
ARIZONA’S S.B. 1070 AND FEDERAL
PREEMPTION OF STATE AND LOCAL
IMMIGRATION LAWS: A CASE FOR A
MORE COOPERATIVE AND
STREAMLINED APPROACH TO
JUDICIAL REVIEW OF SUBNATIONAL
IMMIGRATION LAWS

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I. INTRODUCTION

*Give me your tired, your poor
Your huddled masses yearning to breathe free
The wretched refuse of your teeming shore
Send these, the homeless, tempest-tost to me
I lift my lamp beside the golden door.*

—Poet Emma Lazarus, “The New Colossus,”¹
inscribed beneath the Statue of Liberty

*[U]nless the stream of their importation could be turned . . . they
will soon so outnumber us, that all the advantages we have will, in
my opinion, be not able to preserve our language, and even our*

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1. BETTE ROTH YOUNG, EMMA LAZARUS IN HER WORLD: LIFE AND LETTERS 3 (1997).

government will become precarious.

—Benjamin Franklin, on the threat posed by
German immigration to Pennsylvania, 1753²

Early in the morning of July 15, 2010, protestors began to assemble outside the Sandra Day O'Connor U.S. Courthouse on the sun-baked streets of downtown Phoenix. Nearly 400 individuals gathered, armed with megaphones, sunscreen, and a firm sense of resolve, to demonstrate their support or, more likely, opposition to Arizona's immigration law known as S.B. 1070.³

Senate Bill 1070, the Support Our Law Enforcement and Safe Neighborhoods Act,⁴ was signed into law by Arizona Governor Janice Brewer on April 23, 2010.⁵ The newly-enacted law, which added provisions to the Arizona law concerning the employment, law enforcement, and documentation of immigrants,⁶ has been labeled by pundits as "the nation's toughest bill on illegal immigration."⁷ The demonstration on July 15, one of dozens to occur throughout the nation that summer,⁸ was fueled by the first day of preliminary injunction hearings held by U.S. District Court Judge Susan Bolton, who was presiding over the seven lawsuits challenging S.B. 1070.⁹

While an abundance of legal issues exist with regard to the constitutionality of S.B. 1070, perhaps the most compelling is the analysis

2. EDITH ABBOTT, HISTORICAL ASPECTS OF THE IMMIGRATION PROBLEM 416 (1969).

3. The observations of the protests are based upon the personal recollections of the author, who was employed at the U.S. District Court for the District of Arizona the summer of 2010.

4. In this Note, unless otherwise specified, "S.B. 1070" refers to Senate Bill 1070 as modified by House Bill 2162, collectively describing the April 23, 2010 enactment as modified by the April 30, 2010 amendments.

5. Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Ariz. Sess. Laws 0113, (amended by 2010 Ariz. Sess. Laws 0211 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010))). See also Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1.

6. There is a fairly complicated lexicon and precise definitions for the terms "alien," "immigrant," and "immigration law." See Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1101(a)(3), (15), (17) (2006). Unless otherwise noted, this Note uses these terms in the manner defined in the INA.

7. See Archibold, *supra* note 5.

8. On May 1, 2010 alone, rallies protesting S.B. 1070 were held in over seventy U.S. cities, including "Los Angeles, Dallas, Chicago, Phoenix, Washington, Boston and New York." *Arizona Immigration Law Sparks Huge Rallies*, CBC NEWS (May 1, 2010, 7:32 PM) <http://www.cbc.ca/world/story/2010/05/01/arizona-immigration-law-protests.html>.

9. Alia Beard Rau, *Battle over SB 1070 Gets First Day in Court*, ARIZ. REPUBLIC, (July 16, 2010, 12:00 AM), <http://www.azcentral.com/arizonarepublic/news/articles/2010/07/16/20100716-arizona-immigration-law-court-hearing.html>.

of federal preemption of state and local immigration laws.¹⁰ Congress has enacted a detailed and complex statutory framework regulating immigration.¹¹ These immigration laws empower various federal agencies to administer and enforce the immigration laws.¹² Nevertheless, widespread dissatisfaction with the federal government's regulation and enforcement, or lack thereof, has prompted an exponential increase in state and municipal efforts to enact their own immigration laws, such as Arizona's S.B. 1070.¹³ While the Supreme Court has long ruled that the federal government has broad and exclusive authority to regulate immigration, it has also concluded that not "every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised."¹⁴

Over time, the Supreme Court has formulated a three-pronged approach to analyze whether there is federal preemption of subnational immigration laws: express preemption, implied field preemption, and implied conflict preemption.¹⁵ Though detailed, this approach leaves much to be desired. The application of the two types of implied preemption has been inconsistent. The consequence is that an unpredictable approach to the

10. The author recognizes and is sensitive to the abundance of discrimination and social justice issues raised by S.B. 1070. The dangers of unjust enforcement of the law are apparent. *See, e.g.,* Randal C. Archibold, *Arizona Law is Stoking Unease Among Latinos*, N.Y. TIMES, May 28, 2010, at A11 (chronicling incidents of racial profiling of Latinos in Arizona and its possible augmentation under S.B. 1070). However, this Note is concerned with the legal issue of federal preemption raised by S.B. 1070. The political and social justice issues raised by S.B. 1070 are largely beyond the scope of this inquiry.

11. This web of federal immigration law is largely present in the INA and supplemented with later congressional enactments such as the Immigration Reform and Control Act of 1986 ("IRCA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C. and 18 U.S.C.).

12. *See supra* note 11.

13. State and local attempts to regulate immigration issues have vastly increased over the last decade. In 2005, 300 bills pertaining to immigration were introduced in state legislatures, and thirty-eight were enacted. *2009 State Laws Related to Immigrants and Immigration January 1–December 31, 2009*, NAT'L CONFERENCE OF STATE LEGISLATURES (Dec. 1, 2009), <http://www.ncsl.org/default.aspx?tabid=19232>. In 2009, these numbers increased more than five-fold: approximately 1500 bills pertaining to immigration were introduced. *Id.* From these, 222 laws were enacted, and 131 resolutions were adopted. *Id.*

14. *De Canas v. Bica*, 424 U.S. 351, 355 (1976) (emphasis omitted), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, *as recognized in* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1974–75 (2011). Although *De Canas* was decided a decade before Congress enacted IRCA and IIRIRA, many aspects of the Court's analysis are still relevant to this inquiry.

15. *See infra* Part II.

preemption analysis of state and local immigration laws has emerged in the federal judiciary. Some courts, such as the Court of Appeals for the Third Circuit, have taken a broad approach to preemption by holding that local laws, such as city ordinances regulating immigrant housing and employment, are preempted by federal law.¹⁶ Other courts, such as the Court of Appeals for the Ninth Circuit, have taken a narrower approach by holding that a state law, requiring employers to participate in a program known as “E-Verify” to determine the immigration status of employees, survives the preemption analysis.¹⁷ Judges instead of democratically elected congressmen have taken over setting policy when it comes to state and local immigration laws. As one commentator observed in 2010, “The current divergent approaches to preemption analysis illustrate that courts have become de facto policy makers in the immigration context.”¹⁸

The preliminary injunction on the most controversial provisions of S.B. 1070 has been upheld by the Ninth Circuit and certiorari has been granted by the U.S. Supreme Court.¹⁹ This issue, however, deserves a different analysis. This Note proposes that the Supreme Court adopt a uniform framework for analyzing whether there is federal preemption of state and local immigration laws that focuses on whether the laws expressly conflict or would undermine federal immigration policy. Courts should take a more cooperative approach and avoid the temptation of adopting an overly broad preemption doctrine that would undermine local governments’ ability to enact legislation on issues where they have compelling interests based on their historical police powers. In instances of the vaguer implied conflict preemption, courts should determine whether local laws usurp the policies central to federal legislation: enforcing immigration laws uniformly and preventing discrimination.

Part II of this Note describes the historical power-sharing between federal and local regulation of immigration matters and the various shifts in the balance of power since the beginning of U.S. history. Part III examines the courts’ three-pronged approach to federal preemption of subnational immigration laws and the particularities of express preemption, implied field preemption, and implied conflict preemption. Part IV surveys the

16. *Lozano v. City of Hazleton*, 620 F.3d 170, 219–21 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011).

17. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 860, 866–67 (9th Cir. 2009), *aff’d sub nom. Chamber of Commerce of the U. S. v. Whiting*, 131 S. Ct. 1968 (2011).

18. Maria Marulanda, Note, *Preemption, Patchwork Immigration Laws, and the Potential for Brown Sundown Towns*, 79 *FORDHAM L. REV.* 321, 360 (2010).

19. *United States v. Arizona*, 641 F.3d 339, 344 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (U.S. Dec. 12, 2011) (No. 11-182).

inconsistent application of the preemption analysis by studying the Ninth Circuit's ruling in *Chicanos Por La Causa, Inc. v. Napolitano* and the Third Circuit's ruling in *Lozano v. City of Hazleton*. Part V advocates for the Supreme Court to adopt a more cooperative and streamlined approach to the preemption analysis. Part VI applies this proposed cooperative and streamlined approach to Arizona's S.B. 1070 and shows how it would result in more consistent judicial outcomes across the United States for courts reviewing the constitutionality of subnational immigration laws. Part VII concludes.

II. BALANCE OF POWER BETWEEN FEDERAL AND LOCAL IMMIGRATION LAW

Throughout U.S. history, there has been continuous flux in the balance of power between federal and local regulation of immigration. Initially, states, relying on their police powers to regulate the health, safety, and welfare of their citizens, played the leading role in enacting laws affecting noncitizens.²⁰ However, as the power of the federal government began to grow, Congress and the Supreme Court saw a need for, and therefore created, a strong, unified national policy on immigration.²¹ Today, due to widespread dissatisfaction with the federal government's lack of immigration enforcement, state and local municipalities are harkening back to the earlier trend of exercising their own authority by enacting their own immigration laws.²² A brief understanding of this history is necessary to provide context for the S.B. 1070 debate.

A. FIRST CENTURY OF STATE DOMINANCE

For roughly the first century of U.S. history, the federal government played virtually no part in the regulation of immigration.²³ Generally, the states exercised their police powers to control the movement of people across their borders, often with no regard as to whether they were controlling citizens or noncitizens.²⁴ During this early phase of U.S.

20. Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1566–67 (2008).

21. *See id.* at 1571–73 (describing the rise of the federal government's plenary power to regulate immigration beginning in 1875).

22. *See supra* note 13.

23. *See* Stumpf, *supra* note 20, at 1566 (“Apart from a constitutionally-dubious pair of federal statutes passed in 1798, state and local laws were the only form of immigration regulation during the nation's first century.” (footnote omitted)).

24. *Id.* at 1566–67 (citing DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 34 (2007)).

history, the states were primarily concerned with controlling the movement of convicts and other undesirable persons.²⁵

B. POST-1875 FEDERAL DOMINANCE

In 1875, the concurrent federal and state regulation of immigration came to a sudden end with the Supreme Court's ruling in *Chy Lung v. Freeman*.²⁶ The Court, concerned with foreign policy and the patchwork of state laws regulating immigrants, struck down a California statute regulating Chinese immigration and held that the federal government's power over immigration was supreme.²⁷ Soon thereafter, Congress began passing discriminatory and restrictive laws regulating immigrant access to the United States. Among those excluded were persons likely to become wards of the state and members of so-called "inferior" races, such as the Chinese.²⁸

At the end of the nineteenth century, the Supreme Court's ruling in two cases solidified the federal government's position of dominance in immigration regulation. In 1889, the Court held in *The Chinese Exclusion Case* that, as a function of sovereignty, the federal government has nearly unlimited authority to regulate immigration and exclude noncitizens seeking entry into the United States.²⁹ In 1893, the Court further extended this power in *Fong Yue Ting v. United States*, to include removal of noncitizens that were already within U.S. territory.³⁰ In contrast to prior

25. *Id.* at 1569 ("[T]hese early colonial and state laws constituted a network of border control regulation, reflecting choices about who may join the community and who should be excluded. They served to control the membership of the community by screening out those who were of an undesirable status, race, color, religion, or class." (footnote omitted)). See also Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1841 (1993) (discussing five major categories of state immigration laws prior to 1875: (1) the "regulation of the movement of criminals," (2) "public health regulation," (3) "regulation of the movement of the poor," (4) "regulation of slavery," and (5) "other policies of racial subordination").

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

27. *Id.* at 280 ("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," because "otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.").

28. See, e.g., Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214 (restricting entrance of those likely to become a public charge); Act of May 6, 1882, ch. 126, 22 Stat. 58 (halting the immigration of Chinese laborers for ten years).

29. *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889) ("[T]he United States, in their relation to foreign countries and their subjects or citizens are one nation . . . [and have] [t]he powers to . . . admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice . . .").

30. *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the

cases, the Court did not solely base this plenary federal power on the Constitution but also on the federal government's inherent authority derived from the sovereignty of nations.³¹

C. TWENTIETH CENTURY: FEDERAL DOMINANCE WITH STATE POWER-SHARING

1. Statutory Provisions Providing for Federal Dominance

In 1952, Congress took advantage of its plenary power to regulate immigration and enacted a comprehensive immigration policy in the form of the Immigration and Nationality Act ("INA").³² Although Congress frequently amends the INA to reflect the most current immigration law, it remains the basic federal statute dealing with immigration and nationality.³³ Among its numerous provisions, the INA sets forth the conditions under which a foreign national may be admitted to and remain in the United States.³⁴ The INA also provides for an alien registration system intended to monitor the entry and movement of aliens in the United States.³⁵ Various actions can subject an alien to removal proceedings, such as entering the United States without inspection, presenting fraudulent documents at a port of entry, violating a condition of admission, or engaging in other prohibited conduct.³⁶ Finally, the INA empowers federal agencies, such as the Department of Justice ("DOJ"), Department of Homeland Security ("DHS"), and Department of State to administer and enforce the immigration laws.³⁷

country . . . is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.").

