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Testing the Borders: The Boundaries of State and Local Power to Regulate Illegal Immigration

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I. INTRODUCTION

It began as a tale of two cities. One—Phoenix, Arizona—is the fifth largest city in the United States with a population of 1.6 million in the arid southwestern desert.¹ The other—Hazleton, Pennsylvania—is a small, rural town with a population of 31,000 in the cold stretches of the Northeast.² Yet despite their differences, these two cities shared a common problem: illegal immigration.³ When both communities decided to draw a line in the sand, creating state and local barriers to illegal immigration, they entered into a legal borderland filled with uncertainty.⁴

In Arizona, events like the March 27, 2010 murder of Robert Krentz, who was found dead on his Arizona ranch just twenty miles north of the Mexican border, spurred legislative action.⁵ Shortly before his death, Krentz called his brother to tell him that he had stopped to assist an illegal immigrant crossing his property.⁶ When his brother finally reached Krentz, he found him shot to death and noticed fresh footprints headed towards Mexico beside his dead body.⁷ Because police officials believed that the killer had fled back to his home country, the investigation soon ran cold, leaving locals angry and fearful.⁸

Krentz's murder was not the first act of violence in the Arizona desert bordering Mexico, nor was it the last.⁹ Arizona and other states along the

1. J.C. Grant, *Largest U.S. Cities: Population Size* (2012), ASSOCIATED CONTENT (July 23, 2010), <http://voices.yahoo.com/largest-us-cities-population-size-2012-6453656.html?cat=16> (compiling information from the U.S. Census Bureau).

2. *Pennsylvania Town Enacts Strict Illegal Immigration Ordinance*, FOXNEWS.COM (July 14, 2006), <http://www.foxnews.com/story/0,2933,203513,00.html> [hereinafter *Pennsylvania Town*].

3. See *infra* notes 5–18 and accompanying text.

4. This uncertainty resulted in a circuit split between the Third and Ninth Circuits, which came to contradictory conclusions about the extent of a local government's ability to regulate the employment and housing of illegal immigrants. Compare *Lozano v. City of Hazleton*, 620 F.3d 170, 176 (3d Cir. 2010) (holding that federal law preempted an ordinance regulating the employment and housing of illegal immigrants), *cert. granted and decision vacated*, 131 S. Ct. 2958 (2011), with *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 860–61 (9th Cir. 2009) (concluding that federal law did not preempt an Arizona regulation of illegal immigrant employment), *cert. granted sub. nom.*, *Chamber of Commerce v. Candelaria*, 130 S. Ct. 3498 (2010), *aff'd sub nom.*, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011). See also *infra* notes 174–217 and accompanying text.

5. Randal C. Archibold, *Ranchers Alarmed by Killing Near Border*, N.Y. TIMES, Apr. 4, 2010, <http://www.nytimes.com/2010/04/05/us/05arizona.html>.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* For example, in Phoenix alone, 266 kidnappings and 300 home invasions related to Mexican drug trafficking and drug cartels were reported in 2008, and authorities believed that as many as three times that number occurred but went unreported. Armen Keteyian, *Drug Cartels Flex*

southwestern Mexican border have struggled with numerous kidnappings, burglaries, and murders attributed to Mexican drug cartels and their affiliates who have illegally crossed into U.S. territory.¹⁰ With no end to the violence in sight, the public demanded that state officials take action to stop the death and destruction.¹¹

In the small town of Hazleton, Pennsylvania, the call to action for immigration regulation and reform arose in similar circumstances. In May 2006, several illegal immigrants shot a local man in the forehead as he was walking home at night—the final straw that instigated a city ordinance regulating the housing and employment of illegal immigrants.¹² Other occurrences fueled the city's call to action. For several months prior to the May 2006 murder, city officials battled drug dealing on playgrounds and pit

Muscle in Southwest, CBS NEWS (Feb. 11, 2009, 2:01 PM), http://www.cbsnews.com/stories/2008/11/12/cbsnews_investigates/main4597299.shtml. The situation in Phoenix is so extreme that the city has been dubbed the “kidnapping capital” of the United States. Brian Ross et al., *Kidnapping Capital of the U.S.A.*, ABC NEWS (Feb. 11, 2009), <http://abcnews.go.com/Blotter/story?id=6848672&page=1>. The city has the second-highest number of kidnappings per year in the world, second only to Mexico City. *Id.* Hundreds of U.S. citizens are held captive until their families produce money or otherwise agree to assist Mexican nationals in their drug-smuggling operations. *Id.* And although the apex of the drug cartel violence is centered in Arizona, crimes related to these organizations have occurred in numerous cities along the United States-Mexico border from California to Texas. *Id.*

10. Archibold, *supra* note 5; *see also supra* note 9. Indeed, in August and September 2008 in the nearby state of Texas, four American citizens were kidnapped, transported to Mexico, tortured, and ultimately killed when their families failed to pay the demanded ransom money. *Trial: Kidnapping Victim “Cooked” in Mexico*, VALLEYCENTRAL.COM (Jan. 20, 2010, 1:13 PM), <http://www.valleycentral.com/news/story.aspx?id=404432>. In Birmingham, Alabama, Mexican drug cartel members who had illegally crossed the border bound, gagged, and electrocuted five men. Eve Conant, *The Enemy Within: Cartel-Related Violence Has Moved Well Beyond American Border Towns*, NEWSWEEK, Mar. 13, 2009, <http://www.thedailybeast.com/newsweek/2009/03/13/the-enemy-within.html>. And cartel-related crimes in Atlanta, Georgia—including abductions, assaults, and executions—have spiked as the violence has moved further onto U.S. soil. *Id.*

11. Archibold, *supra* note 5. Krentz's family made a direct plea demanding that state and federal officials increase border enforcement:

We . . . hold the political forces in this country and Mexico accountable for what has happened . . . Their disregard of our repeated pleas and warnings of impending violence towards our community fell on deaf ears shrouded in political correctness. As a result, we have paid the ultimate price for their negligence in credibly securing our borderlands.

Id. State officials have also continued to cite the problem of drug-cartel-related violence resulting from illegal border crossings in pleading to Congress for stronger border patrol measures along the United States-Mexico border. *Horne Warns of Increasing Mexican Drug Cartel Violence in U.S. and Mexico*, ABC15.COM (May 11, 2011), <http://www.abc15.com/dpp/news/state/horne-warns-of-increasing-mexican-drug-cartel-violence-in-u.s.-and-mexico>.

12. Michael Powell & Michelle Garcia, *Pa. City Puts Illegal Immigrants on Notice*, WASH. POST, Aug. 22, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/21/AR2006082101484.html>.

bull attacks on police officers.¹³ With the overall crime rate ten percent higher than normal and with a marked increase in violent crimes after a massive influx of illegal immigrants fleeing larger urban areas, the mayor and city council of Hazleton decided to take immigration matters into their own hands.¹⁴

Local concerns about illegal immigration have not been limited to perceived increases in violent crime. Illegal immigration has put economic strain on states and cities saddled with a greater proportion of undocumented individuals—a growing concern as the U.S. economy suffers from a massive downturn and unemployment levels for legal U.S. residents remain at the highest numbers in history.¹⁵ Even more distressing for these locales, the communities with the greatest illegal immigrant populations must bear the additional costs of these individuals, amounting to billions of dollars each year.¹⁶

13. *Id.*

14. *Id.* From 2000 to 2006, Hazleton’s population had increased from 23,000 to 31,000, mostly from illegal immigrants leaving larger cities like New York, Philadelphia, and Providence to obtain cheaper housing and industrial jobs in the small, coal-mining town. *Id.*

15. More than two-thirds of illegal immigrants living in the United States reside in just six states—California, Texas, Florida, New York, Illinois, and New Jersey. Jeffrey S. Passel et al., *Undocumented Immigrants: Facts and Figures*, URBAN INST. (Jan. 12, 2004), <http://www.urban.org/publications/1000587.html>. Moreover, the population of undocumented immigrants in Arizona, Georgia, and North Carolina has grown so rapidly in recent decades that these states account for a large portion of the remainder. *Id.*

The geographical concentration of illegal immigrants is particularly problematic for those nine states as illegal immigrants constitute approximately five percent of the U.S. workforce and in general earn significantly lower wages than legal residents. *Id.* With nearly fifteen million legal residents left jobless in the wake of the recent recession, concern with illegal immigrants, who hold over eight million jobs in the labor force, has grown considerably. Pallavi Gogoi, *The Jobless Effect: The Toxic Mix of Illegal Immigration and Unemployment*, DAILY FIN. (July 21, 2010, 11:00 AM), <http://www.dailyfinance.com/story/careers/illegal-immigration-and-unemployment-toxic-mix/19560524/>. This is especially true with unemployment rates hitting historically high percentages. *Current Unemployment Rates for States and Historical Highs/Lows*, BUREAU OF LAB. STAT. (last modified Sept. 16, 2011), <http://www.bls.gov/web/laus/lausth1.htm>.

According to Andrew Sum, a professor of economics and director of the Center for Labor Market Studies at Northeastern University, illegal immigrants displace a large number of young adults with no post-secondary education from the jobs that they would otherwise hold, particularly in communities with a greater share of the illegal population. Gogoi, *supra*. Political figures in areas highly populated with illegal immigrants have noted the problem. For example, Texas Representative Lamar Smith commented, “There are 15 million unemployed workers in America and 8 million illegal immigrants in the labor force. We could cut unemployment in half simply by reclaiming the jobs taken by illegal workers.” *Id.* And Alabama State Senate President Pro Tem Del Marsh cited concerns about unemployment as part of the impetus for a new Alabama law regulating illegal immigration: “With almost one out of every 10 Alabamians looking for a job, we need to make sure that legal Alabama residents are not being passed over for employment in lieu of those who are here illegally.” Jerry Seper, *Alabama Defends Its Immigration Law*, WASH. TIMES, Aug. 2, 2011, <http://www.washingtontimes.com/news/2011/aug/2/alabama-defends-its-immigration-law/?page=all> [hereinafter *Alabama Defends*].

16. A study conducted by the Federation for American Immigration Reform estimated that illegal immigrants cost the United States nearly \$113 billion each year. Ed Barnes, *Illegal*

Arizona, for example, spent an estimated 2.7 billion dollars in 2009 to cover the cost of incarceration, education, health, and welfare benefits supplied to illegal immigrants.¹⁷ And former Hazleton, Pennsylvania mayor, Lou Barletta, cited overcrowded and underfunded schools, increased hospital costs, and heightened demand for public services as added factors considered in the city's decision to pass an immigration ordinance.¹⁸

Although Arizona and Hazleton were the first state and local governments to pursue regulation of illegal immigration despite challenges in the federal courts, they are not alone in wanting to take control of a situation that the federal government has not adequately addressed on its own.¹⁹ One organization noted that twenty-five states are considering

Immigration Costs U.S. \$113 Billion a Year, Study Finds, FOXNEWS.COM (July 6, 2010), <http://www.foxnews.com/us/2010/07/02/immigration-costs-fair-amnesty-educations-costs-reform/> [hereinafter Barnes, *Illegal Immigration*]. State and local governments are responsible for covering nearly seventy-five percent of these costs, amounting to \$84.2 billion dollars each year. *Id.* As more than half of the illegal immigrants residing in these states are paid cash and never pay income taxes, states with larger illegal populations often strain resources to meet the additional costs. Dalia Fahmy, *Expensive Aliens: How Much Do Illegal Immigrants Really Cost?*, ABC NEWS (May 21, 2010), <http://abcnews.go.com/Business/illegal-immigrants-cost-us-100-billion-year-group/story?id=10699317&page=1>. Indeed, according to the study, in states with the highest numbers of illegal immigrants, the cost of illegal immigration either equaled or exceeded the state budget deficits. Barnes, *Illegal Immigration*, *supra*.

State officials have noted other hidden costs associated with illegal immigration. For example, Arizona state treasurer Dean Martin noted that the state's residents face higher car insurance rates because illegal immigrants often steal vehicles to travel further north or are involved in hit-and-run accidents because they fear deportation. Fahmy, *supra*. In addition, Arizona has accused the federal government of failing to properly reimburse the state for its portion of the cost of illegal immigrants, further increasing the burdens on state resources. Jacques Billeaud, *Arizona Immigration Law: Jan Brewer Countersues Federal Government over SB 1070*, HUFFINGTON POST (Feb. 10, 2011, 8:13 PM), http://www.huffingtonpost.com/2011/02/10/arizona-immigration-law-j_1_n_821546.html [hereinafter Billeaud, *Arizona Immigration Law*].

17. Ed Barnes, *Cost of Illegal Immigration Rising Rapidly in Arizona, Study Finds*, FOX NEWS (May 17, 2010), <http://www.foxnews.com/us/2010/05/17/immigration-costs-rising-rapidly-new-study-says/>. Some interest groups opposed to stricter immigration regulation, such as the Immigration Policy Center, have argued that this data does not take into account the added benefit of illegal immigration to the state, including spending and gross state product. *Id.* However, the Federation for American Immigration Reform noted that the cost estimates took into account tax revenues from illegal immigrants and was based in part on before-and-after economic studies of communities where large raids had eliminated undocumented workers. *Id.* These studies showed that salaries and tax revenues increased after the raids because companies were forced to pay fair wages to American workers. *Id.*

18. *Pennsylvania Town*, *supra* note 2.

19. Indeed, the boom of state regulations related to illegal immigration can be connected with the emergence of a federal policy that impeded complete enforcement of the presently existing federal scheme. See Nicholas D. Michaud, *From 287(g) to SB 1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Immigration Enforcement*, 52 ARIZ. L. REV. 1083, 1131 (2010) (commenting on the apparent causal link between federal policies that prevented

legislation similar to Arizona Senate Bill 1070 (S.B. 1070), which criminalizes an alien's failure to carry proof of legal status and allows state officials to check the immigration status of suspected immigration offenders.²⁰ Moreover, approximately thirty states and numerous municipalities have existing regulations that punish or discourage the employment of undocumented workers, similar to the contested laws in Arizona and Hazleton.²¹

This onslaught of state and local immigration regulation raises several interesting questions about the extent of states' power to regulate the activities of undocumented aliens within their territories.²² One such question is whether states have the legal authority to regulate any aspect of illegal immigration.²³ If indeed states do have such power, the primary inquiry centers on the extent of that power given the existing federal scheme, which requires consideration of both the nexus between the regulation and legitimate state—as opposed to federal—interests and the limitations on the states' power to sanction offenders.²⁴ More broadly, any restriction on states' power to regulate the local effects of illegal immigration raises strong

full enforcement of federal immigration law and the birth of state and local regulations regarding illegal immigrants).

20. *To Copy or Not to Copy?: State Lawmaking on Immigration After Arizona SB 1070*, IMMIGRATION WORKS USA, 1 (Oct. 22, 2010), http://www.immigrationworksusa.org/uploaded/IW_AZ_copcats_report.pdf; see also S.B. 1070, 2010 Ariz. Sess. Laws 0113, amended by, 2010 Ariz. Sess. Laws 0211 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010)) (“[W]here reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person. . . . In addition to any violation of any federal law, a person is guilty of trespassing if the person is both: 1. present on any public or private land in this state[and] 2. in violation of [federal immigration laws regarding alien registration].”). According to the study, five states were highly likely to pass similar legislation: Georgia, Mississippi, Oklahoma, South Carolina, and Utah. *To Copy or Not to Copy?*, *supra*, at 2–4. Another thirteen states—Tennessee, Nebraska, Florida, Pennsylvania, Texas, Arkansas, Indiana, Colorado, Virginia, Minnesota, Missouri, Idaho, and Kansas—were listed as possible candidates for similar legislation. *Id.* at 5–10. Seven states had considered legislation but were marked as less likely to actually enact measures as extreme as Arizona’s S.B. 1070 law, including Maryland, Massachusetts, Michigan, Nevada, North Carolina, Ohio, and Rhode Island. *Id.* at 11–12.

21. Eric S. Bord, *50-State Survey of State Immigration Laws Affecting Employers*, MORGAN LEWIS, 3 (Sept. 1, 2011), http://www.morganlewis.com/documents/50StateSurvey_StateImmigrationLaws.pdf. The states with existing regulations discouraging employment of illegal aliens are Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and West Virginia. *Id.* at 4–16. In addition, several cities and municipalities have enacted regulations, even where the state itself has no laws. *Id.* at 2. For example, several cities in California, including Temecula, Lake Elsinore, Menifee, and Lancaster, have ordinances requiring electronic verification of the immigration status of new employees. *Id.* at 5.

22. See *infra* notes 102–51, 174–301 and accompanying text.

23. See *infra* notes 102–51, 174–301 and accompanying text.

24. See *infra* notes 102–51, 258–301 and accompanying text.

policy concerns. Should a few states carry the localized economic and social burdens of illegal immigration at the will of the others?²⁵ Should federal law preempt state action when the federal government refuses to enforce it as enacted?²⁶ This Comment addresses these questions to determine exactly where the outer borders of state immigration power do and should fall.

Part II of this Comment provides a historical overview of the division of immigration powers between the state and federal governments, including an examination of the proposed constitutional sources of federal power and the aspects of immigration over which states have traditionally exercised authority.²⁷ Part III discusses the development of federal legislation relating to illegal immigration with a particular focus on the changes enacted in the Immigration Reform and Control Act of 1986 (IRCA) and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).²⁸ Part IV examines the circuit split between the Third and Ninth Circuits regarding state power to regulate local employment and housing of illegal immigrants and addresses the Supreme Court's decision in *Chamber of Commerce v. Whiting* purporting to resolve that split.²⁹ Part V suggests a framework for determining whether state regulations fall within the realm of appropriate state power and applies this framework to two contested Arizona laws—the Legal Arizona Workers Act (LAWA) and Arizona's newest immigration law, S.B. 1070—to demonstrate its viability.³⁰ Part VI concludes.³¹

25. See *infra* notes 258–70 and accompanying text. As discussed *supra* notes 15–17 and accompanying text, the vast majority of illegal immigrants live in a relatively small number of states, and the state and local taxpayers cover a large portion of the costs of these individuals. Moreover, the presence of these illegal aliens is associated with social costs such as increased criminal activity and overcrowding in schools and hospitals. See *supra* notes 3–18 and accompanying text; see also Jack Martin, *Illegal Aliens and Crime Incidence*, FED'N FOR AM. IMMIGR. REFORM, 2, <http://www.fairus.org/site/DocServer/crimestudy.pdf?docID=2321> (last visited Aug. 19, 2011) (providing statistics suggesting that illegal aliens commit statistically more crimes per capita, excluding the crime of illegal entry into the United States, than the native population or than legal immigrants).

26. See *infra* notes 258–70 and accompanying text; see also *supra* note 19.

27. See *infra* notes 32–151 and accompanying text.

28. See *infra* notes 152–73 and accompanying text.

29. See *infra* notes 174–257 and accompanying text.

30. See *infra* notes 258–301 and accompanying text.

31. See *infra* notes 302–09 and accompanying text.

II. DEFINING THE BORDERS: THE HISTORICAL BOUNDARIES OF STATE AND FEDERAL IMMIGRATION POWERS

A. *This Land Is My Land: Immigration Power from the Colonial Era to the Constitution*

As a country born of settlers migrating from England, colonial America's early history is a tale of immigration.³² Even so, the first colonial settlers began to restrict immigration of foreigners as early as 1636, when Plymouth Colony passed a law prohibiting individuals from housing aliens without colonial authorization.³³ In May 1637, the General Court of Massachusetts enacted a similar ordinance, mandating that aliens could not be housed in any colony town or home without the permission of the colonial authorities.³⁴ It was thus the individual colonies, and not the centralized power of the British Crown, that exercised the first control over immigration.³⁵

Interestingly, the primary reason that the individual colonies began to enact local immigration restrictions was concern with the economic burdens these immigrants posed.³⁶ Additional restrictions were promulgated after several towns complained in 1645 and again in 1655 to the Massachusetts colonial authorities about the economic strain that increasing numbers of

32. ROY L. GARIS, *IMMIGRATION RESTRICTION: A STUDY OF THE OPPOSITION TO AND REGULATION OF IMMIGRATION INTO THE UNITED STATES* 3 (1927). Nearly all the first settlers in the Northeast were of English heritage, which is not surprising given that the colonies were British territories. *Id.* Although some "foreigners" immigrated to New England in the seventeenth century, large-scale foreign immigration did not accelerate until the middle of the eighteenth century. *Id.*

33. EMBERSON EDWARD PROPER, *COLONIAL IMMIGRATION LAWS: A STUDY OF THE REGULATION OF IMMIGRATION BY THE ENGLISH COLONIES IN AMERICA* 23 & n.1 (1900). Although Plymouth Colony and Massachusetts Bay Colony are both part of modern-day Massachusetts, the two were distinct entities, and even rivals, during the colonial era. A HISTORY OF NEW ENGLAND VI: MASSACHUSETTS, CONNECTICUT, RHODE ISLAND 25 (R.H. Howard & Henry E. Crocker eds., 1879).

34. PROPER, *supra* note 33, at 23 & nn.1–2. The text of the Massachusetts colonial decree read: It is ordered that no Town or person shall receive any stranger resorting hither with intent to reside . . . or entertain any such above three weeks, except such persons shall have allowance under the hands of some one of the counselors, or two other magistrates . . . upon pain that every town shall forfeit £100 for every offense.

Id. at n.1. John Winthrop, governor of the Massachusetts colony at the time, authored a defense of the court's decision, arguing that the colony had a right to protect itself from the damage that such immigration might cause:

[I]f the place of our cohabitation be our owne, then no man hath a right to come into us without our consent . . . If we are bound to keep off whatsoever appears to tend to our ruine or damage, then may we lawfully refuse to receive such whose dispositions suite not with ours and whose society (we know) will be hurtful to us.

Id. at n.2.

35. *See id.* at 24 (noting England's awareness and apparent acquiescence to colonial regulations on immigration).

36. *Id.*

“illegal” poor and indigent settlers caused.³⁷ The report of the General Court of Massachusetts in response to these complaints not only affirmed the colony’s power to control such immigration, but also affirmed each town’s power to regulate illegal immigration, including fining or ejecting unwanted immigrants within its municipality:

There being complaint to this Court of very great change arising in several Towns by reason of strangers pressing in without the consent or approbation of the inhabitants, and there being no law to prevent the same; this Court doth therefore order, that henceforth all Towns in this jurisdiction shall have liberty to prevent the coming in of such as come from other parts of these jurisdictions, and all such persons as shall bee [sic] brought into any such Town without the consent and allowance of the prudential men shall not be chargeable to the Town where they dwell, but if necessity require shall be relieved and maintained by those that were the cause of their coming in, of whom the Town or Selectmen are hereby empowered to require security at their entrance or else forbid their entertainment.³⁸

Throughout the seventeenth and early eighteenth centuries, the individual colonies and towns continued to exercise exclusive and independent authority over immigration.³⁹ Numerous restrictions were enacted to either protect the economic vitality of the fledgling settlements or to prevent perceived threats of violence or damage to the social welfare of the people.⁴⁰

37. *Id.* Certain towns within the colony began to complain about the economic strain these immigrants caused as early as 1645, although the General Court of Massachusetts did not take action until complaints again arose in 1655. *Id.*

38. *Id.* at 24 n.3.

