INA, precludes the States from enforcing laws and regulations that prove burdensome to aliens."[37]

The majority and dissenting opinions in *Toll* define the contours of the ideological dispute over the federal/state balance in immigration law that is playing out in *United States v. Arizona* today. In *Toll*,

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[29] *Hines*, 312 U.S. at 76 (Stone, J., dissenting).
[30] *Id.* at 80 (Stone, J., dissenting) (quoting *Sinnot v. Davenport*, 63 U.S. 227, 243 (1859)).
[31] 424 U.S. 351 (1976).
[32] *Id.* at 354.
[33] *Id.* at 358 n.6 (quoting *Takahashi*, 334 U.S. 410, 419 (1948).
[34] *Id.* at 355.
[35] *Id.* at 356.
[36] 458 U.S. 1, 10, 17 (1982).
[37] *Toll*, 458 U.S. at 27 (Rehnquist, J., dissenting).

Justice Brennan's majority opinion explained that *DeCanas* was the rare example of a statute that survived the broad rule of preemption of state regulation because "Congress *intended* that the States be allowed" to regulate the employment of illegal aliens.[38] In dissent, Justice Rehnquist read *DeCanas* broadly, arguing that it supported his view that the "federal power over immigration and naturalization" does not "preclude[e] the States from enforcing laws and regulations that prove burdensome to aliens."[39]

The question now is whether the Roberts Court will maintain the strong and exclusive federal power over immigration or move the law in line with then-Justice Rehnquist's arguments in dissent, holding that states have inherent power to protect their own borders and that federal courts should be hesitant to strike down state regulation as preempted by federal immigration law.

The Arizona Cases and the Roberts Court

One year ago, in *Chamber of Commerce v. Whiting*,[40] an ideologically divided 5-3 majority of the Roberts Court—Justice Elena Kagan recused—rejected claims by business and civil rights groups that Arizona's 2007 Legal Arizona Workers Act (LAWA) intrudes upon federal immigration policy regarding aliens' employment. While *Whiting* addressed a fairly narrow statutory question and did not fully address the broader constitutional questions about the respective roles of the federal and state governments with respect to immigration, the decision was closely watched for clues about how the Court would address the wider ranging attempts by states, including Arizona, to deal with perceived problems associated with illegal immigration. The clues given by the Court's majority were not encouraging to opponents of these state laws.

Whiting involved the meaning of the express preemption provision of the Immigration Reform and Control Act (IRCA), which prohibits state and local governments from enforcing "any law" that imposes punishment on those who hire unlawful aliens, but allows state and local governments to impose sanctions by "licensing and similar laws." The *Whiting* majority opinion, authored by Chief Justice John Roberts and joined by Justices Anthony Kennedy, Antonin Scalia, Clarence Thomas (in part), and Samuel Alito, read IRCA's "licensing" exception broadly and LAWA's sanctions narrowly, finding that Arizona's law imposing more onerous penalties than federal law does for hiring unlawful aliens "fall[s] squarely" within IRCA's "licensing" exception. In the majority's view, by narrowly drafting LAWA to closely follow federal law, "Arizona has taken the route least likely to cause tension with federal law."[41]

The dissenting opinions, authored by Justices Stephen Breyer (joined by Justice Ruth Bader Ginsburg) and Sonia Sotomayor, disagreed. They interpreted LAWA as conflicting with the federal regime for controlling employment of unauthorized migrants. As Justice Breyer wrote, Arizona's law would "undermin[e] Congress's efforts (1) to protect lawful workers from national-origin-based

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[38] *Toll*, 458 U.S. at 13 n.18.
[39] *Id.* at 27 (Rehnquist, J., dissenting).
[40] 131 S. Ct. 1968 (2011).
[41] *Id*. at 1987.