31. See Marulanda, *supra* note 18, at 330 (observing that the Court no longer tried to "link the constitutional text to the federal government's absolute power over immigration"); Stumpf, *supra* note 20, at 1572 (noting that "the Court made no attempt to ground this federal power in the Constitution" but in the "ancient and freestanding power derived from the inherent sovereignty of nations, and therefore independent from the Constitution").

32. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

33. CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 2.03 (2011).

34. 8 U.S.C. §§ 1181–1182, 1184 (2006).

35. *Id.* §§ 1201(b), 1301–1306.

36. *Id.* §§ 1225, 1227–1229, 1229c, 1231.

37. See, e.g., *id.* §§ 1103–1104. "Prior to 2003, the Immigration and Naturalization Service ('INS'), which operated under the [DOJ], administrated both immigration services and immigration enforcement." *Lozano v. City of Hazleton*, 620 F.3d 170, 197 n.21 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011). However, on March 1, 2003, Congress abolished the INS with the Homeland Security Act. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.). The INS's functions were divided among "three separate agencies

In 1986, Congress amended and broadened the scope of the INA with the Immigration Reform and Control Act (“IRCA”) to include specific provisions regulating the employment of immigrants.³⁸ IRCA prohibits the employment of aliens not lawfully present and authorized to work in the United States.³⁹ IRCA also dictates specific procedures for employers to verify an individual’s eligibility to work as a lawful alien.⁴⁰ Employers who do not follow IRCA’s provisions face significant civil penalties and criminal penalties of increasing severity for frequent offenders of the statute.⁴¹ Important for the preemption analysis, IRCA expressly preempts states from enacting any civil or criminal penalties for employers who violate its provisions.⁴² However, IRCA also contains a savings clause which excludes licensing and similar laws from the prohibition on state laws sanctioning employers.⁴³ This brief statutory provision is at the center of the S.B. 1070 debate, as it opens the door for state and local regulation of the employment of aliens through legislative enactments within the states’ police powers.⁴⁴

In 1996, Congress enacted another component of federal immigration law with the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”).⁴⁵ IIRIRA deals with a variety of immigration issues “ranging

within the newly-created [DHS]: U.S. Citizenship and Immigration Services (‘USCIS’), which performs immigration and naturalization services, U.S. Immigration and Customs Enforcement (‘ICE’), which enforces federal immigration and customs laws, and U.S. Customs and Border Protection (‘CBP’), which monitors and secures the [United States’] borders.” *Lozano*, 620 F.3d at 197 n.21.

38. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

39. See 8 U.S.C. § 1324a(a)(1)(A) (“It is unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.”). IRCA defines “unauthorized alien” as an alien not “lawfully admitted for permanent residence” or “authorized to be so employed by [IRCA] or by the Attorney General.” *Id.* § 1324a(h)(3).

40. See *id.* § 1324a(b)(1)(A) (requiring employers to attest under penalty of perjury that they have verified an individual’s employment authorization and identity based on a list of acceptable documents); *id.* §§ 1324a(b)(1)(B)–(D) (listing acceptable forms of documentation to verify an individual’s employment authorization).

41. See *id.* § 1324a(e)(4)(A) (describing the civil penalties for employing unauthorized individuals); *id.* § 1324a(f)(1) (calling for criminal penalties for employers that engage in frequent violations of IRCA).

42. *Id.* § 1324a(h)(2).

43. *Id.* (“The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”). This savings clause for licensing and similar laws is an important preemption exception and the subject of the Ninth Circuit’s ruling in *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *aff’d sub nom.* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011).

44. See *infra* Part IV.A.

45. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208,

from border patrol to document fraud to benefits for aliens.”⁴⁶ IIRIRA expanded federal power in immigration with provisions that provided for the removal of certain classes of noncitizens without a hearing, created additional grounds of inadmissibility and deportability, reduced judicial review of immigration decisions, and redefined certain concepts such as “entry,” which determine whether a noncitizen faces a deportation hearing.⁴⁷

Since 1996, there has been a conspicuous lack of a federal update to the immigration regulation scheme. In 2007, then-President George W. Bush attempted reform with the Comprehensive Immigration Reform Act, which would have provided legal status and a path to citizenship for the twelve million or more illegal immigrants in the United States at that time through two new classes of visas and a guest worker program, while simultaneously providing funding for increased enforcement of the U.S.-Mexico border.⁴⁸ Due to partisan disputes, however, the bill failed to make it out of the Senate.⁴⁹ Since President Obama took office, he has yet to propose a new plan for restructuring the immigration policy. A previous approach failed on December 18, 2010 when Senate Republicans and a handful of Democrats thwarted the proposed DREAM Act, an overhaul that would have imparted legal status to hundreds of thousands of illegal immigrants who graduated high school and were attending college in the U.S. or in the U.S. military.⁵⁰ Many hope that the DREAM act can be revived in the 112th congressional session, especially with the support of the Republican-controlled House of Representatives.⁵¹ However, absent

110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C. and 18 U.S.C.).

46. Rachel Feller, Comment, *Preempting State E-Verify Regulations: A Case Study of Arizona's Improper Legislation in the Field of "Immigration-Related Employment Practices,"* 84 WASH. L. REV. 289, 297 (2009).

47. GORDON, MAILMAN & YALE-LOEHR, *supra* note 33, § 2.04[14][c].

48. Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. §§ 101–117 (border security provisions); *id.* §§ 401–414 (immigrant visa reform provisions); *id.* §§ 601–614 (provisions providing for the legalization of undocumented individuals). See also MICHAEL HOEFER, NANCY RYTINA & BRYAN C. BAKER, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2007, at 3 (2008), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2007.pdf; JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC Ctr., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 1 fig.1 (2011), available at <http://www.pewhispanic.org/files/reports/133.pdf>.

49. Robert Pear & Carl Hulse, *Immigration Bill Fails to Survive Senate Vote*, N.Y. TIMES (June 28, 2007), http://www.nytimes.com/2007/06/28/washington/28cnd-immig.html?_r=1&scp=4&sq=Comprehensive%20Immigration%20Reform%20Act%20of%202007&st=cse.

50. David M. Herszenhorn, *Senate Blocks Bill for Young Illegal Immigrants*, N.Y. TIMES (Dec. 18, 2010), <http://www.nytimes.com/2010/12/19/us/politics/19immig.html?scp=3&sq=DREAM%20act&st=cse>.

51. *Id.*

new legislation, the federal dominance provided for in the INA, and its amended provisions in IRCA, IIRIRA, and other congressional acts,⁵² represents the state of federal immigration regulation as of 2011.

2. Statutory and Judicial Provisions That Provide Some State Power-Sharing

Although the INA and subsequent federal immigration laws appear to create a system of immigration regulation that allocates power solely to the federal government, federal immigration law also envisions certain areas of cooperation in immigration enforcement among the federal, state, and local governments. For example, the INA permits “DHS to enter into agreements [with local municipalities] whereby appropriately trained and supervised state and local officials can perform certain immigration responsibilities.”⁵³ The INA also establishes “parameters for information-sharing between state and local officials and federal immigration officials.”⁵⁴ Even more indicative of power-sharing, the statute authorizes “state and local law enforcement officials to arrest [(but not deport)] aliens unlawfully present in the United States who have previously been convicted of a felony and

52. There are several other major acts of Congress which have amended the INA and supplemented the federal immigration scheme. *See* Immigration Act of 1990, Pub. L. No. 101-649 §§ 101, 601, 104 Stat. 4978, 4981, 5067–77 (codified as amended in scattered sections of 8 U.S.C.) (increasing the number of legal immigrants allowed into the United States each year, creating a lottery program that randomly assigned a number of visas to help immigrants from countries where the United States did not often grant visas, and removing homosexuality as grounds for exclusion from immigration.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 §§ 104, 110 Stat. 1214, 1219, 1221 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., 28 U.S.C., and 42 U.S.C.) (limiting the power of federal judges to grant habeas corpus relief unless a state court’s adjudication of the claim resulted in a decision that was: (1) “contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States,” or (2) “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding”); creating special review provisions for capital cases from states that enacted quality controls for the performance of counsel in the state courts in the post-conviction phase in state court); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, § 201-02, 311, 412, 115 Stat. 272, 278, 298–304, 350–52 (dramatically reducing the restrictions on law enforcement agencies’ ability to search telephone, e-mail communications, medical, financial, and other records; easing restrictions on foreign intelligence gathering within the United States; expanding the Secretary of the Treasury’s authority to regulate financial transactions, especially those involving foreign individuals and entities; and broadening the discretion of law enforcement and immigration authorities in detaining and deporting immigrants suspected of terrorism-related acts).

53. *United States v. Arizona*, 703 F. Supp. 2d 980, 988 (D. Ariz. 2010) (citing 8 U.S.C. § 1357(g)(1)–(9) (2006)), *aff’d*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (U.S. Dec. 12, 2011) (No. 11-182).

54. *Id.* (citing 8 U.S.C. § 1373).

deported.”⁵⁵ While these statutory provisions are not wholly indicative of the federal government giving away its power to regulate immigration, they represent a clear sign that not all immigration regulation and enforcement lie outside the hands of state and local municipalities.

The Supreme Court has also envisioned some degree of power-sharing in immigration regulation between the federal government and state and local governments. In 1976, the Court decided *De Canas v. Bica*, which upheld the constitutionality of a California statute that imposed penalties on employers who hired unauthorized immigrants.⁵⁶ While the Court’s holding is more important for its narrow approach to the preemption analysis, the Justices made a profound statement on power-sharing of immigration regulation: “the Court 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 by this constitutional power.”⁵⁷ The Court further stated, “the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”⁵⁸ Drawing this distinction between what is an “immigration law” versus what is a law that merely “affects aliens” allowed the Court to uphold the California statute that may have initially seemed like an immigration regulation exclusively controlled by the federal government. However, this statement is an oversimplification of the Court’s preemption analysis—there is a definitive, judicially created framework for analyzing the constitutionality of state and local laws affecting immigration, which we turn to next.

III. THE COURTS’ THREE-PRONGED APPROACH TO FEDERAL PREEMPTION ANALYSIS

The Supremacy Clause of the U.S. Constitution makes federal law “the supreme law of the land.”⁵⁹ As immigration is a quintessential federal issue,⁶⁰ Congress in the twentieth century enacted the INA, IRCA, IIRIRA,

55. *Id.* (citing 8 U.S.C. § 1252c).

56. *De Canas v. Bica*, 424 U.S. 351, 352–54 (1976).

57. *Id.* at 355.

58. *Id.*

59. U.S. CONST. art. VI, cl. 2.

60. The Supreme Court has long made clear that federal interests are paramount when it comes to immigration. As it explained in 1941: “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, was pointed out by the authors of *The Federalist* in 1787, and has since been given continuous recognition by this Court.” *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941).

and other federal laws to regulate, among other issues, the ingress and egress of immigrants and the conditions upon which they remain in the United States.⁶¹ When the Constitution gives Congress the authority to regulate an issue, state and local municipalities may not make their own laws on that issue because “the Constitution of its own force requires preemption of such state regulation.”⁶² However, when state and local municipalities enact laws which do not explicitly conflict with Congress’s laws on the matter, they can legislate on the same issue.⁶³ Often, these local laws are challenged in court as unconstitutional due to being preempted by federal law. The framework as of 2011 provides that federal law can preempt state law in three ways: express preemption, implied conflict, and implied field preemption.

The most straightforward way a state or local law is preempted is by express preemption. Express preemption occurs when a federal statute contains an explicit provision forbidding state or local municipalities from legislating on the same matter.⁶⁴ For example, IRCA contains an express preemption clause in the provision that sanctions employers for hiring unauthorized aliens. The provision preempts all state sanctions “other than through licensing and similar laws.”⁶⁵

The less explicit manner in which courts find subnational laws preempted is through implied preemption. Implied preemption has two subcategories: implied field and implied conflict preemption. Implied field preemption occurs when the federal legislative scheme is so comprehensive that there is no room for states to supplement the issue with their own laws.⁶⁶ “Congress’s intent to occupy a field can be inferred where a federal regulatory scheme is so pervasive,” that it is reasonable to infer “that Congress left no room for” supplementary state action.⁶⁷ It is also reasonable to infer Congress’s intent to occupy a field when an act of Congress “touches a field in which the federal interest is so dominant that

61. See *supra* Part II.C.

62. *De Canas*, 424 U.S. at 355.

63. See *id.* 355–56 (holding that a state law which indirectly dealt with immigration was not “an invalid state incursion on federal power”).

64. See GEORGENE VAIRO, 16 MOORE’S FEDERAL PRACTICE–CIVIL § 107.14[4][b][i] (2011) (“Often, Congress will include in a statutory scheme a preemption clause or clauses. In such an instance, preemption is express.”).

65. 8 U.S.C. § 1324a(h)(2) (2006).

66. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (describing implied field preemption as where “the depth and breadth of a congressional scheme . . . occupies the legislative field”).

