

**Federal Preemption of State and Local Laws:
State and Local Efforts to Impose Sanctions on Employers of Unauthorized Aliens**

Amanda G. Lewis

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Professor James Tierney
Professor Tam Ormiston
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Introduction

Traditionally, challengers of local and state laws that impose burdens beyond those explicitly imposed by the federal government on the lives of immigrants in the United States have won their cases almost entirely on the basis of equal protection.¹ However, in recent years, courts have largely given short shrift to the equal protection arguments offered by the proponents of invalidating such statutes and ordinances.² Recent opinions, instead of applying an equal protection analysis, employ the doctrine of preemption to determine whether or not a state or local law impermissibly encroaches upon the domain of the federal government.³ Interestingly, although these courts have agreed that preemption is the correct lens through which these claims should be viewed, there has not been agreement on the extent to which state and local laws affecting immigration and the lives of immigrants are preempted by the federal government and thus invalid.⁴

In Part I of this paper I briefly explain the doctrine of federal preemption. In Part II, I review two important background principles that I believe are essential to understanding the preemption doctrine as applied in the immigration context. These principles involve A) the distinction between immigration law and alienage law and B) the federal government's plenary and exclusive power to make immigration law. In Part III, I present an overview of federal preemption doctrine as applied in the immigration context by the Supreme Court. Part IV of this paper contrasts the application of preemption doctrine in two immigration cases that are

¹ See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971).

² See, e.g., *Lozano v. City of Hazleton*, 496 F.Supp.2d 477 (M.D. Pa. 2007).

³ See, e.g., *Lozano and Arizona Contractors Association v. Candelaria* (D. Ariz. Feb. 7, 2008).

⁴ Compare *Lozano* (invalidating city ordinance that imposes sanctions on employers of undocumented aliens on federal preemption grounds) and *Arizona Contractors* (upholding AZ state statute that imposes sanctions on employers of undocumented aliens is not invalid on federal preemption grounds).

currently on appeal to the Third Circuit Court of Appeals and the Ninth Circuit Court of Appeals, respectively. The two cases, *Lozano v. City of Hazleton* and *Arizona Contractors Association v. Candelaria*,⁵ involve challenges to an ordinance passed by the City of Hazleton and an Arizona statute which represent similar attempts to impose sanctions on employers of undocumented aliens. In Part V of this paper I posit the argument that in the absence of comprehensive federal immigration reform, policy arguments and practical considerations are increasingly important in tipping the courts in favor or against the invalidation of a state or local immigration law on federal preemption grounds. In Part VI, I will explore the practical implications of the Arizona employer sanctions law and policy arguments in favor and against finding the law invalid on preemption grounds, which I believe will play an important role in determining the future of this and similar state laws.

I. Doctrine of Federal Preemption

The doctrine of federal preemption is grounded in the Supremacy Clause of the U.S. Constitution.⁶ The Supremacy Clause gives Congress⁷ the power to preempt state legislation as long as it is acting within the powers granted it under the Constitution.⁸ According to the Supreme Court, “State laws that ‘interfere with, or are contrary to the laws of congress, made in pursuance of the constitution’ are invalid.”⁹ In addition, it is important to note the doctrine of

⁵ Note *Arizona Contractors Association v. Candelaria* was consolidated with *Valle del Sol v. Goddard*. Hereinafter, I will refer to the consolidated case as *Arizona Contractors*.

⁶ U.S. Const., Art. VI, cl. 2. See *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (“[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.”)

⁷ Preemption doctrine is not limited to Congress it also applies to actions by the Executive Branch. See, e.g., *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) (holding state law was preempted by Executive Order).

⁸ *California Div. of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 325 (1997).

⁹ *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) (quoting *Gibbons v. Odgen*, 22 U.S. 1 (1824)).

federal preemption is applied in the same way to local ordinances as to state laws.¹⁰ There are two basic categories of federal preemption: express preemption and implied preemption.¹¹ Implied preemption is then further divided into two sub-categories: field preemption and conflict preemption.¹² In addition, there are two black letter rules that are understood to apply to any preemption analysis. First, congressional intent is considered to be the “ultimate touchstone” of any preemption analysis.¹³ Second, there is a presumption against preemption when Congress legislates in a field that the States have traditionally occupied.¹⁴

A) Express Preemption

Express preemption occurs when Congress includes within a statutory scheme a provision that explicitly directs state law shall be preempted.¹⁵ Where Congress has explicitly provided that federal law is exclusive, states cannot interfere with such federal exclusivity by prescribing additional or auxiliary regulations regardless of whether the regulations complement or further federal objectives.¹⁶ In express preemption cases, the Court typically applies standard methods of statutory construction, focusing on the plain meaning of the language at issue, the context of the provision, and the relevant legislative history.¹⁷

B) Implied Preemption

¹⁰ *Hillsborough County v. Automated Medical Laboratories, Inc.* 471 U.S. 707 (1985) (“It is axiomatic that ‘for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.’”).

¹¹ *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

¹² *Id.*

¹³ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Retail Clerks Int’l Ass’n v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

¹⁴ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See also *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

¹⁵ S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. 685, 700 (1991); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. Rev. 559, 566 (1997).

¹⁶ *New York Cent. R. Co. v. Winfield*, 244 U.S. 147, 153 (1917).

¹⁷ Grey, *supra* note 15, at 566; Hoke, *supra* note 15, at 700.

Implied preemption occurs when Congress does not expressly say that it intended to preempt state law. In such cases, the federal statute may be silent, may speak in an ambiguous fashion, or questions may arise as to whether state regulation may operate coextensively with the federal law.¹⁸ The Supreme Court has found that it may infer a congressional intent to preempt if the state law falls into one of the two basic sub-categories of implied preemption: conflict preemption or field preemption.¹⁹

1. Conflict Preemption

Conflict preemption occurs when a state law conflicts with a valid federal law so that it is physically impossible to comply with both or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.²⁰ When the conflict is a consequence of physical impossibility, preemption follows by necessary implication from the fact of conflict (i.e., the intent to preempt state law is inferred from the direct conflict between state and federal law).²¹ In contrast, obstacle preemption is more complex. Under this type of preemption, a state law is preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²² The analysis of obstacle preemption requires 1) identification of the purposes and objectives of the federal statute, and (2) a determination of the extent to which the state statute stands as an obstacle, if at all, to the accomplishment of these purposes and objectives.²³ In either case, conflict preemption turns on

¹⁸ Hoke, *supra* note 15, at 700.

¹⁹ *Id.*

²⁰ *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963) and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

²¹ Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 Sup. Ct. Rev. 175, 205 (2000).

²² *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

²³ Goldsmith, *supra* note 21 at 205-206.

the identification of an “actual” conflict.²⁴ The existence of a hypothetical or potential conflict is insufficient to warrant preemption of the state statute.²⁵

2. Field Preemption

Field preemption²⁶ occurs when Congress has occupied the field of a particular substantive area and thereby precluded any type of state regulation within the field. Congressional intent to preempt an entire field may be found where the scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it”²⁷ or where the 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.”²⁸ In the case of field preemption, even state laws that do not frustrate any purpose of Congress or conflict in any way with a federal statutory provision are invalid because the states are considered to have no regulatory jurisdiction at all in the field.²⁹

II. Background Principles for Understanding Preemption Doctrine in the Context of Immigration

A) Immigration Law versus Alienage Law

Courts and Commentators have drawn a distinction between immigration law³⁰ and alienage law.³¹ As traditionally understood, “immigration law” concerns the admission and

²⁴ *English v. General Electric Co.*, 496 U.S. 72, 90 (1990).

²⁵ *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

²⁶ Although I include field preemption as a sub-category of implied preemption, Congress can also express its intent to preempt a field in explicit terms. Thus field preemption can be either express or implied.

²⁷ *English v. General Electric Co.*, 496 U.S. 72, 79 (1990).

²⁸ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

²⁹ Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo L. J. 2085, 2105 (2000); Garrick B. Pursley, *The Structure of Preemption Decisions*, 85 Neb. L. Rev. 912, 930 (2007).