39. *See id.* at 23–27 (discussing numerous colonial regulations restricting the immigration of particular groups); *see also* GARIS, *supra* note 32, at 14–15 (describing taxes and restrictions implemented in Pennsylvania to prevent certain immigrants from entering the colony); MICHAEL LEMAY & ELLIOTT ROBERT BARKAN, U.S. IMMIGRATION AND NATURALIZATION LAWS AND ISSUES: A DOCUMENTARY HISTORY 1–5 (1999) (listing several colonial immigration regulations passed in the seventeenth and eighteenth centuries).

40. In 1647, Massachusetts passed the first law that criminally punished illegal immigration. PROPER, *supra* note 33, at 26. The act precluded Jesuits from entering the Massachusetts Bay Colony on penalty of banishment or, if it was a second offense, death. *Id.* The law was predicated on fears that the Jesuits were inciting the Indians to violence and was reaffirmed by the General Court in 1700. *Id.* at 26–27.

In 1656, several colonies passed additional laws that criminalized the immigration of Quakers, who were perceived as threats to the social welfare of the colonies as a result of their

The British government took its first actions related to immigration and naturalization in the colonies in 1773, when it ended the processes by which colonial residents could become naturalized British citizens and, in 1774, imposed heavy fines on shipmasters and emigrants who left for colonial soil.⁴¹ The colonies did not approve of Britain's newfound interest in regulating immigration and naturalization, and believed that the power to place such restrictions ought to rest in the hands of the individual colonies.⁴² Indeed, British interference with colonial immigration was an enumerated grievance in the Declaration of Independence.⁴³

Perhaps unsurprisingly, the Articles of Confederation returned the power to decide questions of both naturalization and immigration to the individual states.⁴⁴ But the lack of a uniform naturalization policy was quickly identified as one of the new government's faults, particularly when individual states began enacting widely varying naturalization laws.⁴⁵ Thus, the power of naturalization was enumerated amongst the powers of the

"accursed tenets." *Id.* at 25. The laws provided severe punishments for any violation including whippings, imprisonment, banishment, and even death. *Id.*

In the early 1700s, Massachusetts twice passed regulations designed to prevent new immigrants from becoming an economic burden. LEMAY & BARKAN, *supra* note 39, at 1–4. The first act, passed on March 12, 1700, required shipmasters to provide lists of passengers and denied lame, impotent, or otherwise infirm individuals entry unless either they or the shipmaster deposited sufficient surety money with the town to offset the cost of the immigrant to the town. *Id.* at 2. The second, passed in 1722, merely amended the earlier regulation, requiring a higher bond for infirm passengers and mandating that passenger lists be provided to the town treasurer. *Id.* at 3–4.

Pennsylvania passed a similar measure in 1729. GARIS, *supra* note 32, at 15. The act placed a tax of forty shillings on new immigrants and was intended to deter the immigration of poorer settlers. *Id.* Additionally, it required that potential immigrants be inspected by a port physician for sickness or disease prior to entry. *Id.*

41. CARL FREDERICK WITTKE, *WE WHO BUILT AMERICA: THE SAGA OF THE IMMIGRANT* 5–6 (2d ed. 1967). This action essentially repealed the Plantation Act, which the British Parliament had passed in 1740. *Id.* The Plantation Act allowed individuals residing in the colonies to become naturalized English citizens if they had resided in the colony for seven years, professed a belief in the Christian faith, and took the Sacrament in the Protestant church. LEMAY & BARKAN, *supra* note 39, at 5–7. Obtaining the status of a naturalized British citizen was important because citizens could engage in British commerce without having to pay the harsh monetary penalties that were imposed on aliens. *Id.* at 5.

42. WITTKE, *supra* note 41, at 6.

43. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776) ("[The King of Great Britain] has endeavoured to prevent the Population of these States; for that Purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their Migrations hither, and raising the Conditions of new Appropriations of Lands.").

44. Matthew Spalding, *From Pluribus to Unum: Immigration and the Founding Fathers*, 67 POL'Y REV. 35, 36 (1994).

45. For example, Pennsylvania granted citizenship to any foreigner with "good character" who swore allegiance to the state, acquired property, and resided there for at least a year. *Id.* South Carolina required a minimum two-year residency and a special act of the legislature to obtain citizenship. *Id.* Georgia law, often considered the strictest, specified that no person could obtain citizenship unless he had resided in the state for seven years and had obtained a special act of the legislature. *Id.*

federal government in the new Constitution.⁴⁶ Power over immigration, however, was noticeably absent from the enumerated powers and presumed to be reserved to the states.⁴⁷

In the ensuing decades, state governments continued to exercise their power to exclude certain immigrants and to regulate immigration, with the apparent blessing of the founding fathers.⁴⁸ Eventually, in 1837, a foreign

46. U.S. CONST. art. I, § 8, cl. 4 (stating that Congress has the power “[t]o establish an uniform Rule of Naturalization”).

47. U.S. CONST. amend. X (“The 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.”).

Naturalization and immigration are not synonymous terms. Naturalization refers to “[t]he granting of citizenship to a foreign-born person under statutory authority.” BLACK’S LAW DICTIONARY 1126 (9th ed. 2009). Conversely, immigration is “[t]he act of entering a country with the intention of settling there permanently.” *Id.* at 817. The Supreme Court has never attempted to expand the definition of naturalization to include the regulation of immigration, but instead has held that the Constitution granted the federal government power over immigration under the Foreign Commerce Clause or that the power arose extra-constitutionally via national sovereignty and self-protection. *See infra* notes 63–95 and accompanying text; *see also* *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 162 (1892) (“Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen . . .”).

In defending the inclusion of the naturalization power amongst the new powers of the federal government, James Madison also recognized a distinction between regulation of immigration and regulation of naturalization and appeared to acquiesce to the state’s authority to engage in the former:

By the laws of several States, certain descriptions of aliens who had rendered themselves obnoxious, were laid under interdicts inconsistent, not only with the rights of citizenship, but with the privilege of residence. What would have been the consequence, if such persons, by residence or otherwise, had acquired the character of citizens under the laws of another State, and then asserted their rights as such, both to residence and citizenship within the State proscribing them? Whatever the legal consequences might have been, other consequences would probably have resulted of too serious a nature, not to be provided against. The new Constitution has accordingly with great propriety made provision against them, and all others proceeding from the defect of the confederation, on this head, by authorising the general government to establish an uniform rule of naturalization throughout the United States.

THE FEDERALIST NO. 42, at 286–87 (James Madison) (Jacob E. Cooke ed., 2006). Madison argued that if the federal government had the power to create uniform rules of citizenship, then individual states could exercise their sovereign powers to exclude certain aliens without being undermined by a sister state granting those aliens the rights of citizenship, which the excluding state would then be forced to recognize. *Id.* at 285–87.

48. *See New York v. Miln*, 36 U.S. (11 Pet.) 102, 112 (1837) (“The history of this [New York] law [regulating immigration] also throws some light upon its constitutionality. . . . [O]n the 16th of September [in 1788, after the Constitution had been adopted, but just before it went into effect], the same body unanimously adopted a resolution, recommending to the several states to pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States. When this resolution, so directly bearing upon the point in question, was adopted, there were present, Dana, the profound and enlightened jurist and framer of the government of the North-west Territory; Gilman, Williamson, Fox and Baldwin, members of the convention which

shipmaster challenged the constitutionality of these laws before the Supreme Court in *New York v. Miln*.⁴⁹ The specific law brought before the Court was a New York passenger law that was designed to restrict immigration of poor, diseased, or criminal foreigners into the state.⁵⁰ The law required shipmasters to report identifying information about all passengers to the New York City mayor and, in addition, provided that the mayor could demand a \$300 surety for any passenger that he thought would be an economic drain on the community.⁵¹ Moreover, the act authorized the mayor to demand the removal and deportation of any alien that he believed to be too great an economic burden.⁵²

The defendant in the case, a foreign shipmaster who had been fined \$15,000 for failing to comply with the law's provisions, argued that the law impeded commerce between New York and other nations and therefore intruded upon the federal government's power under the Foreign Commerce Clause.⁵³ The Court rejected the argument that the New York law was a commercial regulation that interfered with Congress's foreign commerce powers.⁵⁴ Instead, the Court concluded that the New York law was a legitimate exercise of the state's police power—a power reserved to the states under the Constitution.⁵⁵ Indeed, the Supreme Court noted that power over state and local immigration was essential to the well-being of communities:

The law is not a commercial regulation, in the sense contemplated in the constitution; but a police regulation. It is a part of the system of poor laws, and intended to prevent the introduction of foreign paupers. This power of determining how and when

formed the federal constitution; Hamilton and Madison, also members of that convention, and the eloquent expounders of that instrument. Jay, the third expounder, and the first chief justice of this court, was the secretary of foreign affairs, and, no doubt, recommended the passage of this law. If any contemporaneous authority is entitled to respect, here was one of the highest character. A resolution, at the very moment the new government was going into operation, recommending to the states to pass these laws, as peculiarly within their province.”; *see also id.* at 114–15 (providing a non-exhaustive list of contemporaneous state regulations dealing with immigration of foreigners).

49. *Id.* at 106.

50. *Id.* at 104–06.

51. *Id.* at 104–05.

52. *Id.* at 105.

53. *Id.* at 104, 106. The Commerce Clause contained in Article I, Section 8 is referred to in three separate parts—the Foreign Commerce Clause, the Interstate Commerce Clause, and the Indian Commerce Clause. *See* U.S. CONST. art. I, § 8, cl. 3 (“[Congress has the power t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

54. *Miln*, 36 U.S. (11 Pet.) at 110. The Court did assume *arguendo* that the law could be construed as a regulation of commerce and considered the implications of that construction, but ultimately rejected the argument in favor of classing the law as an exercise of state police power. *Id.* at 107–10.

55. *Id.* at 110.

strangers are to be admitted, is inherent in all communities. Fathers of families, officers of colleges, and the authorities of walled cities, all have this power, as an incident of police. In states, it is a high sovereign power. It belonged to the states, before the adoption of the federal constitution. It is nowhere relinquished; nor can it be, with safety. It is essential to the very existence of some, and to the prosperity and tranquillity of all.⁵⁶

In support of this proposition, the Court turned to the Constitution, noting that power over immigration had neither been expressly denied to the states, nor expressly granted to the federal government.⁵⁷ Further, according to the Court, the Constitution appeared to concede, at minimum, concurrent state power over immigration in Article I, Section 9.⁵⁸

Finally, the Court discussed the importance of local regulation as a means of handling conflicting immigration interests in different states.⁵⁹ For example, the Court noted that the western states had incentives to encourage immigration, while New York needed to restrict it to prevent overcrowding and the pooling of a large, burdensome population of poor immigrants.⁶⁰ Because problems related to immigration were primarily local, the Court reasoned, the power to control it should rest with the local governments and not with Congress.⁶¹

56. *Id.* (internal citations omitted).

57. *Id.* at 111.

58. *Id.*; *see also* U.S. CONST. art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”). The Court expressly concluded that the power of the state courts to regulate immigration, as assumed in the section, did not extinguish in 1808. *Miln*, 36 U.S. (11 Pet.) at 111. Instead, such power was shared concurrently with the federal government after that date. *Id.*

59. *Miln*, 36 U.S. (11 Pet.) at 114.

60. *Id.*

61. *Id.* The Court noted:

Such a conclusion produces no inconvenience; but, on the contrary, promotes a public good. It vests power where there is an inducement to exercise it. In congress, there is no such inducement. The west seeks to encourage emigration; and it is but of little importance to them, how many of the crowd are left as a burden upon the city of New York. There is, therefore, a hostile principle in congress to regulating this local evil.

Id.

Thus, until the middle of the nineteenth century, regulation of immigration rested primarily in the hands of state and local governments.⁶² However, a shift towards federal power over immigration was nearing.

B. This Land Is Your Land: Federalizing Immigration Power

Just a decade after the Supreme Court defended the individual states' ability to regulate immigration in *Miln*, state immigration power was again subjected to constitutional challenge.⁶³ Consolidating two cases from Massachusetts and New York in *The Passenger Cases*, the Supreme Court reconsidered whether state laws designed to regulate immigration through taxation ran afoul of the Commerce Clause.⁶⁴

In Massachusetts, the statutory provision at issue was nearly identical to the provision that had been challenged in *New York v. Miln*.⁶⁵ The provision provided that Boston city officials had the authority to inspect the passengers on board any ship arriving in the state's harbors.⁶⁶ After inspection, officials could demand a \$1000 security from the shipmaster for any foreign passenger who was classed as physically or mentally disabled or who had been a pauper in a foreign nation.⁶⁷ Additionally, the city taxed the shipmaster two dollars per foreigner.⁶⁸ The money raised was then secured to the cities or towns that were financially burdened with the poor immigrants.⁶⁹

The New York act was similarly designed to raise money that would offset the costs of a marine hospital on Staten Island used primarily to inspect and treat immigrants.⁷⁰ It mandated that shipmasters pay a modest head tax for each foreign passenger that they carried into state ports.⁷¹

62. Congress had not entirely ignored the field of immigration regulation prior to this time. In 1798, Congress passed the Alien and Sedition Acts, which authorized the President to imprison or deport aliens considered "dangerous to the peace and safety of the United States." Alien Friends Act, ch. 58, 1 Stat. 570, 571 (1798) (expired 1800). However, the federal government's efforts to regulate immigration were publically unpopular, and the laws related to imprisonment and deportation were allowed to expire after the 1800 elections. *Primary Documents in American History: Alien and Sedition Acts*, LIBR. OF CONGRESS, <http://www.loc.gov/rr/program/bib/ourdocs/Alien.html> (last updated Oct. 28, 2010).

63. *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849).

64. *Id.* at 288.

65. *Id.* at 285–86; *see supra* notes 50–52 and accompanying text (discussing the statutory provision challenged in *New York v. Miln*, 36 U.S. (11 Pet.) 102, 105–06 (1837)).

66. *The Passenger Cases*, 48 U.S. (7 How.) at 285.

67. *Id.* at 285–86.

68. *Id.*

69. *Id.* at 286.

70. *Id.* at 283.

71. *Id.* at 283–84.

The case sharply divided the Court, resulting in eight separate opinions that totaled nearly 300 pages. A five-Justice majority, however, agreed that the state regulations were an unconstitutional intrusion upon the federal government's power over foreign commerce.⁷² According to these Justices, the state regulations had exceeded the bounds of state police power because they failed to completely distinguish between regulating the entry of foreigners who posed a threat to public health, safety, or welfare and discouraging the entry of foreigners who did not threaten these evils.⁷³

Four dissenting Justices, although agreeing that the Foreign Commerce Clause granted the federal government some power over immigration, did not believe that such power precluded the state regulations before the Court.⁷⁴ Indeed, these Justices argued that a contrary conclusion would intrude upon the states' sovereign police powers.⁷⁵ According to the dissenters, the laws promulgated in the states were not obstructing foreign commerce, but were "a power which has long been exercised by several of

72. *Id.* at 392–410 (McLean, J., concurring) (holding that the Massachusetts and New York laws intruded upon foreign commerce and that the power to regulate foreign commerce was exclusive to the federal government); *id.* at 410–64 (concurring opinions of Wayne, Catron, McKinley, and Grier, JJ.) (concluding that these state regulations conflicted with the will of Congress because the relative absence of federal legislation suggested a policy of free immigration, not indifference or an invitation for state legislation). Some of the concurring opinions appeared to draw conclusions which were directly at odds with the Court's policy reasoning in *Miln*, including, for example, the concurring opinion of Justice Grier:

The United States have, within and beyond the limits of these States, many millions of acres of vacant lands. It is the cherished policy of the general government to encourage and invite Christian foreigners of our own race to seek an asylum within our borders, and to convert these waste lands into productive farms, and thus add to the wealth, population, and power of the nation. Is it possible that the framers of our Constitution have committed such an oversight, as to leave it to the discretion of some two or three States to thwart the policy of the Union, and dictate the terms upon which foreigners shall be permitted to gain access to the other States?

Id. at 461 (Grier, J., concurring); *see supra* notes 59–61 and accompanying text (explaining the *Miln* Court's preference for state regulation because a uniform federal immigration policy might unfairly burden overcrowded states at the expense of those states that sought to encourage additional settlement).

73. *See, e.g., The Passenger Cases*, 48 U.S. (7 How.) at 463 (Grier, J., concurring) ("The argument of those who challenge the right to exercise this power for the States of Massachusetts and New York, on the ground that it is a necessary appurtenant to the police power, seems fallacious, also, in this respect. It assumes, that, because a State, in the exercise of her acknowledged right, may exclude paupers, lunatics, [etc.], therefore she may exclude all persons, whether they come within this category or not.").

74. *Id.* at 464–573 (dissenting opinions of Taney, Daniel, Nelson, and Woodbury, JJ.).

75. *See, e.g., id.* at 470 (Taney, J., dissenting) ("In my opinion, the clear, established, and safe rule is, that [power to control immigration] is reserved to the several States, to be exercised by them according to their own sound discretion, and according to their own views of what their interest and safety require. It is a power of self-preservation, and was never intended to be surrendered.").

the Atlantic States in self-defence against the ruinous burdens which would otherwise be flung upon them by the incursions of paupers from abroad.”⁷⁶ To hold otherwise was to leave the state without a means to defend its sovereign territory from harmful economic and social invasions.⁷⁷

The Court’s decision in *The Passenger Cases* heralded a sharp shift in the historical division of immigration powers in favor of federal control. In the intervening half-century, congressional legislation and Supreme Court rulings worked in lockstep to wrest immigration power from the states and to vest it in the federal government.

From 1875 to 1891, Congress passed numerous regulations designed to control the inflow of foreign immigrants.⁷⁸ These laws significantly increased the scope of federal power over immigration, expanding the federal government’s role from mere concern with the commercial aspects of immigration into the realm of police powers formerly reserved to the states, including restrictions on the immigration of individuals that might socially or economically harm the nation.⁷⁹

Simultaneously, the Supreme Court affirmed this shift towards centralized federal regulation, both by systematically striking down state immigration regulations and by consistently approving federal exercises of power. Just a few decades after *The Passenger Cases* sharply divided the Court, an amended version of the same New York law was challenged in *Henderson v. Mayor of New York*.⁸⁰ The case revisited the same issues addressed in *The Passenger Cases*, pitting state police power against the

76. *Id.* at 518 (Woodbury, J., dissenting).

77. *Id.* at 472 (Taney, J., dissenting) (“[T]his mass of pauperism and vice may be poured out upon the shores of a State in opposition to its laws, and the State authorities are not permitted to resist or prevent it.”).

78. *See* Immigration Act of 1891, ch. 551, § 7, 26 Stat. 1084 (codified as amended at 8 U.S.C. §§ 1551–1574 (2006)) (vesting the power to regulate immigration in the hands of the federal government and establishing the office of the Superintendent of Immigration under the authority of the Secretary of the Treasury); Contract Labor Act of 1885, chs. 161–64, 23 Stat. 332 (repealed 1952) (prohibiting the immigration of foreigners who had entered into employment contracts with American employers prior to leaving their home country); Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943) (preventing Chinese laborers from entering the United States for a period of ten years); Immigration Act of 1882, ch. 376, 22 Stat. 214 (codified as amended at 8 U.S.C. §§ 1551–1574 (2006)) (shifting the authority to control the arrival of immigrants on U.S. soil from the individual states to the federal government); Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974) (prohibiting the immigration of prostitutes, contract laborers, and convicts from Asian countries).

79. *See* statutes cited *supra* note 78.

80. 92 U.S. 259 (1875). The amended law gave shipmasters a choice. *Id.* at 267. The shipmaster could provide the city with a \$300 bond for each foreign passenger to indemnify it against any costs incurred as a result of the foreigner’s presence. *Id.* The bond would be returned in four years if no such costs were incurred. *Id.* In the alternative, the shipmaster could forgo the bond if he paid a non-refundable sum of \$1.50 for each foreign passenger. *Id.* As virtually all shipmasters chose the latter option, the law achieved the same result as the pure head tax that had been declared unconstitutional, yet was presumed to fall within the constitutionally affirmed power of the state to protect itself from immigrants who were an economic drain on the community. *Id.* at 267–68.

federal government's control over foreign commerce.⁸¹ Although the Court's conclusion that the New York provision was unconstitutional was unsurprising—"it [wa]s apparent that the object of this statute . . . [was to charge] a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger Cases*,"—the reasoning in the Court's decision represented a significant shift.⁸² A unanimous Court concluded that any law regulating the transport of foreign passengers—including both revenue-raising measures and provisions designed to police the entry of foreigners who posed economic or social dangers—fell within the purview of foreign commerce and exclusive federal power.⁸³

Thus, the states were thereafter constitutionally forbidden from enacting general provisions that regulated the immigration of foreigners, even when these laws limited their scope to specifically policing social and economic burdens. But this shift was perhaps not unexpected given the changing political, economic, and social landscape of the young nation. Between the Court's decisions in *Miln* in 1837 and *Henderson* in 1875, the first Great Wave of European immigrants began seeking economic refuge in the United

81. *Id.*

82. *Id.* at 268.

83. *Id.* at 270–71. In *The Passenger Cases*, only one Justice held this view. See *The Passenger Cases*, 48 U.S. (7 How.) 283, 399 (1849) (McLean, J., concurring). The Court reaffirmed this view in another case decided on the same day as *Henderson*. See *Chy Lung v. Freeman*, 92 U.S. 275, 277 (1875) (declaring unconstitutional a California law which required shipmasters to post bonds for individuals who might become economic burdens upon the state). The California law, unlike the New York law, specifically limited its scope to foreigners who were:

lunatic, idiotic, deaf, dumb, blind, crippled, or infirm, and is not accompanied by relatives who are able and willing to support him, or is likely to become a public charge, or has been a pauper in any other country, or is from sickness or disease (existing either at the time of sailing from the port of departure or at the time of his arrival in the State) a public charge, or likely soon to become so, or is a convicted criminal, or a lewd or debauched woman.

Id. It thus fell squarely within the boundaries the Court had previously affirmed as a constitutional exercise of state police power. See *The Passenger Cases*, 48 U.S. (7 How.) at 463 (Grier, J., concurring) (discussing the difference between a law that indiscriminately taxed all foreigners, which unconstitutionally intruded upon foreign commerce powers, and a law that regulated "paupers, lunatics, [etc.]," which involved the constitutional exercise of state police power). Despite its previous holding, the Court declared the California law challenged in *Chy Lung* an unconstitutional exercise of state power over foreign commerce. *Chy Lung*, 92 U.S. at 280. In so doing, the Court unequivocally declared, "[t]he 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." *Id.* The decision was thus a death knell to state police power over economically or socially undesirable immigration—a power that the states had held since the first colonial settlements. See *supra* notes 32–62 and accompanying text.

