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# THE CONSTITUTIONALITY OF STATE AND LOCAL LAWS TARGETING IMMIGRANTS

*Karla Mari McKanders\**

This symposium is targeted at addressing current immigration issues across the country, specifically in Arkansas, and how lawyers can seek to achieve social justice for immigrants. There is currently much activity and discussion surrounding state and local laws that target immigrants. Central to this discussion is whether states and localities are constitutionally permitted to enact immigration laws and whether state and local actions upset the current immigration system and how, if at all, their actions affect documented and undocumented immigrants' rights.

Like other states across the country, Arkansas has been busily considering and enacting immigration laws. Arkansas officials have taken different stances on state and local laws that target immigrants. On May 29, 2008, the *Arkansas Times* reported that an organization was lobbying for laws which provide that "public services could not be extended in the state unless would-be recipients proved their American citizenship through authoritative documentation."<sup>1</sup> The previous Governor of Arkansas, Republican Mike Huckabee, strongly opposed a proposed Arkansas law that would have denied immigrants public services.<sup>2</sup> He described the proposed law as "race-baiting and demagoguery."<sup>3</sup> "[T]he bill, seeking to forbid public assistance and voting rights to undocumented immigrants, 'inflames those who are racist and bigots and makes them think there's a real problem. But there's

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1. John Brummett, *Kansas City, Mexico*, ARK. TIMES, May 29, 2008, at 13, available at 2008 WLNR 12106045 (Brummett reported that the "outfit calling itself [S]ecure Arkansas" was led by Jeannie Burlsworth of Bryant, Arkansas).

2. *Labor Department Gives Arkansas \$850,000 Grant*, U.S. ST. NEWS, June 24, 2005, available at 2005 WLNR 10230426. Quite frankly, Huckabee was "delighted" that Arkansas received an \$850,000 grant that would establish centers that focused on "job placement assistance, translation assistance, resettlement assistance and legal assistance" for immigrants. Specifically, Huckabee stated that because "immigrants [were] adding [so] much to the culture and economy of Arkansas, [that he wanted] to do everything [he could] to make the transition easy for them." *Id.*

3. Joseph Perkins, *Debate Immigration Issue, Not Each Side's Integrity*, SAN DIEGO UNION-TRIB., Feb. 18, 2005, available at [http://www.signonsandiego.com/uniontrib/20050218/news\\_lz1e18perkins.html](http://www.signonsandiego.com/uniontrib/20050218/news_lz1e18perkins.html).

not.”<sup>4</sup> He also believed that Arkansas should welcome hard-working immigrants of all races.<sup>5</sup>

In 2007, the Arkansas State Legislature passed laws prohibiting state agencies from contracting with businesses that employ illegal immigrants.<sup>6</sup> Acting along the same line as the State, various Arkansas cities and counties have considered laws that would declare illegal immigration a public nuisance and impose fines on those employing or renting to undocumented residents. While considering laws against immigrants, the Arkansas legislators also considered legislation that would offer in-state college tuition rates to children of undocumented immigrants.<sup>7</sup>

Arkansas is a microcosm of the various states across the country where state and local officials are coping with the recent expansion of legal and unauthorized immigration. In reaction to the growing population of immigrants, both state and local governments are passing laws that are intended to target immigrants who reside in local communities, while others are passing laws to protect immigrants.<sup>8</sup> Over the past few years, the number of state and local governments considering legislation targeting immigrants has dramatically increased. In 2006, local governments considered around 100 immigration related ordinances.<sup>9</sup> Similarly in 2008, state legislatures considered approximately 1,500 immigration related laws.<sup>10</sup> These laws exemplify the complex interaction among federal, state and local governments surrounding immigration issues.

When states and localities pass immigration related laws, the main concern is whether federal, state or local governments are the proper level of government to regulate immigration. The goal of this paper is to chal-

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4. *Id.*

5. *Id.*

6. ARK. CODE ANN. § 19-11-105(b) (2007) (“No state agency may enter into or renew a public contract for services with a contractor who knows that the contractor or a subcontractor employs or contracts with an illegal immigrant to perform work under the contract.”).

7. John Lyon, *Legislature to look at Illegal immigration issues again*, ARK. NEWS BUREAU, Jan. 25, 2009, available at <http://arkansasnews.com/2009/01/25/legislature-to-look-at-illegal-immigration-issues-again/>.

8. See NAT’L CONFERENCE OF STATE LEGISLATURES, STATES’ IMMIGRATION LEGISLATIVE ACTIVITY STILL AT PEAK: EMPLOYMENT ENFORCEMENT AND IDS TOP LIST WHILE STATES ADDRESS INTEGRATION, (2008) [hereinafter NAT’L CONFERENCE], <http://www.ncsl.org/programs/press/2008/pr121808StateImmigrationReport2008.htm>; NATIONAL IMMIGRATION LAW CENTER, LAWS, RESOLUTIONS AND POLICIES INSTITUTED ACROSS THE U.S. LIMITING ENFORCEMENT OF IMMIGRATION LAWS BY STATE AND LOCAL AUTHORITIES, December 2008, <http://www.nilc.org/immlawpolicy/LocalLaw/localaw-limiting-tbl-2008-12-03.pdf>.

9. Karla Mari McKanders, *Welcome to Hazleton! “Illegal” Immigrants Beware: Local Immigration Ordinances and what the Federal Government must do about it*, 39 LOY. U. CHI. L.J. 1, 6 n.23 (2007).

10. See NAT’L CONFERENCE, *supra* note 8.

lenge the position that states and localities should play a central role in immigration enforcement and regulation. To support this contention, part I provides a brief overview of the historical roles of federal, state, and local governments in regulating and enforcing immigration. In particular, the first section focuses on the most recent state and local laws targeting immigrants. These laws pointedly deny essential services of employment, housing, and welfare benefits to immigrants often forcing them to relocate or self-deport. Part II analyzes current case law and the federal circuit split on the constitutionality of state and local laws. This section focuses on two precedent in the passage of laws targeting immigrants: Hazleton, Pennsylvania, and the State of Arizona. Part III discusses the implications of state and local laws targeting immigrants.

## I. HISTORY OF FEDERAL, STATE AND LOCAL REGULATION OF IMMIGRATION

### A. Early Immigration Regulation

The U.S. Constitution contains no language that expressly grants Congress the power to regulate immigration.<sup>11</sup> The Constitution only gives Congress the express power to create a uniform rule of naturalization.<sup>12</sup> Pursuant to this power, Congress enacts laws which the Executive branch enforces. Regulation of immigration occurs when Congress enacts the laws governing the entrance and exit and conditions under which immigrants can remain in the country. The Department of Homeland Security and Department of Justice enforce the rules under which immigration laws are observed. The interior enforcement of immigration law involves the actual execution of the decision making process regarding which immigrants have violated the Immigration and Nationality Act (INA) within the country, the conditions under which the immigrants can work in the country, and conditions of removal. Exterior enforcement involves preventing the entrance of immigrants into the country. In reaction to current federal immigration policies, states and localities are attempting to take over federal regulation and enforcement of immigration laws. States and localities are enacting laws that target both documented and undocumented immigrants.

