

Immigrant Laws, Obstacle Preemption and The Lost Legacy Of *McCulloch*

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With the federal government's perceived failure to enforce the immigration laws as a backdrop, this paper explores how the Supreme Court's recent decision in Chamber of Commerce v. Whiting upholding the Legal Arizona Workers Act exposes some of the tensions and contradictions in modern preemption doctrine. Examining the relationship among express, field, impossibility, and obstacle preemption, I explore three emerging trends, all evident in Whiting. The first is an increasing reluctance of the Court to find implied obstacle preemption. The second is an inclination to expand the scope of impossibility preemption beyond the physical impossibility cases. The third is a tendency to no longer explicitly apply the presumption against preemption, and in some cases, to do the opposite: presume preemption. The Court's decision in Whiting is a harbinger of things to come, as challenges to state and local laws regulating immigrants make their way to the Court and a growing number of states adopt their own versions of Arizona's S.B. 1070 and the Legal Arizona Workers Act. I first offer an overview of preemption jurisprudence, focusing on the nearly-forgotten legacy of McCulloch v. Maryland in

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planting the roots of obstacle preemption. I also examine recent case law showing a tendency on the Court's part to substitute impossibility and obstacle preemption with a "direct conflict" test. I then address the implications for S.B. 1070 and state and local copycat laws of the Supreme Court's and some lower federal courts' willingness to uphold state laws modeled after federal law when enacted to redress a gap in federal enforcement. I conclude that the Supreme Court's adoption of a new direct conflict test as the standard for conflict preemption would be a dramatic paradigmatic shift that would provide lower courts with the means to uphold state and local laws regulating immigrants and immigration to the extent that these laws track federal enforcement measures.

INTRODUCTION.....	155
I. PREEMPTION AND THE REGULATION OF IMMIGRANTS .	158
A. The Near-Forgotten Legacy of <i>McCulloch v. Maryland</i>	158
1. Types of Preemption	159
2. Trends in Preemption Jurisprudence.....	160
B. Preemption Doctrine and the Regulation of Immigrants.....	168
C. Employee Verification Under the I-9 System and E-Verify...	171
D. <i>Lozano v. Hazleton</i> : Preemption Principles in Action.....	174
E. The Legal Arizona Workers Act: A Harbinger of Things to Come?.....	177
II. A FRAMEWORK FOR PREEMPTION ANALYSIS.....	183
A. Does the Law Involve the Regulation of <i>Immigration</i> or of <i>Immigrants</i> ?.....	184
1. State Regulation of <i>Immigration</i> Implicates Field Preemption Analysis	185
2. State Regulation of <i>Immigrants</i> May Be Expressly or Conflict Preempted	192
B. Is the State or Local Law Expressly Preempted by Federal Law?	192
1. Does IRCA's Express Preemption Provision Apply?.....	193
2. Are Any Other Express Preemption Provisions Applicable?	194
C. Is the Law Conflict Preempted by Federal Law?	195
1. Is Compliance with Both State and Federal Law Impossible?	196
2. Does the State or Local Law Stand as an Obstacle to Achieving the Purposes of the Federal Immigration Statute?.....	197
CONCLUSION	205

INTRODUCTION

Over the last few years, lawmakers in states and communities across the nation have taken the regulation of immigrants and immigration into their own hands, introducing and enacting laws and ordinances targeting so-called illegal immigrants, but affecting virtually any person who looks or sounds foreign.¹ This trend has increased since 2007, the year of the last major failed attempt at comprehensive immigration reform. The majority of these laws are generally of two types: laws regulating employers' hiring of immigrants and laws providing for state and local enforcement of U.S. immigration law.² In April 2010, legislation of the latter type made national news when Jan Brewer, the Governor of Arizona, signed into law S.B. 1070, the Support Our Law Enforcement and Safe Neighborhoods Act.³ In so doing, she accused the Obama administration of failing to enforce the immigration laws: "Arizona did not ask for this fight with the federal government," she said, "But now that we are in it, Arizona will not rest until our border is secured and federal immigration laws are enforced."⁴ This law contained some of the harshest provisions to date regulating immigrants.⁵ It was quickly met with a series of challenges, including by the U.S. government, and in July 2010, U.S. District Judge Bolton enjoined enforcement of various provisions of the law,⁶ a decision which was later upheld by the Ninth Circuit in April 2011.⁷ The state of Arizona and

1. See, e.g., Julia Preston, *Political Battle on Illegal Immigration Shifts to States*, N.Y. TIMES, Dec. 31, 2010, at A1.

2. See STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1238 (2009) [hereinafter LEGOMSKY & RODRÍGUEZ].

3. On April 23, Governor Brewer signed into law the Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Arizona Sessions Laws, Chapter 113. S.B. 1070, 49th Leg., 2d Reg. Sess. (Az. 2010). Seven days later, the Governor signed a set of amendments to Senate Bill 1070 under House Bill 2162, 2010 Arizona Sessions Laws, Chapter 211. This article will refer to S.B. 1070 and H.B. 2162 collectively as S.B. 1070, to describe the April 23, 2010 enactment, as modified by the April 30 amendments [hereinafter, S.B. 1070]; see also *United States v. Arizona*, 703 F. Supp. 2d 980, 985 (D. Ariz. 2010) (describing enactment of statute and amendments).

4. Marc Lacey & Salvador Rodriguez, *Arizona Sues Federal Government for Failing to Enforce Immigration*, N.Y. TIMES (Feb. 10, 2011), at 1A [hereinafter *Arizona Sues Federal Government*].

5. Among other things, the law: 1) required law enforcement officers to attempt to verify a person's immigration status if there was reasonable suspicion to believe the person was not lawfully in the United States; 2) made it a crime for a noncitizen to fail to carry proof of immigration status; 3) made it a crime for a foreign national not authorized to work to apply for, solicit or perform work as an employee or independent contractor; and 4) authorized the warrantless arrest of any person if there was probable cause to believe the person had committed a deportable offense. ARIZ. REV. STAT. ANN. §§ 11-1051(B); 13-1509; 13-2928(C); 13-3883 (2010).

6. *United States v. Arizona*, 703 F. Supp. 2d at 986-87.

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

Governor Brewer filed a petition for certiorari on August 10, 2011, which was granted by the Supreme Court on December 12, 2011.⁸

The most common challenge to state and local laws targeting immigrants is that they are preempted by federal immigration statutes. On May 26, 2011, in *Chamber of Commerce v. Whiting*, the first Supreme Court case to address the recent wave of laws, a divided Court upheld various provisions of the Legal Arizona Workers Act of 2007 (“LAWA”) that targeted employers who hired so-called “unauthorized aliens”, finding that these provisions were not preempted by the 1986 Immigration Reform and Control Act (“IRCA”) or the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”).⁹ In so doing, the Court ignored years of Supreme Court precedent, including, most notably, the Supreme Court’s historic 1819 decision in *McCulloch v. Maryland*,¹⁰ arguably the Court’s first implied obstacle preemption decision.¹¹

With the federal government’s perceived failure to enforce the immigration laws as a backdrop, this paper will explore how *Whiting* exposes some of the tensions and contradictions in modern preemption doctrine. These tensions include the tension between cases where the Court, implicitly or explicitly, has applied a presumption *against* federal preemption where “Congress has legislated in a field which the States have traditionally occupied”¹² and those where the Court has appeared to *presume* preemption in certain cases where Congress (or a regulatory agency) has adopted a comprehensive regulatory regime. Examining the relationship among express, field, impossibility, and obstacle (also known as “purposes and objectives”) preemption, this paper also will examine whether a “direct conflict” test should replace the current impossibility and obstacle preemption tests as a new paradigm.¹³

The Supreme Court’s decision in *Chamber of Commerce v. Whiting* is no doubt a harbinger of things to come, as a growing number of states adopt

8. *Arizona v. United States*, 132 S. Ct. 845 (2011); see also U.S. Supreme Court, *Arizona v. United States*, Proceedings and Orders, available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-182.htm>.

9. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011).

10. 17 U.S. (4 Wheat.) 316 (1819).

11. *Id.* (“It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempts its own operations from their own influence . . . [T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government”).