States.⁸⁴ The Northeast was flooded with Irish immigrants fleeing the potato famine in the mid-1840s and German laborers seeking new employment markets in the 1850s, while the Southwest was flooded with Chinese and Mexican immigrants seeking work from railroads, farms, and Gold Rush towns.⁸⁵ For the first time in United States history, the influx of foreigners was truly a national concern, requiring national control and national solutions.⁸⁶ *Miln's* apprehension about divisive state incentives crippling national action was a thing of the past.⁸⁷

As a result of these legal, social, and political changes, the federal government began immediately and actively filling the state regulation void. Congress quickly passed the Immigration Act of 1882, which empowered the Secretary of the Treasury to pair with state officials for the purpose of examining and excluding “any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge.”⁸⁸ Additionally, the Act included revenue-raising taxes on foreign immigrants, which provided a pool of federal funding to offset any financial hardship that poor or diseased immigrants might impose upon the states.⁸⁹ When this federal regulation was constitutionally challenged in a pair of consolidated cases from New York, the Supreme Court again strengthened its position that immigration regulation fell firmly and squarely within foreign commerce powers noting: “The burden imposed on the ship-owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration.”⁹⁰

With the federal government’s constitutional authority over immigration now firmly rooted, federal exercise of this power continued to grow. To accommodate this rapid expansion of federal powers, the Supreme Court quickly upended its constitutional roots in foreign commerce and replanted them in the much less restricted realm of national sovereignty and self-protection.⁹¹ In so doing, the Court acknowledged the recent influx of

84. 2 THE AMERICAN ECONOMY: A HISTORICAL ENCYCLOPEDIA 395 (Cynthia Clark Northrup ed., 2003) [hereinafter Northrup].

85. *Id.*

86. *Id.* The true national scope of the immigration issue can be seen in the emergence of the national Know-Nothing political party, whose sole existence was premised on promoting the exclusion of immigrant groups. *Id.*

87. *See supra* notes 59–61 and accompanying text.

88. Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214 (codified as amended at 8 U.S.C. §§ 1551–1574 (2006)).

89. *Id.* § 1.

90. *Head Money Cases*, 112 U.S. 580, 595 (1884).

91. *See The Chinese Exclusion Case*, 130 U.S. 581, 608 (1889) (“The exclusion of paupers, criminals, and persons afflicted with incurable diseases, for which statutes have been passed, is only an application of the same power to particular classes of persons, whose presence is deemed injurious or a source of danger to the country. . . . [T]here has never been any question as to the

immigrants and opined that this influx created a problem of national proportions, requiring unified national action akin to a war:

If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other.⁹²

With this new extra-constitutional framework in place, federal power blossomed. The Court indicated that the power inherent in national sovereignty was virtually boundless in the realm of immigration, allowing the federal government to create almost any set of conditions for admission or exclusion of foreigners.⁹³ Moreover, the Court concluded that national

power to exclude them. The power is constantly exercised; its existence is involved in the right of self-preservation.”).

92. *Id.* at 606. Ironically, it is now the individual states that are describing the influx of illegal immigrants as an invasion upon their territories, akin to war. Billeaud, *Arizona Immigration Law*, *supra* note 16 (noting that the state of Arizona described the ballooning number of illegal immigrants entering its territory as an “invasion” in a countersuit against the federal government for failing to properly secure the borders). As Arizona Attorney General Tom Horne explained in words echoing the sentiments of the Supreme Court in *The Chinese Exclusion Case*, “The word ‘invasion’ does not necessarily mean invasion of one country by another country. . . . It can mean large numbers of illegal immigrants from various countries.” *Id.*; *see also The Chinese Exclusion Case*, 130 U.S. at 606. This shift in discussion from national sovereignty to state sovereignty stems from the changing nature of illegal immigration in the intervening century after *The Chinese Exclusion Case* was decided—what was a nationwide concern in the mid-nineteenth century is now a problem substantially concentrated in nine states. *See supra* note 15 and accompanying text; *see also infra* Parts II.C, IV, V. As state sovereignty, and not national sovereignty, becomes the more pressing concern in immigration discussions, more power over illegal immigration should be returned to the states so that they can preserve their resources and protect the interests of legal residents. *See De Canas v. Bica*, 424 U.S. 351, 356–57 (1976) (affirming California’s power to regulate intrastate employment of illegal aliens in part because the regulation at issue protected state resources for its lawful residents and noting the increasingly localized nature of illegal immigration concerns).

93. *See Fong Yue Ting v. United States*, 149 U.S. 698, 737 (1893) (Brewer, J., dissenting) (“This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found . . . ?”); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (“It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within

sovereignty permitted the federal government to not only exclude certain foreigners, but also to deport aliens residing in the United States.⁹⁴ For most of the next century, federal immigration power reigned supreme, and most state encroachments in the field were struck down by the Supreme Court.⁹⁵

C. A Hole in the Federal Fence: State Police Power Revisited

Although the Supreme Court consistently expanded the federal government's ability to regulate immigration throughout the nineteenth and twentieth centuries, the Court never fully precluded the states from the immigration field.⁹⁶ Even so, the state powers during this era were narrowly limited, corresponding with the nationwide character of concerns related to

its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”).

94. *Fong Yue Ting*, 149 U.S. at 707 (“The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.”).

95. *See, e.g.*, *Toll v. Moreno*, 458 U.S. 1, 17 (1982) (declaring unconstitutional the policy of Maryland state universities which refused children of aliens with a G-4 visa in-state tuition breaks); *Graham v. Richardson*, 403 U.S. 365, 374 (1971) (consolidating cases from Arizona and Pennsylvania and holding unconstitutional state provisions which refused welfare benefits to aliens or which instigated a residency duration requirement upon aliens before such benefits would be available); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 414–16 (1948) (concluding that a California regulation which denied fishing licenses to aliens who could not attain citizenship interfered with federal control over immigration and violated Equal Protection rights); *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941) (striking down a Pennsylvania statute that required aliens to register with the state annually because the state regulation encroached upon the federal government’s immigration powers).

96. For example, several of the Court’s decisions upheld state statutes that treated resident aliens less favorably than citizens because the laws were necessary to protect either special interests of the state or its citizens. *See, e.g.*, *Crane v. New York*, 239 U.S. 195, *aff’g* 108 N.E. 427 (N.Y. 1915) (concluding that a New York statute prohibiting employment of aliens on state public works projects was a constitutional exercise of state sovereignty because the state had a right to protect its resources—resources that ultimately belonged to the citizenry); *Heim v. McCall*, 239 U.S. 175 (1915) (declaring constitutional a provision in a New York subway construction contract which voided the contract if the company hired alien laborers because it was within the purview of the state to decide how to expend its resources); *McCready v. Virginia*, 94 U.S. 391 (1876) (holding that the state could regulate alien use of the state’s natural resources because the resources were held in a trust for the state’s citizens). Additionally, several circuit courts and state courts have maintained that states have the power under state sovereignty to act in the public’s best interest, including arresting or detaining persons in violation of federal immigration law. *See, e.g.*, *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999) (“[The existence of a federal immigration statute] does not limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws.”); *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983) (holding that states have the power to enforce federal immigration laws within their localities and that federal immigration power did not preempt every state activity relating to illegal aliens), *overruled on other grounds by* *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc); *People v. Barajas*, 147 Cal. Rptr. 195, 199 (Ct. App. 1978) (concluding that local police officers have the power to arrest aliens that illegally enter the country under federal immigration law).

immigration during that time.⁹⁷ Towards the middle of the twentieth century, however, the nature of immigration to the United States again began to change. After 1965, the majority of immigrants were individuals fleeing economic and political oppression in Africa, Asia, Mexico, and South America.⁹⁸ Moreover, given the extensive quotas enacted to limit legal immigration in the first half of the twentieth century, most of these immigrants entered illegally across the 2000-mile-long Mexican border and settled in the southwestern states.⁹⁹

The changing nature of immigration led to changing immigration problems. As the population of illegal immigrants concentrated in a few southwestern states, those states began to feel economic effects.¹⁰⁰ For the first time in over a century, many problems related to immigration were more state and local concerns than national ones.¹⁰¹

The Supreme Court was not ignorant of these changes. Thus, when newly enacted state immigration regulations came before the Court on

97. See *supra* notes 84–87 and accompanying text. After the First Great Wave of immigration in the middle of the nineteenth century, the Second Great Wave flooded the nation with 27.5 million immigrants at the beginning of the twentieth century. Northrup, *supra* note 84, at 395–96. The character of the immigration still represented a broad cross-section of individuals from around the globe, including Europeans, Asians, and Mexicans, arriving at the nation's eastern, western, and southern borders. *Id.*

98. Northrup, *supra* note 84, at 398. The first act limiting immigration was the Emergency Quota Act of 1921. Emergency Quota Act, ch. 8, 42 Stat. 5 (1921). The act established national immigration quotas for different countries based on the number of foreign-born immigrants living in the United States at the time of the 1910 census. *Id.* The Immigration Act of 1924 changed the anchor census from 1910 to 1890 to decrease the number of Eastern and Southern European immigrants. Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (repealed 1952). In 1952, the anchor census was again changed to 1920, but the quota system remained in place. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)). By 1965, the number of immigrants was sharply limited to 170,000 per year with quotas restricting immigration from each hemisphere instead of each nation. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

99. Northrup, *supra* note 84, at 398.

100. Robert S. Catz, *Regulating the Employment of Illegal Aliens: De Canas and Section 2805*, 17 SANTA CLARA L. REV. 751, 751–52 (1977) (discussing the growing problem of illegal aliens and unemployment and noting that it was concentrated in the states adjacent to the Mexican border).

101. Whereas immigration in the prior century included a more balanced collection of foreign nationals arriving in sea ports on the East and West Coasts and crossing the southern land border, immigration in the second half of the twentieth century came primarily from foreigners crossing the southern land border. See *id.* at 755–56 & n.32; see also *supra* notes 84–87 and accompanying text. Indeed, 89% of the 776,600 illegal aliens arrested by the Immigration and Naturalization Service (INS) in 1975 were Mexican nationals. Catz, *supra* note 100, at 756 n.32. Moreover, a large concentration of these individuals settled in the southwestern border region of the United States. For example, in southern California alone, around 200,000 illegal immigrants were arrested in 1974. *Id.* at 753 n.19.

constitutional challenges in *De Canas v. Bica*¹⁰² and *Plyler v. Doe*,¹⁰³ the Supreme Court resurrected the notion of state police power, which had lay dormant for decades, noting that the balance between state and federal interests could reach a tipping point at which the state's interests would prevail.

1. *De Canas v. Bica* and the State's Power to Regulate Local Employment of Illegal Immigrants

De Canas represented the first instance in over a hundred years in which the Supreme Court returned some power over immigration regulation to the states. In *De Canas*, the Court concluded that state governments were entitled to independently enact regulations relating to certain aspects of immigration, provided that the regulations addressed issues associated with well-defined state interests.¹⁰⁴

In the 1970s, California faced a growing problem with illegal immigration. At that time, approximately 1.7 million illegal immigrants resided in the state, representing more than 7% of the state's population.¹⁰⁵ Moreover, the entire nation was suffering from high unemployment and inflation during the post-Vietnam War economic recession.¹⁰⁶ And California was weathering particularly harsh effects. In 1975, state unemployment hit 9.9%—significantly higher than the national unemployment rate of 8.5%.¹⁰⁷ Yet during that same year, the Immigration

102. 424 U.S. 351 (1976).

103. 457 U.S. 202 (1982).

104. *De Canas*, 424 U.S. at 355–57.

105. Catz, *supra* note 100, at 757. The population of illegal immigrants as a whole in the United States at that time was estimated to be somewhere between four and twelve million, showing just how concentrated illegal immigration was in the southwestern states. Controller General of the United States, *Report to the Congress: Number of Undocumented Aliens Residing in the United States Unknown* (Apr. 6, 1981), <http://archive.gao.gov/f0102/114829.pdf> (providing the estimated number of illegal immigrants residing in the United States from Immigration and Naturalization Commissioner Leonard F. Chapman). This put the percentage of undocumented immigrants in the general population of the United States somewhere between 1.9% and 5.6%, significantly lower than the percentage population in California. *See id.*; *see also* U.S. DEP'T OF HEALTH, EDUC., & WELFARE, *VITAL STATISTICS OF THE UNITED STATES 1975*, at 6-23 (1979), *available at* http://www.cdc.gov/nchs/data/statab/mort75_2a_ta.pdf (reporting the United States population in 1975 at 213,032,000 persons).

106. ECONOMIC REPORT OF THE PRESIDENT 3 (1975), *available at* http://fraser.stlouisfed.org/publications/ERP/issue/1279/download/5738/ERP_1975.pdf (“The economy is in a severe recession. Unemployment is too high and will rise higher. The rate of inflation is also too high although some progress has been made in lowering it. Interest rates have fallen from the exceptional peaks reached in the summer of 1974, but they reflect the rate of inflation and remain much too high.”).

107. Cal. Emp't Dev. Dep't, *California Unemployment Rate 1967–2002*, *available at* http://www.wordiq.com/definition/California_unemployment_statistics (last visited Oct. 13, 2011); Cal. Emp't Dev. Dep't, *Historical Annual Average Labor Force for the United States, 1948–2009*,

and Naturalization Service estimated that 287,000 illegal immigrants were employed throughout the state.¹⁰⁸ This displacement of the American labor force did not go unnoticed, and with the federal government unable to effectively police the border, California decided to take matters into its own hands.¹⁰⁹

In response to the growing numbers of illegal immigrants seeking employment, California passed California Labor Code section 2805, which provided that “[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.”¹¹⁰ Several migrant farm workers brought suit seeking civil damages under the statute in the California courts, alleging that Anthony Bica and Juan Silva had unlawfully terminated them in violation of the labor code, while maintaining several illegal aliens as their employees.¹¹¹ The California Court of Appeal held that the California law expressly conflicted with the federal immigration scheme concurrently in place under the Immigration and Nationality Act because the federal scheme’s silence on labor issues indicated an affirmative intent to *not* punish employers for hiring illegal immigrants.¹¹² Therefore, the court concluded,

available at <http://www.labormarketinfo.edd.ca.gov/Content.asp?pageid=164> (last visited Jan. 7, 2012).

108. Catz, *supra* note 100, at 753–54 n.19. According to the estimates, nearly 135,000 illegal immigrants were employed in Los Angeles, 120,000 illegal immigrants were employed in the Central Valley, and 32,000 illegal immigrants were employed in San Francisco. *Id.* Alien laborers were attractive to employers because they demanded much lower wages and were willing to work in much harsher conditions. *Id.* at 754–55 & n.24. This exacerbated the illegal immigrant population problem in California because it encouraged Mexican nationals to flee from the bleak economic conditions of their home country for better prospects across the U.S. border. *Id.* at 756–57.

109. *Id.* at 757.

110. The full text of the California Labor Code section at issue read:

(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

(b) A person found guilty of violation of subdivision (a) is punishable by a fine of not less than two hundred dollars (\$200) nor more than five hundred dollars (\$500) for each offense.

(c) The foregoing provisions shall not be a bar to civil action against the employer based upon a violation of subdivision (a).

CAL. LAB. CODE § 2805 (West 1988) (repealed 1988).

111. *De Canas v. Bica*, 40 Cal. App. 3d 976, 978 (1974), *rev'd*, 424 U.S. 351 (1976).

112. *Id.* at 979. The California Court of Appeal decision reflected the immigration themes that had been iterated in the Supreme Court precedent of the preceding half-century. The court noted that, “in the area of immigration and naturalization, congressional power is exclusive” and that the

Labor Code section 2805 either in its provision for criminal penalties or in its application in providing a basis for injunctive relief or damages is in conflict with the national law and policy . . . [because t]hese are remedies which the Congress has withheld from [even the National Labor Relations Board] and thus may not be utilized by the states.¹¹³

After the California Supreme Court declined to review the case, the Supreme Court granted certiorari.¹¹⁴

In analyzing whether the federal regulatory scheme preempted the California statute at issue in *De Canas*, the Supreme Court differentiated between two types of immigration regulation—direct regulation of immigration and indirect regulation of immigration.¹¹⁵ The Court noted that although it had granted the federal government broad powers in the field of direct immigration regulation, it had never held that federal immigration powers automatically preempted indirect immigration regulation.¹¹⁶ Thus, where the regulation was intended to deal primarily with local causes and effects of illegal immigration, as was the case with section 2805 of the California Labor Code, the Court declined to apply the same automatic constitutional preemption that arose in cases of direct regulation.¹¹⁷

federal government “has as an incident of national sovereignty the implied power to control the conditions for admission of foreign nationals into the country.” *Id.*

113. *Id.* at 980.

114. *De Canas v. Bica*, 422 U.S. 1040 (1975).

115. *De Canas v. Bica*, 424 U.S. 351, 354–55 (1976), *superseded by statute as stated in Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1975 (2011) (noting that the specific California regulation considered in *De Canas* would be expressly preempted under the IRCA). In referring to direct regulation of immigration, the Court cited cases such as *The Passenger Cases* and *Henderson* suggesting that direct regulation referred to any law wherein a state attempted to wield power over the actual entry and deportation of foreign nationals. *Id.* Conversely, in referring to indirect regulation of immigration, the Court cited cases such as *Graham* suggesting that indirect regulation referred to any law wherein a state attempted to wield power over the nature and extent of its resources that flowed to alien residents. *Id.* at 355; *see also supra* note 95 (discussing *Graham* and other similar cases).

116. *De Canas*, 424 U.S. at 354–55. The Court noted that, arguably, these indirect regulations were not immigration regulations at all but were instead statutes in which illegal aliens were the subject and which could “ha[ve] some purely speculative and indirect impact on immigration.” *Id.* at 355.

117. *Compare id.* at 355–56 (“In this case, California has sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country; even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve.”), *with Henderson v. Mayor of New York*, 92 U.S. 259, 270–71 (1875) (concluding that regulation of immigration fell within the exclusive power of the federal government, thus preempting a New York statute governing the entry of aliens, despite the absence of any federal regulatory scheme).

Turning to the preemption analysis, the Court emphasized that, “[F]ederal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.”¹¹⁸ As Congress had yet to speak directly on the issue of penalties for employing illegal aliens, the questions at issue were whether the nature of the regulated subject matter necessitated exclusive federal control and whether Congress’s silence indicated its intent to preclude employer penalties.¹¹⁹

To determine whether statutes restricting illegal alien employment were regulations that, by their nature, required federal preemption, the Court focused primarily on the state interests involved in the issue.¹²⁰ Returning to the familiar justification of state police power, the Court concluded that such power encompassed “broad authority” to regulate state employment and to protect state residents seeking employment, especially because these were compelling and vital state interests.¹²¹ The Court was particularly swayed by the increasingly local nature of immigration problems, including California’s specific struggle with the vast influx of illegal immigrants and with the difficulties that the influx had caused given the relatively dismal state of the economy at the time.¹²² As the Court recognized:

118. *De Canas*, 424 U.S. at 356 (quoting *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)).

119. *Id.* At the time that *De Canas* reached the Supreme Court, a resolution was pending before the House of Representatives that would amend 8 U.S.C. § 1324 to provide sanctions for employers that knowingly hired illegal aliens. *Id.* at 354 n.4. However, the resolution never became law, and it was not until 1986 when Congress passed the IRCA that federal law began addressing sanctions for employers that hired illegal aliens. Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.); *see also infra* notes 152–73 and accompanying text (discussing the development of federal statutory immigration schemes).

120. *De Canas*, 424 U.S. at 356–57.

121. *Id.* As discussed, the theory of state police power had been used to justify direct state regulation of immigration for several centuries prior to the mid-1800s. *See supra* notes 32–57 and accompanying text. Until the Supreme Court’s decision in *De Canas*, the doctrine had been fairly dormant in the realm of state immigration regulation, as its rationale was expressly rejected in *Henderson*. *Henderson*, 92 U.S. at 270–71 (rejecting state police power as a justification for independent state regulation of immigration). The Supreme Court’s resurrection of the doctrine in *De Canas* appeared to hinge on the fact that the California statute was classed as an indirect regulation of immigration not subject to automatic constitutional preemption, as opposed to a direct regulation of immigration. *De Canas*, 424 U.S. at 354–55.

122. *De Canas*, 424 U.S. at 356–57. When *De Canas* was decided, the entire nation was suffering from a serious recession, but the California economy was hit even harder than the rest of the nation, partially because it hosted a disproportionate number of the national population of illegal immigrants. *See supra* notes 105–09.

California's attempt in § 2805(a) to prohibit the knowing employment by California employers of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of [state] police power regulation. Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico. In attempting to protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, § 2805(a) focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils.¹²³

Having found that the nature of the California regulation did not require automatic preemption, the Court turned to an examination of the relevant federal statutes to determine if Congress had expressed the unmistakable intent to preempt this particular category of state regulation.¹²⁴ The Court acknowledged that the regulatory scheme advanced in the Immigration and Nationality Act was both vast and complex.¹²⁵ However, given the importance of the state interests involved, the Court refused to accept the sheer volume of federal regulation as sufficient evidence to conclude that Congress intended to preempt the immigration field, including state regulation of intrastate illegal immigrant employment.¹²⁶

123. *De Canas*, 424 U.S. at 356–57.

124. *Id.* at 359. When it first delineated the unmistakable intent framework, the Supreme Court described it as requiring a showing that a particular piece of legislation indicated “an *unambiguous congressional mandate* to th[e] effect [that state action should be precluded].” *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 146–47 (1963) (emphasis added).

125. *De Canas*, 424 U.S. at 359. Indeed, the Immigration and Nationality Act of 1952, to which the Court was referring, was the first comprehensive scheme to address all aspects of immigration policy in a single statutory package. AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, *IMMIGRATION PRIMER* 5 (1985). The basic provisions of the Act were divided into four titles that addressed definitions and powers of government actors, the basic structure for immigration, the rules for naturalization, and other miscellaneous provisions, including savings clauses. *Id.* For a more detailed discussion of the Immigration and Nationality Act and other statutory developments in immigration law, see *infra* Part III.

126. *De Canas*, 424 U.S. at 359–60. The Court additionally noted that the sheer complexity of the regulation could be attributed to the complexity of the subject matter involved, not to any intent to oust state action. *Id.* (“Given the complexity of the matter addressed by Congress . . . , a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-

Looking then to the language of particular provisions within the Act, the Court acknowledged that the federal scheme did address, if in a somewhat obscure manner, the employment of illegal immigrants.¹²⁷ A provision in 8 U.S.C. § 1324 provided that the harboring of illegal aliens was a felony and defined “harboring” to exclude employment, noting that “employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.”¹²⁸ Although recognizing that this language could suggest a Congressional intent to preclude any punishment of individuals for employing illegal immigrants, therefore preempting state regulation to the contrary, the Court refused to uphold that construction in the absence of more express language.¹²⁹

After a thorough examination of both the relevant state and federal statutes, the Court concluded that the California regulation was not preempted under the Immigration and Nationality Act.¹³⁰ In reaching this

emptive intent.” (quoting *N.Y. Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405, 415 (1973)). Moreover, the mere concentrated mass in a particular field is not sufficient to imply preemption in these contexts. *Id.* at 360. As the Court pointed out:

Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution. To discover the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history.