Despite the Federal Government's practice of regulating and enforcing immigration, at the beginning of our country's history, the state governments were primarily responsible for regulating immigrants within their

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11. THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 192 (6th ed. 2008).

12. U.S. CONST. art. I, § 8, cl. 4 (stating that "The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . .").

communities for two reasons: “First, for almost 100 years, it was unclear whether the federal government was even intended by the Constitution to have power to regulate immigration. Second, the United States officially favored unrestricted immigration for about the same period of time after the nation’s birth.”<sup>13</sup> Furthermore, “[b]etween 1780 and 1882, Congress enacted only piecemeal immigration legislation, leaving passage to the States largely unfettered. The few federal immigration and naturalization laws passed in this period focused more on citizenship, health, and public treasury than preventing foreigners from landing on the eastern seaboard.”<sup>14</sup>

Not until the emergence of the *Passenger Cases*<sup>15</sup> did the Supreme Court begin to address state regulation of immigration.<sup>16</sup> In those cases, decided before the 1850s, “[t]he Supreme Court struck down laws enacted in Boston and New York that imposed special taxes on aliens and passengers arriving from foreign ports.”<sup>17</sup> Although the *Passenger Cases* prohibited states and localities from imposing taxes on arriving immigrants, states continued to set their own the trend of regulating of immigration through 1875. In 1875, the Supreme Court decided *Henderson v. Mayor of New York*<sup>18</sup> which definitively barred state restrictions on immigration.<sup>19</sup> This decision “declared state restrictions on immigration to be unconstitutional as an infringement on the federal power over foreign commerce.”<sup>20</sup>

After the Civil War, Congress began enacting restrictive immigration laws that barred “undesirable” groups from migrating to the United States.<sup>21</sup> In 1875, Congress passed the first restrictive immigration statute which barred convicts and prostitutes from admission.<sup>22</sup> This continued with the Chinese Exclusion Act of 1882, which barred all Chinese workers from migrating to the United States for ten years and provided that courts could not give citizenship to Chinese persons.<sup>23</sup> “In 1891 Congress passed legislation to prevent the entry of the diseased, the insane, polygamists and those previously convicted of immoral crimes,” which was specifically enacted to

13. DAVID WEISSBRODT & LAURA DANIELSON, *IMMIGRATION LAW AND PROCEDURE* 3 (5th ed. 2005).

14. KAI BARTOLOMEO, *Immigration and the Constitutionality of Local Self Help: Escondido’s Undocumented Immigrant Rental Ban*, 17 S. CAL. REV. L. & SOC. JUST. 855, 857 (2008).

15. See *Smith v. Turner*, 48 U.S. 283 (1849).

16. BARTOLOMEO, *supra* note 14, at 859.

17. *Id.* The Court determined that because of Congress’s plenary power under the Commerce Clause of the Constitution, “[a] concurrent power in the States to regulate commerce is an anomaly not found in the Constitution.” *Id.* at 860.

18. 92 U.S. 259 (1875).

19. *Id.*

20. WEISSBRODT & DANIELSON, *supra* note 13, at 4.

21. WEISSBRODT & DANIELSON, *supra* note 13, at 6.

22. WEISSBRODT & DANIELSON, *supra* note 13, at 6.

23. WEISSBRODT & DANIELSON, *supra* note 13, at 6–7.

prevent migration to the United States.<sup>24</sup> This law also established the Bureau of Immigration, the precursor to the Immigration Nationalization Service.<sup>25</sup> The 1900s were marked by more restrictionist immigration laws, such as the enactment of the 1917 Act which excluded certain nationalities from immigrating from Asia, Southern and Eastern Europe, and anarchists nations. In 1921, the Quota Act limited certain nationalities present to three percent present. In 1948, Congress enacted the Displaced Persons Act which permitted refugees to migrate to the United States.

In 1952, Congress passed the Immigration and Nationality Act (“INA”) which solidified the federal government’s control over immigration.<sup>26</sup> The INA created an in-depth system that governs immigrants’ entrance into and exit out of the United States and the conditions under which immigrants can remain in the United States. Since then, Congress has amended the INA several times. Further, there are extensive administrative regulations that govern the implementation and enforcement of the provisions of the INA. Moreover, in 1986 Congress passed the Immigration Reform and Control Act (IRCA),<sup>27</sup> which defines the conditions of employment for immigrants and anti-discrimination provisions to prevent employers from discriminating against immigrants while complying with IRCA.<sup>28</sup>

## B. Recent Federal Inactivity

Currently, state and local authorities are passing laws that target immigrants for various reasons. These reasons include the federal government’s failure to enact comprehensive immigration reform, the lack of resources to enforce immigration laws, and the desire to displace immigrants. Some scholars have articulated that immigrants are moving to states and localities that typically have not had influxes of immigrants. Accordingly, states and localities are arguing that they must enact laws that protect the health, safety, and welfare of the existing members of their communities.<sup>29</sup> For example, former Arizona governor, (and current Secretary of Homeland Security) Janet Napolitano, recently indicated that “[i]mmigration is a federal respon-

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24. BARTOLOMEO, *supra* note 14.

25. WEISSBRODT & DANIELSON, *supra* note 13, at 8.

26. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended 8 U.S.C. §§ 1101-1537 (2006)).

27. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as 8 U.S.C. § 1101 (2000)).

28. *Id.*

29. Juliet P. Stumpt, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1600 (2008) (“[t]he transformation of immigration law from a focus on foreign affairs and national identity to a seemingly domestic issue, touching on center areas of state concern, has invited the states into the immigration arena.”).

sibility, but [I] signed House Bill 2779 [Legal Arizona Workers Act]<sup>30</sup> because it [was] abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reform our country needs.”<sup>31</sup>

Recent, federal programs encourage states and localities to aid in enforcing immigration laws.<sup>32</sup> This trend can be attributed to several things: September 11th, the failure of Congress to enact comprehensive immigration reform, the economy, and immigrant movement into states and localities that have not been exposed to immigrant populations. Recently, the Bush Administration authorized the “No-Match” program. The “No-Match” program allows employers to use the social security numbers to verify employees are authorized to work in the United States. The No-Match program is an electronic database that validates an employee’s social security number to verify his or her immigration status. In addition, the United States House of Representatives expressed interest in federal immigration authorities cooperating with state law enforcement when it introduced the Clear Law Enforcement for Criminal Alien Removal Act (“CLEAR Act”).<sup>33</sup> The CLEAR Act would require state officers to cooperate with federal immigration law enforcement in enforcing immigration laws.<sup>34</sup> Additionally, after September 11, 2001, the Department of Justice’s Office of Legal Counsel authored a legal memorandum providing that states have the inherent authority as sovereigns to enforce immigration laws.<sup>35</sup>

In support of state and local cooperation with the federal government in enforcing immigration, some states have entered into 287(g) agreements with Immigration and Customs Enforcement (“ICE”). Under 287(g) agreements, the Secretary of Homeland Security partners with state and local police departments to permit them to exercise certain immigration functions. Professor Kris Kobach, a staunch supporter of state and local laws targeting immigrants, stated that:

Many states and cities have sought to maximize cooperation between their law enforcement agencies and Bureau of Immigration and Customs Enforcement (ICE) [...] (1) by directing their law enforcement agencies to utilize their inherent arrest authority more frequently, (2) by entering into so-called “Section 287(g) agreements” with ICE so that their offic-

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30. H.B. 2779, 48th Leg., Reg. Sess. (Ariz. 2007) (codified at ARIZ. REV. STAT. ANN. § 23-212 (2008)).