67. *Lozano v. City of Hazleton*, 620 F.3d 170, 204 (3d Cir. 2010) (internal quotation marks omitted), *vacated*, 131 S. Ct. 2958 (2011).

the federal system will be assumed to preclude enforcement of state laws on the same subject.”⁶⁸

The second species of implied preemption is conflict preemption. It describes a situation in which “compliance with both state and federal law is impossible” or “when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁶⁹ “Impossibility” conflict preemption should be construed narrowly and “exists only where it is truly impossible to comply with both federal and state law.”⁷⁰ “Obstacle” conflict preemption calls for “a broader inquiry into the purposes underlying [the] federal statute, and whether a state law [is] an obstacle” to carrying out that purpose.⁷¹ Finally, in order for conflict preemption to apply, the conflict must be an actual conflict, not merely a hypothetical or potential conflict.⁷²

Added to this three-pronged analysis, the Supreme Court has articulated a level of deference to state and local laws that deals with traditional areas of state concern, such as the health, safety, and welfare of its citizens. When Congress legislates in a field which the States have traditionally occupied, the Court starts with the “assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress.”⁷³ The presumption against preemption does not apply, however, when the State regulates in an area where there has been a “history of significant federal presence.”⁷⁴ State and local immigration laws, depending on their content, have fallen on both sides of the equation.

68. *Id.* at 204 (internal quotation marks omitted).

69. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 115 (1992) (internal quotation marks omitted).

70. *Lozano*, 620 F.3d at 204.

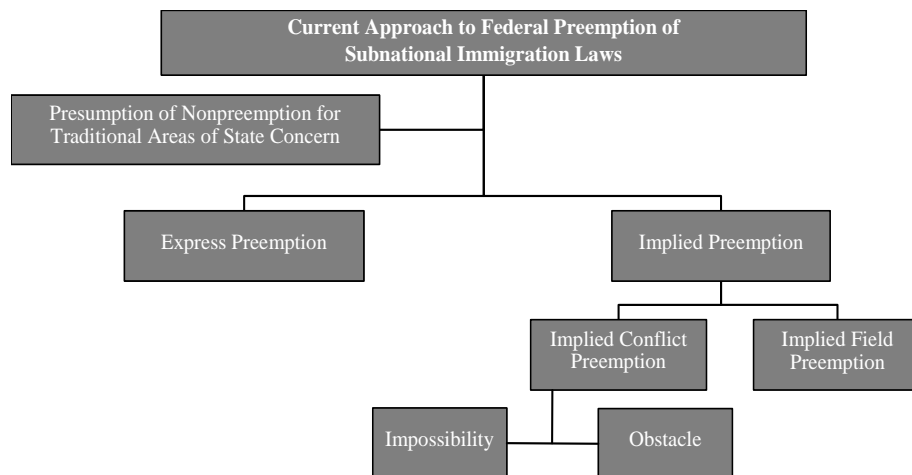
71. *Id.*

72. *Gade*, 505 U.S. at 110.

73. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). *See also* NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2 SUTHERLAND STATUTORY CONSTRUCTION § 36:9 (7th ed. 2009) (“There is a presumption against finding a federal preemption of state law in areas traditionally regulated by the states. Consistent with this approach, courts impose a higher standard to establish federal preemption in domestic relations; the state law must do major damage to the clear and substantial federal interests in order for the preemption doctrine to apply.” (footnote omitted)).

74. *United States v. Locke*, 529 U.S. 89, 108 (2000).

FIGURE 1. Visual Representation of the Courts' Approach to Federal Preemption of Subnational Immigration Laws as of 2011



IV. INCONSISTENT APPLICATION OF PREEMPTION ANALYSIS TO SUBNATIONAL IMMIGRATION LAWS

Although the preemption analysis has been applied by dozens of courts reviewing the constitutionality of state and local immigration regulations, the results have been inconsistent and unpredictable, and the outcome largely turns on finite provisions of the challenged statutes that either save or sacrifice its constitutionality.⁷⁵ This problem has been amplified by the sheer number of state and local laws enacted over the last decade affecting immigration and the numerous challenges these laws have faced. In 2010 alone, forty-six state legislatures and the District of Columbia enacted 208 laws and adopted 138 resolutions for a total of 346

75. Compare *Gray v. City of Valley Park*, No. 4:07CV00881, 2008 U.S. Dist. LEXIS 7238, at *2, *102 (E.D. Mo. Jan. 31, 2008) (upholding a city ordinance that sanctioned employers for hiring unauthorized aliens), *aff'd*, 567 F.3d 976 (8th Cir. 2009), with *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 865, 869-70 (N.D. Tex. 2008) (overturning a city ordinance similar to that in *Gray*, except that the ordinance sanctioned landlords rather than employers), and *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 518-21 (M.D. Penn. 2007) (invalidating a similar city ordinance as preempted by IRCA), *vacated, in part, aff'd, in part*, 620 F.3d 170 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011).

state regulations on immigration-related issues.⁷⁶ In the context of S.B. 1070, similar omnibus state laws concerning law enforcement, employment, and identification of immigrants were proposed in six other state legislatures besides that of Arizona in 2010.⁷⁷ With challenges to these laws surely imminent, the district courts need further guidance on how to apply the three-pronged preemption analysis. If the state law or city ordinance is not expressly preempted by the federal statute, the district courts are left to examine the challenged law using implied field or implied conflict preemption. This examination requires the district courts to determine whether: (1) there is no room for states to supplement the issue with their own laws; (2) the state law is impossible to follow while complying with federal law; or (3) the state law stands as an obstacle to the goals of Congress. This is a daunting task that requires a clearly delineated approach in order to achieve a consistent and just outcome. However, rulings by the U.S. Courts of Appeals over the last three years, suffering from the ambiguity of the three-prong standard, have articulated both broad and narrow approaches to applying the preemption doctrine.

A. THE NINTH CIRCUIT'S NARROW APPROACH IN *CHICANOS POR LA CAUSA, INC. v. NAPOLITANO*

In March 2009, the Ninth Circuit became the first federal appellate court in decades to weigh in on the issue of subnational regulation of immigrants in the context of employment in *Chicanos Por La Causa, Inc. v. Napolitano*.⁷⁸ The lawsuit was a facial challenge to the Legal Arizona Workers Act ("LAWA") enacted by the Arizona legislature in July 2007.⁷⁹

76. *State Laws Related to Immigration and Immigrants*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=19897> (last updated Feb. 22, 2012).

77. These six states include

South Carolina, Pennsylvania, Minnesota, Rhode Island, Michigan and Illinois. South Carolina HB 4919 was introduced by Representative Eric Bedingfield on April 29 and SB 1446 by Senator Grooms on May 13. Pennsylvania HB 2479 was introduced by Representative Daryl Metcalfe on May 5. Minnesota HB 3830 was introduced by Representative Steve Drazkowski on May 6. Rhode Island HB 8142 was introduced by Rep. Palumbo on May 18. Michigan HB 6256 was introduced by Representative Meltzer on June 10; SB 1388 was introduced by Senators McManus, Cropsey, Allen and Brown on June 15; and HB 6366 was introduced by Representative Agema on August 11. Illinois HB 6937 was introduced by Representative Ramey on November 3, 2010.

Ann Morse, *Arizona's Immigration Enforcement Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES <http://www.ncsl.org/?tabid=20263> (last updated July 28, 2011).

78. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *aff'd sub nom.* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011). The Supreme Court affirmed the Ninth Circuit's narrow preemption approach and upheld LAWA as constitutional in *Whiting*, 131 S. Ct. at 1972.

79. Legal Arizona Workers Act, ARIZ. REV. STAT. ANN. §§ 23-211 to 23-216 (Supp. 2011). A facial challenge is a legal challenge to a statute in which the plaintiff alleges that the legislation is

LAWA provides for strict sanctions of employers who hire illegal immigrants. These provisions call for the revocation of an employer's business license if the business is found to knowingly or intentionally employ illegal aliens.⁸⁰ Additional provisions mandate the use of an electronic verification system developed by the federal government known as E-Verify. Under federal law, an employer's use of E-Verify to check the immigration status of its employees is optional; under LAWA, the use of E-Verify is mandatory.⁸¹

LAWA, similar to S.B. 1070, was enacted in response to the massive influx of immigrants, mainly from Mexico and other Central and South American countries, which fueled the widespread belief that "illegal immigrants displace domestic workers, depress wages, and contribute to poor working conditions."⁸² Arizona has suffered a disproportionate amount of the burden with 400,000 Hispanic illegal immigrants present in the state in 2010 alone,⁸³ competing with domestic workers for jobs and social benefits in an economy in the depths of recession. The employer sanctions and mandatory use of E-Verify required by LAWA was the Arizona legislature's solution to these difficult issues.⁸⁴

In its preemption analysis, the Ninth Circuit determined that LAWA was not expressly preempted because it fell within IRCA's savings clause, which allows state and local municipalities to impose sanctions on

always, and under all circumstances, unconstitutional, and therefore void. Contrast this with an as-applied challenge, which alleges that the statute may be, in part, unconstitutional, in redress of a specific and particular injury. As the Supreme Court has stated, "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987), *rev'd on other grounds*, 505 U.S. 317 (1992).

80. ARIZ. REV. STAT. § 23-212(F)(2). *See also* Randall G. Shelley, Jr., *If You Want Something Done Right . . . : Chicanos Por La Causa v. Napolitano and the Return of Federalism to Immigration Law*, 43 AKRON L. REV. 603, 613-14 (2010) (discussing the two main aspects of LAWA).

81. ARIZ. REV. STAT. § 23-214. *See also* Shelley, *supra* note 80, at 613-14.

82. HELENE HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED: AMBIVALENT LAWS, *FURTIVE LIVES* 31 (2001) (internal quotation marks omitted) (discussing how the "decade-long effort to enact IRCA was based on" such beliefs).

83. PASSEL & COHN, *supra* note 48, 14 tbl.4. The Pew Hispanic Center ("PHC") is a project of the Pew Research Center, a nonpartisan "fact tank" based out of Washington D.C. that provides information on the issues, attitudes, and trends shaping America and the world. *Id.* at 7. The PHC notes that as of 2010, Hispanics (legal and illegal) represent 30 percent of Arizona's population, 23 percent of Hispanics ages eighteen to sixty-four are living in poverty, and 28 percent of all Hispanics in Arizona are without health insurance. *Demographic Profile of Hispanics in Arizona, 2010*, PEW HISPANIC CTR., <http://pewhispanic.org/states/?stateid=AZ> (last visited Mar. 25, 2012).

84. *See* Feller, *supra* note 46, at 302 (noting that the "Arizona State Legislature grappled with ways to reduce the number of undocumented workers," and "[o]ne solution that emerged was to require all employers to use E-Verify").

employers for violating “licensing and similar laws.”⁸⁵ By classifying LAWA as a “licensing law,” the court easily disposed of the express preemption issue.⁸⁶

The implied preemption analysis, however, was not resolved as easily. Plaintiffs argued that the LAWA provision mandating the use of E-Verify was preempted through implied conflict preemption because it “conflict[ed] with congressional intent to keep the use [of the program] voluntary.”⁸⁷ The court, however, disagreed and found that mandating the use of E-Verify was not against the purposes and objectives of Congress because “Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation.”⁸⁸ To support its position, the court cited the savings clause in IRCA to demonstrate that if Congress really wanted to preempt states from legislating on an issue, Congress has no qualms about doing so explicitly.⁸⁹ This reasoning has been described and advocated by commentators as the “narrow” approach to the preemption analysis because it narrowly defines the field in which Congress legislates (constraining implied field preemption) and narrowly defines the purposes and objectives of Congress (restricting the application of implied conflict preemption).⁹⁰

The court’s reasoning for implied preemption, however, was circular and unclear. In support of its finding that there was no implied conflict preemption, the court stated that Congress did not expressly prohibit states from mandating E-Verify, which means that it is not against Congress’s objective to have states mandate the use of E-Verify. To find that there is no express preemption and then use that as evidence that there is no

85. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 864 (9th Cir. 2009) (quoting IRCA’s savings clause in 8 U.S.C. § 1324a(h)(2)), *aff’d sub nom.* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011).

86. The court, in a very succinct manner, declared that “[t]he district court [] correctly held that [LAWA] is a ‘licensing’ measure that falls within the savings clause of IRCA’s preemption provision.” *Id.* at 866.

87. *Id.*

88. *Id.* at 867.

89. *Id.*

90. See, e.g., Mark S. Grube, Note, *Preemption of Local Regulations Beyond Lozano v. City of Hazleton: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391, 412 (2010) (stating that courts should take care in not striking down every subnational law concerning “immigration because an overly expansive view of field preemption could result in localities’ losing the ability to regulate in areas where they have a strong interest”); Marulanda, *supra* note 18, at 349 (stating that “the Ninth Circuit performed a narrow preemption analysis to approach [LAWA]” in *Chicanos Por La Causa*); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 596 (2008) (claiming that courts apply the preemption analysis to subnational efforts at immigration regulation too broadly, instead of approaching potential preemption questions narrowly, “thwart[ing] what should be an ongoing dialogue about these issues at the state and local levels”).

implied conflict preemption, essentially, allows courts to use the same evidence as support for both major prongs of the preemption analysis.

Granted, Congress could have intended to allow states to mandate the use of E-Verify, and Congress's lack of an express preemption provision—that is, lack of an express prohibition against mandating the use of E-Verify—could be, as the Ninth Circuit claims, direct evidence of this intent. However, there are other possible explanations for Congress omitting such a preemption provision. Perhaps the drafters of the law needed to omit a preemption provision as a political compromise to get the bill passed. Maybe Congress simply overlooked the necessity of including a preemption provision because it did not foresee that states would take an optional federal program like E-Verify and make it mandatory. Either way, the court seems to have conflated its rationale for express and implied conflict preemption. This outcome, however, is not the result of the court being biased or political, but rather it is the fault of an imprecise and ambiguous standard which allows such a result.