12. See, e.g., *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009).

13. Caleb Nelson argues that none of the historical evidence supports the doctrine of implied obstacle preemption, proposing the logical contradiction test to replace it. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 265 (2000). This article appears to have had a significant impact on Justice Thomas’s thinking on preemption and possibly on that of a conservative plurality of Justices. See, e.g., *Wyeth*, 129 S. Ct. at 1205 (Thomas, J., concurring); *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567, 2579 (2011).

their own immigration laws,¹⁴ and advocates continue to challenge these laws. The Legal Arizona Workers Act (“LAWA”), S.B. 1070, Alabama’s H.B. 56, Georgia’s H.B. 87,¹⁵ South Carolina’s Act 69,¹⁶ and the local ordinance struck down by the Third Circuit in *Lozano v. Hazleton*,¹⁷ all implicate distinct preemption analyses. In challenging these laws on preemption grounds, it becomes critical to identify which frameworks, express, conflict, and/or field preemption, apply. Part IA offers an overview of preemption jurisprudence, focusing in particular on the nearly-forgotten legacy of *McCulloch v. Maryland*, which planted the seeds of implied obstacle preemption. Part IB looks at how preemption jurisprudence has been applied to laws regulating immigrants and immigration, focusing in particular on LAWA, S.B. 1070, Alabama’s H.B. 56,¹⁸ and the local ordinance struck down by the Third Circuit in *Lozano v. Hazleton*.¹⁹ Part II addresses the implications for S.B. 1070 and copycat legislation of the Court’s apparent willingness to uphold state laws modeled after federal law when enacted to redress a gap in federal enforcement and develops a taxonomy of preemption principles for analyzing these laws. It concludes that if the Court were to adopt a “direct conflict” test to replace current impossibility and obstacle preemption analysis, a direction in which the Court seems to be heading in light of recent decisions, it would not only be contrary to nearly two centuries of preemption jurisprudence, but would result in upholding overzealous state and local laws regulating immigrants and immigration.²⁰ Alternatively, I propose adding a separate “dominant

14. At the time of this writing at least fifteen states, including Alabama, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Mississippi, Missouri, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, and Virginia had adopted or introduced some version or combination of either the Legal Arizona Workers Act or S.B. 1070. Michele Vargas, a private attorney and member of the Hispanic National Bar Association, and I organized a team of over a dozen students from St. Thomas University School of Law and Florida International University Law School to research Arizona copycat legislation throughout the country.

15. *Georgia Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317 (N.D. Ga. 2011).

16. *United States v. S. Carolina*, No. 11-CV-2958, 2011 WL 6973241 (D.S.C. Dec. 22, 2011).

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

18. The Beason-Hammon Alabama Taxpayer and Citizen Protection Act, Ala. Laws Act 2011-535 (2011) [hereinafter H.B. 56].

19. *Lozano*, 620 F.3d at 170 (3d Cir. 2010).

20. *See, e.g.*, *United States v. Alabama*, No. 11-CV-2746, 2011 WL 4469941 (N.D. Ala. Sept. 28, 2011) (refusing to enjoin enforcement of various provisions of Alabama immigration statute). Indeed, at oral argument in *Arizona v. United States* on April 25, 2012, the justices’ questions implied a willingness on the part of a possible majority to uphold provisions of Arizona’s S.B. 1070 requiring state and local law enforcement officers to attempt to verify with federal immigration authorities the immigration status of persons subject to otherwise lawful stops, and to make those persons available to the federal government for removal, despite the United States’ argument that this would interfere with federal enforcement priorities. *See* Transcript of Oral Argument at 38-53, *Arizona v. United States*, 135 S. Ct. 832 (2012) (No. 11-182).

federal interest” test to the preemption tool chest, which I believe is largely consistent with Chief Justice Roberts’ analysis in *Whiting*, and would allow the Court to meaningfully distinguish features of S.B. 1070 and other state enforcement measures from the Arizona statute upheld in *Whiting*.

I.

PREEMPTION AND THE REGULATION OF IMMIGRANTS

A. *The Near-Forgotten Legacy of McCulloch v. Maryland*

Preemption doctrine, the principle that federal law trumps inconsistent state law, has its roots not only in the Supremacy Clause of the U.S. Constitution, but also in the 1789 Judiciary Act and Justice Marshall’s 1819 decision in *McCulloch v. Maryland*.²¹ Article VI of the Constitution provides that the Constitution, treaties, and laws 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.”²² The Judiciary Act of 1789, which established the federal court system, authorized the Supreme Court to exercise its Article III powers to hear any suit from state court “where is drawn in question the validity of a statute, or an authority exercised under, any State, on the grounds of their being *repugnant* to the [C]onstitution, treaties, or laws of the United States, and the decision is in favour of their validity.”²³ Section 25 thus codified preemption doctrine in the earliest days of the new republic, authorizing the Court in situations where a state court had upheld state law to invalidate the law on the basis of its repugnancy to the Constitution, a treaty, or federal statute.²⁴

While *McCulloch*, one of the Supreme Court’s most foundational decisions in which the Court struck down Maryland’s tax on the Bank of the United States, is best known for establishing the broad scope of Congress’ powers under Article I, Section 8 and the Necessary and Proper Clause, as well as the principle of federal immunity from state taxation, Justice Marshall’s opinion also gave content to preemption doctrine. He referred to preemption as the “great principle” that the “constitution and the laws made in pursuance thereof are supreme; that they control the

21. 17 U.S. (4 Wheat.) 316 (1819).

22. U.S. CONST. art. VI, § 2.

23. The Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-86 (codified as amended at 28 U.S.C. 1257).

24. Note that this provision did not give the Supreme Court appellate jurisdiction to hear any such case where the highest state court had found in favor of federal law. See Paul Taylor, *Congress’s Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today’s Congress and Courts*, 37 PEPP. L. REV. 847, 861 (2010).

constitution and laws of the respective states, and cannot be controlled by them.”²⁵

1. *Types of Preemption*

The Court has said repeatedly that “the purpose of Congress is the ultimate touchstone in every preemption case.”²⁶ It has identified three principal, albeit sometimes overlapping, forms of preemption: express, field, and conflict preemption.²⁷ Express preemption occurs when Congress plainly declares a law’s preemptive effect, usually through an express preemption provision. In such cases, the court still must determine the scope of what has been preempted.²⁸ In so doing, the court focuses principally “on the plain wording of the [express preemption] clause,” which is deemed to contain the “best evidence” of Congress’ pre-emptive intent.²⁹ In express preemption cases where the wording is ambiguous, the court has also considered the “structure and purpose of the statute as a whole . . . as revealed not only in the text, but through [the court’s] reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to [operate].”³⁰

Field preemption occurs where the state or local law regulates in an area where Congress has made its intent to occupy the field unmistakably clear, either expressly or impliedly. Field preemption can be inferred where a federal regulatory scheme is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”³¹ It also can be inferred where a federal law “touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”³²

Even if a state or local statute is not expressly preempted or field preempted, it may still be conflict preempted. Implied conflict preemption has been found when either it is impossible to comply with both the federal and state law (“impossibility preemption”),³³ or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” (“obstacle preemption”).³⁴ The test for

25. 17 U.S. at 426.

26. *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

27. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

28. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).

29. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002).

30. *Medtronic*, 518 U.S. at 486.

31. *Gade v. Nat’l Solid Waters Mgt. Ass’n*, 505 U.S. 88, 98 (1992).

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

33. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

34. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

impossibility preemption has frequently been stated as whether it is “physically impossible” to comply with both federal law and state law. Until fairly recently, the instances where the Court has found impossibility preemption have been rare.³⁵ Obstacle preemption, in contrast, has allowed for a more elastic inquiry into the purposes underlying a federal statute and whether a state law interferes with the accomplishment of those purposes.³⁶

2. Trends in Preemption Jurisprudence

The Court’s preemption decisions, while frequently reiterating these basic principles, are hard to reconcile. Consistent with the emphasis on states’ rights in modern Commerce Clause and Tenth Amendment cases, the Court has tended over the last fifteen years to narrow the availability of field preemption³⁷ and obstacle preemption, absent clear evidence of Congressional intent.³⁸ At the same time, in interpreting express preemption provisions, it has looked carefully at the scope of what Congress intended to preempt.³⁹ In many of these cases, involving both express preemption and conflict preemption, it has invoked the presumption against preemption as a rule of statutory interpretation.⁴⁰ As the Court stated most recently in *Wyeth v. Levine*:

in all preemption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start

35. See *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567, 2590 (2011) (Sotomayor, J., dissenting).

36. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

37. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting) (stating that “our recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it”); *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 717 (1985) (indicating reluctance to infer preemption from comprehensiveness of statutes).