³⁰ Except for in this section, and the following section, when I use the term immigration law I not only refer to pure immigration law but also to laws that are related to and have an effect upon the admission and expulsion of aliens.

removal of aliens.³² The Supreme Court has defined immigration law as those laws concerning “what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.”³³ On the other hand, “alienage law” embraces other matters relating to their legal status.³⁴ Among others, alienage law governs such issues as access to public education, welfare benefits, government employment, and the ballot box.³⁵ The distinction between immigration law and alienage law is often employed by courts to determine whether a state statute or local ordinance is an unconstitutional attempt to make immigration law.³⁶ Courts have traditionally held that state or local laws that attempt to regulate immigration are preempted because such laws encroach upon the exclusive authority of the federal government to make immigration law. In contrast, state and local alienage laws, which merely relate to immigrants and immigration, are not per se preempted. It is important to remember that in practice, however, there is no bright line between alienage and immigration law.³⁷ As one noted immigration scholar observed, “Instead of trying to find a bright line between them, it is analytically more useful to understand that the contrast defines a spectrum with shades of gray.”³⁸

B) Federal Government’s Exclusive and Plenary Power over Immigration Law³⁹

³¹ See, e.g., Hiroshi Motomura, *Comment: Immigration and Alienage, Federalism and Proposition 187*, 35 Va. J. Int’l L. 201, 202 (1994).

³² *Id.*

³³ Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 Vand. L. Rev. ___, FN 24 (forthcoming 2008) (quoting *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948)).

³⁴ *Id.*

³⁵ Motomura, *supra* note 30 at 202.

³⁶ See, e.g., *De Canas v. Bica*, 424 U.S. 351 (1976).

³⁷ Motomura, *supra* note 30 at 202.

³⁸ *Id.*

³⁹ Except for in this section, and the preceding section, when I use the term immigration law I not only refer to pure immigration law but also to laws that are related to and have an effect upon the admission and expulsion of aliens.

The federal government is considered to have exclusive and plenary power over immigration law.⁴⁰ The doctrine of plenary power holds that Congress and the executive branch have broad and often exclusive authority over immigration decisions.⁴¹ It is generally understood that courts should rarely, if ever, and in a limited manner, review constitutional challenges to federal decisions concerning the admission or expulsion of aliens.⁴² In other words, according to this doctrine, the federal government's power in the domain of immigration law is subject only to narrow judicial review and there is no role for states or localities to regulate in this field.⁴³ As explained below, however, the continuing vitality of the federal government's plenary and exclusive power over immigration has been put into question by recent case law.

III. Preemption Doctrine in the Context of Immigration: Supreme Court Cases⁴⁴

The Supreme Court has developed the doctrine of federal preemption in a very specific way with respect to immigration-related cases. Thus the question of whether states and localities are permitted to regulate with respect to immigration and the lives of immigrants or whether they are preempted from doing so must be looked at against the backdrop of the Court's specialized

⁴⁰ *Truax v. Reich*, 239 U.S. 33, 42 (1915) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (“The authority to control immigration - to admit or exclude aliens - is vested solely in the Federal government.”)). See also *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (“[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.”))

⁴¹ Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545, 547 (1990).

⁴² *Id.*

⁴³ *Hampton v. Mow Sun Wong*, 426 U.S. 88, FN 21 (1976) (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893)).

⁴⁴ Some of the cases that I discuss in this section have traditionally been viewed as equal protection cases; however, there is a viewpoint now that these cases are better viewed as being about the balance between states and the federal government to make law with respect to immigration and the lives of immigrants. Ted Ruthizer, Lecturer in Law at Columbia Law School, Seminar: *Immigration Law & Policy* (April 15, 2008).

federal preemption jurisprudence. However, due to the limited scope of this paper, I will not attempt to review the Supreme Court's entire federal preemption jurisprudence in this area.

In *Chae Chan Ping v. United States* (also known as *The Chinese Exclusion Case*),⁴⁵ decided in 1889, the Supreme Court had its first opportunity to consider directly the federal government's power to exclude aliens.⁴⁶ This case involved a challenge to a statute enacted by Congress, in 1888, which was alleged to be in conflict with treaties, existing at the time, between the U.S. and China.⁴⁷ In 1880, the U.S. and China negotiated a treaty that allowed the U.S. to “regulate, limit or suspend such coming or residence” of Chinese laborers.⁴⁸ The Treaty included the condition that those already here, prior to 1880, would be “allowed to go and come of their own free will and accord.”⁴⁹ Then, in 1882, Congress suspended immigration of Chinese laborers for 10 years.⁵⁰ Those here who wished to leave and return could obtain certificates to show they had come before 1880.⁵¹ In 1888, however, Congress barred the return of Chinese laborers regardless of whether they had obtained a certificate showing entry before 1880.⁵²

Chae Chan Ping had obtained a certificate in 1887, returned to his native China that year and then attempted to return to the U.S., but was barred from reentry due to the newly enacted statute.⁵³ He challenged the law, in part, on the grounds that it was “beyond the competency of Congress to pass” the 1888 statute.⁵⁴ The Court, in its decision, set out the conceptual

⁴⁵ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

⁴⁶ Motomura, *supra* note 41 at 550.

⁴⁷ *Chae Chan Ping* at 589.

⁴⁸ *Id.* at 596-597.

⁴⁹ *Id.*

⁵⁰ *Id.* at 597.

⁵¹ *Id.* at 597-98.

⁵² *Id.* at 599.

⁵³ Motomura, *supra* note 41 at 551.

⁵⁴ *Chae Chan Ping* at 603.

framework for classical immigration law,⁵⁵ holding that the federal government, under the sovereign powers delegated by the Constitution, had exclusive and plenary authority to exclude foreigners.⁵⁶ According to the Court, “The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when . . . the interests of the country require it, cannot be granted away or restrained on behalf of any one.”⁵⁷ Furthermore, although the statute did conflict with the treaties with China,⁵⁸ the Court held that treaties were of no greater legal obligation than the act of Congress and since the statute was later in time, it superseded the treaty.⁵⁹

In its 1915 decision, in *Truax v. Raich*,⁶⁰ the Court struck down an Arizona employment statute that was challenged on equal protection grounds and on preemption grounds. The Arizona statute required an employer with more than five employees “to employ not less than [80%] qualified electors or native-born citizens of the United States or some subdivision thereof.”⁶¹ Central to the Court’s holding was the principle, established in *The Chinese Exclusion Case*, that the authority to control immigration law is vested solely in the Federal government.⁶² According to the Court, “The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live

⁵⁵ Motomura, *supra* note 41 at 551.

⁵⁶ *Chae Chan Ping* at 609.

⁵⁷ *Id.*

⁵⁸ *Id.* at 600 (“It must be conceded that the act of 1888 is in contravention of express stipulations of the treaty of 1868 and of the supplemental treaty of 1880 . . .”).

⁵⁹ *Id.*

⁶⁰ *Truax v. Raich*, 239 U.S. 33 (1915).

⁶¹ *Id.* at 35.

⁶² *Id.* at 42.

where they cannot work.”⁶³ The Court continued, “[I]f such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying . . . the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.”⁶⁴ In sum, the Court found that the Arizona statute was inconsistent with exclusive federal authority to “admit or exclude” aliens and under the Supremacy Clause the state law must yield to the federal statute.

In the 1941 case of *Hines v. Davidowitz*,⁶⁵ the Court was faced with a Pennsylvania alien registration statute that required every alien, 18 years and older, with certain exceptions to do the following: register once each year; provide certain information required by the statute, plus any other information and details that the Pennsylvania Department of Labor and Industry (L&I) may direct; pay annual registration fee of \$1; receive an alien identification card and carry it at all times; show the card whenever demanded by a police officer or agent of the L&I; and show the card as a condition precedent to registering a motor vehicle or obtaining a license to operate one.⁶⁶ Although the plaintiffs made equal protection and preemption arguments for invalidating the state law, the Court viewed it unnecessary to pass on the plaintiffs’ claim that the Pennsylvania statute denies equal protection of the laws to aliens residing in the state.⁶⁷

Thus, deciding the case solely on preemption grounds, the Court began with the well-established premise that the national power in the field of foreign affairs, including power over immigration, naturalization and deportation, is supreme.⁶⁸ The Court then determined that the

⁶³ Id. at 42.

⁶⁴ Id. at 42.

⁶⁵ *Hines v. Davidowitz*, 312 U.S. 52 (1941).

⁶⁶ Id. at 59.

⁶⁷ Id. at 62.

⁶⁸ Id. at 62.