Id. at 360 n.8 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 78–79 (1941) (Stone, J., dissenting)).

127. *Id.*

128. *Id.* at 360. At the time of the action, the relevant statute read:

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

...
(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation;

...
shall be guilty of a felony. . . . *Provided, however*, [t]hat for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

8 U.S.C. § 1324(a) (1976).

129. *De Canas*, 424 U.S. at 360 n.9. The Court bolstered this conclusion by referencing certain partial savings provisions in other sections of the United States Code, including 7 U.S.C. § 2044(b) which allowed the states to revoke the certificate of registration of any farm labor contractor who had employed “an alien not lawfully admitted for permanent residence, or who has not been authorized by the Attorney General to accept employment” and 7 U.S.C. § 2045(f) which provided for civil and criminal sanctions in the event that a farm contractor hired illegal aliens. *Id.* at 361–62 & n.10 (quoting 7 U.S.C. § 2044(b) (Supp. IV 1970) and 7 U.S.C. § 2045(f) (Supp. IV 1970)).

130. *Id.* at 363. The Court remanded the case to the California state courts to determine whether some of the indefinite language used in the California statute directly conflicted with federal law, specifically focusing on the definition of those not entitled to legally work in the United States. *Id.* at 364–65. As none of the lower courts had reached the issue, the Court concluded that the

conclusion, the Court repeatedly emphasized the increasing localization of immigration issues, necessitating a resurgence of state regulatory power in limited aspects of the immigration field.¹³¹

2. *Plyler v. Doe* and Further Recognition that Legitimate State Interests Might Militate in Favor of Allowing State Regulation

Nearly a decade after its decision in *De Canas*, the Supreme Court was again faced with a case in which a state sought to indirectly regulate illegal immigration through state law. In *Plyler v. Doe*, a sharply divided Supreme Court struck down a Texas regulation that prevented state tax contributions from funding the education of undocumented immigrants on Fourteenth Amendment Equal Protection grounds.¹³² Despite striking down the state law at issue, the Court emphasized the narrowness of its holding and reiterated the importance of protecting state immigration regulations in any arena wherein local interests were heavily implicated.¹³³

Although a decade had passed, the circumstances in which *Plyler* arose were virtually identical to the circumstances that gave rise to the regulation in *De Canas*. The entire nation was suffering from an extended and particularly harsh recession.¹³⁴ In 1982, the year that *Plyler* was decided, national unemployment climbed as high as 10.8% and unemployment in Texas reached state record highs of 8.2%.¹³⁵ And like California, Texas was

California courts should, in the first instance, determine the appropriate meaning and construction of the statute and assess whether that meaning improperly conflicted with federal law. *Id.* at 365. As a whole, however, the constitutionality of the state regulation was upheld. *Id.* at 364.

131. *See, e.g., id.* at 363 (“[T]here would not appear to be a similar federal interest [in wielding exclusive power] in a situation in which the state law is fashioned to remedy local problems, and operates only on local employers, and only with respect to individuals whom the Federal Government has already declared cannot work in this country.”).

132. *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (plurality opinion).

133. *Id.* at 228 & n.23 (discussing the difference between statutes that regulate employment, which eliminate incentives to illegally enter the United States, and statutes that regulate education of schoolchildren, which do not eliminate any illegal immigration incentives, and noting the importance of permitting state regulation of the former).

134. ECONOMIC REPORT OF THE PRESIDENT 3 (1983), *available at* http://fraser.stlouisfed.org/publications/ERP/issue/1386/download/5917/ERP_1983.pdf (“For more than a decade, the economy ha[s] suffered from low productivity growth and a rising rate of inflation. . . . [In] 1982, . . . the economy was in an extended recession. I am deeply troubled by the current level of unemployment in the United States and by the suffering and anxiety that it entails for millions of Americans.”).

135. *National Unemployment Rate Chart*, FORECASTCHART.COM, <http://www.forecast-chart.com/chart-unemployment-rate.html> (last visited Oct. 14, 2011); *Unemployment Rate: Texas (December, 1982)*, THELEDGER.COM, <http://www.ledgerdata.com/unemployment/texas/1982/December> (last visited Oct. 14, 2011). After the decision in *Plyler*, unemployment rates in Texas rose even higher, eventually reaching the state’s current record unemployment rate of 9.3% in September 1986. *Unemployment Rate: Texas (September, 1986)*, THELEDGER.COM, <http://www.ledgerdata.com/unemployment/texas/1986/September> (last visited Oct. 14, 2011).

hosting a disproportionately large number of illegal immigrants when compared with other states nationwide.¹³⁶

Responding to this influx of illegal immigrants, in May 1975, the Texas legislature passed a new law that prevented public schools from receiving state funding for the education of children not “legally admitted” into the United States and that permitted the schools to deny enrollment to those same children.¹³⁷ Several illegal immigrants in Texas brought a class action challenging the constitutionality of these Texas Educational Code provisions on Equal Protection and express preemption grounds.¹³⁸ The district court

Interestingly, at that time, the national unemployment rate was only 7.0%, more than 2% lower than Texas’s rate. *National Unemployment Rate Chart, supra*.

At least one Texas politician has provided statistics suggesting that the Supreme Court’s decision in *Plyler* costs the state approximately one billion dollars each year. CAROLE KEETON STRAYHORN, OFFICE OF THE COMPTROLLER OF TEX., SPECIAL REPORT—UNDOCUMENTED IMMIGRANTS IN TEXAS: A FINANCIAL ANALYSIS OF THE IMPACT TO THE STATE BUDGET AND ECONOMY, pub. 96-1224, at 3–4 (Dec. 2006), available at <http://www.window.state.tx.us/specialrpt/undocumented/undocumented.pdf> (discussing the economic impact of the Supreme Court decision in *Plyler* on Texas’s economy and budget).

136. Texas has consistently fallen right behind California in its illegal immigrant resident population. Dep’t of Homeland Sec., *Illegal Alien Resident Population*, HOMELAND SECURITY, <http://www.dhs.gov/xlibrary/assets/statistics/illegal.pdf> (last visited Oct. 14, 2011) (estimating that in 1996 Texas hosted 700,000 illegal immigrants, second only to California’s illegal immigrant population of 2,000,000); *Estimated Number of Illegal Immigrants (Most Recent) by State*, STATEMASTER.COM, http://www.statemaster.com/graph/peo_est_num_of_ill_imm-people-estimated-number-illegal-immigrants (last visited Oct. 14, 2011) (reporting that in 2000, Texas hosted over 1,000,000 illegal immigrants, again second only to California’s illegal immigrant population of over 2,000,000).

137. TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981). The provision, in its entirety, reads as follows:

- (a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
- (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
- (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

Id.

138. *Plyler v. Doe*, 457 U.S. 202, 205 (1982) (plurality opinion). The Supreme Court declined to address the question of preemption, instead limiting its decision to Equal Protection grounds. *Id.* at 210 n.8. This differentiates the analysis in *Plyler* from the analysis in *De Canas*, as cases decided on

concluded that the Texas statute both violated the Equal Protection Clause and was preempted under federal law.¹³⁹ The Fifth Circuit affirmed in part, concluding that the statute failed only on Equal Protection grounds.¹⁴⁰ The Supreme Court granted certiorari to consider the constitutional issues presented.¹⁴¹

The difficult policy questions presented in *Plyler* sharply divided the Court. The Justices agreed that the outcome of the case turned on an Equal Protection and not a preemption analysis.¹⁴² A plurality of the Supreme Court concluded that the provision violated the Equal Protection Clause because the statute impinged upon the near “fundamental right” of elementary education and was not strictly limited to the state’s policy needs.¹⁴³ The plurality voiced particular concern with the fact that the

Equal Protection questions involve different legal and factual considerations. Compare *id.* at 216–18 (describing the legal question for Equal Protection cases as whether a “suspect class” was discriminated against or whether a specific group was denied a “fundamental right”), with *De Canas v. Bica*, 424 U.S. 351, 356 (1976) (framing the legal question for preemption cases as whether the “nature of the regulated subject matter” required preemption or “Congress unmistakably” mandated preemption). As the Court rejected any assertion that illegal immigrants could constitute a suspect class, the decision in *Plyler* turned on the question of whether education was sufficiently like a “fundamental right” such that it should be afforded protection under the Fourteenth Amendment. *Plyler*, 457 U.S. at 219 n.19 & 220. This question sharply divided the Court, with five Justices concluding that education was sufficiently similar to a fundamental right and a strong four-Justice dissent coming to the opposite conclusion. *Id.* at 221; *id.* at 230–31 (Marshall, J., concurring); *id.* at 233–34 (Blackmun, J., concurring); *id.* at 238–39 (Powell, J., concurring); *id.* at 247 (Burger, J., dissenting). The Court was careful to delimit the actual holding in *Plyler*, “emphasiz[ing] the unique character of the cases before [it].” *Id.* at 236 (Powell, J., concurring). *Plyler*’s continued importance lies in its affirmation of the legal and policy reasoning first advanced in *De Canas*. See, e.g., *id.* at 225 (“As we recognized in *De Canas v. Bica*, the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.” (citation omitted)).

139. *Doe v. Plyler*, 458 F. Supp. 569, 580, 590–92, 593 (E.D. Tex. 1978). In making its preemption determination the district court improperly applied the preemption analysis, looking not for an express denial of state power, as the Supreme Court had explained in *De Canas*, but instead for an affirmative grant of state power in the statute. *Id.* at 592 (“Nothing in the Immigration and Nationality Act indicates that additional burdens on illegal immigrants are to be imposed at the whim of the various states.”); see also *De Canas*, 424 U.S. at 361 (looking for evidence that “Congress ‘has unmistakably . . . ordained’ exclusivity of federal regulation in this field.”).

140. *Doe v. Plyler*, 628 F.2d 448 (5th Cir. 1980), *aff’d*, 457 U.S. 202 (1982).

141. *Plyler v. Doe*, 101 S. Ct. 2044 (1981).

142. *Plyler*, 457 U.S. at 210 n.8 (“Appellees in both cases continue to press the argument that § 21.031 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.”).

143. *Id.* at 224. The plurality argued that although the types of “fundamental rights” typically afforded protection under the Fourteenth Amendment included only constitutional rights—not mere government benefits like education—the importance of education placed it close enough to the “fundamental rights” realm to qualify it for the same Fourteenth Amendment protections. *Id.* at 218–23. As the dissent criticized, this decision was likely the product of outcome-oriented reasoning based on the Court’s fundamental sense that the statute was unfair to innocent children. *Id.* at 242 (Burger, C.J., dissenting) (“I fully agree that it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our

children, unlike the adults in *De Canas*, could not control their presence in the United States, and therefore tailored its decision to achieve the desired result of protecting those children.¹⁴⁴ But in so doing, the Court openly acknowledged that the case was “unique” and that the reasoning employed was limited to its specific facts.¹⁴⁵

While the Justices divided on the appropriate outcome given the specific *Plyler* facts, all agreed that the legal and policy reasoning underlying the prior decision in *De Canas* still held strong.¹⁴⁶ In recognizing this, the Court

language. However, the Constitution does not constitute us as ‘Platonic Guardians’ nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, ‘wisdom,’ or ‘common sense.’” (footnote omitted).

144. *Id.* at 226 (plurality opinion). The importance of the statute’s direct effect on children to the ultimate decision of the Court was a theme repeatedly echoed in each Justice’s opinion. Justice Brennan, writing for the plurality, stated:

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their “parents have the ability to conform their conduct to societal norms,” and presumably the ability to remove themselves from the State’s jurisdiction; but the children who are plaintiffs in these cases “can affect neither their parents’ conduct nor their own status.”

Id. at 219–20. Explaining his reasons for concurring in the outcome, Justice Powell added, “The classification in question severely disadvantages children who are the victims of a combination of circumstances.” *Id.* at 237 (Powell, J., concurring). Both he and the plurality compared the *Plyler* decision to previous decisions involving equal protection for illegitimate children, noting “[V]isiting . . . condemnation on the head of an infant’ for the misdeeds of the parents is illogical, unjust, and ‘contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.’” *Id.* at 238 (Powell, J., concurring) (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)); *see also id.* at 219 (plurality opinion) (quoting same). Even the dissent recognized that, were it inclined to believe that the Court should engage in social-policy-oriented analysis, the fact that the statute disadvantaged children would certainly carry the day. *Id.* at 242 (Burger, C.J., dissenting) (“Were it our business to set the Nation’s social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education.”).

145. *Id.* at 236 (Powell, J., concurring); *see also id.* at 244 (Burger, C.J., dissenting) (“In the end, we are told little more than that the level of scrutiny employed to strike down the Texas law applies only when illegal alien children are deprived of a public education If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example.”).

146. Indeed, admitting the necessity of allowing states to regulate certain aspects of illegal immigration—especially aspects bearing on state distribution of resources—was a reoccurring motif in the *Plyler* decision. *Id.* at 219 (plurality opinion) (“Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct.”); *id.* at 228 (“[A] State might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population [due to illegal

revisited its decision in *De Canas* with approval, specifically commenting, “the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.”¹⁴⁷ The Court again rejected any contention that direct federal control over immigration deprived the states of any power to act independently in protecting their interests.¹⁴⁸

Moreover, the Court reiterated the important policy considerations that had informed its earlier decision to allow for at least some state regulation. As the plurality noted, “Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial ‘shadow population’ of illegal migrants—numbering in the millions—within our borders.”¹⁴⁹ According to the Court, such a rapid inundation of undocumented immigrants could impair the state’s ability to function economically and socially, necessitating that each state be afforded a certain range of immigration powers.¹⁵⁰ And as the dissent admonished, the courts should be reluctant to visit the sins of the

immigration]”); *id.* at 240 (Powell, J., concurring) (“I am not unmindful of what must be the exasperation of responsible citizens and government authorities in Texas and other States similarly situated.”); *id.* at 249 n.10 (Burger, C.J., dissenting) (“The Texas law might also be justified as a means of deterring unlawful immigration. While regulation of immigration is an exclusively federal function, a state may take steps, consistent with federal immigration policy, to protect its economy and ability to provide governmental services from the ‘deleterious effects’ of a massive influx of illegal immigrants.”).

147. *Id.* at 225 (plurality opinion).

148. *Id.* at 228 n.23 (“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.”).

149. *Id.* at 218. According to the Court, at the time of the decision the Attorney General estimated that between three and six million illegal immigrants resided in the United States. *Id.* at 218 n.17. The Attorney General testified before Congress that the federal government “ha[s] neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community.” *Id.* Justice Powell provided a compelling description of the perpetual nature of the immigration problem in the Southwest:

Access from Mexico into this country, across our 2,000-mile border, is readily available and virtually uncontrollable. Illegal aliens are attracted by our employment opportunities, and perhaps by other benefits as well. This is a problem of serious national proportions Perhaps because of the intractability of the problem, Congress—vested by the Constitution with the responsibility of protecting our borders and legislating with respect to aliens—has not provided effective leadership in dealing with this problem. It therefore is certain that illegal aliens will continue to enter the United States and, as the record makes clear, an unknown percentage of them will remain here.

Id. at 237 (Powell, J., concurring) (citation and footnote omitted).

150. *Id.* at 228 n.23 (plurality opinion) (“Although the State has no direct interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government, unchecked unlawful migration might impair the State’s economy generally, or the State’s ability to provide some important service.”).

federal government on the head of the states, which striking down regulations designed to protect state resources was bound to do.¹⁵¹

Thus, in its decisions in *De Canas* and *Plyler*, the Supreme Court had created a narrow, but well-defined realm in which state legislatures could operate to protect state interests and resources from illegal immigration. But it left open the possibility that Congress might close that gap.

III. BUILDING THE BORDERS THROUGH STATUTORY REGULATION OF IMMIGRATION

Congress's first effort at a comprehensive immigration scheme was the Immigration and Nationality Act of 1952 (INA).¹⁵² Dividing its provisions into four separate titles, the INA covered every aspect of immigration policy.¹⁵³ It vested the authority to inspect and admit immigrants in the Attorney General through the newly created Immigration and Naturalization Service.¹⁵⁴ Additionally, the Act established quotas limiting the entry of foreign immigrants each year and instituted penalties for aliens who attempted to enter without authorization and for legal U.S. residents who

151. *Id.* at 241–43 (Burger, C.J., dissenting). The dissent pointed out:

The Court makes no attempt to disguise that it is acting to make up for Congress' lack of "effective leadership" in dealing with the serious national problems caused by the influx of uncountable millions of illegal aliens across our borders. The failure of enforcement of the immigration laws over more than a decade and the inherent difficulty and expense of sealing our vast borders have combined to create a grave socioeconomic dilemma. It is a dilemma that has not yet even been fully assessed, let alone addressed.

Id. at 242–43 (internal citation omitted). The dissent argued that it was unfair to force the states to bear the additional costs associated with these undocumented immigrants when the federal government was causing the problem in the first place. *Id.* at 242 n.1 ("It does not follow, however, that a state should bear the costs of educating children whose illegal presence in this country results from the default of the political branches of the Federal Government."). Further, the dissent even admonished the federal government for failing to begin deportation proceedings against the parents of the litigants involved in the case, as "[s]urely if illegal alien children can be identified for purposes of this litigation, their parents can be identified for purposes of prompt deportation." *Id.*

152. FRAGOMEN & BELL, *supra* note 125, at 5.

153. *Id.* Title I of the Act defined the parties and powers relevant to the statutory scheme. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (1953) (codified as amended in scattered sections of 8 U.S.C.). Title II set forth the basic structure for immigration regulation and deportation, including defining the quota of visas available for various nationalities. *Id.* Title III enumerated how an individual might become a naturalized citizen. *Id.* Title IV contained miscellaneous provisions including savings clauses. *Id.*

154. Immigration and Nationality Act of 1952, ch. 477, § 103, 66 Stat. 163, 173 (1953) (codified as amended at 8 U.S.C. § 1184(a) (2006)) ("The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens . . .").

assisted unauthorized aliens in affecting an illegal entry.¹⁵⁵ Although the Act, in a broad sense, sought to protect American workers from unwanted competition in the labor markets, it did not address employment of illegal aliens, nor did it provide any penalties for employers who hired undocumented workers.¹⁵⁶

During the next thirty years, Congress passed two major sets of amendments to the INA.¹⁵⁷ The first, the Immigration and Nationality Act of 1965 (INA of 1965), abolished the nationality-based quota system in favor of a hemisphere-based one.¹⁵⁸ The second, the Refugee Act of 1980, was designed to formalize the United States' policy of "calculated kindness"

155. *Id.* (codified as amended in scattered sections of 8 U.S.C.). The quota system that existed under the INA had two general purposes: (1) maintaining the racial balance that already existed in the United States and (2) encouraging the immigration of individuals who had needed skills. STEVEN G. KOVEN & FRANK GÖTZKE, AMERICAN IMMIGRATION POLICY: CONFRONTING THE NATION'S CHALLENGES 134–35 (2010). In furtherance of the first aim, nearly 85% of the visas were reserved for Northern and Western Europeans. *Id.* at 135. And in furtherance of the second aim, half of the visas within the quota of each nation were preferentially reserved for those with needed skills, skills in inadequate supply in the United States, and skills whose entry into the American workforce would not depress American wages. *Id.* As a result, a substantial portion of the federal government's immigration policy was thus concerned with limiting immigration in ways that would encourage the economic vitality of the nation, despite the federal government's subsequent failure to effectuate that policy.

156. *See* KOVEN & GÖTZKE, *supra* note 155, at 134–35 (noting that one goal of the INA was to encourage the immigration of individuals with needed skills while limiting the entry of those whose immigration would depress American wages); *see also* Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (1953) (codified as amended in scattered sections of 8 U.S.C.). The INA addressed employers directly in only two sections. Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (1953) (codified as amended in scattered sections of 8 U.S.C.). One excluded employers from the definition of those subject to felony criminal prosecution and civil penalties for "harboring" illegal immigrants. *Id.* The other permitted the Department of Labor to exclude certain aliens seeking entry to perform skilled or unskilled labor if a legitimate base of American workers existed to perform that work. *Id.*

157. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1981) (codified as amended in scattered sections of 8 U.S.C.); Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1966) (codified as amended in scattered sections of 8 U.S.C.). Congress undertook a second amendment of the INA in 1976, but the law merely made slight modifications to the quota system and did not represent a substantial change in immigration policy. Immigration and Nationality Act of 1976, Pub. L. No. 94-571, 90 Stat. 2703 (1978) (codified as amended in scattered sections of 8 U.S.C.).

158. The INA of 1965 specified that "[t]he immigration pool and the quotas of quota areas shall terminate June 30, 1968 [and] . . . [afterwards immigrants] shall be admitted in accordance with the percentage limitations and in the order of priority specified [in the INA of 1965]." Immigration and Nationality Act of 1965, Pub. L. No. 89-236, § 201(e), 79 Stat. 911, 911 (1966) (codified as amended in scattered sections of 8 U.S.C.). The Act then listed a detailed system of preferential treatment for aliens seeking admission, including primarily family members of legal U.S. residents and those who "will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States." *Id.* § 203(a)(3). This language evidenced an intended continuity of purpose with the original INA statute—one focused upon encouraging immigration that would improve the nation's economic situation. *See supra* note 155 and accompanying text.

towards political refugees.¹⁵⁹ Neither amendment altered Congress's silent stance towards employment of illegal aliens.

Just a few short years later, however, Congress spoke on the issue of employment of illegal aliens with a resounding voice, passing the most comprehensive reform of immigration law since the INA.¹⁶⁰ The Immigration Reform and Control Act of 1986 (IRCA) was passed with the primary purpose of "remov[ing] the incentive for illegal immigration by eliminating the job opportunities which draw illegal aliens here" and thus "[t]he employer sanctions program [wa]s the keystone and major element."¹⁶¹

To achieve this goal, the seven titles of the IRCA were designed to work in tandem to reduce or eliminate illegal immigration by destroying the incentives that drew undocumented workers into the United States.¹⁶² The primary features of the statute were the imposition of penalties on employers who "knowingly" hired illegal aliens, the grant of amnesty to certain illegal aliens who had resided in the United States since January 1, 1982, and the creation of a temporary worker program for agricultural laborers.¹⁶³

159. According to Title I of the Refugee Act, its purpose was to codify: the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States.

Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102, 102 (1981) (codified as amended in scattered sections of 8 U.S.C.). The Act created uniform procedures for admitting persons defined as refugees and established a separate quota system for their admission. *Id.*

160. PRESIDENT OF THE UNITED STATES, IMMIGRATION REFORM AND CONTROL ACT: STATEMENT OF PRESIDENT RONALD REAGAN UPON SIGNING S. 1200, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5856, 5856 ("The Immigration Reform and Control Act of 1986 is the most comprehensive reform of our immigration laws since 1952."); *see also* KOVEN & GÖTZKE, *supra* note 155, at 138.