38. *Hines* is often read as establishing that immigration law is an area where Congress has preempted the field, precluding enforcement of state laws on the same subject. See, e.g., ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (2011) (“*Hines v. Davidowitz* is a classic example of preemption of state regulation in the field of immigration”). In fact, *Hines* may be more accurately classified as an obstacle preemption case. See *Hines*, 312 U.S. at 67 (“Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania’s law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

39. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1980 (2011); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).

40. See *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009); see also *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 334-37 (2008) (Ginsburg, J. dissenting) (criticizing majority for not applying a presumption against preemption); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (where the text of a preemption clause is open to more than one plausible reading, courts ordinarily “accept the reading that disfavors pre-emption”); *Medtronic Inc. v. Lohr*, 518 U.S. 470 (1996) (Courts have “long presumed that Congress does not cavalierly preempt state law causes of action”); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (“This assumption provides assurance that “the federal balance” will not be disturbed unintentionally by Congress or unnecessarily by the courts”); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (preemption analysis starts with assumption that “the historic police powers of the states [a]re not to be superseded . . . unless that was the clear and manifest purpose of Congress”).

with the 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.⁴¹

Yet at the same time, the Court has invoked obstacle preemption to overturn state jury verdicts against manufacturers of arguably unsafe products on the basis that state tort remedies stand as obstacles to achieving the purposes and objectives of the federal statute or regulation.⁴²

More recently, at least three emerging trends, all evident in *Chamber of Commerce v. Whiting*, are worth noting. The first is an increasing reluctance of the Court to find implied obstacle preemption.⁴³ The second related trend is an inclination to expand the scope of impossibility preemption beyond the physical impossibility cases.⁴⁴ The third is a tendency to no longer explicitly apply the presumption against preemption, and in some cases, to do exactly the opposite—presume preemption.⁴⁵

The reluctance of the Court to find implied obstacle preemption is consistent with the Court's increasing emphasis on textualism and the view of the more conservative justices, particularly Justices Scalia, Thomas, and Roberts, that "purposes and objectives" preemption analysis frequently involves the Court in invalidating state laws based on perceived conflicts with federal policy objectives, legislative history, or congressional purpose that are not embodied in the actual text of the federal statute.⁴⁶ Furthermore, a significant body of scholarly writing over the last decade has concluded that the Court's continuing use of obstacle preemption analysis has allowed it to justify its decisions based on policy preferences rather than demonstrated Congressional intent.⁴⁷ This conclusion has been

41. See *Wyeth*, 129 S. Ct. at 1194-95.

42. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000); see also *Wyeth*, 129 S. Ct. at 1219 (Alito, J., Roberts, C.J., & Scalia, J., dissenting).

43. *Whiting*, 131 S. Ct. at 1985; *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567, 2579 n.6, 2590 n.13 (2011) (Sotomayor, J., dissenting) (expressing concern that Justice Thomas's theory that obstacle preemption is unconstitutional was being used to justify Court's novel expansion of impossibility preemption).

44. See *Pliva*, 131 S. Ct. at 2590 (Sotomayor, J., dissenting) (criticizing the majority for the novel expansion of impossibility preemption beyond the physical impossibility cases).

45. *Pliva*, 131 S. Ct. at 2579-80 (plurality of the Court, in a decision by Justice Thomas, finding that the Supremacy Clause's "notwithstanding" language is a *non obstante* provision, and that the Court should not strain to reconcile federal law with seemingly conflicting state law or apply the presumption against preemption); *Whiting*, 131 S. Ct. at 1981 (upholding state licensing law without applying the presumption against preemption).

46. See *Wyeth*, 129 S. Ct. at 1205 (Thomas, J., concurring); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388-91 (2000) (Scalia, J., concurring) (criticizing majority's reliance on legislative history to discern statutory intent when intent was "perfectly obvious on the face of th[e] statute"); *Whiting*, 131 S. Ct. at 1985 ("Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.'").

47. See, e.g., Chemerinsky, *supra* note 38, at 1327; Nelson, *supra* note 13 (citing David B. Spence & Paula Murray, *The Law, Economics and Politics of Federal Preemption Jurisprudence: A*

reached both by conservative scholars embracing states' rights and by liberal scholars advocating for judicial protection of state consumer protection laws.⁴⁸

There is no doubt some truth to these concerns, as demonstrated by the Court's willingness to use federal preemption to overturn state jury verdicts in products liability and drug safety cases.⁴⁹ Nonetheless, if Congressional intent is to remain the touchstone of preemption analysis, there will be many cases where express, field and impossibility principles will be inadequate in overturning state laws passed in defiance of federal authority but carefully crafted so as not to directly conflict with federal law.⁵⁰ In such situations, some form of obstacle preemption analysis remains vital to challenge these laws.

The second tendency is a natural outgrowth of the first. To the extent that an emerging conservative majority of justices increasingly regards "purposes and objectives" preemption analysis as a form of judicial activism, the Court may feel the need to expand the scope of impossibility preemption beyond those cases where compliance with state and federal law is a "physical impossibility." Indeed, in *Wyeth v. Levine*, Justice Thomas, in his concurrence, questioned why a narrow impossibility standard was the best test for determining whether state and federal laws were in direct conflict.⁵¹ In that case, the Court, in an opinion joined by the liberal justices, upheld a state tort claim brought against the manufacturer of a name-brand drug on the basis that it was not impossible under federal food and drug regulations for the manufacturer to change its labeling to comply with state law standards.⁵² A plurality also found that state law was not obstacle preempted by federal food and drug law.⁵³

In his concurrence, Justice Thomas rejected obstacle preemption analysis as without basis in the Constitution.⁵⁴ He agreed with the plurality,

Quantitative Analysis, 87 CALIF. L. REV. 1125 (1999)); Jamelle C. Sharpe, *Toward (a) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367, 391-95 (2011) ("[T]he Court refuses to explicitly acknowledge its role in making preemption policy decisions . . .").

48. Nelson, *supra* note 13, at 229.

49. See, e.g., *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567, 2577-78 (2011); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000).

50. Kris W. Kobach, 79 UMKC L. REV. 815 (2011) ("Because S.B. 1070 matches federal law so precisely, it is protected by the legal doctrine of 'concurrent enforcement'. . . . Because S.B. 1070 proscribes precisely the same conduct that is prohibited by federal law, Arizona law and federal law are in perfect harmony. Conflict preemption cannot occur.").

51. *Wyeth*, 129 S. Ct. at 1209 (describing how the Court has articulated a narrow impossibility standard because of the availability of obstacle preemption); see also *Crosby*, 530 U.S. at 372-73; *Florida Lime & Avocado Growers*, 373 U.S. at 142-43; *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64-65 (2002); *United States v. Locke*, 529 U.S. 89, 109 (2000).

52. *Wyeth*, 129 S. Ct. at 1199.

53. *Id.* at 1204.

54. *Id.* at 1205-07 (Thomas, J., concurring).

however, that it was not impossible to comply with both state and federal law because the name-brand manufacturer could enhance its labeling without pre-approval from the FDA.⁵⁵ Rather than apply the physical impossibility test, Justice Thomas seems to advocate for a more general “direct conflict” standard, which essentially would look at whether state and federal law give directly conflicting commands⁵⁶ Justices Alito, Roberts, and Scalia, in contrast, would have found that the tort claim was obstacle preempted by food and drug regulations, because the FDA, not state tort juries, was ultimately responsible for determining the adequacy of warning labels for prescription drugs.⁵⁷

Less than two years later, in *Pliva v. Mensing*, another FDA case with facts similar to *Wyeth v. Levine*, Justice Thomas joined the dissenters from *Wyeth v. Levine* to find that a state tort claim against the manufacturer of a generic drug was impliedly preempted by federal food and drug law where it was impossible for the generic manufacturer to change its labeling to comply with state law standards without pre-approval from the FDA.⁵⁸ Justice Thomas authored the opinion, which relied on impossibility preemption rather than obstacle preemption, thus joining the other conservative justices without sacrificing his belief that obstacle preemption analysis is unconstitutional.⁵⁹ These cases suggest that to the extent an emerging, mostly conservative majority is willing to chip away at obstacle preemption, this is likely to be accompanied by either an expansion of impossibility preemption in order to be able to reach state tort actions without having to rely on obstacle preemption analysis to do so, or a redefinition of conflict preemption to focus on whether there is an actual conflict between state and federal law.⁶⁰

The third trend, to no longer explicitly apply the presumption against preemption and in some cases to do the opposite, is evident in both *Whiting*, where the Court found that federal law did not preempt state law without

55. *Id.* at 1204-05 (Thomas, J., concurring).