Pennsylvania statute regulated in a field which affects international relations.⁶⁹ The Court also found the federal government had enacted a comprehensive scheme covering the same field⁷⁰ when it enacted the Federal Alien Registration Act of 1940.⁷¹ Furthermore, in doing so Congress plainly manifested a purpose to protect the personal liberties of law-abiding aliens through one uniform national registration system.⁷² Thus, because the divergent state law conflicted with the purposes and objectives of Congress the Court held that the state law was preempted by the Federal Alien Registration Act.⁷³ According to the Court, “[W]here the federal government, in the exercise of its superior authority . . . has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.”⁷⁴

In its 1971 decision, *Graham v. Richardson*,⁷⁵ the Court considered the constitutional validity of an Arizona law and a Pennsylvania law that limited the access of aliens to welfare benefits. Specifically, the Court dealt with the following questions: (1) is a state law that conditions welfare benefits upon the beneficiary's possession of U.S. citizenship valid? and (2) is a state law that conditions welfare benefits for aliens on fulfillment of a residency requirement valid?⁷⁶ Most of the Court's opinion centered on its analysis of the aliens' equal protection claims; however, the Court also addressed the issue of federal preemption. With respect to preemption, the Court first affirmed the principle, established in earlier cases, that the federal

⁶⁹ Id. at 68.

⁷⁰ Id. at 61 (“The basic subject of the state and federal laws is identical -- registration of aliens as a distinct group.”).

⁷¹ Id. at 69-70.

⁷² Id. at 74.

⁷³ Id. at 74.

⁷⁴ Id. at 66-67.

⁷⁵ *Graham v. Richardson*, 403 U.S. 365 (1971).

⁷⁶ *Graham* at 366.

government has “broad constitutional powers in determining what aliens shall be admitted to the U.S., the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.”⁷⁷ The Court ultimately found the state laws that conditioned the receipt of welfare benefits on citizenship or, in the case of aliens, longtime residency, “equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode.”⁷⁸ These laws were found to be unconstitutional since they encroached upon the federal government’s exclusive power to control immigration.⁷⁹

In a significant move, the Court also rejected Arizona’s argument that its 15-year durational residency requirement for aliens was authorized by Congress in the Social Security Act of 1935. First, the Court held that although federal government has broad constitutional power to determine what aliens shall be admitted, the period they may remain, and the terms and conditions of naturalization, Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.⁸⁰ Second, the Court noted, under the Constitution, Congress’ power is to “establish a uniform Rule of Naturalization.”⁸¹ The Court determined that a congressional statute, construed “so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity.”⁸² Applying the

⁷⁷ Id. at 377 (quoting *Takahashi v. Fish & Game Comm'n*, 334 U.S., at 419; *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941)).

⁷⁸ Id. at 380.

⁷⁹ Id.

⁸⁰ Id. at 382.

⁸¹ Id. (quoting U.S. Const., Art. I, § 8, cl. 4).

⁸² Id.

doctrine of constitutional avoidance, the Court held the federal statute did not authorize the Arizona 15-year residency requirement.⁸³

In the seminal case of *De Canas v. Bica*,⁸⁴ decided in 1976, the Court established a three-part test for determining whether federal law preempts a state or local law.⁸⁵ In addition, this case sheds some light on where to draw the line between immigration law which is exclusively within the federal domain and alienage law which is not. *De Canas* involved a challenge to a California law that prohibited an employer from “knowingly” employing an alien who is not entitled to lawful residence in the U.S. if such employment would have an “adverse effect” on lawful resident workers.⁸⁶ The Court, in a unanimous decision, reversed the lower courts and upheld the challenged state law, declining to find it unconstitutional as a regulation of immigration or as being preempted under the Supremacy Clause by the Immigration and Nationality Act (INA).⁸⁷ In a significant statement, the Court clearly indicated that every state enactment which deals with aliens is not considered to be a regulation of immigration and, thus, such enactments are not per se preempted.⁸⁸

In reaching its conclusion, the Court established the following three-part framework for determining whether a state or local regulation affecting immigration is preempted by federal law.⁸⁹ First, a state or local regulation is preempted if it falls within the narrow category of a

⁸³ Id. at 382-83.

⁸⁴ *De Canas v. Bica*, 424 U.S. 351 (1976).

⁸⁵ It is important to note the Court considered *De Canas* prior to the enactment of the Immigration Reform and Control Act of 1986 (“IRCA”).

⁸⁶ Id. at 353 (citing Cal. Labor Code §2805 (repealed)).

⁸⁷ Id. at 351.

⁸⁸ Id. at 355.

⁸⁹ Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. Legis. & Pub. Pol’y 473, 514 (2006-2007) (citing *De Canas* at 355, 357). See also *Equal Access Educ. v. Merten*, 305 F.Supp.2d 585, 601-602 (ED Va. 2004) (applying *De Canas* three part test to policy of Virginia public universities and colleges that denied admission to undocumented aliens).

“regulation of immigration” (a category over which the federal government has exclusive control).⁹⁰ Second, a regulation is preempted if the federal government intended to occupy the field in which the state policy or statute attempts to regulate.⁹¹ According to the Court, “Only a demonstration that complete ouster of state power . . . was the clear and manifest purpose of Congress” is sufficient to justify a finding of field preemption.⁹² Third, a regulation is preempted if the state regulation “conflicts in any manner with any federal laws or treaties.” Under the third category, a state law or local ordinance is considered to be preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the INA.”⁹³ Courts typically continue to rely on this preemption framework for evaluating the constitutionality of state and local immigration laws.⁹⁴

In *Plyler v. Doe*,⁹⁵ decided in 1982, the Court provided further indication that there might be a role for states to enact immigration law as long as it is consistent with federal law. *Plyler* was explicitly decided on equal protection grounds;⁹⁶ however, in dicta the court addressed the application of preemption doctrine to state laws touching on immigration.⁹⁷ The case involved a

⁹⁰ Id. (quoting *De Canas* at 355).

⁹¹ Id. (quoting *De Canas* at 357); *Merten* at 602.

⁹² *De Canas* at 357.

⁹³ *Merten* at 602 (quoting *De Canas* at 363).

⁹⁴ Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 Mich. L. Rev. 567, 620 (2008).

⁹⁵ *Plyler v. Doe*, 457 U.S. 202 (1982).

⁹⁶ *Plyler* at FN 8 (“Appellees . . . continue to press the argument that [the Texas statute] is pre-empted by federal law and policy. In light of our disposition of the Fourteenth Amendment issue, we have no occasion to reach this claim.”)

⁹⁷ The District Court, in *Doe v. Plyler*, in contrast, decided the case on both equal protection and preemption grounds. *Plyler* at 208, (citing *Doe v. Plyler*, 458 F. Supp. 569, 590-92 (E.D. Tex. 1978)). On the preemption claim, the District Court held the Texas statute was inconsistent with the scheme of national regulation under INA, and with federal laws relating to funding and discrimination in education. *Plyler* at FN 5. The District Court distinguished *De Canas*, by emphasizing the state bar on employment of illegal aliens involved in *De Canas* mirrored the federal policy of protecting the domestic labor market. Id. The court found no similar express federal policy to bar illegal immigrants from education. Id. On appeal, however, the Court of Appeals held the District Court erred in finding the Texas statute preempted by federal law because *De Canas* had not foreclosed all state

challenge to a Texas statute that permitted local school districts to deny enrollment to children not legally admitted to the country.⁹⁸ The Court struck down the law, holding it was a violation of the Equal Protection Clause because the state had failed to advance a substantial state interest to justify the denial of “the free public education that it offers to other children residing within its borders,” to “a discrete group of innocent children.”⁹⁹

With respect to preemption, the Court first differentiated between the state and federal government’s respective powers to make immigration laws: “With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation.”¹⁰⁰ The Court continued, “No State may independently exercise a like power.”¹⁰¹ In a key statement, however, the Court said that if the federal government has by uniform rule prescribed what it deems to be appropriate standards for the treatment of an alien subclass, the States may follow federal direction.¹⁰² Such statement can be viewed as an invitation for States to regulate immigration despite prior cases which seemed to indicate the power to regulate immigration is an exclusive power of the federal government.

Later in its opinion, the Court elaborated on this invitation. The Court cited *De Canas* for the principle that States have some authority to “act with respect to illegal aliens, at last where

regulation with respect to illegal aliens and the court found no express or implied congressional policy favoring the education of illegal aliens. *Plyler* at 208 (citing *Doe v. Plyler*, 628 F.2d 448, 451-54 (5th Cir. 1980)). Thus, the Court of Appeals concluded there was no preemptive conflict between state and federal law. *Id.*

⁹⁸ *Plyler* at 205.

⁹⁹ *Id.* at 230.

¹⁰⁰ *Id.* at FN 19.