31. A.R.S. § 23-212, Office of the Governor, State of Arizona, Governor’s Transmittal Message (June 2, 2007) (Ltr. from Arizona Governor Janet Napolitano (July 2, 2007)).

32. Stumpt, *supra* note 29, at 1593 (stating that after 9/11 that federal government encouraged help from state and local authorities in regulating immigration).

33. H.R. 2671, 108th Cong. (2003).

34. McKanders, *supra* note 9, at 17.

35. See Stumpt, *supra* note 29, at 1593 (stating that after 9/11 the federal government encouraged help from state and local authorities in regulating immigration).

ers can exercise the delegated authority of federal immigration officers, and (3) by prohibiting sanctuary cities.<sup>36</sup>

In alignment with this principle, Arkansas has authorized cooperation with immigration authorities by entering into a “Memorandum of Understanding” with the federal government.<sup>37</sup> The Memorandum of Understanding between ICE and Arkansas permits state law enforcement agencies to verify the immigration status of all immigrants when they are arrested.<sup>38</sup>

Even though the federal government has authorized state and local governments to cooperate with them in enforcing federal immigration laws, the federal government has not enacted laws that give state and local governments full authority to create laws targeting immigrants.<sup>39</sup> As indicated above, in a limited number of circumstances the federal government has sought cooperation with states and localities.<sup>40</sup> Under these limited circumstances, the federal government has *never* delegated its responsibilities to regulate immigrants’ entrance, exit, and the conditions to remain in the country, which would constitute the creation of immigration laws.<sup>41</sup>

### C. State and Local Enforcement

There are a multitude of state and local laws that target immigrants. For instance, some states and localities have passed “pro-immigrant” laws encouraging immigration to their states, while others have passed “anti-immigrant” laws that primarily deny immigrants essential services to force immigrants to leave the states and cities. The following section briefly outlines the rationales behind such laws.

36. Kris Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 478 (2008).

37. See Seth Blomeley, *Beebe: Just Hear of Alien Law*, ARK. DEMOCRATIC GAZETTE, Sept. 20, 2007, available at <http://www.nwanews.com/adg/News/201949/>; Seth Blomeley, *No Extra Role in U.S. Pact, Beebe says*, ARK. DEMOCRATIC GAZETTE, Apr. 9, 2008, available at <http://www.nwanews.com/adg/News/222237/>.

38. See Blomeley, *Beebe*, *supra* note 37; Blomeley, *No Extra Role*, *supra* note 37; see also, Boozman: 287(g) Welcome in NW Arkansas: Praises new agreements, region working together, Sept. 28, 2007, [http://www.house.gov/apps/list/press/ca50\\_bilbray/morenews/boozman.shtml](http://www.house.gov/apps/list/press/ca50_bilbray/morenews/boozman.shtml) (stating that “four Northwest Arkansas law enforcement agencies implemented 287(g) program, allowing state agencies to perform immigration law enforcement functions”).

39. See Michael Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 23, 53 (2007) (stating that “[t]o date the federal laws do not delegate full responsibility for regulating immigration laws”).

40. See *id.*

41. See *id.*



### 1. *State and Local Sanctuary Policies*

Some states and localities have adopted sanctuary policies that prohibit state and local authorities from questioning a person about his or her immigration status.<sup>42</sup> The purpose of sanctuary laws is to safeguard communities by embracing neighboring immigrants (both documented and undocumented), thus avoiding the creation of anti-immigrant sentiment. Another reason for sanctuary policies is that if legislation requires state and local authorities to report undocumented immigrants, undocumented immigrants might go underground—further away from law enforcement officials. The fear is that state and local officials questioning immigrants regarding their immigration status while in the process of investigating another matter would make it harder for immigrant victims of crimes to assist with police investigations.<sup>43</sup> In addition, immigrants may be fearful of coming in contact with other state and local agents in medical situations. Accordingly, some states and localities have passed sanctuary laws with the belief that the alleged harms of unlawful immigration are outweighed by the need for state and local authorities to address crime and the safety of those who reside within their community.

Maine and New Mexico have passed laws that forbid officials from asking about a person's immigration status or informing federal immigration authorities about the presence of undocumented immigrants.<sup>44</sup> Similarly, New Haven, Connecticut, implemented a "don't ask, don't tell policy" for city officials who encounter immigrants.<sup>45</sup> Also, Stamford, Connecticut created "no-hassle zones" to benefit day laborers. The no-hassle zones allow undocumented immigrants to seek work without fear of arrest.<sup>46</sup>

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42. See Stumpt, *supra* note 29, at 1596 (explaining that Durham "passed a resolution stating: '[N]o Durham city officer . . . shall inquire into the immigration status of any person or engage in activities designed to ascertain the immigration status of any person' except as required by duty or law."). See also Rose Cuison Villazor, *What is a "Sanctuary"?* 61 SMU L. REV. 133 (2008).

43. See generally Violence Against Women Act, INA § 204(a), 8 U.S.C. § 1154 (providing protection to immigrants who are abused by Lawful Permanent Residents and Citizens); INA § 101(a)(10)(U)(i), 8 U.S.C. § 1101(a)(10)(U)(i) (U Visas providing protection to immigrants who are the victims of violence in the US and help with the prosecution of crimes).

44. Laurel R. Boatright, "Clear Eye for the State Guy": Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement, 84 TEX. L. REV. 1633, n.63 (2006).