56. *Id.* at 1209. (“The Court, in fact, has not explained why a narrow ‘physical impossibility’ standard is the best proxy for determining when state and federal law ‘directly conflict’ for purposes of the Supremacy Clause”). Justice Thomas indicates that a direct conflict can exist not only when state law penalizes what federal law requires. *Id.* It may also exist where federal law authorizes a person to engage in certain actions prohibited by state law. *See id.* at 1211. Thus, it may not be impossible to comply with both state and federal law, because the individual could refrain from engaging in behavior allowed (but not required) by federal law, but state law nonetheless would directly conflict with rights granted under federal law. *Id.* at 1209.

57. *Id.* at 1227, 1231.

58. *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567, 2577-78 (2011).

59. *Wyeth v. Levine*, 129 S. Ct. 1187, 1209 (2009).

60. *Wyeth*, 129 S. Ct. at 1228 (Alito, J., Roberts, C.J., & Scalia, J., dissenting) (“the sole question is whether there is an ‘actual conflict’ between state and federal law; if so, then pre-emption follows automatically by operation of the Supremacy Clause”).

ever invoking the presumption against preemption,⁶¹ and, much more explicitly, in *Pliva*, where a shifting majority found that, in this case, federal food and drug law did preempt state law standards.⁶² In one portion of the latter opinion, which Justice Kennedy did not join,⁶³ Justices Thomas, Roberts, Alito and Scalia embraced Caleb Nelson's interpretation of the Supremacy Clause as a *non obstante* provision under which the Court need not "distort federal law to accommodate conflicting state law."⁶⁴ This plurality concluded that the *non obstante* provision in the Supremacy Clause signifies "that federal law should be understood to impliedly repeal conflicting state law."⁶⁵ Although this position did not command a majority, in light of Justice Kennedy's position, the opinion signals an emerging block of conservative justices who may in some circumstances, presume preemption "[w]hen the 'ordinary meaning' of federal law blocks a private party from independently accomplishing what state law requires."⁶⁶

As a jurisprudential matter, although there appears to be support in both the Constitution's text and its original understanding for moving away from the presumption against preemption, it would be a dramatic development for the Supreme Court to replace obstacle preemption with a direct conflict test. Obstacle preemption analysis, as noted above, finds its roots in *McCulloch v. Maryland*, the grandfather of all preemption cases.⁶⁷ A close rereading of Part II of Justice Marshall's *McCulloch* opinion, regarding whether the state of Maryland could tax the Bank of the United States, resembles much of the discourse of modern day obstacle preemption analysis.⁶⁸ Furthermore, other cases from the era as well as the writings of major jurists like Justice Joseph Story, a contemporary and successor to John Marshall, underscore that the Constitution's Supremacy Clause, as implemented by the 1789 Judiciary Act and as interpreted in early decisions, was intended to have broad preemptive effect on state laws and policies that obstructed or interfered with national laws and policies.

McCulloch v. Maryland was clearly a case of implied *obstacle* preemption. In *McCulloch*, there was no express preemption provision in the law creating the Bank of the United States.⁶⁹ Nor was this a case of field preemption—the Court recognized that Maryland's power of taxation was of "vital importance," that it was "retained by the states," and that it was "not abridged by the grant of a similar power to the [national]

61. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1977-87 (2011).

62. *Pliva*, 131 S. Ct. at 2577-78.

63. *Id.* at 2572.

64. *Id.* at 2579-80 (citing with approval Nelson, *Preemption*, *supra* note 13, at 234).

65. *Id.* at 2580.

66. *Id.*

67. *See McCulloch v. Maryland*, 17 U.S. 316, 426-27, 436 (1819).

68. *See id.*

69. *McCulloch*, 17 U.S. at 426.

government.”⁷⁰ Moreover, it was not *impossible* for Mr. McCulloch, the cashier of the Maryland branch, to pay Maryland’s two percent tax on its notes and continue to run the bank. Maryland argued that the state should be able to exercise its taxing power, and that the constitution left it this right in the confidence that they would not abuse it.⁷¹ The Court, however, in emphasizing that the power to tax was the power to destroy,⁷² concluded that Maryland did not have the power to enact any laws that would in any way interfere with the execution of laws enacted by the U.S. Congress for running the federal government.⁷³ Marshall wrote that:

no principle, not declared, can be admissible, which would defeat the legitimate operations of a supreme government. *It is of the very essence of supremacy, to remove all obstacles to its action* within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.⁷⁴

At the end of the opinion, Marshall wrote that “the states have no power, by taxation *or otherwise*, to retard, impede, *burden*, or in any manner control, the *operations* of the constitutional laws enacted by congress to carry into execution the powers vested in the general government.”⁷⁵ The Supremacy Clause, as embodied in early doctrine, thus ensures that when Congress acts within the scope of its powers, and either expresses or implies an intent to preclude state or local laws that interfere with the execution of federal law, offending enactments cannot stand.⁷⁶

70. *Id.* at 425.

71. *Id.* at 427-28.

72. *Id.* at 427.

73. *Id.* at 436-37.

74. *Id.* at 427 (emphasis added).

75. *Id.* at 436 (emphasis added).

76. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). In his article *Preemption*, which was favorably cited by Justice Thomas in his opinions in *Wyeth* and *Pliva*, Caleb Nelson argues that there is no historical evidence supporting any general doctrine of obstacle preemption. Nelson, *supra* note 13 at 265. Even *McCulloch*, Nelson argues, does not “compel a general doctrine of obstacle preemption” but is consistent with his logical contradiction test. *Id.* at 270. He writes:

It is one thing to say that states lack the power to tax or otherwise regulate federal instruments. It is quite another thing to say that states cannot exercise legislative powers that they unquestionably possess if their exercise of those powers would get in the way of federal purposes. The principle of intergovernmental immunity, articulated in *McCulloch*, hardly compels a general doctrine of obstacle preemption.”

Id. He finds support for this analysis not in *McCulloch* itself, but in *Osborn v. Bank of the United States*, a later decision, where Justice Marshall interpreted the federal statute creating the Bank as exempting the Bank from control by the States. Although there was no express preemption provision, Marshall writes that “[i]t is no unusual thing for an act of Congress to *imply*, without *expressing*, this very exemption from state control.” *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 865 (1824) (emphasis added). Marshall went on to write that state laws taxing the Bank’s operations were “*repugnant* to a law of the United States made in pursuance of the Constitution, and therefore void.” *Id.* at 868 (emphasis added).

Justice Thomas suggests that a direct conflict standard is more consistent with the intent of the framers and with early constitutional commentary. Indeed, he cites Justice Joseph Story's *Commentaries on the Constitution* as support for his proposition that obstacle preemption is untethered from the Constitution's text and that a direct conflict test would be a more appropriate standard. Specifically, he relies on Justice Story's statement that a state law is preempted by the Supremacy Clause when it is "repugnant to the constitution of the United States."⁷⁷ The use of that term, however, in Justice Marshall's ruling in *Osborn*, in his decision in *McCulloch*,⁷⁸ and in Justice Story's writings was no doubt a reference to section 25 of the Judiciary Act of 1789, which gave the Court jurisdiction to overturn state court decisions upholding state laws that were "repugnant" to federal law. Given contemporaneous understandings of the word "repugnant", the breadth of Justice Marshall's language in *McCulloch*, and other Court decisions of the period, use of that term should not be read as support for a more narrow "direct conflict" test.⁷⁹

Furthermore, in response to Justice Thomas's assertion in the *Wyeth* case that Justice Story embraced a direct conflict test, it is worth underscoring that Justice Story, like Justice Marshall, believed the Constitution had created a strong national government, dedicating his *Commentaries on the Constitution* to Justice Marshall, whom he revered.⁸⁰ Indeed, in *Martin v. Hunter's Lessee*,⁸¹ an 1816 case which established the Supreme Court's power to rule on the constitutionality of state laws, Justice Story wrote that judicial review of state laws was essential because "state attachments, state prejudices, state jealousies and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."⁸²

77. *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) (Thomas, J., concurring) (citing with approval 3 Story § 1836 at 701) (emphasis added).

78. *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819) ("there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control . . .").

79. The term "repugnant" did not necessarily always mean "contradictory" to federal law, as Nelson and Justice Thomas suggest. The Oxford English Dictionary includes a definition of "repugnant" during that time period as "A. I. b. Making or offering resistance or opposition (to a thing); hostile, antagonistic, rebellious." 13 OXFORD ENGLISH DICTIONARY 675-676 (J. A. Simpson & E. S. C. Weiner eds., 2nd ed. 1989).

80. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, at iii (Brown, Shattuck, and Co. 1833) ("I ask the favor of dedicating this work to you. I know not, to whom with so much propriety it could be dedicated, as to one, whose youth was engaged in the arduous enterprises of the Revolution; whose manhood assisted in framing and supporting the national Constitution; and whose maturer years have been devoted to the task of unfolding its powers, and illustrating its principles").

81. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1815).

82. *Id.*

Even more directly on point, fifteen years later, in a letter to his wife, Justice Story expressed grave concern about a proposal to repeal section 25 of the Judiciary Act of 1789, the preemption provision. He wrote,

If it should prevail . . . it would deprive the Supreme Court of the power to revise the decisions of the State Courts and State legislatures, in all cases in which they were repugnant to the Constitution of the United States. So that all laws passed, and all decisions made, however destructive of the National Government, would be utterly without redress . . . [T]he introduction of it shows the spirit of the times.⁸³

Thus, Justice Story's opinions and writings, like those of John Marshall, are more consistent with a broad obstacle preemption standard than with a narrow direct conflict test. Caleb Nelson interprets the language in *Osborn* as Marshall reading the Maryland law taxing the Bank's operations as contradicting the law creating the Bank, and argues that this is consistent with his logical contradiction test.⁸⁴ The language in *Osborn*, however, clearly embraces implied as well as express preemption, incorporates the "repugnancy" standard from section 25 of the Judiciary Act, and is consistent with the obstacle preemption analysis Marshall embraced in *McCulloch*. The concern of Justices Marshall and Story was not just with state laws *contradicting* federal law, but also with state laws that undermined the federal government's authority.

In short, the argument embraced by Justice Thomas that there is no historical support for a general doctrine of obstacle preemption ignores critical language from *McCulloch*, from the Judiciary Act of 1789, and from decisions and commentary by leading jurists of the time.⁸⁵ If the Court were to substitute a direct conflict standard for current conflict doctrine, it not only would be contrary to nearly two centuries of precedent, but also would be a way of ensuring that state and local laws regulating immigrants that track federal enforcement standards, even those passed in clear defiance of federal authority, could be upheld.⁸⁶

83. Letter from Justice Story to Mrs. Joseph Story (Jan. 28, 1831), in 2 LIFE AND LETTERS OF JOSEPH STORY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND DANE PROFESSOR OF LAW AT HARVARD UNIVERSITY 43-44 (William W. Story ed., 1851).

84. Nelson, *supra* note 13, at 270-71.

85. See, e.g., *McCulloch v. Maryland*, 17 U.S. 316, 427, 436 (1819).

86. Similar to state copycat legislation, in *McCulloch*, one rationale for striking down Maryland's tax on the Bank of the United States was because it and many other state laws passed at the time appeared to be motivated by a desire to undermine the Bank's authority, in light of the Bank's failure to solve the country's economic problems. See 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 499-540 (1st ed. 1922).

B. Preemption Doctrine and the Regulation of Immigrants

The Legal Arizona Workers Act, S.B. 1070, and other state copycat laws all exhibit a growing frustration with the federal government's perceived failure to enforce the federal immigration laws. For many state and local leaders, institutional failure on the part of the Department of Homeland Security has justified the entrance by state and local governments into a field long considered a federal domain.⁸⁷ While such an approach may be rooted in theories of federalism, state sovereignty, and the Court's modern approach to federal powers, it is not well grounded in preemption jurisprudence and is untethered from the Constitution's Supremacy Clause.⁸⁸ If the Court were to allow states to act where a federal agency has failed to, so long as the state law tracks federal law, it would require a dramatic paradigmatic shift in preemption doctrine. This shift would parallel that which we saw in standing doctrine in *Massachusetts v. EPA*, which stressed the "special position and interest of Massachusetts" in enforcing federal environmental laws.⁸⁹ While in *Massachusetts v. EPA*, the Court recognized that a sovereign state could be a proper litigant in ensuring that federal environmental laws were enforced,⁹⁰ the Arizona and copycat cases all involve state and local governments enacting their *own* laws in response to the federal government's perceived failure to enforce federal immigration law.

Throughout the twentieth century, the Supreme Court has emphasized that in the field of immigration, federal interests are paramount, and "that the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution."⁹¹ While this might suggest that any state or local laws targeted at immigrants in areas within the federal domain should be *field* preempted, the answer is not so simple. The Supreme Court in 1976 said that not every regulation of *immigrants* is necessarily a regulation of *immigration*.⁹² In *DeCanas v. Bica*, the Supreme Court found that a California law prohibiting the employment of persons unlawfully in the United States was not field preempted by the Immigration and Nationality Act ("INA"). The Court found that while the "[p]ower to regulate

87. Lawrence Downes, *When States Put Out the Unwelcome Mat*, N.Y. TIMES, March 11, 2012 at SR10.

88. See, e.g., Gillian Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 5 (2011) (in context of state tort claims, discusses extent to which recent preemption decisions are concerned with using preemption analysis to improve federal agency performance and address agency failure).

89. *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

90. *Id.* at 519-520.

91. *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941); *Toll v. Moreno*, 458 U.S. 1, 10 (1982).

92. *DeCanas v. Bica*, 424 U.S. 351, 355 (1976), *superseded by statute as stated in Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1975 (2011).

immigration is unquestionably exclusively a federal power⁹³ precluding all state involvement, not “every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted.”⁹⁴ Rather, a state law only regulates immigration if it 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.”⁹⁵ The Court in *DeCanas* found that states have “broad authority under their police powers to regulate the employment relationship to protect workers within the State,” and that the California law fell “within the mainstream of such police power regulation.”⁹⁶ Furthermore, the INA, as it then existed, did not indicate a clear congressional intent to preclude state regulation in the field of employees here unlawfully.⁹⁷

In 1986, the federal landscape changed dramatically when Congress passed the Immigration Reform and Control Act (“IRCA”), which made the regulation of employers who hire “unauthorized aliens a central concern of federal immigration policy.”⁹⁸ Among other things, IRCA:

- 1) made it unlawful “to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment”⁹⁹ and gave the federal government the power to impose sanctions on employers who knowingly or intentionally hire unauthorized workers;
- 2) created the I-9 system for verifying a worker’s eligibility for employment;¹⁰⁰ and
- 3) made it an unfair employment practice to discriminate against individuals with respect to hiring because of their national origin or citizenship status and imposed sanctions on employers who did so.¹⁰¹

Both the legislative history and case law saw IRCA as attempting to carefully balance various competing policy goals, including sanctioning employers who hire unauthorized workers, minimizing the burden on employers of verifying employment eligibility, and protecting workers who

93. *Id.* at 354.

94. *Id.* at 355.

95. *Id.*

96. *Id.* at 356.

97. *DeCanas*, 424 U.S. at 361.

98. *Lozano v. City of Hazleton*, 620 F.3d 170, 206, *vacated and remanded*, *City of Hazleton v. Lozano*, 131 S. Ct. 2958 (2011).

99. *See* 8 U.S.C. § 1324a(a)(1)(A) (2004).

100. *See id.* at § 1324a(b).

101. *See id.* at § 1324b(a) and (g)(2). The protections of this provision did not extend to “unauthorized aliens” (as defined in [§ 1324a(h)(3)]).

look foreign from employment discrimination.¹⁰² Yet it also involved Congress regulating in an area—employment—within the state’s historic police powers. IRCA, however, also included an express preemption provision preempting “any state or local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens”¹⁰³ thus effectively preempting the California law upheld in *DeCanas*.¹⁰⁴

The Supreme Court and lower courts have applied a presumption against preemption where Congress “legislates in a field which the states have traditionally occupied,” absent a “clear and manifest” congressional intent to the contrary.¹⁰⁵ As the Court said most recently in *Wyeth*, the presumption against preemption emerged out of “respect for the states as independent sovereigns in our federal system.”¹⁰⁶ At the same time, as discussed above,¹⁰⁷ the presumption against preemption is arguably at odds with the plain language of the *non obstante* provision in Article VI,¹⁰⁸ particularly where Congress adopts a comprehensive scheme or includes an express preemption provision in the statute. Congress appeared to have created such a regime in enacting IRCA, asserting a dominant federal interest in regulating the employment of unauthorized workers, *and* it included an express preemption provision. At the same time, IRCA’s savings clause in the express preemption provision for “licensing and similar laws” suggested that Congress may not have intended to preempt the entire field. The scope of the savings clause, however, was less than a model of clarity.¹⁰⁹ IRCA thus left dormant and unresolved tensions among the various preemption doctrines and tools of statutory analysis, which would only emerge once state and local governments began enacting their own laws regulating the employment of unauthorized workers. As discussed further below, the Court’s resolution of these tensions in

102. Chamber of Commerce v. Edmondson, 594 F.3d 742, 767 (10th Cir. 2010) (citing H.R. REP. NO. 99-682(1), at 56 (1986)).