¹⁰¹ *Id.*

¹⁰² *Id.*

such action mirrors federal objectives and furthers a legitimate state goal.”¹⁰³ Applying this rule to the Texas statute, however, the Court found no indication that the disability imposed by the state law corresponds to any identifiable congressional policy and, more importantly, found the statute was in conflict with federal law.¹⁰⁴ The Court noted that the federal government enjoys the discretionary power to grant relief from deportation to an illegal entrant.¹⁰⁵ In light of this federal power, a state cannot realistically determine whether any particular undocumented child will in fact be deported prior to the completion of federal deportation proceedings.¹⁰⁶ Thus, the Court concluded it would not be “harmonious” with federal law for Texas, in accordance with its statute, to deny “education to a child enjoying an inchoate federal permission to remain.”¹⁰⁷

Finally, in the context of evaluating the state’s purported justifications for the law singling out undocumented immigrant children, the Court again opened the door to some state and local regulation of immigration. The Court indicated that despite the exclusive federal control of our borders, States have some power to make laws to mitigate the effects of unlawful immigration.¹⁰⁸ The Court stated, “Despite the exclusive federal control of this Nation’s borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.”¹⁰⁹ In evaluating whether the Texas law could be justified on such grounds, the Court found even if states have a cognizable interest in “mitigating the potentially

¹⁰³ Id. at 225.

¹⁰⁴ Id. at 225-26 (“the classification reflected in [the state statute] does not operate harmoniously within the federal program.”)

¹⁰⁵ Id. at 226.

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id. at FN 23.

¹⁰⁹ Id.

harsh economic effects of sudden shifts in population,” the state law does not offer an effective method of dealing with such problems.¹¹⁰

This brief review of Supreme Court jurisprudence in the field of immigration shows some degree of movement away from the early cases, which explicitly, and without qualification, affirmed the principle that the federal government has exclusive and plenary power to regulate immigration. In contrast to the early cases, the more recent cases of *De Canas v. Bica* and *Plyler v. Doe* indicate the Court has shifted away from federal exclusivity as both cases explicitly recognize that states have some power to regulate immigration.¹¹¹ A number of scholars and commentators have also noted this trend and questioned the continuing vitality of the federal government’s exclusive and plenary power over immigration law.¹¹²

IV. Pending Cases: *Lozano v. City of Hazleton* and *Arizona Contractors v. Candelaria*

There are two interesting preemption cases related to immigration which may be working their way up to the Supreme Court. These cases may shed light on whether the federal government will continue to hold exclusive and plenary power over immigration law or whether this power will shift, in some measure, to cities and states. *Lozano v. City of Hazleton* is

¹¹⁰ Id. at 228.

¹¹¹ Further evidence of this shift can be seen in recent Circuit Court and District Court decisions, which have followed the Supreme Court’s lead in upholding state and local immigration laws against challenges that the laws are an unconstitutional infringement on the federal government’s exclusive power to regulate immigration. See, e.g., *Arizona Contractors Association v. Candelaria* (D. Ariz. Feb. 7, 2008); *Gray et al. v. City of Valley Park*, No. 07-00881 (E.D. Mo. Jan. 31, 2008).

¹¹² See, e.g., Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545 (1990) (endorsing the “widely accepted view” that the plenary power doctrine is in some state of decline and suggesting the gradual demise of the doctrine is best understood as a function of the tension in immigration cases between constitutional doctrine and statutory interpretation); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 Vand. L. Rev. ___, (forthcoming 2008) (challenging the view that state and local involvement in immigration is precluded the Constitution and arguing, to the contrary, that the Constitution allows immigration authority to be shared among levels of government.).

currently on appeal to the Third Circuit Court of Appeals and *Arizona Contractors* is currently on appeal to the Ninth Circuit Court of Appeals. Although the district courts which decided these cases agree that preemption is a correct framework through which to evaluate the constitutionality of the similar laws at issue,¹¹³ the courts disagree on whether these laws are preempted by federal statute. Among other things, the courts disagree on whether IRCA¹¹⁴ expressly preempts or expressly authorizes the challenged employer-sanction laws.

A) *Lozano v. City of Hazleton*

1. Factual Background

Hazleton¹¹⁵ is a city of approximately 33,000 people.¹¹⁶ It is located in northeastern Pennsylvania in the foothills of the Pocono Mountains.¹¹⁷ In the early 20th Century, Hazleton experienced substantial population growth as a result of the many jobs created by the booming coal industry (its population increased from 14,320 in 1900 to 25,452 in 1910).¹¹⁸ The population peaked at 38,009 in the 1940 census, but with the decline of the anthracite coal

¹¹³ The challenged Hazleton ordinances and Arizona statute do differ in significant respects. However, they are similar enough that a comparison of the two district court opinions, examined *infra*, which both apply the federal doctrine of preemption but reach different outcomes, still offers an instructive comparison.

¹¹⁴ The Federal Immigration Reform and Control Act (IRCA) is a federal statute enacted in 1986 by Congress, which deals with the employment of unauthorized aliens. The law prohibits employment of aliens who are 1) not lawfully present in the U.S.; and 2) not lawfully authorized to work in the U.S. 8 U.S.C. § 1324a(h)(3). In order to prevent the employment of unauthorized aliens, employers are required to verify the identity and eligibility for work of all new employees by reviewing specified documents. 8 U.S.C. § 1324(a)(b). An employer is prohibited from hiring an alien who is unable to present proper documentation. 8 U.S.C. § 1324(a)(1). IRCA contains an express preemption clause that provides: “The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” 8 U.S.C. § 1324a(h)(2).

¹¹⁵ Under Pennsylvania law, Hazleton is a City of the Third Class and operates under an Optional Plan B form of government. *Lozano* at 484.

¹¹⁶ *Lozano* at 484.

¹¹⁷ City of Hazleton web site, *Live in Hazleton* (available at <http://www.hazletoncity.org/public/life/life-in-hazleton.html>); *Lozano* at 484.

¹¹⁸ *Lozano* at 484.

industry, the city's population steadily decreased.¹¹⁹ Beginning in 2000, however, Hazleton began to again experience a sharp increase in population growth (its population increased from 23,000 in 2000 to approximately 33,000 in 2007). This increase is largely due to a recent influx of immigrants,¹²⁰ most of whom are Latino.¹²¹ The immigrants who moved to Hazleton included U.S. citizens, lawful permanent residents and undocumented immigrants.¹²²

In July of 2006, Hazleton began to enact a series of ordinances aimed at dealing with what the city saw as the problems created by the presence of "illegal aliens."¹²³ On July 13, 2006, the city enacted the first version of its "Illegal Immigration Relief Act Ordinance."¹²⁴ The ordinance prohibits the employment and harboring of undocumented aliens in the City of Hazleton.¹²⁵ Then, the next month, the city passed the "Tenant Registration Ordinance" (RO).¹²⁶ The ordinance requires apartment dwellers to obtain an occupancy permit which requires proof of citizenship or status as a lawful resident.¹²⁷ Then, on September 21, 2006, Hazleton enacted two ordinances which replaced the original Illegal Immigration Relief Act (IIRA).¹²⁸ These ordinances are entitled the "Illegal Immigration Relief Act Ordinance" and the "Official English Ordinance."¹²⁹ In December of 2006, Hazleton amended the IIRA and, ultimately, on March 15,

¹¹⁹ City of Hazleton web site, *History* (available at <http://www.hazletoncity.org/public/life/history.html>).

¹²⁰ This may be seen as the second great wave of immigration to Hazleton. According to the Hazleton's web site, in the late 17th century, "waves of eastern European immigrants poured in to take jobs created by the booming coal industry." City of Hazleton web site, *History*.

¹²¹ *Lozano* at 484.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* (Ordinance 2006-10).

¹²⁵ *Id.*

¹²⁶ *Id.* (Ordinance 2006-13).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* (Ordinance 2006-18 and 2006-19, respectively).

2007, during the course of the litigation, the city enacted the final version of the ordinance at issue in *Lozano v. City of Hazleton*.¹³⁰

In August of 2006, plaintiffs filed a lawsuit challenging the validity of the City of Hazleton's Illegal Immigration Relief Act Ordinance and Tenant Registration Ordinance.¹³¹ Plaintiffs allege the IIRA and the RO are unconstitutional on the grounds that they violate the Supremacy Clause, the Due Process Clause and the Equal Protection Clause of the U.S. Constitution.¹³² The plaintiffs in this suit include lawful permanent residents, undocumented immigrants¹³³ and a number of Latino Organizations (the Hazleton Hispanic Business Association,¹³⁴ the Pennsylvania Statewide Latino Coalition¹³⁵ and Casa Dominicana de Hazleton, Inc.¹³⁶).¹³⁷ Plaintiffs sought relief in the form of a declaratory judgment that the ordinances are unconstitutional and unlawful, an injunction against enforcement of the ordinances and recovery of costs and attorneys' fees.¹³⁸

2. District Court Opinion

¹³⁰ *Lozano* at 485, 515 (Ordinance 2006-40 and Ordinance 2007-6, respectively). Add info. re: what the amendments did (see pp. 86-86 of decision).