B. THE THIRD CIRCUIT'S BROAD APPROACH IN *LOZANO V. CITY OF HAZLETON*

In September 2010, the Third Circuit dealt with a similar, albeit more comprehensive, subnational immigration law but struck it down as preempted in *Lozano v. City of Hazleton*.⁹¹ The lawsuit challenged two ordinances enacted by the City of Hazleton, Pennsylvania, which attempted to regulate the employment of unauthorized aliens and restrict rental housing for those lacking lawful immigration status.⁹²

The Illegal Immigration Relief Act Ordinance (“IIRAO”) asserted that it was unlawful for any business to “recruit, hire for employment, or continue to employ or permit, dispatch, or instruct any person who is an unlawful worker” within Hazleton.⁹³ The ordinance “also provides for public monitoring, prosecution[,]sanctions,” and “a private cause of action against businesses that employ unlawful workers.”⁹⁴ The IIRAO also has a

91. *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011). The Supreme Court granted certiorari, vacated the Third Circuit's holding in *Lozano*, and ordered the Third Circuit to reconsider the constitutionality of the Hazleton ordinances in light of the Supreme Court's ruling upholding LAWA in *Chamber of Commerce of United States v. Whiting*, 131 S. Ct. 1968 (2011).

92. *Id.* at 177.

93. *Id.* at 177–78 (internal quotation marks and emphasis omitted) (quoting HAZLETON, PA., ORDINANCE 2006-18 § 4A (2006)).

94. *Id.* at 178–79 (quoting HAZLETON, PA., ORDINANCE 2006-18 § 4B, E (2006)).

“harboring” provision which makes it “unlawful for any person or business entity that owns a dwelling unit in the City to harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law.”⁹⁵

The second contested law, the Rental Registration Ordinance (“RO”), “operat[ed] in conjunction with the anti-harboring provisions of the IIRAO.”⁹⁶ The RO required that any prospective occupant of rental housing over the age of eighteen must pay a \$10 fee and submit certain documents, including “[p]roper identification showing proof of legal citizenship and/or residency to Hazleton’s Code Enforcement Office.”⁹⁷ Landlords were “prohibited from allowing anyone over the age of eighteen to rent or occupy a rental unit” without such a permit.⁹⁸

The Hazleton ordinances were enacted in response to similar immigration woes as those experienced by Arizona. After the terrorist attacks of September 11, 2001, thousands of immigrants from New York City, legal and illegal, fled to small towns like Hazleton seeking jobs and opportunities.⁹⁹ The population of Hazleton skyrocketed from 23,000 in 2000 to over 30,000 in 2005.¹⁰⁰ In addition to social and educational services being strained, an increase in crime was attributed to immigrants, which led the city council to enact the two ordinances.¹⁰¹ As the IIRAO statement of purpose declares, “[i]llegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, contribute[s] to other burdens on public services, increasing their cost and diminishing their availability to legal residents, and diminishes our overall quality of life.”¹⁰² “In response to these concerns,” the ordinance:

[S]eeks to secure to those lawfully present in the United States and this

95. *Id.* at 179 (internal quotation marks omitted) (quoting HAZLETON, PA., ORDINANCE 2006-18 § 5A (2006)).

96. *Id.* at 179–80 (quoting HAZLETON, PA., ORDINANCE 2006-13 § 7b (2006)).

97. *Id.* at 180 (internal quotation marks omitted) (quoting HAZLETON, PA., ORDINANCE 2006-13 § 7b (2006)).

98. *Id.* (quoting HAZLETON, PA., ORDINANCE 2006-13 § 7b (2006)).

99. Rachel E. Morse, Book Review, *Following Lozano v. Hazleton: Keep States and Cities Out of the Immigration Business*, 28 B.C. THIRD WORLD L.J. 513, 529 (2008) (reviewing PHILIPPE LEGRAIN, IMMIGRANTS: YOUR COUNTRY NEEDS THEM (2007)).

100. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 484 (M.D. Penn. 2007), *vacated, in part, aff’d, in part*, 620 F.3d 170 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011).

101. Morse, *supra* note 99, at 529. “After a murder thought to have been committed by illegal immigrants, the Hazleton city council” enacted the ordinances “aimed at driving out the unwelcome residents of Hazleton. Mayor Louis J. Barletta broadcast his intent to make Hazleton ‘one of the toughest places in the United State for illegal immigrants.’” *Id.* at 529–30.

102. *Lozano*, 620 F.3d at 177 (quoting HAZLETON, PA., ORDINANCE 2006-18 § 2C (2006)).

City, whether or not they are citizens of the United States, the right to live in peace free from the threat [of] crime, to enjoy the public services provided by this city without being burdened by the cost of providing goods, support and services to aliens unlawfully present in the United States, and to be free of the debilitating effects on their economic and social well being imposed by the influx of illegal aliens to the fullest extent that these goals can be achieved consistent with the Constitution and Laws of the United States and the Commonwealth of Pennsylvania.¹⁰³

In its IIRAO preemption analysis, the Third Circuit, like the Ninth Circuit in *Chicanos Por La Causa*, determined that the ordinance concerned the regulation of employment, which is the subject of a historic police power, so it “must benefit from the presumption against preemption.”¹⁰⁴ After briefly mentioning the presumption of nonpreemption, the court proceeded to undergo its standard preemption analysis.¹⁰⁵

In its express preemption analysis, the court found, similar to the Ninth Circuit’s finding in *Chicanos Por La Causa*, that the IIRAO was not expressly preempted because it fell within IRCA’s savings clause, which allows state and local municipalities to impose sanctions on employers for violating “licensing and similar laws.”¹⁰⁶ By classifying the IIRAO as a “licensing law,” the court quickly dismissed the express preemption issue.¹⁰⁷

The implied preemption analysis, yet again, was not resolved as easily. Plaintiffs argued that the IIRAO was preempted through implied conflict preemption because “[its] employment provisions stand as an obstacle to the accomplishment and execution of federal law.”¹⁰⁸ In response, the court went to great lengths to define the purposes of Congress in enacting IRCA, which it described as achieving a “careful balance” among the policy objectives of: (1) effectively deterring employment of unauthorized aliens, (2) minimizing the resulting burden on employers, and (3) protecting authorized aliens and citizens perceived as “foreign” from discrimination.¹⁰⁹

In response to these articulated objectives, the court described four

103. *Id.* (quoting HAZLETON, PA., ORDINANCE 2006-18 § 2F (2006)).

104. *Id.* at 206–07.

105. After only a one-paragraph discussion of the presumption for nonpreemption for areas within the states’ historic police powers, the court proceeded with its preemption analysis. *Id.* at 203.

106. *Id.* at 207–10.

107. *Id.*

108. *Id.* at 210.

109. *Id.* at 211.

ways in which the IIRAO violates these objectives. First, it claims that the IIRAO “significantly increases employer burden by creating a separate and independent adjudicative system for determining whether an employer is guilty of employing unauthorized aliens.”¹¹⁰ Since IRCA requires that a complaint about unlawful hiring have a “substantial probability of validity,” and the IIRAO allows investigation of any complaint against an employer regardless of the merit, the court argued that this difference will present a burden on employers who must “worry about two separate systems of complaints, investigations, prosecutions, and adjudications.”¹¹¹ However, the lower standard for investigating complaints provided by the IIRAO may not be as great of a burden on employers as the court predicts. Granted, employers in Hazleton may have to respond to more complaints as a result of the lower IIRAO standard, but the difference in the federal and local standard does not force employers to “comply with both”—as long as the IIRAO standard is met, which allows investigation of all complaints of unlawful hiring, the IRCA standard, which requires a “substantial probability of validity,” is also met. Nevertheless, the court engaged in a thorough analysis which logically argues that the IIRAO contravenes Congress’s purpose in minimizing the burden on employers.

The next reason cited by the court is that the IIRAO “contravenes congressional objectives” by essentially making the E-Verify system, which employers can use to verify the immigration status of their employees, mandatory instead of optional.¹¹² However, less than two years earlier, the Ninth Circuit held in *Chicanos Por La Causa* that LAWA, Arizona’s law mandating the use of E-Verify, was permissible because it merely supplemented IRCA and did not conflict with it.¹¹³ The court recognized the Ninth Circuit’s position but dismissed it as “fail[ing] to afford proper weight to the purposes underlying Congress’s decision to retain E-Verify as a voluntary program.”¹¹⁴ The court based its decision on the same legislative history and statutory background as the Ninth Circuit but came to a different conclusion. This is another example of how the standard as of 2011 for implied conflict preemption is too ambiguous, as it allows different circuit courts to reach different conclusions on very similar issues. Although it is common for different circuit courts to reach different conclusions in all areas of the law, the primary reason the Supreme Court

110. *Id.* at 212.

111. *Id.* at 211, 213.

112. *Id.* at 214.

113. *See supra* text accompanying notes 87–89.

114. *Lozano*, 620 F.3d at 216.

grants certiorari is to resolve such circuit conflicts. Hence, it is time for the Supreme Court to step in and articulate a clarified standard to resolve this particular conflict on preemption of subnational immigration laws.

The third reason cited by the court is that IIRAO “coerces employers to verify the work authorization of independent contractors, even though Congress purposely excluded independent contractors from IRCA’s verification requirements” because it would increase the burdens on businesses.¹¹⁵ This position by the court is supported by a 2010 ruling by the Court of Appeals for the Tenth Circuit, the Code of Federal Regulations, and the IRCA’s legislative history.¹¹⁶ However, the court fails to acknowledge here that because employment is a traditional area of local concern, it must start with the presumption of nonpreemption and “assume that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear* and *manifest* purpose of Congress.”¹¹⁷ If the court had begun its analysis by engaging in a more thorough nonpreemption evaluation, it probably would have been held that it was the “clear and manifest purpose” of Congress to exclude independent contractors from the work authorization requirement. However, without such analysis, the court is yet again reaching an unpredictable result because of the leeway given to it in the preemption standard as of 2011.

Finally, the court found that the IIRAO contravened Congress’s purpose of protecting authorized aliens and citizens perceived as “foreign” from discrimination because the ordinance “fail[ed] to balance its [employer] sanctions with antidiscrimination protections.”¹¹⁸ As the court noted, the legislative history of the IRCA clearly shows that to be consistent with federal law, subnational entities that use regulatory enactments to sanction employers who employ unauthorized aliens *must impose sanctions of equal severity* on employers found guilty of discriminating.¹¹⁹ This reason is perhaps the best-supported and most thorough reason that the court gives for the IIRAO failing under implied

115. *Id.*

116. *See* Chamber of Commerce of the U.S. v. Edmondson, 594 F.3d 742, 767 (10th Cir. 2010) (citing 8 C.F.R. § 274a.1(f), (g) (2011)) (“Employers are not required to verify the work eligibility of independent contractors, which would increase the burdens on business and could lead to increased employment discrimination.”); H.R. REP. NO. 99-682, pt. I, at 11 (1986) (IRCA is not meant to impose sanctions “in the case of casual hires (i.e. those that do not involve the existence of an employer/employee relationship)”).

117. *Lozano*, 620 F. 3d at 203 (emphasis added) (internal quotation marks omitted).

118. *Id.* at 217.

119. *Id.* at 218. *See also* H.R. REP. NO. 99-682, pt. II, at 4 (1986) (“[I]f there is to be sanctions enforcement and liability there must be an equally strong and readily available remedy if resulting employment discrimination occurs.”).

obstacle conflict preemption. However, it still suffers from the same infirmity as the previous reason for failing to start with an actual presumption of nonpreemption and evaluating whether the proffered antidiscrimination provision was truly a “clear and manifest” purpose of Congress.¹²⁰ Admittedly, the legislative history provides that avoiding racial discrimination is a “clear and manifest” purpose of Congress in enacting the IRCA. However, without this analysis, the court’s evaluation is incomplete. The court, while reaching the seemingly acceptable result of finding the ordinance preempted, fails to take account of the state and local municipality’s strong interest in restricting employment of unauthorized workers. While this error seems harmless given that a logical result was ultimately reached, there is no guarantee that other courts will reach the same result without analyzing this important consideration.¹²¹

This reasoning has been described and criticized by commentators as the “broad” approach to preemption analysis, because it broadly defines the field in which Congress legislates (increasing implied field preemption) and broadly defines the purposes and objectives of Congress (increasing the application of implied conflict preemption).¹²²

Furthermore, while district courts are obligated to follow the law of their respective circuits, circuit courts are clearly not bound by each other’s rulings, as evidenced on this topic by the divergent approaches taken by the Third Circuit and the Ninth Circuit on similar (albeit different in scope) issues of the subnational imposition of employer sanctions. Without more national uniformity, subnational immigration laws will be upheld in certain

120. See *supra* text accompanying note 117.

121. The reader should also note that the court held that the housing provisions in the RO were preempted under implied conflict preemption. See *Lozano*, 620 F.3d at 221. However, this Note does not discuss the court’s preemption analysis of the RO because it is less thorough and mirrors the analysis of preemption of the IIRAO. Also, the court here found that housing is not a traditional area of state concern, so it did not start with a presumption of nonpreemption, which makes the court’s analysis of the RO less applicable to S.B. 1070, which concerns law enforcement and employment, which are traditional areas of state concern. See *id.* at 220 (“Through its housing provisions, Hazleton attempts to regulate residence based solely on immigration status. Deciding which aliens may live in the United States has always been the prerogative of the federal government. Hazleton purposefully chose to enter this area of significant federal presence. Accordingly, we will not presume nonpre-emption.” (internal quotation marks and citation omitted)).