discrimination and (2) to protect lawful employers against erroneous prosecution or punishment."[42] In her separate dissent, Justice Sotomayor invoked Congress's express goal of "uniform enforcement of the immigration laws of the United States,"[43] and observed that it was implausible that "Congress intended for the 50 States and countless localities to implement their own distinct enforcement and adjudication procedures for deciding whether employers have employed unauthorized aliens."[44]

This Term, the Court is revisiting these issues in a far more significant case, *Arizona v. United States*, which stems from Arizona's controversial SB 1070 law. SB 1070 requires local law enforcement officers to verify the immigration status of any person whom they stop or detain whenever "reasonable suspicion" exists that the person might be illegally present in the United States, makes it a crime to be in the state without immigrant registration papers, makes it a crime for an undocumented immigrant to seek employment in Arizona, and authorizes police to make a warrantless arrest if they encounter someone they believe has committed a crime that could lead to deportation. These provisions were blocked from going into effect by a federal district court in Arizona because they were likely to be preempted by federal law, and the Ninth Circuit upheld the injunction.

In the Supreme Court, Arizona has sweepingly asserted that "Arizona officials have *inherent* authority to enforce federal law."[45] Taking a page from Justice Rehnquist's dissent in *Toll*, Arizona has argued that the Court should apply the presumption against preemption to uphold Arizona's regulation, making the point that SB 1070 and its focus on "attrition through enforcement" is "parallel" to federal law, and does not conflict "with any identifiable federal statute."[46] This argument was made again and again by former George W. Bush Solicitor General Paul Clement during oral argument: in SB 1070, Arizona adopted the federal standards as its own, and is merely enforcing federal law. Hence, Arizona argues that a clear and direct conflict between state and federal law—a key ingredient of any preemption claim—is missing.

Arguing for the United States, Solicitor General Donald Verrilli countered this argument by detailing the ways in which Arizona's decision to enact its own immigration policy runs up against federal immigration law and frustrates the Executive discretion that is necessary to balance the myriad concerns of immigration law, such as foreign affairs, deployment of limited resources, and humanitarian concerns. The United States also emphasized, in its briefs and at oral argument, the Constitution's text, history, and structure. Pushing back on Arizona's argument that states have a role to play in protecting their borders, the Solicitor General argued that the Constitution unmistakably gives the federal government exclusive power to regulate immigration and consider the foreign policy implications of how the nation treats non-citizens within its borders. General Verrilli argued that the enjoined provisions of SB 1070 were trumped by federal law under doctrines of field and conflict preemption.

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[42] *Id.* (Breyer, J., dissenting).
[43] *Id*. at 2003 (Sotomayor, J., dissenting) (quoting IRCA, § 115, 100 Stat. 3384) (internal quotation marks and alteration omitted).
[44] *Id*.
[45] Brief of Petitioners, *Arizona v. United States*, at 23.
[46] *Id*. at 26.

The Court's ruling in *Arizona v. United States* is expected before the end of June, and it could have a profound impact on how principles of federalism apply in the immigration context. A majority on the Court has never embraced the concept of inherent state authority to enforce immigration law or a presumption against preemption in the immigration context. Should it do so now, such a change in the baseline rules would effectively allow states, including Arizona, to choose how to enforce immigration law within their borders, unless and until Congress acted to overturn these state policy choices. While such congressional action is certainly possible, gridlock seems more likely in Congress on this issue for the foreseeable future, leaving states free to pursue policies such as Arizona's goal of achieving "attrition through enforcement." In its *Arizona* ruling, the Court could make the federal government work much harder to ensure that its myriad, weighty interests in immigration law and policy—from foreign affairs to due process—are respected in the states.

In a long line of rulings going back to the 19th Century, the Supreme Court has consistently held that the federal power over immigration and naturalization is plenary and exclusive, and that the role of states must be significantly limited to ensure a uniform federal policy. If the Court reverses course in *Arizona,* the Constitution's balance of power between federal and state governments on immigration policy, and the rights of immigrants within our borders, could be in for a major shift.