¹³¹ *Lozano* at 485.

¹³² *Id.*

¹³³ Although the terms are not technically interchangeable, in accord with the District Court, I will use the terms "illegal alien," "unauthorized alien," "illegal immigrant" and "undocumented alien" and "undocumented immigrant" interchangeably to refer to individuals who lack lawful immigration status. *Lozano* at 484-485.

¹³⁴ The Hazleton Hispanic Business Association is an organization comprised of approximately 27 Hispanic business and property owners from the Hazleton area. *Lozano* at 486. Its members include landlords in the city of Hazleton. *Id.*

¹³⁵ The Pennsylvania Statewide Latino Coalition is a non-profit organization with a mission to promote the social, political, economic and cultural development of Pennsylvania Latinos and to develop leadership and create networks among Latino leaders and communities. *Lozano* at 486. See also <http://www.pslconline.org/home/>.

¹³⁶ Casa Dominicana de Hazleton, Inc. is an organization that provides assistance, orientation and education to the Latino community in Hazleton and attempts to unify ties between the Latino and non-Latino communities. It provides members with information, legal referrals and assistance with economic problems and works to keep youth from joining gangs. *Lozano* at 486.

¹³⁷ *Lozano* at 485-486.

¹³⁸ Second Amended Complaint at 4-5, *Lozano v. City of Hazleton*, 496 F.Supp.2d 477 (M.D. Pa. 2007) (No. 3:06cv1586).

In the following opinion, the Pennsylvania district court held the City of Hazleton's ordinances which imposed sanctions on employers of unauthorized immigrants was invalid on federal preemption grounds.

Judge Munley first addressed plaintiffs' assertion that the employment provisions of IIRA (the Hazleton Ordinance) are expressly preempted by IRCA.¹³⁹ Finding express preemption, the court relied on the plain language of the statute and its legislative history.¹⁴⁰ The court construed IRCA's express preemption clause as applying, generally, with an exception for state or local laws that deal with the suspension, revocation or refusal to reissue a license to an entity found to have violated the sanction provisions of IRCA.¹⁴¹ According to the court, the licensing exception to IRCA's express preemption clause did not save the Hazleton ordinance because the Hazleton law suspends the business permit of those who violate the ordinance itself, not of those who violate IRCA.¹⁴² Furthermore, the court noted that the ordinance went beyond the sanction of business permit suspension because the IIRA creates a cause of action for discharged employees.¹⁴³ Although the City of Hazleton argued this sanction is similar to licensing and thus, is not preempted, the court disagreed.¹⁴⁴

Second, Judge Munley discussed whether the Hazleton law was invalid on the basis of implied preemption.¹⁴⁵ The court determined that the ordinance was subject to field preemption because in the area of immigration "the pervasiveness of the federal regulation precludes

¹³⁹ *Lozano* at 518.

¹⁴⁰ *Id.* at 519-520.

¹⁴¹ *Id.* at 520.

¹⁴² *Id.* at 520.

¹⁴³ *Id.* at 520.

¹⁴⁴ *Id.* at 520.

¹⁴⁵ *Id.* at 521.

supplementation by the States” and “the federal interest in the field is sufficiently dominant.”¹⁴⁶ Reviewing a litany of cases, the court reached the seemingly uncontroversial conclusion that in areas of immigration the federal government’s interest vis-à-vis the states is sufficiently dominant.¹⁴⁷ As to the more complex question of whether the federal government had pervasively regulated the field, the court relied, primarily, on the Supreme Court’s characterization, in *Hoffman Plastic*, of IRCA as “a **comprehensive scheme** prohibiting the employment of illegal aliens in the United States.”¹⁴⁸

Third, Judge Munley examined whether conflict preemption applies to the employer provisions of Hazleton’s ordinance.¹⁴⁹ According to the court although IIRA and IRCA have a similar goal, they are in conflict because the means employed to reach that goal are different.¹⁵⁰ The court identified differences between IIRA and IRCA on the basis of the following: the laws have different procedures for verifying employee identification documents;¹⁵¹ IIRA provides for strict liability for civil causes of action authorized by the statute whereas IRCA requires the element of knowledge;¹⁵² IIRA treats the Basic Pilot Program¹⁵³ as mandatory whereas it is voluntary under IRCA;¹⁵⁴ IIRA provides a 3-day timeframe within which employer must terminate an employee found to be unauthorized whereas IRCA prohibits termination during this

¹⁴⁶ Id. at 521 (quoting *Shneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988)).

¹⁴⁷ Id. at 521-22.

¹⁴⁸ Id. at 523 (quoting, with emphasis added, *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 1275, 1282 (2002)).

¹⁴⁹ Id. at 525.

¹⁵⁰ Id. at 526.

¹⁵¹ Id. at 526.

¹⁵² Id. at 526.

¹⁵³ The Basic Pilot Program, now called E-Verify, is a voluntary experimental program created by Congress that permits employers to electronically verify the employment eligibility of employees. *Lozano* at 526 (citing Note following 8 U.S.C. § 1324a).

¹⁵⁴ *Lozano* at 526.

period;¹⁵⁵ IIRA does not provide for any appeal rights to employees whereas IRCA provides for such rights;¹⁵⁶ and, finally, IIRA has no anti-discriminatory provisions whereas IRCA creates a cause of action against employers that discriminate on the basis national origin or citizenship status.¹⁵⁷ After pointing out these differences, the court observed that the local and federal laws strike “a different balance between the rights of businesses and workers and the goal of preventing illegal employment.”¹⁵⁸ The court held because Hazleton’s ordinance conflicts, interferes with and complements IRCA it is preempted on the basis of conflict preemption.¹⁵⁹

B) *Arizona Contractors v. Candalaria*

1. Factual Background

The State of Arizona has had a contentious relationship with the federal government on immigration related matters.¹⁶⁰ Due to the fact that it shares a border with Mexico the state is disproportionately affected by problems associated with the presence of undocumented immigrants. Arizona’s total population is estimated at a little over 6 million.¹⁶¹ The state’s foreign-born population is an estimated 12.6%.¹⁶² Since 1990, Arizona’s foreign-born population has increased sharply (it increased from 268,700 in 1990 to 830,900 in 2004; an

¹⁵⁵ Id. at 527.

¹⁵⁶ Id. at 527.

¹⁵⁷ Id. at 528.

¹⁵⁸ Id. at 527.

¹⁵⁹ Id. at 529.

¹⁶⁰ See, e.g., Ariz. Governor Janet Napolitano, Declaration of Emergency: Arizona/Mexico International Border Security Emergency (Aug. 15, 2005) (Declaring state of Emergency to combat problems associated with illegal immigration, in part, because “the federal government has failed in its responsibility to secure the United States and Mexico border.”); Ariz. Governor Janet Napolitano Executive Order 2005-13 (Mandating summit to be held on immigration enforcement strategies, in part, because the “Department of Justice has failed to adequately enforce federal immigration law or reimburse Arizona’s actual costs of incarcerating criminal aliens, thereby costing Arizona taxpayers more than \$200 million.”).

¹⁶¹ U.S. Census Bureau, *State and County QuickFacts: Arizona*, <http://quickfacts.census.gov/qfd/> (last visited May 1, 2008).

¹⁶² Id.

increase of almost 280%).¹⁶³ Most immigrants are of working age and have come to the U.S. seeking employment.¹⁶⁴ Contrary to the popular perception that immigrants are a drain on the economy,¹⁶⁵ a study published by the Udall Center for Studies in Public at the University of Arizona estimated that the fiscal impact of immigration in Arizona was positive.¹⁶⁶

Regardless of whether the study's conclusions are true, amidst negative public opinion about undocumented immigrants and public support for legislative action, on July 2, 2007, the Arizona State Legislature enacted the Legal Arizona Workers Act.¹⁶⁷ The Act prohibits businesses from knowingly or intentionally employing an "unauthorized alien."¹⁶⁸ The law also requires employers to use the "E-Verify" system to verify the employment authorization of all new employees.¹⁶⁹ A violation of the law by an employer, who intentionally or knowingly employs unauthorized aliens, could result in the suspension or revocation of the employer's business licenses by the Superior Court of Arizona.¹⁷⁰

¹⁶³ Judith Gans, Udall Center for Studies in Public Policy, University of Arizona, *The Economic Impacts of Immigrants in Arizona* (July 2007) at 1.