45. Jennifer Medina, *New Haven Welcomes Immigrants, Legal or Not*, N.Y. TIMES, Mar. 5, 2007, at B1.

46. See Darnell Weedon, *Local Laws Restricting The Freedom of Undocumented Immigrants as Violations of Equal Protection and Principles of Federal Preemption*, 52 ST. LOUIS U. L.J. 479, 480 (2008). But see *Roe v. Prince William County*, 525 F. Supp. 2d 799 (E.D.Va. 2007) (In Prince William County, Virginia, a lawsuit was filed questioning the

The legality of sanctuary policies is challenged based on their ability to hinder federal enforcement of immigration laws.<sup>47</sup> Additionally, states and cities that pass sanctuary policies are characterized as being “soft” on immigration.<sup>48</sup> In Herndon, Virginia, taxpayers brought a lawsuit alleging that the town passed a law protecting day laborers in contravention of the United States Constitution’s Supremacy Clause, the Immigration and Nationality Act, and Virginia law.<sup>49</sup> The Herndon law provided a “physical plant for the Day Laborer site as well as funds to operate the site.”<sup>50</sup> Although outsiders viewed Herndon’s act as pro-immigrant, the town’s mayor stated that he was not pro-immigrant and that he was only attempting to control the day laborer situation.<sup>51</sup> In an action that seemed to echo the mayor’s words—at least where undocumented workers were concerned—town officials closed the labor center after a Fairfax, Virginia county court rendered a decision that would require the center to service both documented and undocumented immigrants.<sup>52</sup>

## 2. *Anti-Immigrant Policies*

Some states and localities are unlawfully passing anti-immigrant laws that target employers, landlords, and others who seek to give immigrants employment, housing, or other public benefits. These laws are purposely enacted to restrict essential services to undocumented immigrants to force them to either leave the country or relocate to another state and city.<sup>53</sup>

The majority of the laws being passed are related to employing undocumented immigrants. Employment laws sanction businesses for hiring un-

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legality of an ordinance which permitted “police officers to question otherwise lawfully detained persons about their immigration status and authorizing county personnel to determine what services might be lawfully denied based on immigration status.”).

47. See generally Joseph F. Murphy, Jr., *Maryland’s Sanctuary Policies Isolate Federal Law and the Constitution While Undermining Criminal Justice*, 36 U. BALT. L.F. 149 (2006).

48. Villazor, *supra* note 42.

49. *Karunakaram v. Herndon*, No. 2005-4013, 2006 WL 408389 (Va. Cir. Ct. Feb. 10, 2006)

50. *Id.*

51. Anita Kuman, *Virginia Town Tackles Immigration: A Laborer Center Fuels Debate as It Keeps Undocumented Workers Off Street Corners*, ST. PETERSBURG TIMES, June 11, 2007, available at [http://sptimes.com/2007/06/11/WorldandNation/Wirginia\\_town\\_tackless.shtml](http://sptimes.com/2007/06/11/WorldandNation/Wirginia_town_tackless.shtml).

52. Cristina Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 599 (2008) (citing Karin Brulliard, ‘*What We had Here Was a Family*’; *As Herndon’s Day-Laborer Center Closes, Job Seekers Band to Find Another Site*, WASH. POST, Sept. 15, 2007, at B01).

53. ARIZ. REV. STAT. ANN. § 23-212, Office of the Governor, State of Arizona, Governor’s Transmittal Message (June 2, 2007) (Ltr. From Arizona Governor Janet Napolitano (July 2, 2007)).

documented immigrants. If an employer hires an undocumented immigrant the state or municipality suspends the employer's business license as a sanction. Proponents of the employment laws incorrectly argue that these laws are permissible under IRCA. They believe that the clause within IRCA that provides for state regulation of business licenses, permits states and localities to suspend the business license of employers who employ undocumented workers.<sup>54</sup>

Following this trend, Arkansas passed an act that prohibits state agencies from contracting with businesses that knowingly employ or contract with "illegal immigrants."<sup>55</sup> This law provides that before a business can contract with a state agency, it must certify that it neither employs nor contracts with undocumented workers.<sup>56</sup> If the business utilizes any subcontractors, the subcontractors must assure the business that they do not employ unauthorized workers.<sup>57</sup>

States and localities have also passed laws prohibiting landlords from renting to undocumented immigrants.<sup>58</sup> For example, some of the laws permit city officials to suspend or deny a landlord's business permit if he or she rents to an undocumented immigrants.<sup>59</sup> The other model for landlord-tenant laws attempts to target undocumented immigrants by placing restrictions on the number of people that can inhabit a residence and by allowing others to file complaints for violations.

For example, the town of Jupiter, Florida enacted laws that targeted landlords who provided affordable housing to Latino immigrants through "excessive and selective housing policies."<sup>60</sup> Under the Jupiter law, lay citizens can submit a complaint alleging that a landlord rents to an undocumented immigrant. The Jupiter laws gave the complainant total discretion to determine who may be legal and illegal. This discretion opens the door to profiling individuals that community members believe are undocumented immigrants. Invalidating the Jupiter law, the Eleventh Circuit found that "the discriminatory motive behind this ostensibly neutral ordinance was clear throughout the enactment process [...] officials reassured local residences that a complaint driven scheme focusing on overcrowding would

54. *See infra* Part III.C.

55. Act of Feb. 28, 2007, No. 157, 2007 Ark. Acts 157 (codified at ARK. CODE ANN. § 19-11-105 (2007)).

56. *Id.*; Gary Endelman & Cynthia Juarez Lange, STATE IMMIGRATION LEGISLATION AND THE PREEMPTION DOCTRINE, 1698 PLI/CORP 123, 139 (2008).

57. *Id.*

58. *See e.g.*, PELHAM, ALA. MUNICIPAL CODE, ORDINANCE NO. 429 (2007); CHEROKEE COUNTY, GA, ORDINANCE NO. 2006-003 (2006) (currently has not been enforced due to litigation).

59. *See* ESCONDIDO, CAL., MUNICIPAL CODE, ORDINANCE NO. 2006-38R (2006) (never enforced as court granted Permanent Restraining Order).

60. *Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027, 1033 (11th Cir. 2008)

allow the town to target only the landlords of Latino immigrant tenants for enforcement, without affecting the rights of other property owners.”<sup>61</sup>

In addition to employment and rental laws, states and localities have attempted to limit undocumented immigrants’ access to state benefits like medical care, health programs, and other public services. To justify these laws, states claim that immigrants deplete state resources and are a financial burden. In 2007, the Arkansas Senate considered the proposed Arkansas Taxpayer and Citizen Protection Act.<sup>62</sup> Under this proposed law, undocumented immigrants would be ineligible for public benefits and voting rights.<sup>63</sup> The goal of the bill was to require all public agencies to cooperate with federal immigration authorities and to discourage illegal immigration.<sup>64</sup>

#### D. Impact of State and Local Enforcement

Anti-immigrant laws can cause immigrants to feel unwelcome and to leave the communities in which they reside. The employment laws also promote defensive hiring practices.<sup>65</sup> An employer will use defensive hiring practices when they refuse to hire immigrants, even those with legal documentation, because they fear that they will mistakenly hire an undocumented immigrant and be subject to sanctions.<sup>66</sup> Furthermore, state and local police officers, without proper training in immigration law, often instigate prosecutions of immigrants who may lawfully be in the country.