122. See, e.g., Grube, *supra* note 90, at 412 (stating that courts should take care in not striking down every subnational law concerning “immigration because an overly expansive view of field preemption could result in localities’ losing the ability to regulate in areas where they have a strong interest”); Marulanda, *supra* note 18, at 344 (stating that when analyzing the claims in *Lozano*, the Court “subscribed to a broad preemption inquiry”); Rodriguez, *supra* note 90, at 596 (claiming that courts apply the preemption analysis to subnational efforts at immigration regulation too broadly, instead of approaching potential preemption questions narrowly, “thwart[ing] what should be an ongoing dialogue about these issues at the state and local levels”).

districts and struck down as preempted in others, leading to a patchwork of immigration laws, which is precisely what the Supreme Court cautioned against in the nineteenth century in *Chy Lung v. Freeman*.¹²³ Patchwork immigration laws would create the disastrous consequence of fifty or more versions of American immigration policy, which would be confusing and detrimental to the United States as a sovereign nation. As the Supreme Court articulated in 2001, “We recognize . . . the Nation’s need to ‘speak with one voice’ in immigration matters.”¹²⁴ As a foreign policy matter, overly-broad and discriminatory subnational immigration laws put the United States at risk of alienating other nations due to our treatment of their citizens.¹²⁵ Finally, from a federalism perspective, the standard as of 2011 fails to adequately recognize and protect the states’ interests. A clearer and more uniform standard is necessary, which is the subject to which we now turn.

V. PROPOSED COOPERATIVE AND STREAMLINED APPROACH TO PREEMPTION ANALYSIS

The Supreme Court has a unique opportunity to address the deficiencies in the preemption analysis with its grant of certiorari for *United States v. Arizona*.¹²⁶ The concerns about patchwork immigration laws, foreign policy, and state sovereignty will inevitably be juxtaposed against the legal principle of *stare decisis* and political and constitutional concerns of racial discrimination. The best method to balance these interests would be for the Court to adopt a more cooperative and streamlined approach to the preemption of subnational immigration laws that respects Congress’s goals of enforcing immigration laws uniformly and preventing discrimination while also allowing states to legislate in areas that are derived from their historic police powers.¹²⁷ The mechanics

123. See *supra* text accompanying notes 26–27.

124. *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001).

125. See *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (“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,” because “otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.”). See also Mike Watkiss, *Mexican President denounces SB-1070 before U.S. Congress*, AZFAMILY.COM (May 20, 2010), <http://www.azfamily.com/news/national/Mexican-President-Felipe-Calderon-denounces-SB-1070-before-Congress-94543219.html> (describing Mexican President Felipe Calderón’s opposition to S.B. 1070 in front of Congress).

126. *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010), *aff’d*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (2011) (No. 11-182).

127. This cooperative approach draws its inspiration from Cristina Rodriguez’s article, *The Significance of the Local in Immigration Regulation*, and refines her immigration regulation thesis. See Rodriguez, *supra* note 90. Her proposal is a “functional account” that calls for abandoning the federal

of this approach involve preserving the express preemption facet of the three-pronged approach, while streamlining the implied field and implied conflict prongs, mandating antidiscrimination provisions, and giving teeth to the presumption of nonpreemption for traditional areas of state concern.

A. PRESERVATION OF EXPRESS PREEMPTION

“If it’s not broken, don’t fix it.” While simply stated, this mantra holds true in many contexts, including the judicial analysis for preemption of subnational immigration laws. The difficulties associated with an ambiguous preemption standard are not derived from the express preemption prong of the analysis.

When a federal statute contains an explicit provision prohibiting state or local municipalities from legislating on a matter, the state legislatures have clear guidance from Congress on what they can and cannot do. For example, IRCA’s savings clause, which preempts all state employer sanctions “other than through licensing and similar laws,”¹²⁸ also operates as an express preemption clause, because it alerts state legislatures that enacting laws that impose sanctions *other* than those for licensing and similar laws have a distinct possibility of being challenged as preempted and declared unconstitutional.

Furthermore, courts have little difficulty applying the express preemption prong of the three-pronged analysis. As seen in *Lozano* and *Chicanos Por La Causa*, the Third and Ninth Circuits succinctly employed the maxims of statutory interpretation to determine: (1) whether the federal statute has an express preemption provision; (2) what type of subnational laws are preempted by such a provision; and (3) whether the state law in question is the type identified as expressly preempted in the federal statute. In both cases, the court determined that: (1) IRCA’s savings clause operates as an express preemption provision; (2) the provision preempts all but “licensing and similar laws”; and (3) LAWA and IIRAO are licensing laws and therefore not expressly preempted.¹²⁹

Finally, express preemption serves Congress’s goal of uniformly

exclusivity principle (discussed in Part II.B–C) in favor of new lawmaking norms which command Congress (rather than the Supreme Court) to adopt a cooperative approach by including immigration regulation on the list of “quintessential[] state interests.” *Id.* at 571.

128. 8 U.S.C. § 1324a(h)(2) (2006).

129. See *Lozano v. City of Hazleton*, 620 F.3d 170, 207–08 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011); *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 866 (9th Cir. 2009), *aff’d sub. nom* *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011).

enforcing immigration laws, which alleviates the concern of patchwork immigration regulations and the foreign policy issues associated with it. If Congress passes legislation in an area of immigration law and unambiguously includes in the statute a provision preempting states from supplementing or passing identical laws, then there is no room for debate. Congress has spoken on the issue, and the Supremacy Clause takes care of the rest.¹³⁰

B. ABANDONMENT OF IMPLIED FIELD PREEMPTION IN THE IMMIGRATION CONTEXT

The implied field and implied conflict prongs of the preemption analysis have been more difficult for courts to apply. It is beneficial for a judicial standard to have some degree of flexibility so that courts may use it in a variety of factual and legal circumstances.¹³¹ However, if a standard is too flexible and too ambiguous, then lower courts have little guidance on how to apply it. Issues will be decided on a case-by-case basis, and outcomes will vary enormously by jurisdiction.¹³² The implied prongs of the standard for preemption are so ambiguous, it has spawned scholarly debate as to which approaches, broad or narrow, are more fair, just, and feasible.¹³³

A clearer approach would first require reexamining implied field preemption. With the complex statutory framework of the INA, IRCA, and IIRIRA, it seems at first glance that the federal legislative scheme is so

130. The intent of Congress should not be taken lightly in the preemption analysis. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) (stating that “[t]he purpose of Congress is the ultimate touchstone” in determining preemption. (internal quotation marks omitted)); VAIRO, *supra* note 64, at § 107.14[4][b][i] (“Whether federal law preempts state law depends on an analysis of congressional intent.”).

131. The Supreme Court has exhibited a trend of rejecting bright-line tests in favor of more flexible standards that can be applied by lower courts in a variety of circumstances. *See, e.g.*, Steven Seidenberg, *Standing by Its Flexible Standards: The Bilski Ruling Will Keep the Patent Bar Churning*, ABA JOURNAL (Aug. 1, 2010), http://www.abajournal.com/magazine/article/standing_by_its_flexible_standards/ (describing the Court’s holding in the patent case *Bilski v. Kappos*, 130 S. Ct. 3218 (2010), in which the court “declined to impose sweeping new restrictions on the types of inventions that can be patented”). Similar to federal preemption of subnational immigration laws, patent and copyright issues also involve a factor-intensive analysis that requires examination of legal and policy concerns.

132. *See id.* Samson Helfgott, a partner in the New York City office of Katten Muchin Rosenman and a council member of the ABA Section of Intellectual Property Law notes that the *Bilski* “decision was disappointing because there was not even a hint of a guideline for what is an abstract idea and what isn’t.” *Id.* The result, according to many experts, will be confusion and excess litigation as “the courts . . . attempt to determine, on a case-by-case basis, which business methods, diagnostic methods and other inventions are too abstract to be patentable.” *Id.*

133. *See supra* note 90.

comprehensive that there is no room for states to supplement immigration regulation with their own laws.¹³⁴ Once again, congressional intent is key here because “Congress’s intent to occupy a field can be inferred where a federal regulatory scheme is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”¹³⁵ It is also reasonable to infer Congress’s intent to occupy a field when “an Act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”¹³⁶

Despite it being reasonable to assume, based on the statutory framework as of 2011, that Congress is to be sole regulator of immigration-related issues, the INA, numerous executive agencies, and the Supreme Court have clearly articulated that this is not so.¹³⁷

The Third and Ninth Circuits also declined to use implied field preemption in their analyses, and instead relied principally upon implied conflict preemption.¹³⁸ Though some may argue that implied conflict preemption was simply more applicable to the cases in question, it is more likely that it was the only functional alternative because implied field preemption is confusing, imprecise, and, thus, rarely used. For example, in *Lozano*, the Third Circuit only analyzed the case using implied field preemption in a footnote that reads as follows:

Although we have been framing this question as one of conflict preemption, Hazelton’s actions may be subject to field pre-emption as well The categories of pre-emption are not rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress’ intent (either express or plainly implied) to exclude state regulation.¹³⁹

The court conflated the clearly delineated categories of implied field and implied conflict preemption, resolved the issue by classifying implied

134. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (describing implied field preemption as where “the depth and breadth of a congressional scheme . . . occupies the legislative field”).

135. *Lozano v. City of Hazleton*, 620 F.3d 170, 204 (3d Cir. 2010) (internal quotation marks omitted), *vacated*, 131 S. Ct. 2958 (2011).

136. *Id.* (internal quotation marks omitted).

137. See *supra* Part II.C.2.

138. See *Lozano*, 620 F.3d at 204–06; *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 866–69 (9th Cir. 2009), *aff’d sub nom.* *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011).

139. *Lozano*, 620 F.3d at 213 n.34 (internal quotation marks and citations omitted).

field preemption as a “species” of implied conflict preemption, and then proceeded to use the implied conflict preemption analysis.¹⁴⁰ If the Third Circuit—comprised of the best and brightest legal minds—misapplies the standard, it is unreasonable to expect lower courts, with less expertise in the area and busier dockets, to correctly apply the standard.

Critics will surely point to what is considered the seminal field preemption case from 1941, *Hines v. Davidowitz*, in arguing that implied field preemption still plays a useful role in evaluating subnational immigration regulations.¹⁴¹ In *Hines*, the Supreme Court encountered a Pennsylvania law imposing numerous obligations solely on aliens residing within the state. These obligations included yearly registration, payment of registration fees to the state, and the purchase of an alien registration card to be carried at all times while within state borders.¹⁴² In concluding that the law impermissibly interfered with the federal Alien Registration Act of 1940,¹⁴³ the Court relied on constitutional text and history,¹⁴⁴ the potentially negative impact the Pennsylvania law would have on the nation’s relations with foreign powers,¹⁴⁵ the nation’s collective experiences with and commitment to protecting aliens from local prejudice,¹⁴⁶ and the breadth of the general scheme under which Congress regulated the field of foreign nationals within the country.¹⁴⁷ However, *Hines* was decided before the complex statutory framework of the INA, IRCA, and IIRIRA was put in place by Congress to regulate matters of immigration. Though their precursor, the Alien Registration Act of 1940, was in force at the time, federal immigration law then was not nearly as extensive in breadth and depth as the statutory scheme as of 2011. Accordingly, in the respect of showing a practical application of implied field preemption to subnational immigration laws, *Hines* is outdated and not useful for supporting the modern use of implied field preemption in the immigration context.

The implied field prong of the preemption analysis is impractical, infrequently used by the courts, and misapplied when it is utilized. As such, the Supreme Court’s reformulation of the implied preemption analysis for

140. *See id.*

141. *See Hines v. Davidowitz*, 312 U.S. 52 (1941).

142. *Id.* at 59.

143. *Id.* at 73–74.

144. *Id.* at 62–63.

145. *Id.* at 63–66.

146. *Id.* at 70–73.

147. *Id.* at 72–73 (stressing that Congress had passed the 1940 Act without the restrictions placed on aliens included in the Pennsylvania law).

subnational immigration laws should include abandoning implied field preemption.¹⁴⁸

C. AUGMENTATION AND REFINEMENT OF IMPLIED CONFLICT PREEMPTION

The most important facet of the implied preemption analysis is conflict preemption. As we have seen, lawmakers understand it, courts are willing to apply it, and scholars are ready to critique it.¹⁴⁹ Its importance also stems from its preservation of Congress's purposes and objectives regarding subnational immigration regulations.

"Impossibility" conflict preemption should be construed narrowly and "exists only where it is truly impossible to comply with both the federal and state law."¹⁵⁰ Such instances are rare, and as of the date of this Note's publication, the author is aware of no cases where implied impossibility conflict preemption was the applicable analysis for striking down a subnational immigration regulation.¹⁵¹ As such, it should be preserved but rarely has practical application in this field.

"Obstacle" conflict preemption calls for a broader inquiry into the

148. For academic critique of implied field preemption in other contexts, see Kimberly K. Asano & Kamaile A. Nichols, Case Note, *Center for Bio-Ethical Reform, Inc. v. City & County of Honolulu: Demonstrating the Need to Abandon the Field Preemption Doctrine*, 29 HAW. L. REV. 501, 502 (2007) (contending that implied field preemption should be abandoned in favor of express and conflict preemption because it is impractical in application and undermines federalism principles, whereas express and conflict preemption are "workable doctrines that provide the appropriate distribution of state and federal power"); Stacey Allen Carroll, Note, *Federal Preemption of State Products Liability Claims: Adding Clarity and Respect for State Sovereignty to the Analysis of Federal Preemption Defenses*, 36 GA. L. REV. 797, 827 (2002) (arguing that "the Court should abandon the area of implied field preemption within the context of state tort remedies because there is no rational basis for its continuance in this area [since] [o]nce a court has found that dual compliance is not impossible, and assuming there is no express preemption clause or substantial conflict with congressional objectives, then no basis remains for retaining an analysis tool that gives 'unelected federal judges carte blanche to use federal law as a means of imposing their own ideas of tort reform on the States'" (footnote omitted)).