¹⁶⁴ Id.

¹⁶⁵ In a recent N.Y. Times/CBS News Poll (conducted May 2007) when asked, "Do you think illegal immigrants do more to strengthen the U.S. economy because they provide low-cost labor and they spend money or do illegal immigrants do more to weaken the U.S. economy because they don't all pay taxes but can use public services?" 70% of respondents thought they do more to weaken the economy. In contrast, only 23% of respondents thought illegal immigrants do more to strengthen the economy. Complete poll results available at www.nytimes.com/2007/05/25/us/25poll.html (last visited May 1, 2008).

¹⁶⁶ The fiscal costs of immigrants (for education, health care, and law enforcement) were an estimated \$1.414 billion compared with a total estimated state tax revenue attributable to immigrant workers of \$2.356 billion. Gans, *supra* note 121 at 2. Thus, according to the study, the net 2004 fiscal impact of immigrants in Arizona was positive by about \$942 million. Id.

¹⁶⁷ *Arizona Contractors* at 1040.

¹⁶⁸ Arizona Attorney General Terry Goddard, *FAQs about the Legal Arizona Workers Act*, <http://www.azag.gov/LegalAZWorkersAct/FAQ.html> (last visited May 1, 2008) (Under the statute, an "unauthorized alien" is defined as "an alien who does not have the legal right or authorization under federal law to work in the United States.").

¹⁶⁹ Id.

¹⁷⁰ *Arizona Contractors* at 1040.

In 2007, two groups of plaintiffs filed lawsuits challenging the validity of the Legal Arizona Workers Act. The first group of plaintiffs, including the Arizona Contractors Association, the U.S. Chamber of Commerce, Wake Up Arizona!, Inc. and other business associations, filed their law suit on July 13, 2007.¹⁷¹ The second group of plaintiffs, Chicanos Por La Causa, Inc., and Somos America, filed their law suit on September 4, 2007.¹⁷² The district court consolidated the two cases and, after trial, dismissed both law suits for lack of standing.¹⁷³ In December of 2007, the two groups of plaintiffs¹⁷⁴ filed new law suits naming different state officials as defendants in an effort to avoid another dismissal on standing grounds.¹⁷⁵ The district court again consolidated the two new cases.¹⁷⁶

Both groups of plaintiffs challenged the constitutionality of the Legal Arizona Workers Act. Plaintiffs argued the statute is preempted by federal law, and, therefore, a violation of the Supremacy Clause of the U.S. Constitution.¹⁷⁷ In addition, plaintiffs argued the act is a violation of the Due Process Clause of the Fourteenth Amendment.¹⁷⁸ Plaintiffs sought relief in the form of an injunction, barring implementation of the act; declaratory judgment, stating certain

¹⁷¹ Plaintiffs/Appellants' Consolidated Opening Brief at 3, *Arizona Contractors v. Candelaria*, No. 07-17272 (9th Cir. April 1, 2008) .

¹⁷² Id.

¹⁷³ Id. at 4.

¹⁷⁴ Plaintiffs include the following: the Arizona Contractors Association, Inc., Arizona Employers for Immigration Reform, Inc., U.S. Chamber of Commerce, Arizona Chamber of Commerce, Arizona Hispanic Chamber of Commerce, Inc., Arizona Farm Bureau Federation, Arizona Restaurant and Hospitality Association, Associated Minority Contractors of America, Arizona Roofing Contractors Association, National Roofing Contractors' Association, Wake Up Arizona! Inc., Arizona Landscape Contractors Association, Inc., Valle Del Sol, Inc., Chicanos por la Causa, Inc. and Somos America.

¹⁷⁵ Plaintiffs/Appellants' Consolidated Opening Brief at 4.

¹⁷⁶ *Arizona Contractors*, 534 F.Supp.2d 1036, 10401 (Feb. 7, 2008).

¹⁷⁷ See, generally, Complaint filed by Valle Del Sol, et al., *Arizona Contractors v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. Feb. 7, 2008) (No. CV07-2518); Complaint filed by Arizona Contractors Association, et al., *Arizona Contractors v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. Feb. 7, 2008) (No. CV07-2496).

¹⁷⁸ Id.

provisions of the act are unlawful and invalid; and recovery of costs and attorneys' fees.¹⁷⁹ Since the defendants agreed not to contest plaintiffs' standing before the district court, the court proceeded to address the merits of the case.¹⁸⁰

2. District Court Opinion

Judge Wake, the Arizona district court judge, upheld the Legal Arizona Workers Act in a considerably shorter opinion than that of Judge Munley, the Pennsylvania district court judge who decided *Lozano v. Hazleton*.¹⁸¹

The court first briefly reviewed IRCA. At the outset, Judge Wake noted Congress' realization that IRCA's I-9 system was imperfect and that IRCA's text authorized evaluation and change of the employment verification system.¹⁸² The court then discussed Congress' enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and E-Verify.¹⁸³ Specifically, Judge Wake discussed employers' set-up and operation costs for participating in the program as considerably less than "modest," but sufficient to provide plaintiffs with standing.¹⁸⁴ The court found the average cost to set up E-Verify is \$125, with 85% of employers spending \$100 or less and the average annual operation cost is \$728, with 75% of employers spending \$100 or less on operation costs.¹⁸⁵ Furthermore, returning to IRCA's I-9 verification system, Judge Wake noted the system "has been thoroughly defeated by document and identity fraud, allowing upwards of eleven million unauthorized workers to gain

¹⁷⁹ Id.

¹⁸⁰ *Arizona Contractors* at 1041.

¹⁸¹ See, generally, *Arizona Contractors* (37 pages); cf. *Lozano* (206 pages).

¹⁸² *Arizona Contractors* at 1042.

¹⁸³ Id. (The IIRA "directed the U.S. Attorney General to conduct three pilot programs to improve the employment verification system. . . . One of the systems created by IIRIRA was formerly known as the Basic Pilot. . . . The Basic Pilot is now known as the Web Basic Pilot or E-Verify.").

¹⁸⁴ Id. at 1043.

¹⁸⁵ Id.

employment in the United States labor force.”¹⁸⁶ The court then characterized the Legal Arizona Workers Act as a conscious attempt to address the flawed system at the State level.¹⁸⁷ In addition, the court noted the similarities between the Arizona law and IRCA: first, the state law adopts IRCA’s definition of “unauthorized alien” and, second, the state law relies on the federal determination of a person’s immigration status and employment authorization.¹⁸⁸

After presenting the statutes at issue, Judge Wake reached the question of whether the Arizona statute was preempted by federal law. The court began its discussion of preemption doctrine, reciting the principle that, “[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.”¹⁸⁹ Taking up the question of express preemption, first, Judge Wake turned to the language of the provision in question, IRCA’s express preemption clause.¹⁹⁰ The court concluded that the plain language¹⁹¹ of the statute authorizes Arizona’s employer sanctions law.¹⁹² According to the court, the Arizona law falls squarely within IRCA’s exception to preemption because it authorizes courts to suspend or revoke the business licenses¹⁹³ of

¹⁸⁶ Id.

¹⁸⁷ Id.

¹⁸⁸ Id. at 1043-44.

¹⁸⁹ Id. at 1044 (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

¹⁹⁰ As noted above, IRCA’s express preemption provision states, “The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through the licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment unauthorized aliens.” 8 U.S.C. § 1324a(h)(2).

¹⁹¹ The court declined to look to the legislative history of IRCA to determine the scope of the statute’s express preemption provision. *Arizona Contractors* at 1046-1048 (“The language of the statute that Congress approved, not language from the House Report concerning the statute, controls. . . . [I]f the House Report did mean what Plaintiffs contend, such an attempt to override the plain language of the statute would be precisely the kind of excess that the modern view of legislative history illegitimizes. The Members or their staff must write amendments into the bill, not into the Report.”)

¹⁹² *Arizona Contractors* at 1045-1046.