Anti-immigrant laws also have reinforced extra-legal activities like citizen enforcement of immigration laws, hate crimes targeting immigrants, harassment and discrimination against immigrants.<sup>67</sup> The anti-immigrant

61. *Id.*

62. See S. 206, 85th Gen. Assem., Reg. Sess. (Ark. 2005).

63. See *id.*

64. See *id.*

65. Institute for Survey Research-Westat, *Immigration and Naturalization Services Basic Pilot Evaluation Summary Report for U.S. Dept. of Justice, Immigration and Naturalization Service*, p. 12 (Jan. 29, 2002) (stating that a state study also reported significant and disturbing incidents of workplace discrimination that could be tied to confusion or lack of understanding about the employment verification provisions).

66. *Id.*

67. Southern Poverty Law Center, *Close to Slavery: Guestworker Program in the United States*, [www.splcenter.org](http://www.splcenter.org), (last visited on Apr. 15, 2008) (the great depression arrived and Mexican workers were seen as a threat to American jobs). See also Southern Poverty Law Center, *Close to Slavery: Guestworker Program in the United States*, pg. 6 [www.splcenter.org](http://www.splcenter.org), (last visited on Apr. 15, 2008), pg. 2 (stating that the National Socialist Movement (NSM) one of the largest neo-Nazi groups in the United States, is planning a march on Washington, D.C. on April 19, 2008 to protest the illegal invasion of America. NSM believes that only heterosexual pure blood whites should be allowed citizenship. All others should be stripped of their constitutional rights. The NSM further calls on the United States to ban all ‘non-white’ immigration and to publicly execute black, Hispanic, and Jewish ‘criminals’”). See Megan Irwin, *Flushing Them Out: Joe Arpaio and Andrew Thomas are*

sentiment instills a fear in immigrants, which causes them to flee states and localities that pass anti-immigrant laws because they fear the extra-legal activities that come along with the passing of the laws. This is particularly true with Latino immigrants. Certainly, there is a correlation between legislative enactment and extra-legal activities. First, states and localities pass anti-immigrant laws. Then, the laws reinforce the belief that immigrants do not belong, which authorizes citizen extra-legal activities against immigrants. This cycle will unquestionably prevent immigrants from “belonging,” regardless of their actual legal status.

## II. PREEMPTION AND IMMIGRATION FEDERALISM

### A. *De Canas* and Immigration Preemption

Under the constitutional preemption doctrine, state and local immigration laws should be invalid. The expansiveness of the INA and immigration policy in general precludes state action. The Supremacy Clause of the Constitution preempts state action where federal immigration law and policy expressly or impliedly precludes state action.<sup>68</sup> The Supremacy Clause, Article VI § 1, clause 2 of the Constitution, provides:

[t]he Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution, or Laws of any state to the Contrary notwithstanding.<sup>69</sup>

Under the Supremacy Clause, a state or local law can be expressly or impliedly preempted. First, under the doctrine of express preemption, a state or local statute is preempted if it clearly attempts to regulate immigration where Congress has direct regulatory authority.<sup>70</sup> Second, the doctrine

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*Teaching the Rest of the Nation How to Terrorize Illegal Immigrants*, PHOENIX NEW TIMES Dec. 17, 2007 (stating that immigrants are being held hostage in drop houses where coyotes call families and bribe them to pay money for the return of their family members); EXTREMIST HIJACK IMMIGRATION DEBATE: INCREASED REPORTS OF HATE CRIMES AND DISCRIMINATION AIMED AT U.S. AND FOREIGN BORN LATINOS, <http://www.immigrationpolicy.org/images/File/factcheck/hatecrimes01-08.pdf> (last visited Apr. 12, 2008) (Giving examples of violence against immigrants in different cities, for example: in California, in August 2007, an immigrant working as a janitor at a fast-food restaurant, was taunted with racist threats such as, “Go back to Mexico, you wetback!” and was then attacked by three men, one of whom was carrying a loaded gun).

68. *De Canas v. Bica*, 424 U.S. 351, 356 (1976).

69. U.S. CONST. art. VI, § 1, cl. 2.

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

of implied preemption governs field preemption and conflict preemption.<sup>71</sup> Field preemption exists when Congress intends to occupy the field of immigration and leaves no room for state or local action.<sup>72</sup> Conflict preemption occurs when a state or local statute “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>73</sup> The preemption analysis “starts with an assumption that the historic police powers of the states [are] not [to] be superseded by Federal Act unless [that is] the clear and manifest purpose of Congress.”<sup>74</sup>

*De Canas v. Bica*<sup>75</sup> is the key Supreme Court case addressing whether state laws that target immigrants are preempted.<sup>76</sup> In *De Canas*, the Supreme Court held constitutional a California statute that restricted an employer from knowingly employing an undocumented immigrant, even if such employment would not have an adverse effect on lawful resident workers.<sup>77</sup> The suit arose when migrant farm workers sued farm labor contractors, claiming that the contractors unlawfully terminated their employment pursuant to the California statute, which permitted employers to terminate migrant workers when there was a surplus of labor.<sup>78</sup> The California courts accepted the farm workers’ argument that state regulatory power over immigration was foreclosed because Congress had enacted the Immigration and Nationality Act as a comprehensive scheme governing all aspects of immigration and naturalization, including the employment of immigrants.<sup>79</sup>

The Supreme Court, however, rejected this argument.<sup>80</sup> The Court determined that it had never held that every state enactment that deals with immigrants is *per se* preempted.<sup>81</sup> The Court reasoned that “standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration.”<sup>82</sup> Today, proponents of state and local laws targeting or affecting immigrants incorrectly use this decision to justify state and local immigrant regulation. *De Canas*, however, was decided prior to the enactment of IRCA. The enactment of IRCA provided definitive evidence that Congress intended to regulate not only the entrance and exit of immigrants, but also the conditions for immigrants while residing in this country.

71. *See Id.*

72. *See Id.*

73. *Id.* at 363.

74. McKanders, *supra* note 9, at 45 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

75. 424 U.S. 351 (1976).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

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

82. *Id.* at 355.