103. See 8 U.S.C. § 1324a(h)(2).

104. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1975 (2011).

105. See *supra* note 40.

106. *Wyeth v. Levine*, 129 S. Ct. 1187, 1195 n.3 (2009).

107. See *supra* notes 61- 66.

108. In his 2000 article, *Preemption*, Caleb Nelson makes a persuasive argument, based on historical evidence and a close parsing of the language in the Supremacy Clause, that the presumption against preemption is inconsistent with what he identifies as the *non obstante* clause in the Supremacy Clause. This clause provides that the Constitution, federal laws and treaties shall be the Supreme Law of the land, and that state judges shall be bound thereby “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Nelson, *supra* note 13, at 245 (emphasis added).

109. *Lozano v. City of Hazleton*, 620 F.3d. 170, 210 n.32 (existence of savings clause negates inference that Congress left no room for state causes of action), *rev’d on other grounds*, *City of Hazleton v. Lozano*, 131 S. Ct. 2958 (2011).

Chamber of Commerce v. Whiting and *Hazleton v. Lozano* shed limited light on how the Court might rule in *Arizona v. United States*.

C. *Employee Verification Under the I-9 System and E-Verify*

Over the last several years, a number of states, including Arizona with passage of the Legal Arizona Workers Act, South Carolina, Alabama and Mississippi have enacted laws making E-Verify, the voluntary federal internet-based system for authentication of employees' identity and employment documents, mandatory for all employees.¹¹⁰ An additional thirteen states require government agencies and/or contractors to run their employees through the system.¹¹¹ These laws, like E-Verify itself, have not been without controversy. In 2011, Arizona's version was challenged (and upheld) by the Supreme Court in *Chamber of Commerce v. Whiting*.¹¹²

E-Verify, adopted as a Basic Pilot Program in 1996 as part of the sweeping Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),¹¹³ was designed to supplement without replacing the I-9 employment verification system, a core component of IRCA's scheme for regulating employers. Under the I-9 system, new employees must complete the I-9 form and present certain identity and work eligibility documents,¹¹⁴ and employers must examine these documents and attest that they appear to be genuine.¹¹⁵ If these documents appear genuine on their face, employers who act in good faith will fall within a safe harbor if it later turns out that an employee is not authorized to work, either because the documents are fraudulent or belong to someone else.¹¹⁶

In 1996, in light of growing concerns about the use of fraudulent employment documents, Congress supplemented the I-9 system for verifying employment eligibility with E-Verify. E-Verify permits an employer to authenticate an employee's identity and employment documents by submitting information provided on the I-9 form over the Internet to the Social Security Administration and/or Department of

110. See ARIZ. REV. STAT. ANN. §§ 23-211 to 23-215 (West 2007); S.C. CODE §§ 8-14-20, 41-8-20; Alabama's H.B. 56, *supra*, note 18, at § 15(b); MISS. CODE ANN. § 71-11-3 (2008).

111. Stephen Dinan, *E-Verify Job-check System Has Room to Grow, Agency Says*, THE WASH. TIMES (March 15, 2012), available at <http://www.washingtontimes.com/news/2012/mar/15/e-verify-job-check-system-is-underutilized-agency-/?page=all> (last visited April 20, 2012).

112. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1985-87 (2011).

113. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C. 110 Stat. 3009-546, at § 403.

114. 8 U.S.C. § 1324a(b)(1)(A) (2004).

115. *Id.*

116. *Id.* at § 1324a(a)(3), (b)(6).

Homeland Security.¹¹⁷ The Government will issue either a confirmation that an employee is authorized to work or a tentative nonconfirmation.¹¹⁸ E-Verify was, and remains at the time of this writing, a voluntary system of employment verification. Since its adoption, it has been expanded to all fifty states, and there are ongoing state and congressional efforts to make the program mandatory.¹¹⁹ Although the House Judiciary Committee approved a bill to make E-Verify mandatory in September 2011 and it appeared to enjoy broad support among Republicans, it stalled in 2012 in the midst of primary season, firm opposition from the agricultural industry, and reports from growers in states that have enacted mandatory E-Verify laws that they could not find enough legal workers willing to work in the fields.¹²⁰ A mandatory federal E-Verify system is attractive to some legislators because it would apply nationwide, avoiding the current piecemeal approach.¹²¹ It would also, presumably, preempt inconsistent state laws. One reason E-Verify has remained voluntary, however, is because of various flaws in the system identified by Westat, the outside auditor for E-Verify.¹²² Due to delays in getting up-to-date, accurate information into the system, as many as one-fifth of workers issued tentative nonconfirmations (“TNCs”), including naturalized U.S. citizens, are authorized to work.¹²³ Additionally, a number of employers whose

117. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 862 (9th Cir. 2009). Employers who opt for E-Verify submit status information from the I-9 form about the employee over the Internet, which the U.S. government must verify against its own databases. *Whiting*, 131 S. Ct. at 1975. If the person claims to be a U.S. citizen, the information is submitted to the Social Security Administration for authentication. If the person claims to be a noncitizen legally authorized to work, the Social Security Administration does an initial check, and if its information matches the information provided by the employer, the information is then forwarded to the Department of Homeland Security (“DHS”), which verifies that the person is either a lawful permanent resident (“LPR”) or has a valid employment authorization document (“EAD”). WESTAT, FINDINGS OF THE E-VERIFY PROGRAM EVALUATION 6-7 (2009) [hereinafter WESTAT REPORT]. In the latter instance, DHS will send back a copy of the picture it has of the noncitizen, so that the employer can match it against the picture on the LPR card or EAD provided by the employee. *Id.* at 6. If the person claims to be a naturalized U.S. citizen and the initial Social Security check does not reveal a match, the employee can give permission to check DHS databases for proof of naturalization.

118. *Whiting*, 131 S. Ct. at 1975.

119. Rep. Lamar Smith (R-Tex.) introduced legislation into Congress to make E-Verify mandatory for all employers. See Legal Workforce Act, H.R. 2164, 112th Cong., June 14, 2011.

120. David Harrison, *Election Issues May Stall E-Verify Bill in GOP House*, CQ TODAY ONLINE, March 13, 2012.

121. Lamar Smith & Elton Gallegly, *Op-ed: E-Verify Works; Let's Use It*, L.A. TIMES, June 13, 2011, available at <http://articles.latimes.com/2011/jun/13/opinion/la-oe-gallegly-everify-20110613> (last visited April 20, 2012).

122. WESTAT REPORT, *supra* note 117, at xli (“care should be taken not to expand the Program so rapidly as to create problems with USCIS and SSA implementation and monitoring of the Program.”).

123. *Id.* at 21 (Breyer, J., dissenting). Cf. WESTAT REPORT, *supra* note 117, at xxix (indicating that approximately 14% of workers receiving TNCs are ultimately verified as work authorized). E-Verify’s accuracy rate is even worse “in states that require the use of E-Verify for all or some of their employees.” *Id.* at 122.

employees are issued TNCs are not communicating this to the employee or not providing the employee with necessary information regarding how to contest a TNC.¹²⁴ If an employee does contest the TNC, the employer is prohibited from taking adverse action against the employee while the contest is pending.¹²⁵ Workers have eight federal working days from receiving written notification to contest a TNC by contacting the Social Security Administration or USCIS to resolve any discrepancies.¹²⁶ If an employee does not contest the TNC within that period, after 10 federal working days, the E-Verify system issues a final nonconfirmation (“FNC”).¹²⁷ At this point, an employer must terminate an employee to comply with the law.¹²⁸ Thus, an employee not properly advised by his or her employer of a TNC is likely to face dismissal.