¹⁹³ The court also noted that the statute’s definition of the term “license” does not depart from common sense or traditional understandings of the word. *Arizona Contractors* at 1046.

employers who knowingly or intentionally employ unauthorized aliens.¹⁹⁴ The court rejected plaintiffs’ argument that Congress only intended to provide an exception for state laws related to a person’s fitness to receive a license without much explanation.¹⁹⁵ Furthermore, the court declined to accept plaintiffs’ argument that the law is invalid because its definition of license reaches some legal instruments that fall outside the traditional understanding of the term “license.”¹⁹⁶ According to Judge Wake, even if plaintiffs’ allegation is true, “the Act is not facially invalid if its definition sometimes exceeds the savings clause for ‘licensing laws.’”

Next, the court addressed plaintiffs’ argument that the structure and purpose of IRCA create an inference of field preemption.¹⁹⁷ Judge Wake began by asserting, “Unlike interstate transportation, foreign affairs, and even immigration, employment of unauthorized aliens is neither intrinsically nor historically an exclusive concern of the federal government, such ‘that the federal system will be assumed to preclude enforcement of state laws on the same subject.’”¹⁹⁸ Citing *De Canas*, the court stated that the states have strong local interests in prohibiting the employment of unauthorized aliens.¹⁹⁹ Judge Wake then held that a presumption against preemption applies in this case because IRCA regulates in a field of traditional state regulation.²⁰⁰ The court concluded that the structure and purpose of IRCA “do not clearly evidence an intent” (necessary to rebut the presumption against preemption) to preempt states from exercising their police power to act upon the business licenses of those who knowingly

¹⁹⁴ Id. at 1046.

¹⁹⁵ Id. at 1046.

¹⁹⁶ Id.

¹⁹⁷ Id. at 1048.

¹⁹⁸ Id. (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

¹⁹⁹ Id.

²⁰⁰ Id. at 1051 (quoting *De Canas* at 356) (“When Congress enacted employer sanctions in IRCA, it acted ‘within the mainstream of [state] police power regulation.’”).

employ unauthorized aliens.²⁰¹ Furthermore, drawing upon the distinction between immigration law and alienage law, the court held that the Act does not intrude upon the federal government's plenary power over the field of immigration because the challenged provisions of the Arizona statute do not "regulate immigration."²⁰²

Lastly, the court addressed plaintiffs' conflict preemption argument that the Legal Arizona Workers Act is invalid because it conflicts with the purposes and objectives of Congress.²⁰³ First, the court examined the act's licensing sanctions procedures.²⁰⁴ Judge Wake found the Arizona law carefully tracks the federal employer sanctions law.²⁰⁵ The court held the Act's adjudicatory procedures did not conflict with federal law because although a State Superior Court judge and a federal administrative law judge might disagree on evidence, ultimately, the statute directs the state court to defer to the federal determination of a person's immigration status.²⁰⁶ Furthermore, the court found the absence of an explicit prohibition on discrimination does not render the state law in conflict with federal law because Arizonans are protected against by anti-discrimination provisions of IRCA and other federal and state laws.²⁰⁷ The court concludes, "There is no actual conflict because the act prohibits discrimination through

²⁰¹ Id.

²⁰² Id. (quoting *De Canas* at 355) ("Like the California law at issue in *De Canas*, the Act does not determine 'who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.'").

²⁰³ Id. at 1052-1057.

²⁰⁴ Id. at 1053.

²⁰⁵ Id. at 1053-1054 (The court reached this conclusion because it found the Act does the following: (1) does not impose a stricter standard of liability on employers than IRCA; (2) applies only to persons who have an "employment relationship" with an employer; (3) contains procedures for weeding out frivolous complaints; (4) provides enforcement officers with discretion; (5) does not change degree of inspection employers must perform on I-9 documents; (6) provides employers who have "complied in good faith" with the I-9 system an affirmative defense; and (7) accords employers who verify new hire's eligibility through E-Verify presumption of non-liability.).

²⁰⁶ Id. at 1054.

²⁰⁷ Id.

deference to State and federal protections.”²⁰⁸ With respect to plaintiffs’ argument that the Act upsets the balance that Congress struck between deterring employment of unauthorized aliens and minimizing discrimination, the court found this argument lacked merit because “[t]he sanctioned activity under IRCA and the Act is exactly the same.”²⁰⁹ Finally, the court held the state law requirement that employers use E-Verify is not in conflict with the purposes and objectives of Congress because the plain language of IRCA and IIRIRA demonstrates Congress’ intent for E-verify to be used and revised through experimentation.²¹⁰ The court found although the IIRA demonstrates Congress’ intent not to make E-Verify mandatory at the national level, the provisions of the statute that refer to voluntary participation, without more, do not raise an inference that Congress intended to prevent the states from mandating use of the system.²¹¹ In sum, the court held the Legal Arizona Workers Act does not actually conflict with the purpose and objectives of Congress and, thus, it is not conflict-preempted.

V. Tipping the Scale: Practical Considerations and Policy Arguments

The traditional view of federal preemption in the field of immigration holds that the federal government has plenary and exclusive power to make immigration law. However, in the absence of Congressional enactment of comprehensive federal immigration reform and increasing frustration by local and state governments attempting to cope with the challenges of a growing population of undocumented immigrants, states and localities are making laws that

²⁰⁸ Id.

²⁰⁹ Id. at 1055.

²¹⁰ Id. at 1055-56.

²¹¹ Id.

regulate immigration on an almost unprecedented scale.²¹² I posit the argument that practical considerations and policy arguments are increasingly important in tipping the scale in favor or against the invalidation of a state or local immigration law on federal preemption grounds. This argument is supported by a number of scholars and commentators who agree that the doctrine of plenary power and federal exclusivity with respect to immigration law is in some state of decline or, at the very least, on questionable footing.²¹³ The *Lozano* and *Arizona Contractors* decisions, reviewed above, present excellent examples of what I believe to be the past and the future of federal preemption doctrine as applied to state and local immigration laws. This is not to say that courts will rule in contravention of Supreme Court precedent (at least not explicitly); however, in the absence of federal action, I believe courts have become and will continue to be more tolerant of state and local efforts to enact immigration laws unless countervailing practical considerations and policy arguments can be offered for continuing to view the power to make immigration law as exclusively belonging to the federal government. In sum, the doctrine of plenary power is in a vulnerable position and in need of defense beyond illusory justifications if it is to survive.

²¹² In 2007, 1562 pieces of legislation related to immigrants and immigration were introduced among the 50 state legislatures. Of these bills, 240 became law in 46 states. National Conference of State Legislatures, *2007 Enacted State Legislation Related to Immigrants and Immigration* (Jan. 31, 2008) at 1, available at <http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf>.

²¹³ See, e.g., Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545 (1990) (endorsing the “widely accepted view” that the plenary power doctrine is in some state of decline and suggesting the gradual demise of the doctrine is best understood as a function of the tension in immigration cases between constitutional doctrine and statutory interpretation); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 Vand. L. Rev. ___, (forthcoming 2008) (challenging the view that state and local involvement in immigration is precluded the Constitution and arguing, to the contrary, that the Constitution allows immigration authority to be shared among levels of government). Cf. Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protectionism, and Federalism*, 76 N.Y.U. L. Rev. 493, 496 (2001) (arguing the federal power to regulate immigration is among those that are exclusively national and incapable of devolution to the states); Gilbert Paul Carrasco, *Congressional Arrogation of Power*, 74 B.U. L. Rev. 591 (1994) (arguing that federal authorization for state alienage classifications impermissibly delegates power that is exclusively federal under the Naturalization Clause of the U.S. Constitution).

VI. The Legal Arizona Workers Act: Practical Considerations and Policy Arguments

In this section I explore the practical implications of the Arizona employer sanctions law and some of the policy arguments that can be offered in favor and against the law, which I believe will play an important role in determining the future of this and similar state laws.

A) The Legal Arizona Workers Act in Practice

As noted above, the Legal Arizona Workers Act, also known as the Arizona Employer Sanctions Law, went into effect on January 1, 2008.²¹⁴ The law prohibits businesses from knowingly or intentionally employing an “unauthorized alien” and requires employers in the state to use E-Verify to verify the employment authorization of all new employees hired on or after January 1, 2008.²¹⁵ Recently, the Arizona State Legislature passed, and Arizona Governor Napolitano signed into law, House Bill 2745 which amended the Legal Arizona Workers Act.²¹⁶ The bill took effect on May 1, 2008 as a result of its Emergency Clause.²¹⁷ The new law clarifies some ambiguities in the original Act but also makes some significant changes.²¹⁸ Significantly, the amendment makes clear that the law applies only to workers hired on January 1, 2008 and thereafter.²¹⁹

²¹⁴ Arizona Attorney General Terry Goddard, *Legal Arizona Workers Act*, May 1, 2008, <http://www.azag.gov/LegalAZWorkersAct/index.html> (last visited May 5, 2008).