## B. Federal Courts on Regulation of Immigration: *Lozano* and *Napolitano*

There is currently a split among federal circuit courts regarding state and local regulation of immigration. The courts take two main positions: (1) when states act pursuant to their police powers, state laws that affect immigration are not *per se* preempted, and (2) the INA establishes a comprehensive scheme that preempts state and local laws that target or affect immigrants. There are two noteworthy cases analyzing state and local government ability to enact statutes and ordinances affecting immigration: *Chicanos Por La Causa, Inc. v. Napolitano*<sup>83</sup> and *Lozano v. City of Hazleton*.<sup>84</sup>

In *Napolitano*, the Ninth Circuit upheld the Legal Arizona Workers Act.<sup>85</sup> This Act permits the state to revoke the business license of employers who hire undocumented immigrants.<sup>86</sup> The Act also requires employers to use the e-verify system.<sup>87</sup> "E-verify is an internet-based system that allows an employer to verify an employee's work authorization status."<sup>88</sup> It is an alternative to the paper based I-9 verification system whereby employers must obtain documentation from prospective employees to verify their citizenship status prior to hiring.<sup>89</sup>

In *Lozano*, the city of Hazleton's ordinances addressed the presence and employment of undocumented immigrants.<sup>90</sup> Like the Arizona statute in *Napolitano*, Hazleton's employment ordinance sanctioned businesses for hiring undocumented workers.<sup>91</sup> The Legal Arizona Workers Act, however, differs from Hazleton's employment ordinance because it mandates that employers use the voluntary federal e-verify program to determine a worker's immigration status.<sup>92</sup>

In *Napolitano*, the Ninth Circuit found that the Act was not expressly preempted. The court first held that the Act falls within IRCA's savings clause.<sup>93</sup> The savings clause provides that "[t]he 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 of unauthorized aliens."<sup>94</sup> Relying on the language of this provision, the court found that the law does not attempt to

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83. 544 F.3d 976 (9th Cir. 2008).

84. 496 F. Supp. 2d 477 (M.D. Pa. 2007).

85. *Napolitano*, 544 F.3d at 981.

86. ARIZ. REV. STAT. ANN. § 23-211-216 (2008).

87. ARK. CODE ANN. § 19-11-105(b) (2007).

88. *Id.*

89. *Id.*

90. 496 F. Supp. 2d at 517.

91. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 484-85, 518-20 (M.D. Pa. 2007).

92. *Napolitano*, 544 F.3d at 981.

93. *Id.* at 985.

94. 8 U.S.C. § 1324a(h)(2) (2006).

define who is eligible and ineligible to work in the country.<sup>95</sup> The court also upheld the lower court's ruling that the provision requiring an employer's use of e-verify was not preempted.<sup>96</sup> The court found that even though Congress made participation in the E-verify program voluntary, this did not preclude Arizona from mandating participation in E-verify.<sup>97</sup>

The court also rejected the implied preemption argument that because Congress made E-verify voluntary, the mandatory nature of the Arizona Act conflicted with a federal policy and would cause discrimination against immigrants.<sup>98</sup> The court reasoned that Congress requires use of some form of system to verify an employees immigration status whether it is the E-verify or the I-9 system, and plaintiffs could not show greater discrimination from E-verify than the I-9 system.<sup>99</sup> The court ultimately held that regulating employment falls within the states' historic police powers and applied a presumption against preemption.<sup>100</sup>

Contrastingly, in a lengthy opinion, the district court in *Lozano* held that Hazleton's ordinances were expressly and impliedly preempted.<sup>101</sup> The court found that the savings clause, on which the Ninth Circuit relied, was intended for states to enforce, as a sanction for violating federal laws, the suspension of an employer's business license. The court reasoned that *first* the federal government must find an IRCA violation, and then the states can suspend an employer's business license as a sanction. The *Lazono* court held that localities cannot make independent determinations of which immigrants are permitted to work.

Even though the *Lazono* court found that the employment provision was expressly preempted, the court went on to analyze the ordinance under the implied preemption doctrine.<sup>102</sup> The court found that the federal government's interest in the entire field of immigration was dominant.<sup>103</sup> The court found that the complex bureaucracy and intricate regulations evinced Congress's desire to occupy the field of immigration.<sup>104</sup> In support of this position, the court relied on the Constitution's Naturalization Clause that provides that Congress shall establish a uniform rule of naturalization.<sup>105</sup> The court also found that IRCA's provisions are so pervasive that they preclude Hazleton's ordinance. The court relied on the *Hoffman Plastic Com-*

95. *Chicano Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 985 (9th Cir. 2008).

96. *Id.*

97. *Id.* at 985.

98. *Id.* at 986.

99. *Id.*

100. *Id.* at 984.

101. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 517–29 (M.D. Pa. 2007).

102. *Id.* at 521.

103. *Id.* at 521–22.

104. *Id.* at 525.

105. *Loranzo*, 496 F. Supp. 2d at 522 (citing U.S. CONST. art. 1, § 8, cl. 4).



*pounds Inc. v. N.L.R.B.*<sup>106</sup> decision in which the court stated that IRCA “forcefully” made combating the employment of illegal immigrants central to immigration policy.<sup>107</sup>

In analyzing whether Hazleton’s ordinance conflicted with IRCA, the court found the Hazleton ordinance to be duplicative of IRCA and that it would impose an obstacle to compliance with IRCA.<sup>108</sup> While Hazleton required the employer to collect “identification papers” to be presented to the Hazleton Code Enforcement office, IRCA requires the use of the I-9 forms.<sup>109</sup> In addition, IRCA does not provide for the verification of the status of certain classes of workers, while Hazleton does not limit the classes of workers who need to be verified.<sup>110</sup> The court ultimately held that Hazleton’s ordinance conflicts with and differs from IRCA and is therefore preempted.<sup>111</sup>

The *Lozano* and *Napolitano* cases extensively cite *De Canas* as its precedential guide in determining whether a state’s regulation of employment constitutes regulation of immigration.<sup>112</sup> Although the *Lozano* court found that reliance on *De Canas* was misplaced because the regulation of employment was only a peripheral concern to immigration policy, the court cited the passage of IRCA as evidence that Congress intended to create “[a] complete statutory scheme . . . that addresses the employment of unauthorized workers.”<sup>113</sup> In upholding the constitutionality of the Arizona Legal Workers Act, *Napolitano* court relied on the *De Canas* language which stated that “the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted in the country, and the conditions under which a legal entrant may remain.”<sup>114</sup>

Both cases also consider whether the state employment laws violated the Due Process Clause of the Fourteenth Amendment and arrived at very different conclusions. The *Lozano* court found that the ordinance did not provide sufficient due process because it did not provide notice to an employee that he or she, allegedly, was undocumented.<sup>115</sup> Therefore, once a complaint was filed, an employee would risk being fired so that the employ-

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106. 535 U.S. 137, 147 (2002).

107. *Loranzo v. City of Hazelton*, 496 F. Supp. 2d 477, 518 (M.D. Pa. 2007).

108. *Id.* at 527.

109. *Id.* at 526.

110. *Id.*

111. *Id.* at 520 n.42, 525 & n.49. This case is currently on appeal to the Third Circuit.

112. *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 983 (9th Cir. 2008); *Lozano*, 496 F. Supp. 2d at 524 (M.D. Pa. 2007).

113. *Lozano v. City of Hazelton*, 496 F.Supp.2d 477, 524 (M.D. Pa. 2007). *But see Napolitano*, 544 F.3d at 984.

114. *Napolitano*, 544 F.3d at 983.