161. PRESIDENT OF THE UNITED STATES, *supra* note 160, at 1.

162. Immigration Reform Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.). Title I contained a three-part strategy for reducing the number of undocumented workers in the U.S. labor force through employer penalties, improved federal enforcement, and an employment verification system. *Id.* Title II granted amnesty to certain individuals that had previously illegally entered the United States. *Id.* Title III created the "bracero" program, which granted temporary visas to migrant farm workers. *Id.* Title IV required certain entities to file regular reports with Congress, updating it on the status and efficacy of the program. *Id.* Titles V, VI, and VII impressed certain duties upon the federal government, including the duty to reimburse states for the cost of imprisoning illegal immigrants, to initiate a cooperative economic development study, and to expeditiously deport certain illegal aliens. *Id.*

163. *Id.* § 101 (codified at 8 U.S.C. § 1324) (making it unlawful to hire, recruit, or continue to employ any unauthorized alien); *id.* § 201 (codified at 8 U.S.C. § 1255) (providing that the

But when Congress giveth, it also taketh away. While the IRCA finally attempted to tackle one of the true sources of the nation's illegal immigration problems, it also *expressly* preempted any state regulation that imposed civil or criminal penalties for the employment of illegal aliens.¹⁶⁴ The Act left only one small, but significant, savings provision—the states could still deter employment of illegal aliens through “licensing and similar laws.”¹⁶⁵

What began as a promising federal foray into the field of immigration regulation quickly fell short of its promised effectiveness. The IRCA failed to deter employment of illegal immigrants and instead fostered the growth of a document forgery industry.¹⁶⁶ Moreover, the federal government failed to devote promised resources to policing the borders, redirected existing resources to battling the importation of drugs, and eliminated or reduced the funding required to enforce several provisions in the statute.¹⁶⁷ Only a year

Attorney General should alter the immigration status of any qualified, but previously illegal, immigrant who had resided in the United States since January 1, 1982); *id.* §§ 301–305 (codified at 8 U.S.C. § 1186) (creating a new class of temporary legal immigrant farm workers).

164. Title I of the Act, which dealt with civil and criminal sanctions for employers who knowingly hired, retained, or recruited illegal aliens for employment, included the preemption provision which stated, “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.” *Id.* § 101 (codified at 8 U.S.C. § 1324).

165. *Id.*

166. KOVEN & GÖTZKE, *supra* note 155, at 140 (“IRCA, however, did not work as intended by its sponsors. IRCA did not significantly terminate illegal employment but appears to simply have fueled a false documentation cottage industry. Illegal documents allowed employers to continue hiring workers without fear of penalty for ‘knowingly hiring’ undocumented workers.”). Critics of IRCA asserted that the federal government’s failure to take simple measures like creating a database in which business owners could check the validity of employment documentation enhanced the vitality of the document forgery industry. *Id.*; see also Patrick McDonnell, *New Law Not Deterring Aliens, Researcher Says*, L.A. TIMES, June 18, 1988, http://articles.latimes.com/1988-06-18/local/me-4536_1_immigration-law (“[M]any workers are getting around the law by using fraudulent documents that are being purchased, rented or borrowed from suppliers—sometimes with encouragement from employers. Many critics have said that the law has a glaring loophole: It does not require employers to check the authenticity of workers’ documents, a fact that many say has allowed California employers to maintain their reliance on undocumented labor with relative ease.”).

167. KOVEN & GÖTZKE, *supra* note 155, at 140. As one contemporaneous *New York Times* article noted, “Immigration officials acknowledge that their task in enforcing the law is daunting. In Los Angeles, for example, about 70 agents are assigned to monitor roughly half a million employers.” Richard W. Stevenson, *Jobs Being Filled by Illegal Aliens Despite Sanctions*, N.Y. TIMES, Oct. 9, 1989, <http://www.nytimes.com/1989/10/09/us/jobs-being-filled-by-illegal-aliens-despite-sanctions.html?pagewanted=all&src=pm>. Moreover, as a result of the shortage of funds for enforcement, the INS often targeted companies that had attempted to comply with immigration laws but made an inadvertent error rather than companies who blatantly violated immigration laws, because the latter often lacked documentation, making prosecution more difficult. *Id.*

Arizona became so frustrated with the federal government’s failure to effectively enforce the law that it sued the federal government for failing to supply sufficient funding and border patrol resources. Jacques Billeaud, *Ariz. Governor Countersues Federal Government*, ABC NEWS, (Feb. 10, 2011), <http://abcnews.go.com/US/wireStory?id=12886615>. Additionally, Arizona’s complaint

later, employment of illegal aliens was at pre-IRCA levels.¹⁶⁸ The states were left with the same problems and even less power to protect themselves.

Nearly ten years later, the federal government attempted to respond to the problematic aspects of the IRCA with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).¹⁶⁹ The Act instigated improvements in border patrol and technology, enhanced penalties for document forgery and smuggling, redoubled efforts to apprehend and remove illegal immigrants living in the United States, and instituted three new pilot programs to increase enforcement of employer restrictions.¹⁷⁰ The most significant contribution of the Act, however, was the creation of the 287(g) program, which allowed states to partner with the federal government to investigate, detain, and initiate deportation proceedings against illegal immigrants.¹⁷¹

sought to force the federal government to pay for the incarceration of illegal immigrants—a service that costs the state several hundred million dollars each year, despite the IRCA provisions that impose a federal duty to cover those costs. *Id.* (seeking approximately \$125 million in reimbursement from the federal government for the cost of imprisoning illegal aliens); *see also* Jim Nintzel, *SCAAP Crap: Why Does the White House Hate Paying Its Prison Bills to the States?*, TUCSON WEEKLY, May 8, 2009, <http://www.tucsonweekly.com/TheRange/archives/2009/05/08/scaap-crap-why-does-the-white-house-hate-paying-its-prison-bills-to-the-states> (reporting Arizona’s bill to the federal government for incarceration of illegal immigrants at \$400 million). As Arizona lawmakers see it, “As long as sheriff’s offices in Pima, Cochise and other Arizona counties are doing the federal government’s job of securing our border, they must get compensated for it. That is the fair thing to do.” Nintzel, *supra*.

168. KOVEN & GÖTZKE, *supra* note 155, at 140.

169. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C.).

170. *Id.*; *see also* KOVEN & GÖTZKE, *supra* note 155, at 142 (listing the various reforms included in the IIRIRA). One of these pilot programs was known as E-Verify. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 404, 110 Stat. 3009-546, 3009-664 (1996) (found in note following 8 U.S.C. § 1324a) (describing the pilot program that would come to be known as E-Verify); *see also* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1975 (2011) (reciting the history of the E-Verify program, which was originally known as the “Basic Pilot Program” under the IIRIRA). E-Verify is the only one of the original three pilot programs to survive to the present day. *Whiting*, 131 S. Ct. at 1975. Essentially, E-Verify is a work authorization program that allows employers to verify the status of potential employees through an Internet-based system. *Id.*

171. 8 U.S.C. § 1357(g) (2006) (“[T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.”). Under the 1996 IIRIRA, the Secretary of the Department of Homeland Security (DHS) was authorized to enter into agreements with state and local law enforcement agencies that would allow those agencies to perform immigration officer duties. *Id.*

The 287(g) program, which allowed for joint federal-state action in effectuating federal immigration law, was popular amongst the states and almost seventy localities entered into partnership agreements with the federal government.¹⁷² But eventually, decreased federal interest in enforcing the immigration laws, coupled with a new federal policy that narrowly limited the use of deportation proceedings, crippled the effectiveness of the new reforms, including state partnerships.¹⁷³

With the federal government unwilling or unable to resolve the illegal immigration problem, the states began to again take immigration matters into their own hands. However, this time, their hands were tied by the

172. U.S. Immigration and Customs Enforcement, *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Oct. 14, 2011).

173. Responding to political criticism of the IIRIRA legislation, DHS Secretary Janet Napolitano issued a new policy in July 2009 that altered the partnership between ICE and local law enforcement agencies in two ways. Michaud, *supra* note 19, at 1103. First, the policy divided undocumented immigrants into three categories based upon their dangerousness and, through limitations on the discretion of local agencies, essentially restricted the use of removal proceedings to the most dangerous and violent offenders. *Id.* at 1103–04. Second, the policy required local officials to prosecute any domestic charges that had led to the arrest of an illegal alien prior to initiating removal proceedings. *Id.* at 1103. The ultimate effect of these policy changes was to weaken the ability of state and local actors to combat illegal immigration. *Id.* at 1105.

The principal author of the IIRIRA, Iowa Senator Chuck Grassley, noted the crippling effect that these policy changes had on local immigration law enforcement and pointed out that the added limitations were contrary to the law’s plain language and intent in a letter to Napolitano:

I am dismayed at the recent changes being instituted by your Department with regard to the 287(g) program. . . . [T]he changes being asked of those who have a cooperative agreement or plan to enter into one are a step backward in the effort to enforce our country’s immigration laws.

As the principal author of Section 287(g) of the Immigration and Nationality Act, I can assure you that Congress fully intended to allow local law enforcement officers to investigate, apprehend, and detain illegal aliens. . . .

When it was created, the 287(g) program was meant to help officers arrest and detain all illegal immigrants—not just convicted criminals or serious offenders. There is nothing in the Act that requires that the aliens in question be criminal aliens or be convicted of or arrested for other offenses. However, the changes your Department is forcing on agencies implies a three tier system only designed to get convicted criminal aliens off the streets. I am concerned that the changes being made will weaken our attempts to arrest and detain illegal immigrants in this country, no matter the magnitude of their crime. I’m afraid that your Department is too much concerned about criminal aliens, and not at all focused on illegal aliens who knowingly broke the law by crossing the border or overstayed a visa. While it’s important to apprehend those who have already committed a crime, I’m afraid these new changes to the 287(g) program may preclude local law enforcement from apprehending illegal aliens who they encounter in the course of their normal duties.

Press Release, Grassley: Homeland Security Department Hampers State and Local Law Enforcement Ability to Apprehend Illegal Aliens (July 14, 2009), *available at* http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=21811.

preemption provision in the IRCA, thus posing a new preemption question for the courts to resolve.

IV. PUSHING THE BOUNDARIES: STATE AND LOCAL GOVERNMENTS TAKE IMMIGRATION REFORM INTO THEIR OWN HANDS

As the federal government's interest in effectively enforcing its own immigration laws began to wane, states again became restless.¹⁷⁴ And the familiar, perfect mix of circumstances was brewing. Although the economy was healthy in early 2007, a large national recession was close on the horizon.¹⁷⁵ Illegal immigration was booming and was heavily concentrated in just a few states and localities.¹⁷⁶ Further, a new factor was in play—problematic increases in crime, which states and localities attributed to the large wave of illegal immigrants settling within their borders.¹⁷⁷

Reacting to these circumstances, two disparate local governments enacted laws designed to target illegal immigration with the only power the states had left: the power to revoke state-issued licenses if the license-holder

174. As one Arizona report on the Legal Arizona Worker's Act (LAWA) described it:

The U.S. Congress and the White House have engaged with the issue [of illegal immigration] but have failed to take definitive action to confront it and have failed as well to develop an acceptable guest workers program.

...
Federal failure to enforce or reform immigration laws has led public officials in states such as Arizona to take matters into their own hands and enact measures designed to reduce illegal immigration and drive illegal immigrants from their states.

Judith Gans, *Arizona's Economy and the Legal Arizona Worker's Act*, ii (Dec. 11, 2008), http://udallcenter.arizona.edu/immigration/publications/2008_GANS_lawa.pdf.

175. ECONOMIC REPORT OF THE PRESIDENT 3 (2008), *available at* http://www.gpoaccess.gov/eop/2008/2008_erp.pdf (“Americans should be confident about the long-term strength of our economy, but our economy is undergoing a period of uncertainty, and there are heightened risks to our near-term economic growth.”); *id.* at 26 (“Slower growth is anticipated for the first half of [2008], and the average unemployment rate for 2008 is projected to move up from the 2007 level.”).

176. ECONOMIC REPORT OF THE PRESIDENT 196 (2007), *available at* http://www.gpoaccess.gov/eop/2007/2007_erp.pdf (“In recent decades, a handful of states have absorbed the majority of foreign-born persons.”); *see also* Gans, *supra* note 174, at 1 (“The United States and, particularly, the Southwest has experience[d] nearly unprecedented immigration from countries south of the U.S. border in recent decades.”).

177. *See* Powell & Garcia, *supra* note 12 (attributing Hazleton's decision to pass an ordinance penalizing employers and landlords who contracted with illegal immigrants in part to increased violent crime, drug dealing, and a particularly brutal murder-robbery); Keteyian, *supra* note 9 (reporting on Arizona's battle with unusually high rates of kidnapping, ransom demands, and torture as a result of Mexican drug cartel members illegally crossing the border).

was caught hiring or housing illegal immigrants.¹⁷⁸ Arizona passed the LAWAA, a law that targets employers who hire illegal aliens by revoking any state-issued licenses authorizing them to perform business functions in the state.¹⁷⁹ The city of Hazleton in Pennsylvania similarly passed a series of ordinances, known collectively as the Illegal Immigration Relief Act Ordinance (IIRAO), that prohibited employing or housing illegal immigrants and that punished any violation by revoking the violator’s business and rental licenses.¹⁸⁰ When both laws were challenged in the federal courts, the Ninth and Third Circuits came to disparate conclusions, creating a circuit split that the Supreme Court was called upon to resolve.¹⁸¹

178. As previously discussed, in passing the IRCA reforms to the federal immigration scheme, Congress also expressly preempted any state law that imposed civil or criminal sanctions on employers who hired illegal aliens. *See supra* notes 164–65 and accompanying text; *see also* 8 U.S.C. § 1324(a)(h)(2) (2006) (“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.”).

179. ARIZ. REV. STAT. ANN. §§ 23-211 to 23-216. The relevant portion of the statute proscribes the hiring or employment of illegal aliens within the state:

An employer shall not knowingly employ an unauthorized alien. If, in the case when an employer uses a contract, subcontract or other independent contractor agreement to obtain the labor of an alien in this state, the employer knowingly contracts with an unauthorized alien or with a person who employs or contracts with an unauthorized alien to perform the labor, the employer violates this subsection.

Id. § 23-212(a). After a first violation of the law, the employer is ordered to terminate the undocumented worker, is placed on probation, and may have its license suspended for ten business days if the violation is sufficiently egregious. *Id.* § 23-212(f)(1)(a)–(d). If the employer commits a second violation, any licenses held in the state of Arizona are revoked. *Id.* § 23-212(f)(2).

180. The IIRAO made it unlawful “‘for any business entity’ to ‘recruit, hire for employment, or continue to employ’ or ‘permit, dispatch, or instruct any person’ who is an ‘unlawful worker’ to perform work within Hazleton” and defined unlawful worker using the definition contained in the IRCA. *Lozano v. City of Hazleton*, 620 F.3d 170, 177–78 (3d Cir. 2010), *cert. granted and decision vacated*, 131 S. Ct. 2958 (2011). If a city resident believes that an employer is violating the ordinance, he or she may submit a complaint with the city government, thus triggering an investigation into the employee’s legal status using the federal electronic verification system created as a pilot program under the IIRIRA. *Id.* at 178. After the first violation, the violator’s license is suspended until the undocumented worker is terminated and if a second violation occurs, the violator’s license is suspended for twenty business days. *Id.* at 178–79.

In addition, the IIRAO created a city violation making 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.” *Id.* at 179. As with the employer licensing laws, city residents can report violations to the city government, triggering an investigation. *Id.* If the city detects a violation, the landlord has five days to evict the illegal immigrant or have his rental license revoked. *Id.*

181. *Id.* at 176 (enjoining the city of Hazleton from enforcing the IIRAO and finding the ordinances to be preempted under both the Constitution and federal law), *cert. granted and decision vacated*, 131 S. Ct. 2958 (2011); *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 860–61 (9th Cir. 2009) (concluding that the LAWAA was neither expressly nor impliedly preempted under the federal immigration scheme), *cert. granted sub. nom. Chamber of Commerce v. Candelaria*, 130 S. Ct. 3498 (2010).

A. *Arizona Breaks the Barrier to State Regulation in Chicanos Por La Causa, Inc. v. Napolitano*

Arizona's LAWAs were the first significant state effort to regulate illegal immigration that had reached the federal circuit courts since the passage of the IRCA and its respective preemption provision. As the first circuit court to pass upon the issue, the Ninth Circuit concluded that the LAWAs were a valid licensing law within the savings clause of the IRCA's preemption provision and that it was therefore constitutionally sound.¹⁸²

Reacting to "rising frustration with the United States Congress's failure to enact comprehensive immigration reform," Arizona passed an expansive legislative package that targeted employment of illegal aliens by revoking the business licenses of any employer who hired undocumented workers.¹⁸³ Various businesses and civil rights organizations brought a facial challenge to the law in federal court claiming it was either expressly or impliedly preempted under the IRCA.¹⁸⁴ The district court concluded that the LAWAs

Two other circuit courts have touched on the issue of similar provisions' constitutionality, but not sufficiently enough to allow for comparable analysis of their conclusions. In *Gray v. City of Valley Park*, the Eighth Circuit affirmed the decision of the district court, which concluded that a city ordinance regulating the employment and housing of illegal immigrants through licensing laws was neither expressly nor impliedly preempted under federal law. *Gray v. City of Valley Park*, 567 F.3d 976, 987 (8th Cir. 2009), *aff'g* 2008 WL 294294 (E.D. Mo. 2008). The Eighth Circuit's ruling, however, analyzed arguments about standing and preclusion resulting from a previous state court decision and never addressed the preemption issue beyond generally affirming the ruling of the district court. *Id.* But the court's willingness to affirm in whole the district court decision suggests that had the Eighth Circuit reached the issue, it would have sided with the Ninth Circuit in finding no federal preemption of the licensing laws. Conversely, the Tenth Circuit addressed an Oklahoma statute that prevented any business entity that did not electronically verify the employment status of its employees from obtaining contracts with the Oklahoma government and required certain taxes to be withheld from contractors until the employment status of their workers could be verified. *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 750 (10th Cir. 2010). Not only was the law in *Edmondson* significantly different from the licensing laws at issue in the Third and Ninth Circuits, but the complainants also only sought a preliminary injunction, which only required a showing of a "likelihood of success on the merits." *Id.* at 770 ("Oklahoma has waived any argument that its Act is a licensing or other similar law . . ."); *id.* ("Having concluded that the Chambers have shown a strong likelihood of succeeding on the merits of their preemption challenges to Sections 7(C) and 9, we turn to the remaining preliminary injunction factors."). Therefore, these decisions will not be discussed further in this Comment.

182. *Chicanos Por La Causa, Inc.*, 558 F.3d at 860–61.

183. *Id.* at 860; *see also supra* note 179 (explaining the relevant provisions of the LAWAs).

184. *Chicanos Por La Causa, Inc.*, 558 F.3d at 860. The complainants argued that the law was expressly preempted under the preemption provision contained in 8 U.S.C. § 1324(a)(h)(2). *Id.* In the alternative, they argued that the law was either expressly or impliedly preempted because it required employers to use the federal electronic verification system, while federal law merely made the program optional. *Id.* at 860–61.

was a licensing provision within the savings clause of IRCA's preemption provision, and the Ninth Circuit affirmed this conclusion.¹⁸⁵

In analyzing the preemption challenges, the Ninth Circuit first differentiated between express and implied preemption, defining the former as a circumstance in which Congress has passed "an explicit preemption provision" and the latter as a circumstance in which either "the depth and breadth of a congressional scheme . . . occupies the legislative field" or "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹⁸⁶

Turning first to the express preemption issue, the Ninth Circuit recognized, and the parties agreed, that the controlling question was whether the LAWA could be properly classed as a "licensing law" under the IRCA's savings clause.¹⁸⁷ The complainants argued that the LAWA did not fall within the class of "licensing law[s]" that the statute authorized because Congress had intended the statute to permit sanctions only following a federal adjudication of employer liability, not sanctions stemming from independent state investigations.¹⁸⁸ Arizona asserted that the law fell within the plain language of the IRCA savings clause as the LAWA imposed only licensing penalties on violating employers.¹⁸⁹

Relying heavily on the Supreme Court's decision in *De Canas*, the Ninth Circuit concluded that the IRCA savings provision should be interpreted broadly, particularly because the state statute under consideration was an indirect regulation of immigration that related closely to an important

185. *Id.* at 860.

186. *Id.* at 863. The two types of implied preemption are generally referred to as field preemption and conflict preemption, respectively. *Id.*

187. *Id.* at 864 ("The parties agree that the Act is expressly preempted by IRCA unless it falls within the savings clause of IRCA's express preemption provision.")

188. *Id.* This argument was based upon an ambiguous passage in the legislative history of the IRCA, which stated:

The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens. They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation. Further, the Committee does not intend to preempt licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

H.R. REP. NO. 99-682(i), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662. The complainants argued that the use of the past tense in "who has been found to have violated" implied that the federal government must find an employer violation before the state can act. *Chicanos Por La Causa, Inc.*, 558 F.3d at 865-66. The court ultimately rejected this argument. *Id.* at 866.

189. *Chicanos Por La Causa, Inc.*, 558 F.3d at 864.

state interest.¹⁹⁰ The court thus applied “an assumption of non-preemption,” and ultimately concluded that the LAWA was a valid licensing provision not expressly preempted under federal law.¹⁹¹

Moving to the question of implied preemption, the court addressed the complainants’ assertion that the LAWA impliedly conflicted with existing federal law because it made electronic verification mandatory rather than optional.¹⁹² The Ninth Circuit concluded that this actually served, rather than detracted, from Congress’s purposes in passing the IIRIRA because, although Congress had made electronic verification optional, it had clearly “encouraged” its use.¹⁹³ Moreover, the court reasoned that had Congress intended to preclude the states from requiring electronic verification, it both had the opportunity and the knowledge to do so.¹⁹⁴

Therefore, the court held that the LAWA did not raise either express or implied preemption concerns and that it was a constitutional exercise of state power.¹⁹⁵

B. The City of Hazleton Is Turned Away at the Gates in Lozano v. City of Hazleton

A little more than a year after the Ninth Circuit held that the LAWA was not preempted in *Chicanos Por La Causa*, a challenge arose to a similar regulation in the Third Circuit. Unlike the Ninth Circuit, however, the Third

190. *Id.* As the Court concluded in *De Canas*, state and local employment of illegal aliens was predominantly a state interest:

California employers of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of [state] police power regulation. . . . In attempting to protect California’s fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, [the California law at issue] focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils.

De Canas v. Bica, 424 U.S. 351, 356–57 (1976). Additionally, the Court drew a distinction between direct regulation of immigration, such as exclusion and deportation, and indirect regulation of immigration, such as regulations involving the distribution of state resources to undocumented immigrants. *Id.* at 354–55; *see also supra* notes 115–19 and accompanying text.