149. See *supra* Part IV.A–B.

150. *Lozano v. City of Hazleton*, 620 F.3d 170, 204 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011).

151. Implied impossibility conflict preemption does have utility in contexts other than immigration. One example is *McDermott v. Wisconsin*, 228 U.S. 115 (1913). In *McDermott*, a state law made it criminal to offer to sell syrup that was not labeled in compliance with state law, even though the syrup offered for sale did meet federal labeling requirements. *Id.* at 124–27. There, the Supreme Court held that the state law was preempted by the federal regulation. *Id.* 136–37. A more modern example occurred in *Wyeth v. Levine*, 555 U.S. 555 (2009). In *Wyeth*, a drug manufacturer claimed it was impossible to comply with both the FDA and Vermont's drug labeling requirements, and therefore, the state labeling requirements were preempted using impossibility conflict preemption. *Id.* at 555. Here, the Supreme Court did not find it was a physically impossible to comply with both laws but used impossibility conflict preemption as a principal part of its analysis. *Id.* at 562–73.

purposes underlying the federal statute and whether a state law is an obstacle to carrying out that purpose.¹⁵² Courts must first ascertain Congress's underlying objectives before it can determine whether state laws or actions interfere with them.¹⁵³ However, inquiry into Congress's purposes and objectives should not be free reign for courts to surmise congressional intent based on what they did not say or do. Maxims of statutory interpretation require looking at the stated purpose of the law articulated within the statute, recorded legislative history, or other concrete sources to determine the intent of Congress.¹⁵⁴ Given the availability of recorded legislative history, there should not be as much "guess work" in ascertaining congressional intent in the immigration context.

For example, the Third Circuit in *Lozano* had little trouble identifying Congress's purpose in enacting IRCA as achieving a "careful balance" among the policy objectives of: (1) "effectively deterring employment of unauthorized aliens," (2) "minimizing the resulting burden on employers," and (3) "protecting authorized aliens and citizens perceived as 'foreign' from discrimination."¹⁵⁵ The court relied on the congressional record, speeches of congressmen, and committee reports to articulate these goals.¹⁵⁶

When undergoing the implied conflict preemption analysis, all other courts should be required to do the same. Only with reasoned and proven reliance on actual congressional objectives can courts properly and fairly evaluate whether a subnational immigration law stands as an obstacle to Congress's purposes and objectives.¹⁵⁷

Finally, adhering to the legislative history serves the policy goals of preventing foreign policy disputes and preventing the development of

152. *Wyeth*, 555 U.S. at 563–64.

153. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 5.2.5 (3d ed. 2006) (describing preemption cases that proceed in this order).

154. Dr. Daniel M. Klerman, Charles L. and Ramona I. Hilliard Professor of Law and History, University of Southern California Gould School of Law, Lecture to Law, Language and Values Class (Aug. 28, 2009).

155. *Lozano*, 620 F.3d at 210–11.

156. *Id.* at 211–12.

157. Some commentators, echoing Justice Thomas' concurring opinion in *Wyeth*, advocate disposing of implied conflict preemption because ascertaining the goals of Congress "facilitates freewheeling, extratextual, and broad evaluations of the 'purposes and objectives' embodied within federal law." See, e.g., Eric Policastro, Note and Comment, *Saying Goodbye to Implied-Federal Preemption: The Contemporary Scope of Federal Preemption in Light of Geier, Riegel, and Wyeth*, 61 BAYLOR L. REV. 1028, 1049–50 (2009) (quoting *Wyeth*, 555 U.S. at 604 (Thomas, J. concurring)). The author there declines to take such an extreme view and believes that there is significant merit and utility in examining legislative history in ascertaining the purposes and objectives of Congress. *Id.* at 1030–32.

patchwork of state immigration laws. The sheer act of Congress enacting immigration legislation creates a degree of uniformity in immigration regulation, and that uniformity does not include alienating foreign nations with discriminatory or oppressive immigration regulations of their citizens. Ascertaining concrete sources of congressional intent is not a mystery and should be a required element in every court's analysis of "obstacle" implied conflict preemption.

D. ANTIDISCRIMINATION PROVISIONS

Immigration regulations present special challenges apart from the purely legal issues. From a theoretical standpoint, immigration laws are principally about which foreign nationals may be admitted to the United States and the conditions under which they remain.¹⁵⁸ From a practical standpoint, immigration laws drastically affect individuals' well-beings and livelihoods by affecting if and how long they may stay in the United States.

Unfortunately, many subnational immigration laws are enacted in response to the social and economic woes caused by unregulated illegal immigration. Many of the regulations are barely disguised as an effort to oust those perceived to have caused such problems. For example, in enacting the IIRAO, the City of Hazleton's mayor stated that the law was intended "to deter and punish illegal immigrants."¹⁵⁹ The ordinances were enacted as part of an organized campaign of certain states and localities attempting to collectively remedy what certain individuals viewed as the federal government's "failure to secure our borders."¹⁶⁰ As lead sponsor of S.B. 1070, former Arizona state senator Russell Pearce has said that "he is on a mission to rid the state of illegal immigrants and discourage others from coming."¹⁶¹

"Further, the parties enforcing local regulations," including "employers, citizens, and local police[,] have less training in immigration law than federal authorities and are more likely to resort to [other methods,] such as race or ethnicity[,] to determine an individual's immigration

158. See 8 U.S.C. §§ 1181–1182, 1184 (2006).

159. *Lozano*, 620 F.3d at 209 n.31 (internal quotation marks and citations omitted).

160. *Id.* (quoting the "testimony of Hazleton's mayor that he has encouraged communities across the country to enact similar ordinances").

161. Randal C. Archibold, *Immigration Bill Reflects a Firebrand's Impact*, N.Y. TIMES, Apr. 19, 2010, at A12. As this Note went to press, Arizona state senator Russell Pearce suffered a historic loss by being the first Arizona state senator to be recalled from office. Art Thomason, Jim Walsh & John D'Anna, *Russell Pearce on Verge of Historic Loss in Recall*, ARIZ. REPUBLIC (Nov. 8, 2011), <http://www.azcentral.com/news/articles/2011/11/08/20111108russell-pearce-recall-trailing-jerry-lewis.html#ixzz1ihTcuFVu>.

status.”¹⁶² One of many documented examples of this occurred in Chandler, Arizona in 1997 when local police picked up residents with a “Mexican appearance” during urban raids for illegal immigrants.¹⁶³ Another example is noted in the United States’ motion for a preliminary injunction of S.B. 1070, noting that Arizona police officers have little to “no familiarity with assessing whether a public offense would make an alien removable from the United States.”¹⁶⁴

Given that one of Congress’s primary purposes in enacting immigration laws is to prevent discrimination, antidiscrimination provisions in subnational immigration regulations should be a mandatory component, without which the laws will not survive the preemption analysis. For example, in enacting IRCA, “Congress strove to ensure that the prohibition against hiring unauthorized aliens would not result in discrimination against authorized workers (whether alien or citizen) who appear ‘foreign,’ as [it] feared that employers might incorrectly assume such persons were unauthorized to work in the United States.”¹⁶⁵ IRCA’s legislative purpose could not be clearer about Congress’s commitment to preventing this sort of discrimination. As one House Report explains:

Numerous witnesses over the past three Congresses have expressed their deep concern that the imposition of employer sanctions will cause extensive employment discrimination against Hispanic-Americans and other minority group members [T]he Committee does believe that every effort must be taken to minimize the potentiality of discrimination and that a mechanism to remedy any discrimination that does occur *must* be a part of this legislation [A]nti-discrimination protections are essential to this bill.¹⁶⁶

The Supreme Court should craft an antidiscrimination requirement as part of the revised preemption analysis. Although such a requirement may seem like a policy initiative more appropriate for congressional action, the antidiscrimination element of the preemption analysis is, in fact, derived from congressional intent.¹⁶⁷ Enforcing and respecting congressional intent is a “touchstone” in the preemption analysis,¹⁶⁸ as both express and implied

162. Grube, *supra* note 90, at 423.

163. See, e.g., Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting from INS and Local Police’s Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 CLEV. ST. L. REV. 75, 83–84 (2005).

164. *United States v. Arizona*, 703 F. Supp. 2d 980, 1006 (D. Ariz. 2010), *aff’d*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (2011) (No. 11-182).

165. *Lozano*, 620 F.3d at 211–12.

166. H.R. Rep. No. 99-682, pt. I, at 22–23 (emphasis added).

167. See text accompanying notes 164–65.

168. See *Lozano*, 620 F.3d at 203; *Chicano Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 866

preemption, based on the Supremacy Clause of the Constitution, prevent state and local municipalities from usurping Congress's acts with their own laws.¹⁶⁹ Hence, the Supreme Court could craft an antidiscrimination provision as part of the preemption analysis based on its authority to defend and interpret the Constitution and the laws of the United States.¹⁷⁰

The mechanics of the mandatory antidiscrimination provision would call for state and local municipalities to impose civil and criminal penalties on employers and members of municipal agencies, such as police officers, who are found guilty of applying the subnational law in a discriminatory manner. The civil and criminal penalties would be of equal severity as those penalties levied on illegal immigrants.¹⁷¹ The subnational entity should create a separate executive agency to handle discrimination charges, with the positions being filled by the highest executive officer of that jurisdiction. This is similar to the role of the Special Counsel for Immigration-Related Unfair Employment Practices, which was created by Congress to handle discrimination charges associated with the enforcement of IRCA.¹⁷² Finally, the antidiscrimination provision should provide law enforcement with guidance on how to comply with the subnational regulation without discriminating against lawful immigrants.¹⁷³

The negative externalities of discrimination in immigration enforcement are apparent,¹⁷⁴ but a mandatory antidiscrimination provision

(9th Cir. 2009), *aff'd sub.nom* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011).

169. See text accompanying notes 59–62.

170. See U.S. CONST. art. III, §§ 1–2 (“The judicial Power of the United States, shall be vested in one supreme Court . . . [and] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States.”).

171. This is similar to one of the antidiscrimination provisions proposed by Mark Grube. “Municipal ordinances must provide proportionate safeguards against discrimination in order not to conflict with federal law prohibiting discrimination. If municipalities choose to impose licensing penalties following the procedures of [IRCA] § 1324a, they should also provide protections to minority employees comparable to those in § 1324b.” Grube, *supra* note 90, at 423.

172. See 8 U.S.C. § 1324b(c) (2006); *Lozano*, 620 F.3d at 200.

173. This is similar to another antidiscrimination provision proposed by Grube. In the context of employment regulations, Grube argued that “the municipalities should provide training to local law enforcement in how to enforce the regulations without discriminating against minorities and immigrants. Local governments should also provide employers with guidance on how to comply properly with the regulations without discriminating against lawful workers.” Grube, *supra* note 90, at 423.

174. See, e.g., Emily Bazar, *Illegal Immigrants Moving Out*, USA TODAY, Sept. 27, 2007, at 3A (documenting how area immigrants were picking up and leaving because of the City of Hazleton's ordinances); *Study: 100,000 Hispanics Left Arizona After SB1070*, FOXNEWS.COM (Nov. 12, 2010), <http://www.foxnews.com/politics/2010/11/12/study-hispanics-left-arizona-sb/> (describing a 2010 study by BBVA Bancomer Research that estimates that 100,000 Hispanics left Arizona as a result of S.B. 1070).

in the preemption analysis is grounded in congressional intent, which as previously discussed, is an integral consideration in the preemption analysis.¹⁷⁵ As part of Congress's general commitment against racial discrimination, not just in employment but in all facets of immigration enforcement, antidiscrimination provisions should be mandatory in the subnational law before it can survive the preemption analysis.

E. DUE WEIGHT GIVEN TO PRESUMPTION OF NONPREEMPTION FOR TRADITIONAL AREAS OF STATE CONCERN

A more "cooperative" approach to the preemption analysis does not just call for greater respect of congressional intent in enacting federal immigration controls; cooperation also means greater respect for state sovereignty by giving due weight to the presumption of nonpreemption for traditional areas of state concern such as public health, safety, welfare, and domestic relations.¹⁷⁶

As the Supreme Court noted, it has "long presumed" that Congress does not "cavalierly" preempt states or municipalities from acting within the parameters of their historic police powers.¹⁷⁷ Hence, in the preemption inquiry as of 2011, courts are to assume "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear* and *manifest* purpose of Congress."¹⁷⁸ However, when states act beyond the scope of their historic police powers and wander into "an area where there has been a history of significant federal presence," courts do not begin with the presumption of nonpreemption.¹⁷⁹

There are several good reasons for this presumption of nonpreemption. First, cooperation with subnational entities has underpinnings in the principles of federalism and the Tenth Amendment.

175. See *supra* text accompanying note 130.

176. For other academic support of subnational immigration regulation in areas of states' historic police powers, see Laurel R. Boatright, Note, "*Clear Eye for the State Guy*": *Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement*, 84 TEX. L. REV. 1633, 1665–66 (2006) (noting that "Congress can, to borrow a phrase from civil litigation, 'put states to their proof' and force sanctuary states and cities to defend their policy choices to their constituencies"). But see Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 6, 22 (2007) (noting that "States have traditionally used their Tenth Amendment police powers to exercise control over immigrants within their communities," but arguing that immigration-related regulation at the subnational level is "unconstitutional").

177. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

178. *Id.* (emphasis added) (internal quotation marks omitted).

179. *United States v. Locke*, 529 U.S. 89, 108 (2000).