115. *Loranzo*, 496 F.Supp.2d at 536.

er could avoid the trouble of determining the employee's status.<sup>116</sup> The *Lozano* court also found that the ordinance's resort to the Pennsylvania state courts to determine an employee's immigration status was unlawful because under 8 U.S.C. § 1229a(a)(1) only immigration judges have jurisdiction to determine an immigrant's status.

In *Napolitano*, the Ninth Circuit held that the plaintiffs' due process rights were not violated where the Arizona Legal Workers Act provided for (1) submission of a complaint to the Arizona Attorney General; (2) verification of the employee's status under 8 U.S.C. § 1373; and (3) enforcement against the employer in the state court in the county in which the undocumented worker is employed.<sup>117</sup> The Ninth Circuit found that the creation of a rebuttable presumption under 8 U.S.C. § 1229a(H) of an employee's immigration status through the E-verify system was a sufficient procedural safeguard.<sup>118</sup>

The *Lozano* court also struck down Hazleton's landlord-tenant ordinance that sanctioned landlords for renting to undocumented immigrants.<sup>119</sup> Hazleton's ordinance was a tenant registration scheme that fined landlords who did not obtain occupancy permits for their tenants.<sup>120</sup> The occupancy permit required landlords to verify that they were not renting to undocumented immigrants. The court held that Hazleton's landlord tenant ordinance was at odds with the federal immigration system.<sup>121</sup> The court partially based its holding on the fact that the federal system is uniquely equipped to determine a person's immigration status.<sup>122</sup> The court relied on Justice Blackmun's statement in *Plyer v. Doe* that "the structure of the immigration statutes makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported."<sup>123</sup>

Interestingly, both cases' outcomes depend on the interpretation of how, "immigration law" is defined. The Ninth Circuit interpreted Congress's power to regulate immigration narrowly and classified the state's ability to regulate the employment of immigrants as falling within the states historic police powers.<sup>124</sup> While the *Napolitano* court held that the Arizona statute was not a regulation of immigration, it opened its opinion by stating that the passing of the Arizona state law was "aimed at illegal immigration"

116. *Id.*

117. *Id.* at 986 (citing ARIZ. REV. STAT. ANN. § 23-212).

118. *Id.* at 987.

119. 496 F. Supp. 2d 477, 533 (M.D. Pa. 2007).

120. *Id.* at 530.

121. *Id.*

122. *Id.* at 531 (stating that there are "categories of aliens that have permission to work in the United States but may not have proper documents").

123. *Id.* at 531 (quoting *Plyler v. Doe*, 457 U.S. 202, 236 (1986)).

124. *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976, 984 (9th Cir. 2008).

and “reflects rising frustration with the United States Congress’s failure to enact comprehensive immigration reform.”<sup>125</sup> Although the court states that the Legal Arizona Workers Act is not a regulation of immigration, it acknowledges that Arizona enacted the law because of Congress’s failure to enact comprehensive immigration reforms. This decision implies that because Congress has not enacted immigration laws states and localities have the power to pass laws. This is additional evidence that the state and local laws are crafted so that they appear to be addressing matters of state and local concern, but are targeting both documented and undocumented immigrants. “As the District Court for the Middle District of Pennsylvania stated perfectly, ‘[w]hatever frustrations officials of the City of Hazleton may feel about the current state of federal immigration enforcement, the nature of the political system in the United States prohibits the City from enacting ordinances that disrupt a carefully drawn federal statutory scheme.’”<sup>126</sup>

Contrary to the Ninth Circuit in *Napolitano*, the *Lozano* court correctly and broadly interpreted Congress’s power to regulate immigration. The *Lozano* court found that Congress, under IRCA, had created a comprehensive scheme that prohibited the employment of unauthorized workers and that a state law that sanctioned employers by suspending their business license prior to a federal finding of employment of undocumented workers was preempted.

In another federal court decision regarding local regulation of immigration, *Gray v. City of Valley Park*,<sup>127</sup> the federal district court examined “whether the employment ordinance in question involve[d] an area of law traditionally governed by the states, the regulation of business licenses, or an area traditionally governed by the federal government, immigration. The court explained that “[t]here is an assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>128</sup> Like the Ninth Circuit, the district court upheld the employment ordinance, finding that facially, the ordinance appeared to be a licensing law.<sup>129</sup> The court further explained that because the ordinance only suspended the employer’s business license, the law was not constitutionally preempted.<sup>130</sup> The court also held that the plain meaning of IRCA clearly provided for state and local governments to pass licensing laws even though they involve issues of illegal immigration.<sup>131</sup>

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125. *Id.* at 978.

126. McKanders, *supra* note 9, at 48 (citing *Chicanos Por La Causa v. Lozano*, 496 F. Supp. 2d 477, 555 (M.D. Pa. 2007)).

127. No. 4:07CV00881 ERW, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008).

128. *Gray v. City of Valley Park*, 2008 WL 294294, at \*8 (E.D. Mo. 2008).

129. *Id.* at \*10.

130. *See Id.*

131. *Id.* at \*12.

### C. Immigration Federalism

As articulated above, whether a state or local law is preempted is contingent on how immigration law is defined. The narrow construction of immigration law, as defined by advocates in favor of state and local laws, gives states and localities the ability to pass laws that essentially allow states and localities to regulate and enforce federal immigration and their own immigration laws. If immigration law is defined as the entrance and exit of immigrants and includes the treatment of immigrants in the country, state action in this area is precluded.

Traditionally, immigration has been defined as the determination of admission, exclusion, and the conditions under which immigrants can remain in the country.<sup>132</sup> “In reality, however, Congress has much broader power over immigrant and alienage law and policy, including the ability to regulate, ‘the conditions of residence such as access to education, welfare, and employment.’”<sup>133</sup> When Congress passed the IRCA in 1987, it extended its authority from regulating the entrance and exit of immigrants to also regulating immigrants’ employment conditions.<sup>134</sup> Also, pursuant to federal regulations the United States Citizenship and Immigration Services determines which immigrants are permitted to work.<sup>135</sup>

Congress has plenary power over immigration law, which means that courts have traditionally deferred to congressional authority in making decisions regarding immigration law. The dispute over state and local regulation begins when there is an overlap between states’ traditional police powers to regulate the health, safety, and welfare of its citizens and the federal government’s regulation of education, welfare, and employment of immigrants while in the United States.<sup>136</sup>

The current issue of how state and local laws are classified will, in part, determine whether a state or local law withstands constitutional scrutiny.<sup>137</sup> Recently, some courts have held that state and local laws addressing education, crime, health, safety, and welfare are clearly matters outside the scope of immigration law.<sup>138</sup> State and local laws that have an effect on im-

132. McKanders, *supra* note 9, at 27 n.186 (2007).

133. McKanders, *supra* note 9, at 15. (quoting Evangeline G. Abriel, *Rethinking Pre-emption for Purposes of Aliens and Public Benefits*, 42 UCLA L. REV. 1597, 1626–27 n. 157 (1994–95)).