Moreover, Westat reports that employers have improperly used E-Verify to check a potential employee’s immigration status before a decision is made to hire the employee.¹²⁹ Westat raised concerns that, while the E-Verify system has been improved to address many of its earlier problems, there are still instances of discrimination by employers against workers who are issued tentative nonconfirmations but are legally authorized to work.¹³⁰ Critics of E-Verify underscore the burdensome nature of the system, which restricts what employers can do during the contest period; the significant numbers of persons wrongly identified as “unauthorized aliens;” and the voluntary nature of what still remains a pilot program.¹³¹ The persistence of these problems has been identified as something that must be fixed should the program become mandatory.¹³²

124. WESTAT REPORT, *supra* note 117, at 153-54.

125. IIRIRA § 403(a)(4)(B)(iii).

126. Westat Report, *supra* note 117, at 7.

127. *Id.*

128. *Id.* at 8.

129. *Id.* at 149.

130. *Id.* at 157-58. In some instances, these individuals are not hired. In others, the employees are discouraged from contesting the TNC, *id.* at 154, or their employment is postponed until questions regarding a TNC are resolved. *Id.* at 157. All of these practices violate E-Verify’s requirement that an employer not take any adverse action against an employee while the contest of a TNC is pending. *Id.* at 153-54.

131. Plaintiffs/Appellants’ Consolidated Opening Brief at 38-44, *Ariz. Contractors Ass’n v. Candelaria, decided sub nom. Chicanos por la Causa v. Napolitano*, 558 F.3d 856 (9th Cir. 2008) (Nos. 07-17272, 07-17274, 08-15357, 08-15359, 08-15360), *aff’d sub nom. Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).

132. *Id.* at 246; *see also*, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1991 (2011) (Breyer, J., dissenting).

D. Lozano v. Hazleton: Preemption Principles in Action

Several recent cases have tested the preemptive effects of IRCA and IIRIRA on state and local laws regulating immigrants. During the first decade of the twenty-first century, the city of Hazleton in northeastern Pennsylvania experienced a major influx of Latino families, many from the Dominican Republic.¹³³ Although many were U.S. citizens, lawful permanent residents, or otherwise in the United States legally, others were undocumented or no longer in valid status.¹³⁴ In response to this influx and community leaders' perception that many of these newer residents were to blame for increased crime rates and a drain on social services, in July 2006, city officials began enacting a series of ordinances to address these concerns.¹³⁵ Two of these ordinances, the Illegal Immigration Relief Act Ordinance ("IIRAO")¹³⁶ and the Rental Registration Ordinance ("RO")¹³⁷ attempted to regulate the employment of "unlawful workers" and the provision of rental housing to noncitizens lacking lawful immigration status. The IIRAO, whose license revocation provisions are strikingly similar to those in the Legal Arizona Workers Act, did two distinct things: 1) it allowed the city to revoke the business license of any business hiring or continuing to employ "unlawful workers",¹³⁸ and 2) it made it unlawful for landlords to "harbor" persons in Hazleton in violation of federal

133. Michael Kruse, *Stirring the Melting Pot*, ST. PETERSBURG TIMES, Dec. 24, 2011 at 1A (describing consequences for this former coal mining town of the influx of immigrants from the Dominican Republic after September 11, 2011).

134. *Lozano v. City of Hazleton*, 620 F.3d 170, 176 (2011), *vacated and remanded*, *City of Hazleton v. Lozano*, 131 S. Ct. 2958. Although less pejorative than "illegal alien", the term "undocumented immigrant" does not always accurately reflect the status of immigrants not authorized to work in the United States. Some of those persons may have entered without inspection, and thus lack proper immigration documents. Others may have overstayed nonimmigrant visas. Still others may have acquired fraudulent documents that have enabled them to work. Yet still others may be in a status, such as an asylum applicant, VAWA self-petitioner, or U Visa nonimmigrant applicant, which allows them to be lawfully in the United States but does not yet authorize them to work. *Cf. Whiting*, Slip Op. at 33 (Sotomayor, J., dissenting); Beth Lyon, *When More "Security" Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 577-78 (2004) ("The word 'unauthorized' avoids the overbroad and criminal connotations associated with the word 'illegal' by tying directly to the specific immigration violation committed: the law limits the right to work to people who possess 'employment authorization.'").

135. *Lozano*, 620 F.3d at 176-77.

136. Hazleton, Pa., Ordinance 2006-18 (Sept. 2006), *amended by* Ordinance 2006-40 & Ordinance 2007-7 [hereinafter IIRAO]. The Illegal Immigration Relief Act Ordinance begins with a statement of the findings and purposes behind the ordinance: "That unlawful 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, contributes to other burdens on public services, increasing their cost and diminishing their availability to legal residents, and diminishes our overall quality of life." IIRAO § 2C.

137. Hazleton, Pa., Ordinance 2006-13 (Aug. 15, 2006) [hereinafter RO].

138. IIRAO § 4B.

immigration laws.¹³⁹ The RO operated in conjunction with the anti-harboring provisions of IIRAO, requiring any prospective occupant of rental housing to apply for and receive a residency permit, and prohibiting a landlord from renting to anyone without such a permit.¹⁴⁰

Several individual plaintiffs and the Hazleton Hispanic Business Association brought suit for injunctive relief challenging the validity of the IIRAO and RO as violating the Supremacy Clause, the Due Process Clause, and the Equal Protection Clause of the U.S. Constitution.¹⁴¹ The district court granted a preliminary injunction, and after a nine-day bench trial, issued an order permanently enjoining Hazleton from enforcing the ordinances.¹⁴² The Third Circuit later affirmed this decision in all but one respect, although applying somewhat different reasoning.¹⁴³

139. IIRAO § 5A.

140. RO §§ 6(a); 7(b); 10(b). Specifically, Section 4 of IIRAO made it unlawful for any business to recruit, hire or continue to employ an “unlawful worker,” IIRAO § 4A, defined as a person “who does not have the legal right or authorization to work due to an impediment in any provision of federal, state or local law, including but not limited to ... an unauthorized alien as defined by [8 U.S.C. § 1324a(h)(3)].” IIRAO § 3E. It allowed a city resident, city official, or business entity to file a complaint with Hazleton’s Code Enforcement Office, IIRAO § 4B(1), and required the Code Enforcement Office to investigate and to suspend the business license of any business that did not provide requested identity information about the alleged unlawful worker within three business days. IIRAO § 4B(3). If it was subsequently determined that a worker lacked authorization to work in the United States, the business had to terminate the person within three business days or the City would suspend its license. IIRAO § 4B(4). A business whose license was suspended would regain its license after submitting an affidavit affirming that it had terminated any unlawful worker. IIRAO § 4B(6). If an employer were found to have employed two or more unlawful workers, it would also have to confirm enrollment in E-Verify to regain its license. IIRAO § 4B(6)(b). A second violation of section 4 would result in license suspension for at least twenty days and the reporting of any violation to the federal government. IIRAO § 4B(7). Section 4 also created a private cause of action for treble damages, costs, and attorney’s fees for any *lawful* workers discharged if on the date of the discharge the business entity: 1) employed an unlawful worker, and 2) was not participating in E-Verify. IIRAO § 4E(2). Section 5 of IIRAO made 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.” IIRAO § 5A. Harboring was broadly defined; the ordinance stated that “to let, lease, or, rent a dwelling unit to an illegal alien, 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, shall be deemed to constitute harboring.” IIRAO § 5A(1). Under the RO, in order to receive an occupancy permit, any prospective occupant was required to pay a ten-dollar fee and submit “[p]roper identification showing proof of legal citizenship and/or residency” to Hazleton’s Code Enforcement Office, which would issue the permit. RO § 7(b). A landlord found guilty of renting to someone without a permit would be subject to an initial \$1000 fine per unauthorized occupant and an additional fine of \$100 per day until the violation was corrected. RO § 10(b). Authorized occupants permitting someone without a rental permit to live with the authorized occupant would be subject to the same fine. RO § 10(c).

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

142. The District Court found that eight of the eleven plaintiffs had standing to challenge the IIRAO and the RO, and that it was appropriate for the John and Jane Doe plaintiffs to proceed anonymously. *Id.* at 504-06.