191. *Chicanos Por La Causa, Inc.*, 558 F.3d at 865–66.

192. *Id.* at 867. The complainants did not assert field preemption, and therefore the issue was not addressed by the court. *Id.* at 863.

193. *Id.* at 867 (“Though Congress did not mandate E-Verify, Congress plainly envisioned and endorsed an increase in its usage.”).

194. *Id.*

195. *Id.* at 866–67, 869. The court interpreted the statute to allow employers to present counterevidence disputing a state finding that the employer had hired illegal aliens to avoid due process concerns. *Id.* at 869.

Circuit concluded that the federal regulatory scheme preempted the City of Hazleton's employment and housing licensing laws.¹⁹⁶

Between 2000 and 2006, Hazleton's population rapidly increased from only 23,000 to close to 33,000 residents.¹⁹⁷ Most of the increase in population was due to legal and illegal Latino immigrants fleeing New York and New Jersey for the rural Pennsylvania mining town.¹⁹⁸ Believing that this immigration was straining local resources and that the federal government lacked either the ability or willingness to act, Hazleton lawmakers passed a series of ordinances designed to deter illegal immigration into the city.¹⁹⁹ These ordinances targeted employment and housing of illegal immigrants, allowing the city to revoke the business or rental license of any person or entity that extended an employment or housing offer to an illegal immigrant.²⁰⁰ The district court concluded that federal law preempted the Hazleton ordinances, and the Third Circuit affirmed.²⁰¹

196. *Lozano v. City of Hazleton*, 620 F.3d 170, 202 (3d Cir. 2010), *cert. granted and decision vacated*, 131 S. Ct. 2958 (2011). Originally, the complainants in *Lozano* challenged an additional city ordinance that provided a private cause of action for unfair business practices if an employer hired illegal immigrants. *Id.* at 178–79. This city ordinance was not analyzed for preemption, however, because the court concluded that none of the present complainants had standing to challenge it. *Id.* at 183. Thus, only the employment and housing ordinances were considered in the court's preemption discussion and only these ordinances will be discussed here. *Id.* at 202–24.

197. *Id.* at 176.

198. *Id.*

199. *Id.* at 177. The ordinance contained a statement of findings and declaration of purpose. *Id.* The findings were that:

[U]nlawful employment, the harboring of illegal aliens in dwelling units in the City of Hazleton, and crime committed by illegal aliens harm the health, safety and welfare of authorized U.S. workers and legal residents in the City of Hazleton. Illegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, contributed to other burdens on public services, increasing their cost and diminishing their availability to legal residents, and diminishes our overall quality of life.

Id. The statement of purpose set forth the city's proposed response in enacting the ordinances:

[This ordinance] seeks to secure to those lawfully present in the United States and this 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.

Id.

200. *Id.* at 177–80; *see also supra* note 180 (explaining the relevant provisions of the Hazleton ordinance).

201. *Lozano*, 620 F.3d at 202. The district court and the Third Circuit applied different reasoning but ultimately came to the same conclusion about the preemption question. *Id.*

As the Hazleton law contained both employment and housing provisions, the Third Circuit addressed the preemption of each separately, beginning with the employment regulations.²⁰²

The complainants had asserted, and the district court had agreed, that the Hazleton employment ordinance was expressly preempted under federal law both because the revocation of business licenses acted as a sanction and because the statute intended to permit only licensing sanctions that followed a federal finding of employer liability.²⁰³ The Third Circuit, however, reached a different conclusion on the question of express preemption.²⁰⁴ Examining in depth the Supreme Court's holding in *De Canas*, the Third Circuit agreed with the Ninth Circuit that a presumption against preemption should apply where the local regulation at issue both indirectly regulates immigration and shares a close nexus with an important state interest.²⁰⁵ The Hazleton employment ordinance fell within this classification and thus was entitled to the presumption.²⁰⁶

With this presumption in place, the court then looked to the plain meaning of the statute to determine whether the savings clause in the preemption provision encompassed the Hazleton law.²⁰⁷ Concluding that the plain language of the IRCA savings clause was clear and unambiguous and that no reasonable interpretation could exclude the revocation of business licenses as the Hazleton law prescribed, the court found no express preemption.²⁰⁸

202. *Id.* at 206, 219.

203. *Id.* at 207–10. The latter argument was identical to the one raised by the complainants in *Chicanos Por La Causa* and relied on the same House Report to support its interpretation of the IRCA preemption provision. *Id.* at 207 n.29; *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 864 (9th Cir. 2009); *see also supra* note 188 and accompanying text (explaining the legislative history upon which this argument was based).

204. *Lozano*, 620 F.3d at 207–10.

205. *Id.* at 206–07. The Third Circuit noted that the district court had run afoul in its analysis because it failed to take the crucial first step of differentiating between laws that directly regulate immigration and laws that indirectly regulate immigration through withholding certain state resources. *Id.* at 206. The court also rejected any contention that the passage of the IRCA would alter the presumption against preemption because that aspect of the analysis depended on the “historic police power” attributed to the state and thus on the “past balance of state and federal regulation.” *Id.* at 206–07. Because employment was historically a realm in which state police power had been recognized, a presumption against preemption and a broad interpretation of the IRCA savings clause was required. *Id.* at 207.

206. *Id.*

207. *Id.* at 208.

208. *Id.* at 209 (“Nowhere in IRCA’s text or legislative history is there an indication that Congress intended that clause to apply only to licensing laws that impose minor penalties, and not to licensing laws that impose more significant sanctions. Similarly, there is no indication that Congress

Although the complainants failed in their argument of express preemption, the Third Circuit looked more favorably on the assertion of conflict preemption.²⁰⁹ The complainants argued that the Hazleton ordinances disturbed the careful balance that Congress had created between several different policy objectives in enacting the IRCA including “detering employment of unauthorized aliens, minimizing the resulting burden on employers, and protecting authorized aliens and citizens perceived as ‘foreign’ from discrimination.”²¹⁰ The Third Circuit concluded that because the Hazleton ordinances placed the first of these policy objectives above the other two, the extent of their conflict with federal policy was sufficient to overcome the presumption against preemption, and thus the Hazleton ordinances were impliedly preempted under federal law.²¹¹

In analyzing the Hazleton housing regulations, the court revisited the question of whether the *De Canas* presumption against preemption ought to apply.²¹² The court’s analysis turned on whether housing regulations were direct immigration laws that governed “which aliens are permitted to reside in the United States” or indirect immigration laws that governed “rental

intended to exclude laws regulating the provision, suspension, and revocation of business licenses from the term ‘licensing law,’ and Plaintiffs do not offer an alternative definition of ‘license’ that would sensibly exclude business licenses. . . . We therefore conclude that the IIRAO is a licensing law under IRCA’s saving clause and saved from express pre-emption.”)

209. *Id.* at 210. As in *Chicanos Por La Causa*, field preemption was not argued on appeal and was therefore not considered by the court. *Id.* at 210 n.32.

210. *Id.* at 210–11.

211. *Id.* at 211. The court went on to clarify four ways in which the Hazleton ordinances conflicted with the policy balance that Congress struck in enacting the IRCA. *Id.* at 212. First, the court asserted that the law increased the burden on employers by creating a second adjudicative system to which they would be answerable. *Id.* Second, the law made electronic verification mandatory instead of permissive. *Id.* at 214. Third, the law required verification of independent contractors as well as employees. *Id.* at 216. Finally, the law failed to adequately protect against discrimination of workers who appeared to be foreign, but were legally authorized to work in the United States. *Id.* at 217.

These reasons for finding conflict preemption were hardly persuasive, particularly given the presumption against preemption that arose in the case. *See id.* at 206–07. When Congress included the savings clause provision in the IRCA, it did not indicate that the states must depend on federal adjudication of employer violations to enforce state licensing laws. *See* 8 U.S.C. § 1324(a)(h)(2) (2006). Moreover, legislative history suggested that at least some independent state investigation was presupposed. H.R. REP. NO. 99-682(i), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662 (“[T]he Committee does not intend to preempt licensing or ‘fitness to do business laws,’ such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.”); *see also* *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 866 (9th Cir. 2009) (recognizing that this legislative history presupposes at least some independent state action). Additionally, although Congress made electronic verification optional, it strongly encouraged its use, expanding its availability to all fifty states and extending its duration as a pilot program, suggesting that it both endorsed and fully expected widespread use. *Chicanos Por La Causa*, 558 F.3d at 867. Finally, any potential for discrimination was not implicated any more with electronic verification than with the traditional federal I-9 system, and thus this did not create conflicting policy objectives. *Id.*

212. *Lozano*, 620 F.3d at 219.

accommodations.”²¹³ In reaching the conclusion that housing provisions were direct regulations of immigration, the court looked at “the reality of what these ordinances accomplish,” which was to force at least a contingent of illegal immigrants to leave the city.²¹⁴ As a direct regulation of immigration, the Hazleton housing ordinance was not entitled to the presumption against preemption and was an unconstitutional exercise of state power in a field that Congress had clearly intended to occupy—the field of direct immigration regulation.²¹⁵

213. *Id.* at 220.

214. *Id.* In its analysis, the Third Circuit improperly applied the *De Canas* test for direct and indirect regulation of immigration. The court recognized that the Hazleton housing ordinance *did not* attempt to regulate who may enter the city, nor did it allow for physical deportation of illegal immigrants, as was the *De Canas* definition of a direct regulation of immigration. *Id.*; see also *De Canas v. Bica*, 424 U.S. 351, 355 (1976) (defining direct regulation of immigration as “essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain”). But the court argued that because “in essence” the regulations encouraged illegal immigrants to leave the city it achieved the same result. *Lozano*, 620 F.3d at 220–21. This entirely misses the point. Any indirect regulation of immigration, including both regulation of employment and regulation of housing, “in essence” encourages illegal immigrants to leave by eliminating the incentives and the means for those immigrants to stay. See *De Canas*, 424 U.S. at 355–56 (“[E]ven if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration . . .”); see also *Plyler v. Doe*, 457 U.S. 202, 228 n.23 (1982) (“Although the State has no direct interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government, unchecked unlawful migration might impair the State’s economy generally, or the State’s ability to provide some important service. 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.” (emphasis added)). The presumption against preemption should have applied to the Hazleton housing ordinance because it fell within the traditional powers of the state and indirectly regulated immigration by excluding illegal immigrants from the use of local resources. *Lozano*, 620 F.3d at 220 (“[W]e realize that a state certainly can, and presumably should, regulate rental accommodations to ensure the health and safety of its residents . . .”); see also *De Canas*, 424 U.S. at 356 (concluding that employment fell within state police powers, and thus was an indirect immigration regulation, because “[s]tates possess broad authority under their police powers . . . to protect workers within the State” through health and safety regulations).

215. *Lozano*, 620 F.3d at 220–21. The Third Circuit determined that the Hazleton ordinance attempted “to determine who should or should not be admitted into the country, and the conditions under which a legal entrant may remain,” referencing the definition of direct immigration regulation employed in *De Canas*. *Id.* at 220 (quoting *De Canas*, 424 U.S. at 355).

In addition to finding the housing ordinance field preempted, the court also concluded that it was conflict preempted. *Id.* at 223–24. The court rejected Hazleton’s argument that its ordinance, which prohibits landlords from knowingly renting to illegal immigrants, virtually mirrored federal immigration law, which prohibits “harboring” illegal immigrants. *Id.* at 222–23; see also 8 U.S.C. § 1324(a)(1)(A)(iii) (2006) (“[Any person who] 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, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any

Thus, the Third Circuit and Ninth Circuit decisions were directly at odds, leaving unanswered the question of whether and when states could regulate certain aspects of immigration within their boundaries.²¹⁶ But the question would not remain unanswered for long, as the Supreme Court prepared to yet again address the balance between federal and state immigration powers.²¹⁷

C. *The Supreme Court Resolves the Border Dispute Between State and Federal Immigration Powers in Chamber of Commerce v. Whiting*

Shortly after the circuit split emerged regarding the extent of state power to regulate housing and employment of illegal immigrants under the IRCA's savings clause, the Supreme Court heard arguments in an appeal from the Ninth Circuit's *Chicanos Por La Causa* decision.²¹⁸ Faced with difficult questions about the boundaries between state police power and federal control over immigration policy, the eight-Justice panel splintered and issued three different opinions.²¹⁹ But in the end, a five-Justice majority

place, including any building or any means of transportation [shall be criminally punished].”). Pointing to general disagreement amongst the circuit courts over the breadth of the definition of “harboring” in the federal statute, the court suggested that merely renting a dwelling place might not fall within the term’s scope. *Lozano*, 620 F.3d at 224. Additionally, the court noted that the Hazleton ordinance could be interpreted as requiring landlords to inquire into the immigration status of prospective tenants—a requirement that had no equivalent in federal immigration law. *Id.* According to the Third Circuit, this inconsistency amounted to a conflict between the Hazleton ordinance and federal policy. *Id.*

216. Compare *Lozano*, 620 F.3d at 176 (concluding that federal law preempted Hazleton’s ordinances, which restricted the employment and housing of illegal immigrants within city boundaries), *cert. granted and decision vacated*, 131 S. Ct. 2958 (2011), with *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 860–61 (9th Cir. 2009) (holding that federal law neither expressly nor impliedly preempted the LAWA, which regulated employment of illegal immigrants within the state of Arizona), *cert. granted sub. nom.*, *Chamber of Commerce v. Candelaria*, 130 S. Ct. 3498 (2010).

217. The Supreme Court granted certiorari to the Ninth Circuit’s decision in *Chicanos Por La Causa* and to the Third Circuit’s decision in *Lozano*, but only heard oral arguments and issued a full opinion on the former case. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011). The Supreme Court vacated the Third Circuit’s decision in *Lozano* and remanded the case for reconsideration in light of its decision in *Whiting*. *Lozano*, 131 S. Ct. at 2958.

218. *Whiting*, 131 S. Ct. at 1968.

219. Chief Justice Roberts wrote the controlling opinion, which Justices Alito, Kennedy, and Scalia joined in the entirety. *Id.* at 1973–87. Justice Thomas concurred in Parts I, IIA, and IIIA of the controlling opinion and concurred in the judgment, but did not write separately to explain his reluctance to join Parts IIB and IIIB of the controlling opinion. *Id.* at 1973. Justice Breyer wrote a dissenting opinion, which Justice Ginsburg joined. *Id.* at 1987–97 (Breyer, J., dissenting). Justice Sotomayor filed a separate dissenting opinion. *Id.* at 1998–2007 (Sotomayor, J., dissenting). Justice Kagan recused herself from the case because of her prior involvement with it as Solicitor General for the United States. *Id.* at 1987 (majority opinion); see also Joan Biskupic, *Supreme Court Upholds Ariz. Employer Sanctions Law*, ABC NEWS (May 26, 2011), <http://abcnews.go.com/Politics/supreme-court-upholds-ariz-employer-sanctions-law/story?id=13696779> (noting Kagan’s recusal stemmed from her prior position as U.S. Solicitor General).

concurred that the licensing regulations set forth in the LAWA constituted a permissible exercise of state power—an exercise that the federal immigration scheme neither expressly nor impliedly preempted.²²⁰

Challenging the Ninth Circuit's decision, the United States Chamber of Commerce advanced three separate arguments in support of federal preemption.²²¹ The Chamber first argued that the LAWA was expressly preempted because it reached beyond the intended scope of the savings clause in the IRCA.²²² In the alternative, the Chamber asserted that the LAWA was impliedly preempted because it conflicted with the general balance of policy objectives that Congress sought to create under the IRCA.²²³ Finally, the Chamber contended that the LAWA was impliedly preempted because it required Arizona employers to use the federal E-Verify system whereas federal law made the program optional.²²⁴

220. *Whiting*, 131 S. Ct. at 1973 (concluding that the LAWA was not preempted under federal law and was therefore a permissible exercise of state power over illegal immigration).

221. *Id.* at 1977, 1985.

222. *Id.* at 1977. The Chamber proffered several different theories in support of its assertion that the LAWA was expressly preempted. *Id.* at 1977–81. According to the Chamber, the LAWA could not be classified as a licensing law because it only operated to suspend or revoke licenses, not to grant them. *Id.* at 1979. Additionally, the Chamber argued that the LAWA did not fall within the savings provision because it allowed independent state adjudications of employer liability, which other aspects of federal immigration law did not permit. *Id.* Noting that Congress's goal in enacting the IRCA was to create uniformity of federal immigration policy, the Chamber asserted that Congress could not have intended the IRCA savings clause to allow the states to enact their own separate regulations like Arizona had done in enacting the LAWA. *Id.* at 1979–80. Finally, pointing to the limited legislative history of the text, the Chamber asserted that the term “licensing” referred specifically to licenses issued to farm contractors who hired migrant workers and not to other types of licensing sanctions. *Id.* at 1980.

223. *Id.* at 1983. The Chamber offered two separate formulations of this argument. *Id.* at 1981–85. In the broader sense, the Chamber contended that the federal system under the IRCA was intended to be exclusive and that therefore any state regulation dealing with employment of illegal immigrants was in conflict with federal objectives. *Id.* at 1981. More specifically, the Chamber suggested that the LAWA upset the balance that Congress had intended to strike under the IRCA between four policy objectives: “deterring unauthorized alien employment, avoiding burdens on employers, protecting employee privacy, and guarding against employment discrimination.” *Id.* at 1983. In the Chamber's view, the LAWA favored the policy of deterring illegal immigrant employment above all others, thus upsetting the balance that Congress sought to achieve. *Id.*

224. *Id.* at 1985. In addition to arguing that the LAWA conflicted with federal law because it made E-Verify mandatory rather than optional, the Chamber highlighted potential logistical problems with widespread use of E-Verify. *Id.* at 1986. First, the Chamber hypothesized that if all fifty states began requiring the use of E-Verify, the system would be overwhelmed, preventing the federal law that established the system from operating as Congress intended. *Id.* Second, the Chamber asserted that the E-Verify program had a track record of inaccuracy and therefore should not be used as the sole basis for determining workers' eligibility for employment in the United States. *Id.*

Beginning with the express preemption argument, the Court examined the plain language of the IRCA’s savings clause.²²⁵ Primarily focusing on the word “licensing,” the majority looked at definitions of the term found both in other portions of the federal code and in the dictionary to determine if the LAWA sanctions were within the plain meaning of the savings clause’s scope.²²⁶ Upon examination of these definitions, the Court determined that “Arizona’s licensing law f[ell] well within the confines of the authority Congress chose to leave to the States” in the IRCA savings clause.²²⁷ Because the Court found no ambiguity in the savings clause, it refused to look beyond the clause’s plain language to its legislative history and context either to discover ambiguity or to further define its meaning.²²⁸

225. *Id.* at 1977 (“[W]e ‘focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ preemptive intent.’” (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993))). The IRCA savings clause provides in its entirety: “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.” 8 U.S.C. § 1324a(h)(2) (2006) (emphasis added).

226. *Whiting*, 131 S. Ct. at 1977–79. Under the LAWA, the licenses that could be revoked included:

any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state . . . [including a]rticles of incorporation . . . , [a] certificate of partnership, a partnership registration or articles of organization . . . , [and a]ny transaction privilege tax license.

ARIZ. REV. STAT. ANN. § 23-211(9) (2010). Congress defined license in the Administrative Procedure Act as “the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission,” which the Arizona definition largely parroted. *Whiting*, 131 S. Ct. at 1978 (citing 5 U.S.C. § 551(8) (2006)). The Court determined that items without an express equivalent in the federal definition, like articles of incorporation and certificates of partnership, still fell within the general umbrella of “licenses” as the term was commonly defined. *Id.* at 1978 (“A license is ‘a right or permission granted in accordance with law . . . to engage in some business or occupation, to do some act, or to engage in some transaction which but for such license would be unlawful.’” (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1304 (2002))).

227. *Whiting*, 131 S. Ct. at 1981. The Court rejected outright the Chamber’s argument that the LAWA could not be a licensing law because it merely suspended or revoked, rather than granted, licenses. *Id.* at 1979. Finding “no basis in law, fact, or logic for deeming a law that grants licenses a licensing law, but a law that suspends or revokes those very licenses something else altogether,” the majority pointed out that the Administrative Procedure Act defined licensing under federal law as any “process respecting the grant, renewal, denial, *revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.*” *Id.* at 1979 (quoting 5 U.S.C. § 551(9) (2006)).

228. *Id.* at 1980 (“We have already concluded that Arizona’s law falls within the plain text of IRCA’s savings clause. And, as we have said before, Congress’s ‘authoritative statement is the statutory text, not the legislative history.’” (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005))). Indeed, the majority criticized the dissenters for delving into the legislative history and context when the plain meaning of the text was unambiguous. *Id.* at 1980 n.6. As the majority pointed out, because the dissenters’ “statutory analysis [wa]s so untethered from the text,” it resulted in two different dissenting opinions with sharply different viewpoints on how to interpret the IRCA savings provision. *Id.*; see also *id.* at 1992–93 (Breyer, J., dissenting) (concluding that the IRCA savings clause referred to “*employment-related* licensing systems” or

Thus, the majority concluded that the IRCA did not expressly preempt the Arizona law.²²⁹

Addressing the first of the Chamber's implied preemption arguments, the plurality²³⁰ rejected any contention that Congress had intended the federal system to be exclusive, finding the mere presence of a savings clause in the preemption provision sufficient to rebut that conclusion.²³¹ Moreover, the Court found unavailing the Chamber's argument that the LAWA altered the delicate balance of policy interests underlying the IRCA.²³² The plurality examined precedent that had upheld similar arguments in the context of conflict preemption and noted that all the prior cases "involve[d] uniquely federal areas of regulation."²³³ The Arizona law regulated in-state business and thus could not be equated to those predominately federal areas

more specifically "the licensing of firms in the business of recruiting or referring workers for employment, such as . . . state agricultural labor contractor licensing schemes"); *id.* at 1998 (Sotomayor, J., dissenting) (determining that the IRCA savings clause meant to allow state licensing sanctions only upon a federal adjudication of employer liability).

229. *Id.* at 1981 (majority opinion).

230. Although Justice Thomas did not join the reasoning in this subsection of the Court's opinion, he did concur in the Court's judgment that the LAWA was neither expressly nor impliedly preempted. *Id.* at 1973.

231. *Id.* at 1971 ("But Arizona's procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws. Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority."). Although the Chamber appeared to be advancing a field preemption argument—Congress "intended the federal system to be exclusive" or to occupy the field—the Chamber framed the assertion as one of conflict preemption, perhaps because it had waived the field preemption argument in the lower courts. *Id.*; see *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009) (noting that the complainants had not raised the argument of field preemption before the Ninth Circuit).

232. *Whiting*, 131 S. Ct. at 1984–85.