As the Supreme Court articulated more than sixty years ago, “due regard for our *federalism* . . . favors survival of the reserved authority of a State over matters that are the intimate concern of the State unless Congress has clearly swept the boards of all State authority, or the State’s claim is in unmistakable conflict with what Congress has ordered.”¹⁸⁰ Furthermore, the Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁸¹ These provisions make clear that powers not expressly delegated to the federal government are reserved for the states. In the immigration context, this means that subnational immigration regulations that also involve traditional areas of state concern, such as public health, safety, welfare, and domestic relations, deserve an adequate presumption of nonpreemption.¹⁸²

Secondly, the presumption of nonpreemption for traditional areas of state concern is grounded in important policy concerns. State and local municipalities are the entities most directly affected by the social and economic difficulties of illegal immigration. For example, increased crossings into border states like Arizona is widely believed to be the cause of an increase in burglaries and other violent property crimes.¹⁸³ Furthermore, the increase in drug cartel violence has accentuated the sense of danger linked to illegal immigration.¹⁸⁴ From a fiscal standpoint, research indicates that local and state governments spend more on social services for illegal immigrants than they receive from those immigrants in state and local tax revenue.¹⁸⁵ As such, state legislatures should be empowered to respond to these concerns, up to the Constitutional limit, if the situation in their state or municipality calls for such regulation.¹⁸⁶

180. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 241 (1947) (emphasis added).

181. U.S. CONST. amend. X.

182. See SINGER & SINGER, *supra* note 73, at § 36:9 (“There is a presumption against finding a federal preemption of state law in areas traditionally regulated by the states. Consistent with this approach, courts impose a higher standard to establish federal preemption in domestic relations; the state law must do major damage to the clear and substantial federal interests in order for the preemption doctrine to apply.”).

183. R. Cort Kirkwood, *Border Town Violence: As Illegal Immigrants Flood the United States, A Wave of Crimes Committed by Illegals is Crashing into Border Towns and Threatening to Engulf Our Entire Nation*, NEW AM., Aug. 7, 2006, at 25–28.

184. *Id.*

185. CONG. BUDGET OFFICE, PUB. NO. 2500, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 1 (2007), available at <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf> (noting the local fiscal impact of unauthorized immigrants in the areas of education, health care, and law enforcement).

186. As one commentator noted, “courts should be careful to not strike down every law touching on the subject of immigration because an overly expansive view . . . could result in localities’ losing the

These policy concerns and the principles of federalism call for true respect of the presumption of nonpreemption for traditional areas of state concern. Unfortunately, as it stands in 2011, such respect is recognized but not adequately given. For example, the Third Circuit in *Lozano* began its preemption analysis with a thorough discussion of the presumption of nonpreemption for traditional areas of state concern.¹⁸⁷ In its analysis of the employment ordinance, the IIRAO, the court reasoned that even though Congress enacted IRCA in 1986, employment is a historic police power based on the past balance of state and federal regulation so it “must benefit from the presumption against pre-emption.”¹⁸⁸ However, the court failed to *apply* this presumption and moved directly into the three-pronged analysis, finding no express preemption but implied conflict (and a strange species of implied field) preemption.¹⁸⁹ Similarly, the Ninth Circuit in *Chicanos Por La Causa* recognized that “[a]n issue central to our preemption analysis is thus whether the subject matter of the state law is an area of traditionally state or federal presence.”¹⁹⁰ The court, exactly like the Third Circuit, concluded that “the power to regulate the employment of unauthorized aliens remains within the states’ historic police powers” so “an assumption of nonpreemption applies.”¹⁹¹ However, there was no *application* or further discussion of the presumption, and the court proceeded with its normal three-pronged preemption analysis.¹⁹² Unfortunately, the analytical portions of these two opinions did not appear to have been affected in any respect by the courts’ presumption of nonpreemption.

Fortunately, this problem is easily rectifiable. First, courts must ascertain whether they are reviewing a subnational immigration regulation which deals with a traditional area of state concern. The regulation of employment, as *Lozano* and *Chicanos Por La Causa* demonstrate, is clearly derived from the states’ historic police powers.¹⁹³ Housing

ability to regulate in areas where they have a strong interest.” Grube, *supra* note 90, at 412.

187. See *Lozano v. City of Hazleton*, 620 F.3d 170, 203 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011).

188. *Id.* at 206.

189. *Id.* at 210–19. The Court found no presumption of nonpreemption for the housing provisions of the IIRAO and the RO because instead of regulating rental accommodations, which could be within the state’s historic police powers, the ordinances effectively regulated *who may live* in Hazleton based on immigration status, which is a “historically federal function far beyond the police powers of any state.” *Id.* at 220.

190. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 864 (9th Cir. 2009), *aff’d sub nom.* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011).

191. *Id.* at 865.

192. See *id.* at 865–67.

193. See *supra* text accompanying notes 188, 191.

provisions, as long as they are fashioned as *rental accommodations* and not regulations on who may live in the United States, are also part of the state's historic police powers.¹⁹⁴ Protection of citizens' safety and well-being is also classified as a historic police power.¹⁹⁵ The evaluation of what is a "historic police power" of the states is largely context specific but relatively straightforward for a preemption inquiry.

Secondly, if the subnational regulation is a traditional area of state concern, courts must determine whether it was the "*clear and manifest* purpose of Congress" to have the state regulation superseded by the federal statute.¹⁹⁶ When there is an express preemption provision in the text of a statute, such as the savings clause in IRCA, Congress's will to supersede the state regulation is at its clearest and most manifest. Implied field preemption, as previously discussed, should be abandoned due to its inapplicability in the immigration context.¹⁹⁷ Implied conflict preemption involves evaluating the purposes and objectives of Congress and determining whether the subnational regulation contravenes those goals.¹⁹⁸ However, in application, the presumption of nonpreemption for traditional areas of state concern is integral in implied conflict preemption: unless it is shown, via *recorded* legislative history, that Congress *clearly* and *manifestly* intended to have the federal law supersede the state regulation, courts should not invalidate the regulation using the preemption analysis. In other words, the presumption of nonpreemption should come *first* and should only be rebutted by a heightened level of *clear and manifest* evidence from Congress, in the form of recorded legislative history, that the federal government intended to supersede the subnational immigration regulation. Using this analysis, the presumption of nonpreemption for traditional areas of state concern will finally have teeth and conform with the principles of federalism and state sovereignty embodied in the Tenth Amendment.

The mechanics of the streamlined, cooperative approach to

194. See *Lozano v. City of Hazleton*, 620 F.3d 170, 220 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011) ("[W]e realize that a state certainly can, and presumably should, regulate rental accommodations to ensure the health and safety of its residents.").

195. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) ("[T]he structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." (internal quotation marks and citations omitted) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996))); RONALD D. ROTUNDA & JOHN E. NOWAK, 5 TREATISE ON CONSTITUTIONAL LAW § 20.61(*l*) (4th ed. 2007) ("The state's police power has been traditionally defined as encompassing the power to regulate for health, safety, and morality.").

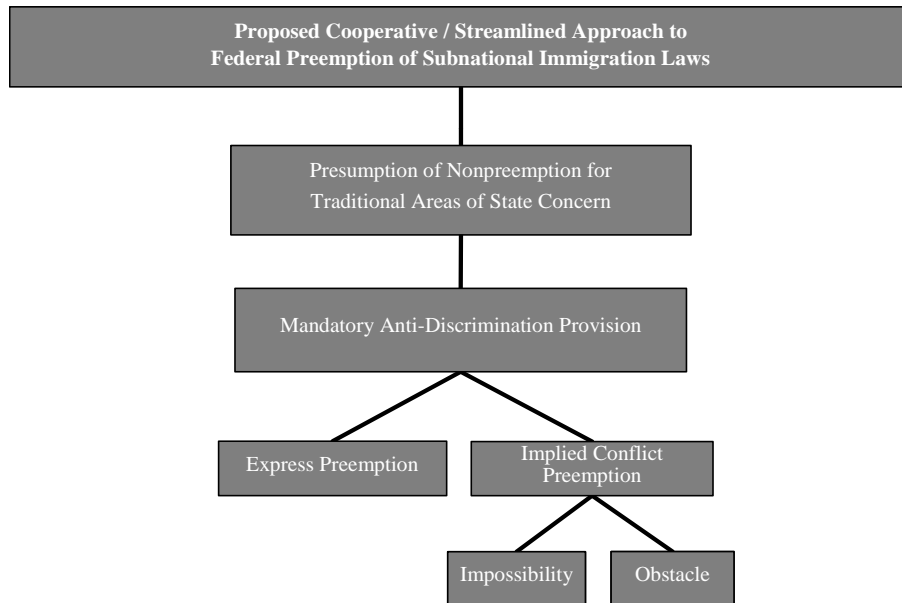
196. See *Medtronic*, 518 U.S. at 485 (emphasis added) (internal quotation marks omitted).

197. See *supra* Part V.B.

198. See *supra* Part V.C.

preemption analysis have been fully articulated. Now, we must evaluate the preemption of Arizona's S.B. 1070, which is the final subject to which we turn.

FIGURE 2. Proposed Cooperative and Streamlined Approach to Federal Preemption of Subnational Immigration Laws



VI. APPLICATION OF COOPERATIVE AND STREAMLINED PREEMPTION APPROACH TO ARIZONA'S S.B. 1070

S.B. 1070, the "Support Our Law Enforcement and Safe Neighborhoods Act," was signed into law by Arizona Governor Janice Brewer on April 23, 2010.¹⁹⁹ The omnibus state law adds numerous provisions to the Arizona Revised Statutes concerning the employment, law enforcement, and documentation of immigrants. S.B. 1070 was labeled by pundits as "the nation's toughest bill on illegal immigration."²⁰⁰ One group of scholars from the University of Arizona described S.B. 1070 as the bill that "has provoked intense reactions by political leaders,

199. Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Ariz. Sess. Laws 0113, (amended by 2010 Ariz. Sess. Laws 0211 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010))).

200. Archibold, *supra* note 5.

commentators, and the public . . . rais[ing] critical issues of race, security, sovereignty, civil rights, state power, and foreign relations. Such issues encompass larger debates about modern immigration law and policy, and are worthy of sustained public commentary and scholarly discourse.”²⁰¹

Pending review by the Supreme Court, the most controversial provisions of S.B. 1070 were preliminarily enjoined by Federal District Court Judge Susan Bolton on July 28, 2010.²⁰² The applicable provisions can be summarized as follows:

Portion of Section 2 of S.B. 1070 (A.R.S. § 11-1051(B)): requiring that an officer make a reasonable attempt to determine the immigration status of a person stopped, detained or arrested if there is a reasonable suspicion that the person is unlawfully present in the United States, and requiring verification of the immigration status of any person arrested prior to releasing that person

Section 3 of S.B. 1070 (A.R.S. § 13-1509): creating a crime [in the state of Arizona] for the failure to apply for or carry alien registration papers

Portion of Section 5 of S.B. 1070 (A.R.S. § 13-2928(C)): creating a crime [in the State of Arizona] for an unauthorized alien to solicit, apply for, or perform work

Section 6 of S.B. 1070 (A.R.S. § 13-3883(A)(5)): authorizing the warrantless arrest of a person where there is probable cause to believe the person has committed a public offense that makes the person removable from the United States.²⁰³

201. Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47, 48 (2010).

202. *United States v. Arizona*, 703 F. Supp. 2d 980, 988 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (2011) (No. 11-182).

203. *Id.* at 987.

A. APPLICATION OF THE PRESUMPTION OF NONPREEMPTION FOR
TRADITIONAL AREAS OF STATE CONCERN

Following the proposed cooperative and streamlined approach, the court would first examine whether there is a presumption of nonpreemption due to the subnational law dealing with traditional areas of state concern.²⁰⁴ S.B. 1070 is not a uniform law but rather an omnibus piece of legislation that deals with many substantive topics. As such, the court would have to evaluate each section independently to determine if it merits a presumption of nonpreemption.

Section 2 of S.B. 1070 mandates that police officers make a “reasonable attempt” to ascertain the immigration status of a person stopped, detained, or arrested if there is a “reasonable suspicion” that the person is illegally present in the United States. Section 2 also requires verification of the immigration status of “any person arrested” before releasing that them.²⁰⁵ This section may be classified as a “law enforcement” provision, which is usually a historic state police power due to it falling under the state’s power to protect the safety and welfare of its citizens.²⁰⁶ On the other hand, a court reviewing S.B. 1070 may find that section 2’s mandatory immigration verification upon arrest deals with the “monitoring and documentation” of immigrants, which is a power exclusively reserved to the federal government under the INA.²⁰⁷ As the Supreme Court articulated in *Hines*, “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.”²⁰⁸ “[W]hatever power a state may have is subordinate to supreme national law.”²⁰⁹

Similarly, section 6, which authorizes the warrantless arrest of an individual where there is “probable cause” to believe the person has committed a crime that makes him or her eligible for deportation,²¹⁰ could also be classified as either a “law enforcement” provision that is derived

204. See *supra* Part V.E.

205. *Arizona*, 703 F. Supp. 2d at 989.

206. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (“[T]he structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.” (internal quotations omitted)); ROTUNDA & NOWAK, *supra* note 195, at § 20.61(l) (“The state’s police power has been traditionally defined as encompassing the power to regulate for health, safety, and morality.”).

207. See *supra* text accompanying note 35.

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

209. *Id.* at 68.

210. *Arizona*, 703 F. Supp. 2d at 990.

from the state's historic police powers or a "monitoring and documentation" provision that is reserved to the federal government under the INA. The reviewing court, depending on its interpretation, will have to make a fact-specific determination of whether sections 2 and 6 are areas of traditional state concern, which deserve a presumption of nonpreemption.