134. Immigration Reform and Control Act of 1986, PUB. L. NO. 99-603, 100 Stat. 3359 (1986).

135. *See generally* 8 C.F.R § 274a.12 (2009).

136. Stumpt, *supra* note 29, at 1604.

137. Linda S. Bosniak, *Membership, Equality, the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994).

138. *See, e.g.,* Chicanos Por La Causa v. Napolitano, 544 F.3d 976, 989 (9th Cir. 2008); Gray v. City of Valley Park, No. 4:07CV00881 ERW, 2008 WL 294294, at \*8 (E.D. Mo.

migration and influence patterns of migration clearly are constitutionally preempted. States and localities must cooperate with the federal government, but only where the federal government initiates their involvement. Laws that attempt to influence the movement of non-citizens under the guise of protecting traditional state police powers over employment, welfare, and crime should be barred.<sup>139</sup>

Currently, state and local governments are attempting to regulate and enforce immigration. Although the purposes of the laws declare that they aim to promote the health, safety, and welfare of citizens, legislators readily admit that the true goal behind the listed protections is to have immigrants relocate or self-deport.<sup>140</sup> For example, the former governor of Arizona and current Secretary of Homeland Security, Janet Napolitano, stated that she wanted to restrict the flow of immigration in Arizona by enacting the Arizona Legal Workers Act.<sup>141</sup> Likewise, in Arkansas, Professor Kris Kobach, a staunch supporter of anti-immigrant laws, indicated that the purpose of the proposed Cherokee County ordinances was for immigrants to self-deport.<sup>142</sup> This is important to note because while states and localities allege that their motivations are to protect the health, safety, and welfare of their communities, they also want immigrants to self-deport.

Immigration law scholars differ over which level of government should regulate immigration. There are three predominant models for state and local regulation of immigration: federal exclusivity, state and local cooperation, and state and local regulation of immigration. Under the federal exclusivity model, state and local governments would be barred from experimenting and enacting any laws in the area of immigration.<sup>143</sup> The concern with the federal exclusivity model is that a blanket prohibition of state and local regulation may eliminate state and local laws that benefit immigrants, including state and local sanctuary policies.

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139. Stumpt, *supra* note 29, at 1593 (explaining that “criminal grounds for deportation do not distinguish between federal and state crimes”).

140. Kobach, *supra* note 36.

141. Letter from Arizona Governor Janet Napolitano (July 2, 2007).

142. Kobach, *supra* note 36.

143. Michael Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (advocating for strict removal of state and local involvement in regulation of immigration and alienage law and arguing against state and local participation in immigration enforcement on civil rights grounds. His article does not analyze the current state and municipal regulation of immigration, as it was written to critique the 1996 Personal Responsibility Work and Reform Act); Olivas, *supra* note 39 (describing the relationship between the state and federal government as hydraulic with the state and federal government ebbing and flowing as federal action increases state action decreases and vice versa. He takes the position that states and localities have no authority to regulate immigration).

Under the cooperative model, state and local governments should work in conjunction with the federal government in regulating immigration.<sup>144</sup> Under this model, the federal government would set the immigration policy and seek state and local help when needed. In addition, under the cooperative model, states and localities are permitted to act in a limited manner that does not take away immigrants' rights, but allow the states to exercise some authority.<sup>145</sup> On the other end of the spectrum is the model that permits states and localities to regulate immigration under the states' inherent authority to protect the health, safety, and welfare of their communities.<sup>146</sup> This model also permits states and localities to experiment with immigration laws.

Some form of the cooperative model with the federal government exercising exclusive authority over enforcing and regulating immigration is the preferable model. Under this model, the federal government will exclusively set immigration policy and initiate interactions with states and localities as needed. Under no circumstances would states and localities be able to enact or establish their own laws targeting immigrants.

In spite of the different arguments regarding which level of government should regulate immigration, there is no question that when a state or locality passes a law in which the federal government has expressly stated that the states and localities cannot act, the states and localities have no authority. Less clear are areas where the federal government is silent or where states and localities are legislating pursuant to their Tenth Amendment police powers.<sup>147</sup> The legislatures passing state and local laws targeting immigrants state that they are legislating pursuant to their Tenth Amendment police powers, but the laws affect whether documented and undocumented immigrants will remain in their state and sometimes within the country. When this occurs, the doctrine of implied preemption should apply to bar state and local laws targeting immigrants under the guise of protecting the health, safety, and welfare of the state and localities.

The traditional implied preemption justification for why states and localities should not be permitted to target immigrants is that the U.S., as a national sovereign, has the authority to decide which persons should enter

144. See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and The Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006).

145. See Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

146. Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008) (positing that the issues regarding state and local regulation of immigration are not really about immigration at all; instead, they are about local resource allocation).

147. U.S. CONST. amend X. The Tenth Amendment to the U.S. Constitution provides that "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."

and exit the United States. The foreign policy justification is another reason why states and localities have traditionally been excluded from regulating immigrants. The rationale is that the federal government does not want states and localities to unnecessarily embroil the country in arguments with other countries by their treatment of foreign nationals.<sup>148</sup>

The Immigration and Nationality Act (INA) supplies another justification for preemption. The INA is a comprehensive act that provides a system for managing who is lawfully within the country, adjusting the status of immigrants, and providing guidance for immigration officers and judges making determinations as to who fits the criteria under the INA. The expansiveness of the INA leaves no room for state and local regulation of immigration.

### III. CONCLUSION

The practice of employing state and municipal laws to exclude immigrants should be discontinued. State and local governments cannot cite and allege the depletion of resources as the rationale for passing laws when the real reason is to prohibit immigrants from entering their communities. Similarly, states and municipalities cannot use state and local laws to cause the removal of lawful immigrants from the community.<sup>149</sup> If states and localities are permitted to enact immigration laws, our country will have fifty different iterations of pro- and anti- immigrant laws. This will also cause state and local governments across the country to compete with each other to see who can pass laws to exclude immigrants from their states, so they will not have to address any issues that come along with migration and integrating immigrants into their communities. This will essentially result in a downward spiral of states with laws that exclude (a race to the bottom) as states and localities attempt to enact laws which result in immigrants relocating or self-deporting. This will cause the unequal regulation and enforcement of immigration laws which may lead to violations of immigrants' rights. This can all be halted with the federal government taking an active role in enforcing existing immigration laws and enacting laws that clearly articulate that federal government regulates immigration and defines the conditions under which states and localities can aid the federal government.

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148. McKanders, *supra* note 9, at 37.

149. *See* *Am. Ins. Ass'n. v. Garamedi*, 539 U.S. 396, 423–24, 427 (2003) (stating that California could not “employ [a] different state system of economic pressur[e]” to address an issue touching on foreign relations nor “use an iron fist where the [federal government] has consistently chosen kid gloves.”).