233. *Id.* at 1983. The federal regulations examined in previous cases involved presidential conduct of foreign policy, power over foreign affairs, defrauding federal agencies, regulation of maritime vessels, and patent law. *Id.* The plurality's decision to class the LAWA as an "in-state business[.] . . . licensing law[]" rather than a regulation of immigration was perhaps a veiled reference to the indirect-direct dichotomy elucidated in the Court's previous *De Canas* decision. *Id.*; see *De Canas v. Bica*, 424 U.S. 351, 354–55 (1976) (distinguishing between direct regulation of immigration, which involves wielding power over the actual entry and deportation of foreign nationals, and indirect regulation of immigration, which involves wielding power over the flow of state resources to illegal aliens). Had the Court classed the Arizona law as a direct immigration regulation, the analysis of the regulation would have involved issues of national sovereignty, as it would have fallen within a "uniquely federal area[] of regulation" like in the other conflict preemption cases the Court refused to analogize to the case before it. *Whiting*, 131 S. Ct. at 1983; see *The Chinese Exclusion Case*, 130 U.S. 581, 608 (1889) (holding that immigration powers fell within the realm of national sovereignty and self-protection and thus were federal concerns).

of concern.²³⁴ More importantly, the Court pointed out, part of the balance created in the IRCA was the balance between state and federal powers—a balance that permitted the states to sanction employers of illegal immigrants “through licensing and similar laws,” like Arizona’s regulation did.²³⁵ The Court refused to delve further into “freewheeling” investigations of Congressional policy objectives and upheld the LAWA against the Chamber’s implied preemption challenge.²³⁶

The Court then turned to the Chamber’s final preemption argument and concluded that the LAWA provision making employers’ use of E-Verify mandatory rather than permissive did not conflict with federal law.²³⁷ In reaching its conclusion, the Court first analyzed the plain language of the statutory text and noted that the section establishing the E-Verify program contained no language constraining state action.²³⁸ Perhaps more

234. *Whiting*, 131 S. Ct. at 1983 (“Regulating in-state businesses through licensing laws has never been considered such an area of dominant federal concern.”). The Court’s assertion that the Arizona licensing law dealt more with state rather than federal concerns was reminiscent of the *De Canas* Court’s reasoning in upholding the California regulation at issue in that case. *De Canas*, 424 U.S. at 356–57 (“In attempting to protect California’s fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, [the California statute] focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils.”).

235. *Whiting*, 131 S. Ct. at 1984. The Court rejected the Chamber’s contention that the savings clause was only meant to allow small or ineffective state regulations. *Id.* at 1984–85 (“Part of that balance [Congress created in the IRCA] involved allocating authority between the Federal Government and the States. The principle that Congress adopted in doing so was not that the Federal Government can impose large sanctions, and the States only small ones. . . . [And] in preserving to the States the authority to impose sanctions through licensing laws, Congress did not intend to preserve only those state laws that would have no effect.”). Even though the LAWA placed additional sanctions on employers who hired illegal immigrants, the Court reasoned, it would be illogical to assume that this change would suddenly drive employers to discriminate against foreign-seeming individuals in violation of both federal and state anti-discrimination laws. *Id.* at 1984. The Court found no reason to suppose that the LAWA would impermissibly tilt the IRCA’s policy balance towards deterring employment of illegal aliens over preventing discrimination against legal residents when the most logical course for Arizona employers would be to obey all laws—immigration and anti-discrimination alike. *Id.*

236. *Id.* at 1985.

237. *Id.* The LAWA requires employers to verify the eligibility of potential employees using the federal E-Verify system. ARIZ. REV. STAT. ANN. § 23-212(I) (2010). E-Verify was a pilot program created under the IIRIRA that allowed employers to verify the eligibility of potential employees through an Internet-based system. *Whiting*, 131 S. Ct. at 1975. Federal law generally does not require employers to use the E-Verify system, but does encourage its use by presuming that employers who have received confirmation of an employee’s eligibility through the system have not violated the IRCA’s provisions. *Id.*

238. *Whiting*, 131 S. Ct. at 1985. As the Court recognized, the IIRIRA only constrained the Secretary of Homeland Security from requiring the use of E-Verify. *Id.* (“[A]bsent a prior violation of federal law, ‘the Secretary of Homeland Security may not require any person or other entity [outside of the Federal Government] to participate in a pilot program’ such as E-Verify.” (quoting Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-656 (1997) (found in note following 8 U.S.C. § 1324a))). In fact, in a contemporaneous challenge to an Executive Order requiring federal contractors to use E-Verify, the federal

importantly, the Court found that requiring Arizona employers to use the E-Verify system actually furthered Congress's aims in enacting the IIRIRA—it “ensure[d] reliability in employment authorization verification, combat[ed] counterfeiting of identity documents, and protect[ed] employee privacy.”²³⁹ Responding to the Chamber's argument that mandatory use of E-Verify would both overload the system and result in inaccurate determinations of employee eligibility, the Court quoted statements from the federal government specifically rejecting those concerns.²⁴⁰ The Court thus found no reason to conclude that the LAWA could not harmoniously coexist with federal law and rejected the Chamber's second implied preemption claim.²⁴¹

Justice Breyer, in dissent, expounded on two general points of disagreement with the Court's opinion.²⁴² First, Justice Breyer disagreed with the majority's interpretation of the term “licensing” and criticized it as overbroad and detached from the statutory history and context.²⁴³ In Justice Breyer's view, Congress could not have intended “licensing” to encompass

government had cited the LAWA E-Verify requirements as permissible applications of federal law precisely because the plain language of the IIRIRA did not limit the actions of the states. *Id.* The Court found no reason to reject the federal government's own interpretation of the statute. *Id.*

239. *Id.* at 1986. The history of the E-Verify program lent further support to Arizona's claim that expanding its use was well in line with federal policy. *Id.* Congress had consistently broadened E-Verify's operations since its creation in 1996—growing it from a six-state pilot program authorized for only four years into a fifty-state advertised program that was renewed on four separate occasions. *Id.*

240. *Id.* In an amicus brief, the United States reassured the Court that “the E-Verify system can accommodate the increased use that the Arizona statute and existing similar laws would create.” *Id.* (quoting Brief for United States as Amicus Curiae at 17, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (No. 09-115), 2010 WL 3501180 at *17). In addition, the United States rebutted claims that the E-Verify system was unreliable, asserting before the Court that, “E-Verify's successful track record . . . is borne out by findings documenting the system's accuracy and participants' satisfaction.” *Id.* (quoting Brief for United States as Amicus Curiae Supporting Petitioners at 31, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (No. 09-115), 2010 WL 3501180 at *31).

241. *See id.* at 1985–87.

242. *See id.* at 1987–98 (Breyer, J., dissenting).

243. *Id.* at 1987 (“Congress did not intend its ‘licensing’ language to create so broad an exemption, for doing so would permit States to eviscerate the federal Act's pre-emption provision . . .”). Breyer criticized the majority's reliance on definitions of “licensing” appropriated from dictionaries and an unrelated federal statute, arguing that although the definitions were accurate in a vacuum, they failed to capture how Congress meant to “use[] that word in this federal statute.” *Id.* at 1988. Looking at the contemporaneous practices at the time of the statute, particularly joint federal-state regulation and licensing of businesses responsible for recruiting or referring temporary employees, Breyer concluded that the term licensing referred to “state licensing systems applicable primarily to the licensing of firms in the business of recruiting or referring workers for employment, such as the state agricultural labor contractor licensing schemes in existence when the federal Act was created.” *Id.* at 1993–95.

laws like the LAWA because it unbalanced the policy interests underlying the statute by encouraging employers to err on the side of discrimination to avoid a potential “business death penalty.”²⁴⁴ Second, Justice Breyer argued that federal law impliedly preempted the LAWA provision requiring employers to use the federal E-Verify system.²⁴⁵ According to Justice Breyer, the E-Verify program remained a voluntary pilot program because unresolved issues still existed with its use—issues like inaccuracies in the electronic database, procedural means for appealing database determinations, and methods to ensure that the program did not result in employer discrimination.²⁴⁶ For those reasons, Justice Breyer found the LAWA expressly and impliedly preempted.²⁴⁷

In a separate dissent, Justice Sotomayor presented her own reasons for opposing the majority’s conclusion.²⁴⁸ Justice Sotomayor asserted that the LAWA would require independent state adjudications of an employee’s work authorization and argued that the mere existence of this separate adjudicatory system conflicted with Congress’s intent to displace a patchwork of state laws with a uniform federal adjudicatory process under the IRCA.²⁴⁹ In addition, Justice Sotomayor generally concurred with

244. *Id.* at 1988–93. Justice Breyer identified three primary objectives underlying the IRCA: discouraging employers from hiring illegal immigrants, limiting the burdens imposed upon employers and employees in determining an employee’s work eligibility, and preventing discrimination against foreign-seeming individuals. *Id.* at 1988–89. Comparing the penalties under federal law with those under the LAWA, Justice Breyer reasoned that the additional penalties the LAWA imposed would encourage employers to discriminate rather than risk a violation for hiring an illegal immigrant. *Id.* at 1989–90 (“[H]ow will employers behave when erring on the side of discrimination leads only to relatively small fines, while erring on the side of hiring unauthorized workers leads to the ‘business death penalty’?”). What Justice Breyer’s argument failed to properly acknowledge, however, was that the LAWA only penalized employers who “knowingly or intentionally” hired an unauthorized worker and only imposed the “business death penalty” if the employer committed a second violation at the same business location where the first violation occurred while still on probation for the first violation. *Id.* at 1976 (majority opinion). As the majority noted, “[a]n employer acting in good faith need have no fear of the sanctions” and thus, need not discriminate. *Id.* at 1984.

245. *Id.* at 1995 (Breyer, J., dissenting).

246. *Id.* at 1996–97. In addition, Justice Breyer emphasized the extensive use of permissive language in the portion of the IIRIRA creating the E-Verify program and Congress’s continued reluctance to transform the program from a voluntary pilot program into a mandatory permanent program despite four opportunities to do so when it was extended or renewed. *Id.*

247. *Id.* at 1997.

248. *See id.* at 1998–2007 (Sotomayor, J., dissenting).

249. *Id.* at 1999–2004. Similar to Justice Breyer, Justice Sotomayor looked to the historical context of the IRCA’s enactment to develop her understanding of its meaning and purpose. *See id.* She noted that prior to the IRCA a myriad of state laws were in force and that Congress had explicitly indicated its intent to have a single law that was enforced “uniformly.” *Id.* at 1999–2000. Recognizing this as Congress’s goal, Justice Sotomayor argued that Congress could not have intended to preserve a state’s right to independently adjudicate employer violations of federal law, as this would completely defeat the uniformity objective. *Id.* at 2003 (“[G]iven Congress’ express goal of ‘unifor[m]’ enforcement of ‘the immigration laws of the United States,’ I cannot believe that

Justice Breyer's conclusion that federal law impliedly preempted the LAWA provision requiring employers to use E-Verify.²⁵⁰ She supplemented his reasoning, however, with her own observation that Congress might have refrained from mandating E-Verify's use to avoid the hefty price tag associated with the program's growth—a policy objective that laws like Arizona's would defeat.²⁵¹ Thus, Justice Sotomayor also concluded that federal law preempted the LAWA.²⁵²

Notably absent from any of the three opinions was a mention of the presumption against preemption, which the lower courts had uniformly applied.²⁵³ The meaning to be drawn from this omission, however, was far from clear. Although the Court never expressly employed the *De Canas* presumption, neither did it expressly overturn the rule set forth in its prior *De Canas* decision.²⁵⁴ Moreover, despite the Court's failure to expressly indicate whether or not the presumption survived, some reasoning in the

Congress intended for the 50 States and countless localities to implement their own distinct enforcement and adjudication procedures for deciding whether employers have employed unauthorized aliens.” (internal citations omitted)).

As the majority recognized, however, the LAWA actually forbade state officials and state courts from making independent judgments about an employee's work eligibility. *Id.* at 1976 (“The Arizona law expressly prohibits state, county, or local officials from attempting ‘to independently make a final determination on whether an alien is authorized to work in the United States.’ . . . [And w]hen a complaint is brought against an employer under Arizona law, ‘the court shall consider only the federal government’s determination pursuant to’ 8 U.S.C. § 1373(c) in ‘determining whether an employee is an unauthorized alien.’” (quoting ARIZ. REV. STAT. ANN. § 23-212 (2010))). Justice Sotomayor countered that the statute under which Arizona could presently request information about an individual's immigration status from the federal government—8 U.S.C. § 1373(c)—did not exist when the IRCA was first enacted. *Id.* at 2002 (Sotomayor, J., dissenting). Therefore, Congress could not have intended to afford states the power to enact a statute like Arizona's, which permitted independent state prosecutions dependent upon federal eligibility determinations. *Id.* at 2002–03.

250. *Id.* at 2005.

251. *Id.* at 2006. A congressional report estimated the cost of a voluntary nationwide program at \$11 million and the cost of a mandatory nationwide program at \$11.7 billion. *Id.*

252. *Id.* at 1998.

253. See *id.* at 1973–87 (majority opinion); *id.* at 1987–97 (Breyer, J., dissenting); *id.* at 1998–2007 (Sotomayor, J., dissenting); *Lozano v. City of Hazleton*, 620 F.3d 170, 206–07, 219–20 (3d Cir. 2010) (applying the presumption against preemption analysis in determining whether federal law expressly or impliedly preempted the Hazleton city ordinances), *cert. granted and decision vacated*, 131 S. Ct. 2958 (2011); *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 864–65 (2009) (applying the *De Canas* framework and determining that a presumption against preemption applied in analyzing whether the LAWA was a permissible exercise of state power).

254. The Court did note that regulations like the California law upheld in *De Canas* would now be expressly preempted because they imposed civil penalties rather than licensing sanctions. *Whiting*, 131 S. Ct. at 1975. In addition, the majority discussed *De Canas* briefly in describing the historical development of the law relating to employment of illegal immigrants. *Id.* at 1974. In its legal analysis, however, the majority only cited *De Canas* once—notably, with approval. *Id.* at 1981.

majority's opinion suggested that the presumption was being silently applied.²⁵⁵

As the Court's decision was narrowly circumscribed to the facts and circumstances in the case before it, it will likely leave the lower courts without the guidance necessary to determine whether similar provisions that differ even slightly from the Arizona law are preempted.²⁵⁶ This uncertainty is troublesome given the volume of similar laws that will soon be likewise challenged in the federal courts.²⁵⁷

V. REDEFINING THE BORDERS TO BALANCE STATE AND FEDERAL INTERESTS

Immigration reform and regulation has been an area of the law that has concerned citizens, judges, and politicians since before our nation was founded.²⁵⁸ Although historically it was a power exercised by the city and state governments, since the mid-nineteenth century the Supreme Court has

255. For example, the Court broadly interpreted the definition of "licensing" in the IRCA, expanding it even beyond the comprehensive definition found in the Administrative Procedure Act to include articles of incorporation, certificates of partnership, and grants of authority to foreign companies to practice business in the state. *Id.* at 1978; *see also id.* at 1988 (Breyer, J., dissenting) (noting the breadth of the definition of "licensing" that the majority chose to apply to the IRCA savings provision). Later, in analyzing the Chamber's implied preemption argument, the Court rejected the Chamber's attempt to analogize the case to others involving "uniquely federal areas of regulation" because it determined that Arizona's law dealt with in-state business concerns. *Id.* at 1983 (majority opinion). This distinction was reminiscent of the *De Canas* Court's language creating the presumption against preemption in cases where state police power historically reigned supreme. *De Canas v. Bica*, 424 U.S. 351, 357 (1976) ("Of course, even state regulation designed to protect vital state interests must give way to paramount federal legislation. But we will not presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship . . . in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was 'the clear and manifest purpose of Congress' would justify that conclusion.").

256. *See Whiting*, 131 S. Ct. at 1973–87 (describing in detail the Arizona law and its provisions and comparing those provisions to federal law and policy).

257. Indeed, the Supreme Court has already remanded one case for determination in light of its decision in *Whiting*. *City of Hazleton v. Lozano*, 131 S. Ct. 2958 (2011) (vacating the judgment of the Third Circuit and remanding the case for further consideration in light of the Court's *Whiting* decision).

Challenges to other, slightly different state laws are soon to follow. In one instance, the Department of Justice has already filed a lawsuit challenging a similar Alabama law, which prohibits sheltering illegal immigrants and requires use of E-Verify, amongst other things. *DOJ Challenges Alabama's Tough Immigration Law*, CBS NEWS (Aug. 1, 2011), <http://www.cbsnews.com/stories/2011/08/01/national/main20086673.shtml> [hereinafter *DOJ Challenges*]. Challenges to immigration laws enacted in Georgia, Utah, and Indiana are also currently pending in the federal courts. Verna Gates, *Federal Government Attorneys Fight Alabama Immigration Law*, YAHOO! NEWS (Aug. 24, 2011), <http://news.yahoo.com/federal-government-attorneys-fight-alabama-immigration-law-202404178.html>.

258. *See supra* notes 32–62 and accompanying text.

allowed federal power to reign supreme in the field.²⁵⁹ In the mid-nineteenth century, this balance of power was perfectly suited to the social, political, and economic realities of the nation because the burdens of illegal immigration were truly a shared national concern.²⁶⁰ But the present realities of immigration, particularly illegal immigration, preclude exclusive federal control for the same reasons that earlier Supreme Court decisions were reticent to wrest immigration power from the states.²⁶¹ With illegal immigration primarily concentrated in just a few states and localities and with those states straining economically and socially to accommodate undocumented individuals, it is necessary to return at least some power over regulation to state and local governments.²⁶²

259. See *supra* notes 63–103 and accompanying text.

260. See *supra* notes 84–87 and accompanying text. When the Supreme Court first wrest control of immigration from the states and ceded it to the federal government in *The Passenger Cases*, immigration was truly an event of national proportions. Northrup, *supra* note 84, at 395. Immigrants traveled to the Northeast and Southwest from across the world, arriving by land and by sea, and chasing land and jobs from coast to coast. *Id.* With the motivation and interest in controlling immigration thus evenly shared amongst the states, federal control was perfectly sensible.

261. See *supra* notes 15, 49–62 and accompanying text. As the Court noted in *Miln*, where the states do not have uniform incentives to act on immigration, exclusive federal control is worrisome:

Such a conclusion produces no inconvenience; but, on the contrary, promotes a public good. It vests power where there is an inducement to exercise it. In congress, there is no such inducement. The west seeks to encourage emigration; and it is but of little importance to them, how many of the crowd are left as a burden upon the city of New York. There is, therefore, a hostile principle in congress to regulating this local evil.

New York v. Miln, 36 U.S. (11 Pet.) 102, 114 (1837).

262. See *supra* notes 15–16, 98–101, 105–09, 134–36 and accompanying text. Nearly all of the illegal immigrants reside in just nine states. Passel, *supra* note 15. These illegal immigrants to some extent displace the legal U.S. labor force as they hold more than eight million jobs. Gogoi, *supra* note 15. Additionally, immigrants cost the states approximately \$84.2 billion dollars each year in government services and increase other intangible social costs, putting strains on school systems, hospitals, and prisons. Fahmy, *supra* note 16. The federal government has consistently lacked either the resources or the political motivation to enforce its immigration laws, leaving the states in a predicament—they are preempted from action by ineffectual federal regulations yet must directly bear the economic burdens caused by illegal immigration. See *supra* notes 166–68, 173–74. States are not ignorant to their predicament. As the Alabama House GOP Majority Leader and Representative Micky Hammon pointed out:

[The Obama Administration has] turned a blind eye toward the immigration issue and refuse to fulfill their constitutional duty to enforce laws already on the books. Now, they want to block our efforts to secure Alabama's borders and prevent our jobs and taxpayer dollars from disappearing into the abyss that illegal immigration causes.

DOJ Challenges, *supra* note 257.

This is not to say that the federal government should have no power to regulate illegal immigration. Certainly, reform in federal immigration policy is necessary and should be a national undertaking. But given the present and historical realities of the situation, the states must be given some room in which to act for their own self-protection.

In more recent decisions, the Supreme Court has recognized the need for reshaping the balance between state and federal powers in the immigration field, particularly where state interests were compelling.²⁶³ This recognition represented a pendulum shift from the Court's century-long jurisprudence favoring unfettered federal discretion in the field back towards more localization of immigration regulatory power.²⁶⁴ The need for extending and clarifying this pendulum shift has become even more urgent in the past few years as the perfect storm of economic recession, increased crime, and slackened federal enforcement has left a few states and localities facing an inequitable burden on their resources with no means to defend themselves on a policy level.²⁶⁵

263. Plyler v. Doe, 457 U.S. 202, 228 n.23 (1982) (“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.”); De Canas v. Bica, 424 U.S. 351, 356–57 (1976) (“Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico. In attempting to protect California’s fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, § 2805(a) focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils.”).

264. See *supra* notes 32–95 and accompanying text. After the Court’s decision in *The Chinese Exclusion Case*, federal power was detached from its constitutional boundaries and replanted in the realm of national sovereignty and self-protection, thus becoming virtually boundless. See *The Chinese Exclusion Case*, 130 U.S. 581, 608 (1889) (“The exclusion of paupers, criminals, and persons afflicted with incurable diseases, for which statutes have been passed, is only an application of the same power to particular classes of persons, whose presence is deemed injurious or a source of danger to the country. . . . [T]here has never been any question as to the power to exclude them. The power is constantly exercised; its existence is involved in the right of self-preservation.”). However, as *Miln* recognized, and as the colonial history demonstrates, this was never the intention of the Framers. See *Miln*, 36 U.S. (11 Pet.) at 112 (“[O]n the 16th of September [in 1788, after the Constitution had been adopted, but just before it went into effect], the same body unanimously adopted a resolution, recommending to the several states to pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States. When this resolution, so directly bearing upon the point in question, was adopted, there were present, Dana, the profound and enlightened jurist and framer of the government of the North West Territory; Gilman, Williamson, Fox and Baldwin, members of the convention which formed the federal constitution; Hamilton and Madison, also members of that convention, and the eloquent expounders of that instrument. Jay, the third expounder, and the first Chief Justice of this court, was the secretary of foreign affairs, and, no doubt, recommended the passage of this law. If any contemporaneous authority is entitled to respect, here was one of the highest character. A resolution, at the very moment the new government was going into operation, recommending to the states to pass these laws, as peculiarly within their province.” (emphasis added)); see also *supra* notes 32–62 and accompanying text (discussing the colonial history of immigration and noting that localities were primarily responsible for regulation of immigration).

265. See *supra* notes 5–18 (discussing the economic and social conditions preceding the passage of the Arizona and Hazleton laws); see also *supra* notes 152–73 (explaining the federal regulatory scheme and the government’s recent policy of slackened enforcement).

The Supreme Court laid the basic groundwork for achieving a better balance between state and federal immigration power in its *De Canas* decision.²⁶⁶ But as the conflicting decisions in *Chicanos Por La Causa* and *Lozano* muddied the waters, and as the decision in *Whiting* failed to explain the Court's stance on *De Canas*'s continued legal vitality, much clarification is needed regarding the scope and meaning of the presumption against preemption in the context of immigration-related state laws.²⁶⁷

The presumption against preemption is an essential legal tool that allows the states to retain their traditional police powers to the fullest extent possible within constitutional bounds.²⁶⁸ As the states that illegal immigration most deeply affects continue to clamor for a legal means to protect their interests, the *De Canas* presumption will become a much-

266. *De Canas v. Bica*, 424 U.S. 351, 354–57 (1976).