Section 3 of S.B. 1070 creates a separate, punishable crime in the state of Arizona for failing to apply for or carry alien registration papers.²¹¹ This section is the most clear-cut example of a "monitoring and documentation" provision, which is a power reserved exclusively to the federal government under the INA.²¹² Accordingly, section 3 should not receive a presumption of nonpreemption by a reviewing court.

Finally, section 5 of S.B. 1070 creates a separate, punishable crime in the State of Arizona for an unauthorized alien to solicit, apply for, or perform any type of work.²¹³ As discussed by the Third and Ninth Circuits, "employment" is clearly a traditional area of state concern.²¹⁴ As section 5 directly concerns employment, it should be granted a presumption of nonpreemption by a reviewing court.

Once a reviewing court determines that section 5 and possibly sections 2 and 6 of S.B. 1070 are traditional areas of state concern, it would next have to determine whether it was the "*clear* and *manifest* purpose of Congress" to have the federal statute supersede the state regulation.²¹⁵ When there is an express preemption provision in the text of the applicable federal statute, Congress's will to supersede the state regulation is at its clearest and most manifest. Implied field preemption, as previously discussed, should be abandoned due to its inapplicability in the immigration context.²¹⁶ Implied conflict preemption involves evaluating the purposes and objectives of Congress and determining whether the subnational regulation contravenes those goals.²¹⁷ However, in application, the presumption of nonpreemption for traditional areas of state concern is integral in implied conflict preemption: unless it is shown, via recorded legislative history, that Congress *clearly* and *manifestly* intended to have

211. *Id.* at 989.

212. *See supra* text accompanying note 35.

213. *Arizona*, 703 F. Supp. 2d at 990.

214. *Lozano v. City of Hazleton*, 620 F.3d 170, 205 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011); *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 865 (9th Cir. 2009), *aff'd sub nom.* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011).

215. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (emphasis added) (internal quotation marks omitted).

216. *See supra* Part V.B.

217. *See supra* Part V.C.

the federal law supersede the state regulation, courts should not invalidate these sections of S.B. 1070 using the preemption analysis. In other words, for section 5 and possibly sections 2 and 6, the presumption of nonpreemption should come *first* and should only be rebutted by a heightened level of *clear* and *manifest* evidence from Congress, in the form of recorded legislative history, that the federal government intended to supersede the subnational immigration regulation in these areas.

B. APPLICATION OF THE MANDATORY ANTIDISCRIMINATION PROVISION

Given the unique and substantial burdens that subnational immigration regulations impose on individuals, antidiscrimination provisions are a necessary component to ensure fair and just application of the law. S.B. 1070 is especially likely to place a discriminatory burden on individuals, given the xenophobic motivations of its legislative sponsor.²¹⁸ As such, an effective antidiscrimination provision is integral for S.B. 1070.

Section 12 of S.B. 1070 reads: “This act shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of U.S. citizens.”²¹⁹ Section 12 represents the bare bones of an effective antidiscrimination provision that does little more than command law enforcement to implement S.B. 1070 in a manner which would “protect” individuals’ civil rights.

In the context of the proposed preemption analysis, the antidiscrimination provision in S.B. 1070 would not pass muster. Section 12 amounts to mere rhetoric that does little to effectively combat the dangers of racial profiling and enforcement of the law based on arbitrary judgments of race and national origin. The proposed approach mandates that the law’s antidiscrimination provision impose civil and criminal penalties of equal severity on officers and agencies found guilty of applying the subnational law in a discriminatory manner, as those civil and criminal penalties for immigrants found in violation of the law. The antidiscrimination provision should also create a separate executive agency at the local level to handle discrimination charges, with the positions being filled by the highest executive officer of that jurisdiction, modeled after the Office of Special Counsel created by Congress. Finally, the antidiscrimination provision should provide law enforcement with detailed

218. See *supra* text accompanying note 161.

219. Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Ariz. Sess. Laws 0113, (amended by 2010 Ariz. Sess. Laws 0211 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010))).

guidance on how to comply with the subnational regulation without discriminating against lawful immigrants.²²⁰ Section 12 of S.B. 1070 accomplishes none of these goals, and would, thus, fail under mandatory antidiscrimination provision of the proposed preemption approach.

C. APPLICATION OF THE EXPRESS PREEMPTION ANALYSIS

In the event a reviewing court did not find that S.B. 1070 failed for lack of an adequate antidiscrimination provision, the court would next engage in the express preemption analysis.²²¹ Once again, S.B. 1070 is not a uniform law but rather an omnibus piece of legislation that deals with many substantive topics. As such, the court would have to evaluate each section independently to determine if any are expressly preempted.

There are numerous provisions in the INA and other federal immigration laws that one could argue expressly preempt sections 2, 3, 5 and 6 of S.B. 1070. Engaging in such an analysis, however, is largely beyond the scope of this Note's inquiry.²²² A reviewing court would be charged with examining the provisions of federal law that concern employment and registration of immigrants to determine if any of them expressly preempt the provisions of S.B. 1070 in question.

Furthermore, for sections 5 and possibly 2 and 6, that have been granted a presumption of nonpreemption due to them being traditional areas of state concern, the court would have to show that Congress *clearly* and *manifestly* intended to have the federal law supersede them in order to rebut the presumption of nonpreemption and find them expressly preempted.²²³

D. APPLICATION OF THE IMPLIED PREEMPTION ANALYSIS

The last step of the analysis would be for the reviewing court to examine those provisions of the subnational law that are not expressly preempted to determine if they are impliedly conflict preempted as contravening the purposes and objectives of Congress.²²⁴ As previously discussed, implied field preemption is largely outdated in the immigration context because of the expansive scope of the federal immigration scheme

220. See *supra* text accompanying notes 171–73.

221. See *supra* Part V.A.

222. The purpose of Section VI is to show how to apply the framework of the proposed preemption approach to S.B. 1070, not to write a full judicial opinion doing so.

223. See *supra* Part V.E.

224. See *supra* Part V.C.

as of 2011, so it would not be part of the analysis.²²⁵ Impossibility conflict preemption is rare, so the court would principally rely upon obstacle conflict preemption, meaning it would examine sections 2, 3, 5 and 6 of S.B. 1070 to determine if they pose an obstacle to the purposes and objectives of Congress based upon recorded legislative history.²²⁶

Furthermore, the court would apply the presumption of nonpreemption most strongly in this facet of the analysis. As previously discussed, the presumption of nonpreemption for traditional areas of state concern is integral in implied conflict preemption: unless it is shown, via recorded legislative history, that Congress *clearly* and *manifestly* intended to have the federal law supersede the state regulation, courts should not invalidate these sections of S.B. 1070 using the preemption analysis. Once again, the presumption of nonpreemption should come *first* and should only be rebutted by a heightened level of *clear* and *manifest* evidence from Congress in the form of recorded legislative history that the federal government intended to supersede the subnational immigration regulation. The reviewing court would take into account Congress's goals of enforcing immigration laws uniformly and preventing discrimination while also allowing states to legislate in areas that are derived from their historic police powers.²²⁷

VII. CONCLUSION

Scholars from all political persuasions recognize that the United States is experiencing an immigration crisis. Dr. Roger Pilon of the Cato Institute, ranked as the world's fifth most influential think tank by one study²²⁸ and known for its Libertarian persuasion, noted that the lack of mechanisms for legal immigration of unskilled workers has led to an "enforcement-only approach which hardly addresses the problem of illegal immigration."²²⁹ On the other side of the spectrum is Karen Tumlin, managing attorney of

225. See *supra* Part V.B.

226. See *supra* text accompanying notes 152–54.

227. See *supra* text accompanying note 127.

228. Chris Rizo, *Tort Reform "Godfather" Moves to the Cato Institute; Class-Action Crusader Joins Manhattan Institute*, LEGALNEWSLINE.COM (May 6, 2010), <http://www.legalnewsline.com/news/226984-tort-reform-godfather-moves-to-the-cato-institute-class-action-crusader-joins-manhattan-institute>.

229. Dr. Roger Pilon, Remarks at the 2011 USC Gould School of Law, Review of Law and Social Justice Symposium: Fundamentally Broken? The Past, Present, and Future of U.S. Immigration Policy (Mar. 9, 2011). Dr. Pilon is the founder and director of the Cato Institute's Center for Constitutional Studies. He is also the publisher of the annual *Cato Supreme Court Review*, which features leading legal scholars analyzing the Supreme Court's important cases.

the National Immigration Law Center's Los Angeles office, which represents the plaintiffs in one of the seven law suits against S.B. 1070. Ms. Tumlin has noted that the "tremendous frustration with the status quo has led us to S.B. 1070 and over a dozen similar state laws . . . [T]he national conversation that is happening involves the states saying: 'we want this to be resolved by the Supreme Court.'"²³⁰

Unfortunately, the last major federal immigration reform occurred over fifteen years ago with the enactment of IIRIRA. With little hope in sight for bills such as the DREAM act getting through Congress, states have taken matters into their own hands, and there has been an explosion of subnational immigration laws. The Supremacy Clause of the Constitution dictates that matters of pure immigration law, such as determining who may enter the United States and the conditions under which they remain, are exclusively under the control of the federal government. However, other matters that merely affect immigration, such as local regulations of employment, housing, and law enforcement, have the possibility of being controlled by state and local governments, as long as they survive the preemption analysis. The federal preemption analysis as of 2011, however, is severely broken. The inconsistent application of the standard, as illustrated in *Chicanos Por La Causa* and *Lozano*, means that the United States faces a patchwork of immigration laws that gives lower federal courts little guidance on how to apply the standard and creates difficult foreign policy issues when immigrants suffer undue discrimination.

The solution to this problem is for the Supreme Court to articulate a clearer approach to the federal preemption of subnational immigration regulations. The proposed cooperative and streamlined approach would address the problems discussed above by giving teeth to the presumption of nonpreemption for traditional areas of state concern, mandating effective antidiscrimination provisions, preserving express preemption, abandoning implied field preemption, and augmenting and refining implied conflict preemption. Using this proposed standard, laws such as S.B. 1070 can be reviewed in a fair and just manner that allows states, who suffer most of the burden of illegal immigration, to regulate the matters that affect them the most, while protecting individuals from invidious discrimination. While Benjamin Franklin and poet Emma Lazarus could not agree on America's

230. Karen Tumlin, Esq., Remarks at the 2011 USC Gould School of Law, Review of Law and Social Justice Symposium: Fundamentally Broken? The Past, Present, and Future of U.S. Immigration Policy (Mar. 9, 2011). Ms. Tumlin's work focuses on promoting the rights of low-income immigrants through litigation and administrative advocacy. Her work involves the litigation of cases challenging the federal immigration detention policies and state anti-immigrant ordinances.

approach to immigration, the Supreme Court has the unique opportunity to do so. The time has come.

VIII. EPILOGUE

While this Note was in production, the Supreme Court heard oral arguments in *Arizona v. United States*, the case which will decide the fate of Arizona's S.B. 1070.²³¹ The four provisions of S.B. 1070, which were preliminarily enjoined in July 2010 by Arizona District Court Judge Susan Bolton, are at the heart of the federal preemption argument and will be weighed by the Justices.²³² A written decision is not expected until June 2012, but from the questions asked by the Justices, it appears that Arizona stands a chance of prevailing, at least on some provisions.²³³ The line of questioning between Justices Sotomayor and Scalia and U.S. Solicitor General Donald Verrilli, who represents the federal government, set the tone:

GENERAL VERRILLI: . . . Mr. Clement [representing the state of Arizona] is working hard this morning to portray SB 1070 as an aid to Federal immigration enforcement. But the very first provision of the statute declares that Arizona is pursuing its own policy of attrition through enforcement and that the provisions of this law are designed to work together to drive unlawfully present aliens out of the State. That is something Arizona cannot do because the Constitution vests exclusive—

JUSTICE SOTOMAYOR: General, could you answer Justice Scalia's earlier question to your adversary? He asked whether it would be the Government's position that Arizona doesn't have the power to exclude or remove — to exclude from its borders a person who's here illegally.

GENERAL VERRILLI: That is our position, Your Honor. It is our position because the Constitution vests exclusive authority over immigration matters with the national government.

JUSTICE SCALIA: All that means, it gives authority over naturalization, which we've expanded to immigration. But all that means is that the Government can set forth the rules concerning who belongs in this country. But if, in fact, somebody who does not belong in this

231. Transcript of Oral Argument, *Arizona v. United States*, 132 S. Ct. 835 (Apr. 25, 2012) (No. 11-182) [hereinafter Transcript], available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-182.pdf.

232. Leslie Berestein Rojas, *What the Judges Said: A Transcript of Today's Supreme Court Hearing on SB 1070*, 89.3 KPPC, S. CAL. PUB. RADIO (Apr. 25, 2012), <http://multiamerican.scpr.org/2012/04/what-the-judges-said-a-transcript-of-todays-supreme-court-hearing-on-sb-1070/>.

233. *Id.*

country is in Arizona, Arizona has no power? What does sovereignty mean if it does not include the ability to defend your borders?

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. The national government, and not an individual State—

JUSTICE SCALIA: But it's still up to the national government. Arizona is not trying to kick out anybody that the Federal government has not already said do not belong here. And the Constitution provides—even with respect to the Commerce Clause—“No State shall without the consent of Congress lay any imposts or duties on imports or exports except,” it says, “what may be absolutely necessary for executing its inspection laws.” The Constitution recognizes that there is such a thing as State borders and the States can police their borders²³⁴

The Supreme Court's decision in *Arizona v. United States* will set the tone for state and local governments' creation and enforcement of immigration-related laws. Regardless of the outcome of S.B. 1070, it is imperative that the Supreme Court provide further guidance on the proper standard for federal preemption of subnational immigration laws.

234. Transcript, *supra* note 231, at 33–35.