²¹⁵ *Id.*

²¹⁶ Benson, Matthew, “Changes to sanctions law approved,” *The Arizona Republic*, May 2, 2008.

²¹⁷ *Id.*

²¹⁸ See House Summary of H.B. 2745, as transmitted to Governor, April 28, 2008, available at http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/2r/summary/h.hb2745_04-29-08_astransmittedtogovernor.doc.htm (last visited May 5, 2008).

²¹⁹ Benson, supra note 219. See also House Summary of H.B. 2745, supra note 221; Arizona Attorney General Terry Goddard, *Legal Arizona Workers Act*, May 1, 2008, supra note 217.

Under the law, enforcement responsibilities are assigned to the State Attorney General and the County Attorneys.²²⁰ The law authorizes County Attorneys and the State Attorney General to investigate complaints.²²¹ Under the amended law, if the Attorney General investigates and determines the complaint is not false and frivolous, then the case must be turned over to the County Attorney of the county where the alleged unauthorized alien is or was employed.²²² The Act does not give the Attorney General’s Office the power to pursue sanctions against an employer in court.²²³ The power to pursue action in court against an employer is only given to the County Attorneys.²²⁴

The recent amendment to the Act requires the Attorney General to create a complaint form²²⁵ for alleging violations of the Act.²²⁶ In addition, the amendment established the “Voluntary Enhanced Employer Compliance Program.” Participants in the voluntary program would have to additionally utilize the Social Security Number Verification Service and provide information about an employee upon the request of the Attorney General or a County Attorney.²²⁷ The specific details of the program are unclear; however, the amendment provides that any employer that enrolls in the program and fulfills the program’s requirements will not be

²²⁰ Arizona Attorney General Terry Goddard, *Legal Arizona Workers Act*, May 1, 2008, supra note 217.

²²¹ Id.

²²² Id.

²²³ Id.

²²⁴ Id.

²²⁵ The form cannot require notarization or provision of the complainant’s social security number. House Summary of H.B. 2745, supra note 221. In addition, any complaint made on the complaint form “shall” be investigated, whereas any complaint made in some other format “may” be investigated. Arizona Attorney General Terry Goddard, *Legal Arizona Workers Act*, May 1, 2008, supra note 217.

²²⁶ House Summary of H.B. 2745, supra note 221.

²²⁷ Id.

subject to sanctions.²²⁸ The new law addresses discrimination by prohibiting the investigation of any complaint that is based solely on race, color or national origin.²²⁹

Despite the controversy and litigation generated by enactment of the Arizona law none of the state's County Attorneys have initiated court action against employers alleged to have employed unauthorized aliens in violation of the Legal Arizona Workers Act.²³⁰ Some of the reasons behind this may include the substantial obstacles that exist to enforcement of the law. One of the primary obstacles to enforcement is the limited resources available to the County Attorneys and the Office of the Attorney General to investigate complaints.²³¹ For example, County Attorneys usually have only one investigator available to follow up on complaints filed with the office.²³² Furthermore, the investigation of complaints is limited by employers' Fourth Amendment protections.²³³ These limits on the Attorney General's and County Attorneys' ability to thoroughly and effectively investigate complaints make it difficult for a County Attorney to establish that an employer has, in fact, "intentionally" or "knowingly" employed an unauthorized alien in violation of the law.²³⁴

B) Policy Arguments in Favor of Invalidating the Arizona Law on Preemption Grounds

1. Value of Uniformity

²²⁸ Id.; See also Arizona Attorney General Terry Goddard, *Legal Arizona Workers Act*, May 1, 2008, supra note 217.

²²⁹ House Summary of H.B. 2745, supra note 221.

²³⁰ Phone Interview with Pinal County Attorney James P. Walsh, April 24, 2008.

²³¹ Interview with County Attorney Walsh, supra note 233.

²³² Id.

²³³ Id. See also Brief of *Amici Curiae* National Federation of Independent Small Business Legal Center and the Associated Builders and Contractors in Support of Plaintiff-Appellant's Opening Brief, dated April 8, 2008.

²³⁴ Id.

Detractors of state and local efforts to regulate immigration argue that a uniform system of immigration law is both necessary and desirable. The Supreme Court has endorsed this view to some degree as well. For example, in *Harisiades v. Shaughnessy*, the Court pointed out that it is important to grant the federal government exclusive and plenary power over immigration law because of the impact of the connection between immigration law and U.S. foreign affairs: “It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations”²³⁵ Such a statement foreshadows the “one voice” theory, in which the Court has recognized that the nation must “speak with one voice” in foreign affairs. Basically, the argument is that it is important for the nation to speak with one voice, not fifty, regarding the treatment of aliens because the enactment of different immigration laws by individual states and municipalities may affect the entire country’s relations with foreign governments.²³⁶

Another policy argument in favor of a uniform system of immigration law is offered by members of the business community. The plaintiffs in *Arizona Contractors* argue inconsistent state immigration laws with respect to employment of unauthorized aliens create a “risk of chaos” for employers doing business in multiple states.²³⁷ Such employers could potentially be forced to comply with different schemes for all 50 states and for every city and town.²³⁸ The

²³⁵ *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952).

²³⁶ An example of how a local ordinance regulating immigration can embroil the U.S. in disputes with foreign nations can be seen in the aftermath of California’s passage of Proposition 187, which contained anti-immigrant provisions. After it was passed, Mexico publicly opposed the measure and called for political and civic leaders to boycott California commercially. 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, 37 (2007).

²³⁷ Plaintiffs/Appellants’ Consolidated Opening Brief, dated April 1, 2008 at 26.

²³⁸ *Id.*

Hispanic Chamber of Commerce presented similar arguments in its *amicus curiae* brief.²³⁹ The group indicated that as a result of independent immigration schemes designed to sanction employers, enacted by various states and localities, “National corporations and companies that do business in multiple states are faced with complying with different rules, different procedures, and different schemes.”²⁴⁰ Furthermore if such divergent schemes are upheld, “Employers will be faced with multiple sanctions, threat of losing businesses and the potential for inconsistent rulings on the various issues involved.”²⁴¹

C) Policy Arguments against Invalidating the Arizona Law on Preemption Grounds

1. Value of Experimentalism

In contrast to proponents of uniformity, defenders of state and local efforts to regulate immigration argue that allowing such experimentalism further values of efficiency and effectiveness.²⁴² If state and local governments are permitted to enact divergent immigration laws, other states, localities and the federal government would have the opportunity to learn from the various state and local experiences. For example, if a state invested considerable resources in immigration enforcement, resulting in a substantial increase in the number of arrests for immigration violations, this would provide the federal government with information about the potential positive value of such investments.²⁴³ On the other hand, if the increased enforcement also created significant problems, such as racial profiling, decreased reporting of crimes by non-citizens and fewer arrests for other crimes, such as robbery and assault, this would provide the federal government with information about the

²³⁹ *Amicus Curiae* Brief of the United States Hispanic Chamber of Commerce in Support of Appellants, dated April 7, 2008 at 14.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² See Huntington, *supra* note 33 at 35 (“The experimentalism that would be fostered under devolution and decentralization might further the values of efficiency and effectiveness.”).

²⁴³ *Id.* at 42-43.

potential negative value of such investments.²⁴⁴ Thus, experimentation by state and local governments could benefit the country as a whole.

In the specific context of the Legal Arizona Workers Act, those defending the Arizona statute argue that it will result in increased efficiency and effectiveness with respect to the federal E-Verify program.²⁴⁵ Specifically, they argue the country will benefit from Arizona's experience with its requirement that employers utilize E-Verify to verify the work authorization status of new employees.²⁴⁶ According to defendants, "Although plaintiffs point to deficiencies identified in a September 2007 Program evaluation of E-Verify to support their conflict preemption argument, that report suggests that requirements such as Arizona's will help improve the E-Verify program."²⁴⁷ Thus, Arizona's experience with its requirement that employers utilize E-Verify will help inform the federal government's debate on whether the program should be mandated nationally.²⁴⁸

²⁴⁴ Id.

²⁴⁵ As explained, *supra* note 154, E-Verify is a voluntary experimental program created by Congress that permits employers to electronically verify the employment eligibility of employees.

²⁴⁶ Defendant-Appellees Consolidated Answering Brief, dated April 29, 2008 at 39-40.

²⁴⁷ Id. at 39.

²⁴⁸ Id. at 40.