267. *Lozano v. City of Hazleton*, 620 F.3d 170, 206–07, 220–21 (3d Cir. 2010) (using the *De Canas* framework, but concluding that a housing ordinance constituted a direct regulation of immigration because it, “in essence,” intended to encourage illegal immigrants to leave the city); *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 860–61 (9th Cir. 2009) (concluding under the *De Canas* framework that Arizona employment regulations were indirect regulations of immigration despite the fact that they encouraged illegal immigrants to leave the state and, using the presumption against preemption, finding no preemption under federal law); see also *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973–87 (2011) (holding that federal law did not expressly or impliedly preempt the LAWA, but failing to expressly apply the *De Canas* presumption against preemption).

In *Whiting*, although the Court did not openly apply the presumption against preemption, it appears as though the majority might have nonetheless employed the basic *De Canas* principles. See *supra* notes 253–55 and accompanying text. Moreover, the Court never overruled the prior *De Canas* decision and cited it with approval in its legal analysis. See *supra* note 254 and accompanying text. This uncertain treatment of the prior *De Canas* decision has left open the question of its continued vitality.

268. The *De Canas* decision properly draws the divide between those powers reserved to the federal government and those that should be given to the states. It prevents the states from unconstitutionally exercising direct control over entry, status, or deportation of illegal immigrants, which the Court has previously held is an exclusive federal power rooted in national sovereignty and self-protection. See *The Chinese Exclusion Case*, 130 U.S. at 608 (concluding that direct regulation of immigration is an exclusively federal power anchored in national sovereignty and self-protection); see also *De Canas*, 424 U.S. at 354–56 (classing immigration powers as either direct regulations of immigration—such as the power over entry, status, and deportation—or indirect regulations of immigration—such as power over housing or employment of illegal immigrants—and holding that the presumption against preemption may only apply to the latter class of regulations). Additionally, it recognizes that Congress may preempt state action even in the realm of indirect regulation of immigration, but employs a presumption to preserve traditional state police powers to the greatest extent possible consistent with federal law. *De Canas*, 424 U.S. at 357 (“Of course, even state regulation designed to protect vital state interests must give way to paramount federal legislation. But we will not presume that Congress . . . intended to oust state authority to regulate the employment relationship [which is a traditional state police power] . . . in a manner consistent with pertinent federal laws.”).

needed judicial tool.²⁶⁹ When the *De Canas* presumption is properly defined and applied, it represents a significant step towards protecting important state interests, while leaving the broad brush strokes of immigration policy squarely in the hands of the federal government.²⁷⁰

A. *Drawing the Line Between State Police Power and Federal Policy Control*

To be an effective means of policing the border between federal and state power over illegal immigration, the *De Canas* presumption against preemption must be clarified. Although the *De Canas* decision set forth the basic principles that form the groundwork for a presumption analysis, the legal framework of that analysis remains unstructured and undefined.²⁷¹ And as more state and local immigration laws are enacted and challenged in federal courts, a systematic means for determining when the courts should employ the presumption is necessary.²⁷² Because the Court's decision in *Whiting* failed to provide that means, lower courts can look to past Supreme Court precedent—such as *Plyler* and *De Canas* itself—as well as circuit court decisions applying the presumption to formulate a uniform presumption test.²⁷³

Piecing together these prior decisions, the *De Canas* presumption against preemption test can be simplified and clarified into a systematic three-step analysis. First, courts should determine whether the state or local regulation at issue is a direct regulation of immigration or an indirect

269. Alabama is one such state insisting that the courts grant at least some state authority over illegal immigration. *Alabama Defends*, *supra* note 15. Alabama House Speaker Mike Hubbard emphasized the state's determination to obtain a legal method of deterring illegal immigration on the state books:

Make no mistake, this lawsuit will not undo Alabama's immigration law. If the court finds problems with parts of the law, tweaks can be made. . . . But Alabama is not going to be a sanctuary state for illegal immigrants. Alabama will have a strict immigration law and we will enforce it.

Id.

270. The decision in *De Canas* can achieve this goal because the two-part analysis first separates laws that attempt to directly create immigration policy from those wherein the state is acting within federal immigration policy and then restricts state action to those fields in which strong state interests have been long recognized. *De Canas*, 424 U.S. at 354–57. It therefore prevents a patchwork policy scheme while still giving the states a means to shield their resources for their citizens and legal residents, if they so choose.

271. See *supra* notes 104–31 and accompanying text (discussing the *De Canas* decision and the Court's analysis at length).

272. See *supra* note 257 (noting the preemption challenges to other state immigration laws currently pending in the federal courts); see also *supra* note 21 (listing states that are currently considering enacting immigration laws similar to the LAWA).

273. See *supra* notes 253–57 and accompanying text (explaining that the Court's *Whiting* decision was very fact-specific and thus failed to provide proper legal guidance to lower courts).

regulation of immigration.²⁷⁴ If the law is a direct regulation of immigration, the presumption should not apply; but if the law is an indirect regulation of immigration, the court should then decide whether the immigration law regulates an area traditionally within state police powers.²⁷⁵ Where the state or local law is an indirect regulation of immigration that operates in a realm of historical state police power, the court should presume that Congress did not intend to preempt it in analyzing both express and implied preemption challenges.²⁷⁶

To determine whether a challenged state regulation is a direct or indirect regulation of immigration, the courts must look at the law's approach, not its purpose or effect.²⁷⁷ If the law attempts to curb illegal immigration by restricting or denying illegal immigrants' access to state resources, then it falls squarely within the realm of indirect immigration regulation.²⁷⁸

274. *De Canas*, 424 U.S. at 354–56.

275. *Id.* at 356–57.

276. *Id.* at 357–59.

277. *Id.* at 355–56 (“[T]he 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. . . . [E]ven if [a] local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration.”).

The Third Circuit improperly applied this portion of the test in analyzing the constitutionality of the Hazleton housing ordinance. *Lozano v. City of Hazleton*, 620 F.3d 170, 220–21 (3d Cir. 2010); *see also supra* note 214. In concluding that the Hazleton housing ordinance was not a direct regulation of immigration, the court looked at “the reality of what these ordinances accomplish,” finding that it would “in essence” encourage illegal immigrants to leave the city. *Lozano*, 620 F.3d at 220–21. This analysis incorrectly focused on the effect of the Hazleton legislation as opposed to its approach. In deciding both *De Canas* and *Plyler*, the Supreme Court recognized that indirect state regulation might ultimately have the effect or purpose of causing illegal immigrants to leave the locality, but concluded that this indirect effect did not necessitate preemption. *Plyler v. Doe*, 457 U.S. 202, 228 (1982) (finding that indirect state regulation might have the purpose of allowing the state “to protect itself from an influx of illegal immigrants”); *De Canas*, 424 U.S. at 355–56 (holding that a state regulation did not become unconstitutional merely because its effect was to stem the tide of illegal immigration).

278. For example, in *De Canas*, the Court concluded that the California statute was an indirect regulation of immigration because its approach to immigration regulation focused on preserving the limited number of positions in the state labor force:

Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico. In attempting to protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from

Conversely, if the state law purports to create its own definition for who may or may not enter the country or creates a state law action that can compel the removal of individuals from its territory, it has crossed the line into direct regulation and has engaged in a constitutionally impermissible exercise of state power.²⁷⁹

If the law is an indirect regulation of immigration, the court should proceed to the second step in the analysis—deciding whether the law regulates conduct in a realm of traditional state interest.²⁸⁰ The court’s inquiry should focus on the historical division of powers between the state and federal governments to determine whether the challenged statute governs activities closely tied to well-established local concerns.²⁸¹ Virtually any regulation involving the distribution or use of state resources will qualify as a regulation operating in the realm of traditional state interests.²⁸² But regulations that impose upon a traditionally federal field are not deserving of the *De Canas* presumption against preemption deference.²⁸³

A law that both indirectly regulates immigration and operates in a field of traditional state interest is entitled to a presumption against preemption.²⁸⁴

the employment of illegal aliens, [the California statute] focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils.

De Canas, 424 U.S. at 356–57.

279. *Id.* at 354–55. When referring to direct immigration regulation, the Court cited cases like *The Passenger Cases* and *Henderson* both of which involved state statutes that controlled eligibility for entry into the United States. *Id.* at 354; *see also* *Henderson v. Mayor of New York*, 92 U.S. 259, 267–68 (1875) (declaring unconstitutional a New York law that taxed immigrants upon entry); *The Passenger Cases*, 48 U.S. (7 How.) 283, 283–86 (1849) (finding unconstitutional Massachusetts and New York laws that allowed city officials to examine and tax immigrants upon entry).

280. *De Canas*, 424 U.S. at 356 (“States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen’s compensation laws are only a few examples. California’s attempt in [its statute] to prohibit the knowing employment by California employers of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of such police power regulation.”).

281. The Third Circuit’s explanation perfectly captured the essence of the test: “The applicability of the presumption turns on a state’s *historic* police powers. By definition, that means that the presumption depends on the *past* balance of state and federal regulation, not on the present.” *Lozano*, 620 F.3d at 206–07. If the test were to look at the present balance of state and federal regulation, the presumption against preemption would be entirely circumvented because the court would be conducting the preemption analysis in this second step.

282. *De Canas*, 424 U.S. at 356–57 (finding protection of the state’s labor force was a regulation that fell within the realm of traditional state interests); *see also Plyler*, 457 U.S. at 219 (“Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct.”).

283. *See Plyler*, 457 U.S. at 225 (“[T]he States do have some authority to act with respect to illegal aliens, at least where such action . . . furthers a legitimate state goal.”).

284. *De Canas*, 424 U.S. at 357–58; *see also Lozano*, 620 F.3d at 206 (“[T]hey regulate the employment of persons unauthorized to work in this country, and . . . fall within the state’s historic police powers. Accordingly, they must benefit from the presumption against pre-emption.”); *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 865 (9th Cir. 2009) (“We conclude that,

The presumption should operate in three ways. First, it would mandate a broad interpretation of any savings provision included in the federal statute.²⁸⁵ Second, it would severely weaken, if not outright defeat, any claim of field preemption.²⁸⁶ And third, it would require the court, when possible, to interpret the provisions in the challenged statute so as to avoid preemption.²⁸⁷ With these three specific modes of presumption in mind, the court could then proceed through a traditional preemption analysis to determine if the statute is a constitutional exercise of state power.²⁸⁸

because the power to regulate the employment of unauthorized aliens remains within the states' historic police powers, an assumption of non-preemption applies here.”).

285. *De Canas*, 424 U.S. at 356 (beginning its preemption analysis with a presumption that the states enjoyed “broad authority” to regulate in the realm of employment); *Chicanos Por La Causa*, 558 F.3d at 864 (rejecting complainant’s argument that the IRCA’s savings provision should be construed “narrowly” because regulation of employment fell within the state’s traditional police powers).

286. *De Canas*, 424 U.S. at 357 (“But we will not presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship covered by [the California statute] in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was ‘the clear and manifest purpose of Congress’ would justify that conclusion.”); *Lozano*, 620 F.3d at 207 (“[W]hen Congress enacted IRCA, it began legislating in an area in which states had regulated, and in which the federal government, for the most part, had not. Accordingly, we presume that Congress did not intend to sweep away the states’ historic police powers by enacting IRCA, absent clear evidence to the contrary.”).

287. *De Canas*, 424 U.S. at 353 n.2 (presuming, without deciding, that the definition of illegal alien in the California statute coincided with the federal definition and remanding to the California courts for clarification on the statute’s ambiguity).

288. Here, again, the Third Circuit’s analysis of the Hazleton employment provision missed the mark. For example, in finding that the employment statute was impliedly preempted, the court failed to interpret the savings provision broadly, concluding that conflict existed merely because the state regulation had a “separate and independent adjudicative system” which operated concurrent with the federal one and which might additionally burden employers. *Lozano*, 620 F.3d at 212. Because the legislative intent could have been interpreted as presupposing concurrent state action and because the additional burden on employers was purely speculative, the presumption should have operated to tip the outcome in the city’s favor. See *supra* note 211. Notably, although not expressly applying a presumption against preemption, the *Whiting* Court came to a very similar conclusion. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1984 (2011) (“As with any piece of legislation, Congress did indeed seek to strike a balance among a variety of interests when it enacted IRCA. Part of that balance, however, involved allocating authority between the Federal Government and the States. The principle that Congress adopted in doing so was not that the Federal Government can impose large sanctions, and the States only small ones. IRCA instead preserved state authority over a particular category of sanctions—those imposed ‘through licensing and similar laws.’”).

B. Judicial Border Patrol in Action: Applying the De Canas Framework to Separate Constitutional from Unconstitutional State Regulation

To demonstrate the viability of the *De Canas* presumption against preemption framework, its three-step analysis will be used to analyze the constitutionality of two Arizona laws that have been challenged in the federal courts.²⁸⁹ The first is the LAWA, which prohibits employers from hiring or recruiting illegal aliens and which ultimately sanctions offenders by revoking the licenses that allow them to do business in the state.²⁹⁰ The second is S.B. 1070, which requires state law enforcement officials to assist in the enforcement of federal immigration laws and which creates state misdemeanor offenses for failing to carry proper immigration documentation or for transporting, harboring, or concealing an illegal immigrant.²⁹¹

Looking at each of these laws under the first step in the *De Canas* analysis, it is clear that the LAWA falls on one side of the direct-indirect immigration regulation spectrum, while S.B. 1070 falls on the other.²⁹² The LAWA approaches immigration regulation from the vantage point of preserving limited state resources for legal residents—specifically, the limited state resource of job opportunities—a clearly indirect approach.²⁹³ In contrast, S.B. 1070 requires state officials to determine the immigration status of certain individuals and creates a state crime for failing to carry federal documentation that proves authorization to enter the United States, a clearly direct approach that requires no further analysis under the *De Canas*

289. *Whiting*, 131 S. Ct. at 1975 (analyzing a federal challenge to the LAWA); *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (deciding a federal challenge to S.B. 1070).

290. ARIZ. REV. STAT. ANN. §§ 23-211 to 23-216. For a more complete discussion of the statute see the explanation *supra* note 179.

291. S.B. 1070, 2010 Ariz. Sess. Laws 0113, *amended by*, 2010 Ariz. Sess. Laws 0211 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010)). The Arizona law contains several provisions designed to encourage “cooperative enforcement of federal immigration laws.” *Id.* § 1. The three key provisions of the law create: (1) a requirement for state law enforcement officials to determine, where practicable, the immigration status of a person if they have reasonable suspicion to believe that the person is an illegal alien; (2) a misdemeanor offense for the willful failure to carry documentation of immigration status as required by federal law; and (3) a misdemeanor offense for the knowing transportation, concealment or harboring of an illegal alien. *Id.* §§ 2–4 (codified at ARIZ. REV. STAT. ANN. §§ 11-1051, 13-1209, 13-2929).

292. See *supra* notes 277–79 and accompanying text.

293. See *De Canas v. Bica*, 424 U.S. 351, 355–56 (1976) (finding indirect regulation where the California statute attacked employment of illegal immigrants). Indirect regulation of immigration focuses on protecting state resources from those that the federal government has already defined as not legally entitled to those resources. *Id.* at 363 (“[Indirect regulation exists where] there would not appear to be a similar federal interest in a situation [as when] the state law is fashioned to remedy local problems, and operates only on local employers, and only with respect to individuals whom the Federal Government has already declared cannot work in this country.”).

framework.²⁹⁴ For S.B. 1070, the presumption against preemption would not apply.

Turning then to consider the LAW A under the second step of the *De Canas* framework, it becomes clear that the LAW A's employment regulations concern an area of traditional state interest.²⁹⁵ As the Court emphasized in *De Canas* and repeated in *Plyler*, states have a compelling interest in preserving resources, such as job opportunities, for legal residents.²⁹⁶ Moreover, states have historically exercised "broad authority" in legislating in the employment arena—ranging from wage and hour laws to occupational health and safety regulations.²⁹⁷ Thus, a presumption against preemption is warranted.²⁹⁸

Viewing the LAW A through the lens of this presumption, federal preemption would be unjustified. As the LAW A sanctioned employers by suspending and revoking their state business licenses, it fell within the plain language of the IRCA savings clause, particularly as the presumption

294. See *id.* at 355 ("[A direct] regulation of immigration . . . 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."); see also *Arizona*, 641 F.3d at 355 ("Starting with the touchstones of preemption, punishing unauthorized immigrants for their failure to comply with federal registration laws is not a field that states have traditionally occupied. Therefore, we conclude that there is no presumption against preemption." (internal quotations and citations omitted)). Thus, under the *De Canas* framework, Arizona's S.B. 1070 would not be entitled to a presumption against preemption.

It should be noted that S.B. 1070 might be considered a valid exercise of state police power in a different manner. The Supreme Court has recognized that states have the authority as sovereigns to enforce federal laws. See, e.g., *Miller v. United States*, 357 U.S. 301, 303–06 (1958) (affirming the authority of local officials to arrest individuals for violations of federal narcotics law). Several circuit courts have construed this grant of power to include the power to enforce federal immigration law. See, e.g., *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 2009) (finding a "preexisting general authority" in state law enforcement officers to enforce any federal regulation, including immigration law); *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983) (same), *overruled on other grounds by* *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999). Thus, if the Arizona regulation defines illegal immigration status in the same manner as the federal statute, it might properly fall within this exercise of state police power. For a more in depth discussion of this argument see Michaud, *supra* note 19.

The Supreme Court recently accepted certiorari on the Ninth Circuit's decision enjoining enforcement of S.B. 1070 and may overturn that court's decision, holding that the Arizona law, although not entitled to a presumption against preemption, is still valid as an exercise of state police power. See *Arizona v. United States*, No. 11-182, 2011 WL 3556224, at *1 (Dec. 12, 2011).

295. See *supra* notes 280–83 and accompanying text; see also *De Canas*, 424 U.S. at 356–57. S.B. 1070 need not be analyzed further because direct regulation of immigration is not entitled to a presumption against preemption in any circumstance. See *supra* note 294 and accompanying text.

296. See *supra* note 278.

297. See *De Canas*, 424 U.S. at 356.

298. See *supra* notes 280, 284 and accompanying text.

mandates that this clause be interpreted broadly.²⁹⁹ The presence of an express savings clause, coupled with the presumption, forecloses any argument of field preemption.³⁰⁰ And as the law generally mirrors the employer-deterrence efforts that underlie the IRCA, it fails the conflict preemption test.³⁰¹

Therefore, under the *De Canas* framework, Arizona was within its immigration powers in enacting the LAWA but exceeded the scope of proper state regulation in passing S.B. 1070.

VI. CONCLUSION

Immigration regulation poses policy questions that have plagued the nation since the earliest colonial settlements.³⁰² For nearly four centuries, state and federal governments have wrestled for control over the difficult immigration questions, and at various times in history both have exercised unbounded authority in the field.³⁰³ But with the changing nature of the political, social, and economic realities of immigration in the last half-

299. See *supra* note 285 and accompanying text; see also 8 U.S.C. § 1324(a)(h)(2) (2006). Although the Supreme Court in *Whiting* failed to explicitly apply the *De Canas* presumption against preemption test, its conclusions track those that would be expected had the presumption been applied. For instance, the Court broadly interpreted the term “licensing” found in the IRCA savings clause to include any law that sanctioned offenders by revoking a “permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission” or by revoking a business’s articles of incorporation, certificates of partnership, or other authorizations to do business in the state. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1978 (2011) (quoting 5 U.S.C. § 551(8) (2006)).

300. See *supra* note 286 and accompanying text; see also *Lozano v. City of Hazleton*, 620 F.3d 170, 210 n.32 (3d Cir. 2010) (“The district court also concluded that the IIRAO’s employment provisions are pre-empted because IRCA occupies the field of ‘the employment of unauthorized aliens.’ . . . This is . . . a difficult conclusion to sustain given IRCA’s saving clause.” (citation omitted)), *cert. granted and decision vacated*, 131 S. Ct. 2958 (2011). The Court in *Whiting*, although not expressly applying the presumption against preemption, dismissed a quasi-field preemption argument in much the same manner as would be expected had the presumption been applied. *Whiting*, 131 S. Ct. at 1981 (rejecting the Chamber’s argument that Congress “intended the federal system to be exclusive” and thus any state regulation was preempted because Congress had included a savings clause in the IRCA that reserved certain powers for the states); see also *supra* note 231 (explaining why the Chamber’s conflict preemption argument was more properly classified as a field preemption challenge).

301. See *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 866–67 (9th Cir. 2009) (performing this analysis of the conflict preemption question). In rejecting the Chamber’s conflict preemption argument, the *Whiting* Court similarly concluded that “[t]he balancing process that culminated in IRCA resulted in a ban on hiring unauthorized aliens, and the state law here simply seeks to enforce that ban.” *Whiting*, 131 S. Ct. at 1985. Thus, again, the Court appeared to be applying the presumption against preemption analysis and simply failed to clarify the legal reasoning that it used to reach its conclusions.

302. See *supra* notes 32–151 and accompanying text.

303. See *supra* notes 32–151 and accompanying text.

century, the time has come to achieve some semblance of balance between the two sovereign extremes.³⁰⁴

The federal government should retain the authority to set general immigration policy, to determine who is entitled to entry, and to decide when exclusion or deportation is appropriate.³⁰⁵ The state governments, however, must have the power and the right to protect their limited resources—resources like jobs and housing—from depletion as a result of large-scale illegal immigration.³⁰⁶ The federal government has repeatedly demonstrated that it lacks the willingness or ability to police these aspects of illegal immigration.³⁰⁷ Moreover, national action in this realm is unlikely, given that a minority of states bear the majority of the illegal immigration weight.³⁰⁸ Concurrent state power to effectuate traditional state interests is thus an effective solution to this balancing equation. The *De Canas* presumption against preemption provides an important first step towards achieving that balance.³⁰⁹

As the federal courts encounter future challenges to state immigration laws, they will have the opportunity to achieve what state and federal governments have not—create firm borders in the realm of immigration that can be adequately policed. Federal courts should take the opportunity to draw clear lines and to create a friendly partnership between the two sovereign powers involved in American immigration law.

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304. See *supra* notes 96–151 and accompanying text.

305. See *supra* notes 258–70 and accompanying text.

306. See *supra* notes 258–70 and accompanying text.

307. See *supra* notes 160–73 and accompanying text.

308. See *supra* notes 15–16 and accompanying text.

309. However, this presumption is only the first of many steps that can and should be taken to better balance the interests of state and federal governments. Other potential steps include reinstating the 287(g) partnerships between state and federal governments to allow for joint enforcement of federal immigration law, allowing state governments to enforce federal immigration law under state police powers, and increasing federal enforcement of existing regulations. See *supra* notes 167, 171–73, 294 and accompanying text (discussing these potential solutions in greater detail).

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