143. The Third Circuit found that Pedro Lozano, the named plaintiff, a lawful permanent resident who rented out half of his duplex in Hazleton and who hired contractors to perform repairs on his property, as well as Rudolfo Espinal, the President of the Hazleton Hispanic Business Association

While the District Court concluded that IIRAO's license revocation provisions were expressly preempted,¹⁴⁴ the Third Circuit applied the presumption against preemption, finding that IRCA had not expressly preempted Hazleton's license revocation ordinance because the law fell within the plain language of IRCA's savings clause for "licensing and similar laws."¹⁴⁵ Nonetheless, it found that the Hazleton ordinance was *conflict* preempted because it stood as an obstacle to accomplishing the competing policy objectives underlying IRCA.¹⁴⁶ In examining Congress' efforts to carefully balance these objectives, the court cited to both extensive case law and IRCA's legislative history, as well as the overall structure of IRCA, which included employer sanctions for hiring "unauthorized aliens," sanctions for discriminating against authorized workers on the basis of national origin, and the I-9 provisions.¹⁴⁷ It also described IRCA's carefully crafted prosecution and adjudication scheme for holding employers accountable and the due process protections built into that scheme.¹⁴⁸ It contrasted the federal scheme with the fewer procedural protections available under the Hazleton ordinance.¹⁴⁹ Ultimately, it reached its conclusion that the Hazleton ordinance was conflict preempted because Hazleton

has enacted a regulatory scheme that is designed to further the single objective of federal law that it deems important—ensuring unauthorized aliens do not work in the United States. It has chosen to disregard Congress' other objectives—protecting lawful immigrants and others from employment discrimination, and minimizing the burden imposed on employers. Regulatory "cherry picking" is not concurrent enforcement, and it is not constitutionally permitted.¹⁵⁰

Eleven days after upholding the Legal Arizona Workers Act in *Whiting*, however, the Supreme Court vacated and remanded, without opinion, the Third Circuit's decision in *Lozano v. Hazleton*, in light of its ruling in *Whiting*.¹⁵¹

("HHBA"), who also owned and rented out property and hired contractors to perform repairs, had standing to challenge both the employment provisions and housing provisions of IIRAO, that the HHBA had standing to challenge the employment provisions, and that the Doe plaintiffs had standing to challenge the housing provisions of IIRAO and the RO. *Lozano v. City of Hazleton*, 620 F.3d 170, 187, 192 (2011), *vacated and remanded*, 131 S. Ct. 2958. It found, however, that the challengers lacked standing to challenge IIRAO's private cause of action, because they had not established that they feared prosecution under that provision or had any reason to fear such prosecution. *Id.* at 177-78.

144. *Lozano*, 496 F. Supp. 2d at 520.

145. *Lozano*, 620 F.3d at 209.

146. *Id.* at 219.

147. *Id.* at 211-12.

148. *Id.* at 212.

149. *Id.*

150. *Id.* at 219.

151. *City of Hazleton v. Lozano*, 131 S. Ct. 2958 (2011).

E. The Legal Arizona Workers Act: A Harbinger of Things to Come?

Not surprisingly, the Legal Arizona Workers Act of 2007 did not generate nearly the same national controversy as its 2010 counterpart, S.B. 1070, the Support Our Law Enforcement and Safe Neighborhoods Act. LAWA directly impacted employers who hired unauthorized workers, and indirectly the workers they fired or refused to hire because of issues regarding their immigration status.¹⁵² S.B. 1070, on the other hand, imposed a tangible threat to virtually anyone in Arizona who looked or sounded foreign, including Arizona residents and persons just passing through who were identified by state or local police as present in violation of the immigration laws.¹⁵³ Yet the Supreme Court's decision in *Whiting* contained broad language implying that its rationale could be extended to other state laws regulating immigrants, including, potentially, provisions of S.B. 1070. The Court ultimately concluded that LAWA was not preempted because Arizona had taken the route "least likely to cause tension with federal law" by relying on the federal standards in IRCA and IIRIRA for sanctioning employers.¹⁵⁴

LAWA essentially did two things:

- 1) it allowed the superior courts of Arizona to revoke the business licenses of employers hiring "unauthorized aliens,"¹⁵⁵ and
- 2) it required employers to use the federal E-Verify system for determining an employee's eligibility to work.¹⁵⁶

LAWA allowed "any person" to submit a complaint to the Arizona Attorney General or a county attorney.¹⁵⁷ If, however, a complaint was filed against an employer alleging that the employer had hired an "unauthorized alien," the county attorney had to first request the federal government to verify the immigration status of the employee. LAWA expressly prohibited Arizona officials from attempting to "independently make a final determination on whether an alien is authorized to work in the United States."¹⁵⁸ In addition, LAWA imposed a graduated series of sanctions for violations. A first violation required the employer to terminate the employment of all unauthorized aliens, file quarterly reports

152. ARIZ. REV. STAT. ANN. §§ 23-211, 212 (2012).

153. See Alessandra Soler Meetze, *Op-Ed: Arizona's Immigration Law: A View from the ACLU*, N.Y. TIMES, May 22, 2011, at A22.

154. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1987 (2011).

155. ARIZ. REV. STAT. at §§ 23-211, 212.

156. *Id.* at § 23-214.

157. *Id.* at § 23-212(B).

158. *Id.* at § 23-212(B). If the inquiry to the federal government reveals that the worker is not authorized to work, the Arizona attorney general or county attorney must notify U.S. Immigration and Customs Enforcement ("ICE") and local law enforcement officers and begin an action against the employer. *Id.* at §§ 23-212(C)(1)-(3), (D).

of new hires for a probationary period, and file an affidavit stating that it had terminated all unauthorized aliens and would not intentionally or knowingly hire any others.¹⁵⁹ A second violation during the probationary period resulted in permanent revocation of the employer's business license.¹⁶⁰

Within days of its passage, businesses and immigrant advocacy groups brought lawsuits challenging LAWA in federal court. These suits were consolidated into *Chicanos por la Causa, Inc. v. Napolitano*, which eventually was decided by the Supreme Court as *Chamber of Commerce v. Whiting*. The District Court upheld LAWA,¹⁶¹ and the Ninth Circuit affirmed in 2008.¹⁶² The case was appealed to the U.S. Supreme Court, which granted certiorari in 2010.¹⁶³ Oral argument was held on December 8, 2010, and on May 26, 2011, the Supreme Court affirmed the lower court rulings.¹⁶⁴

For the Supreme Court majority that upheld LAWA, one of its saving features was that violations of the state statute were defined in terms of federal law and thus were consistent with IRCA.¹⁶⁵ For example, under the state statute, the term "unauthorized alien" was defined as an alien that "does not have the legal right or authorization under federal law to work in the United States as described in 8 U.S.C. §1324a(h)(3)."¹⁶⁶ An "authorized alien" was under federal law either a lawful permanent resident ("LPR") or one with a valid employment authorization document ("EAD").

The challengers in *Whiting*, like those in the *Hazleton* case, argued that IRCA preempted the Arizona statute.¹⁶⁷ In *Whiting*, the challengers, together with the U.S. Solicitor General appearing as amicus,¹⁶⁸ argued that LAWA's license revocation provisions were *expressly* preempted by IRCA, which preempted "any state or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who

159. *Id.* at §§ 23-212(F)-212.01(F).

160. *Id.* at §§ 23-212(F)(2)-212.01(F)(2), (3).

161. *Ariz. Contractors Ass'n v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008).

162. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 869 (9th Cir. 2009).

163. *Chamber of Commerce v. Candelaria*, 130 S. Ct. 3498 (2010).

164. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011).

165. Immigration Reform and Control Act ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359 (1986), *codified at* 8 U.S.C. § 1324a et seq. [hereinafter IRCA].

166. ARIZ. REV. STAT. § 23-211. The federal statute defined an "unauthorized alien" as "with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General." 8 U.S.C. § 1324a(h)(3).

167. *Chicanos por la Causa, Inc.*, 558 F.3d at 860, *amending* 554 F.3d 976 (9th Cir. 2008).

168. Brief for the United States as Amicus Curiae Supporting Petitioners, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (No. 09-115) [hereinafter Brief for the United States as Amicus Curiae].

employ, or recruit or refer for a fee for employment, unauthorized aliens.”¹⁶⁹ They argued that Arizona’s license revocation provision did not fall within the savings clause exception for “licensing and similar laws” because the Arizona statute was not a licensing law at all since it did not provide for the licensing of anyone.¹⁷⁰ The challengers and the U.S. government argued that the statute essentially imposed a death penalty on businesses that hired unauthorized workers, which could not possibly have been what Congress intended when it included the express preemption provision.¹⁷¹ Arizona argued that the savings clause for licensing laws allowed the state to revoke the license of a business that hired unauthorized workers, even if it could not otherwise impose civil or criminal sanctions.¹⁷²

Oral argument before the Supreme Court centered on what Congress meant when it exempted licensing laws from the express preemption provision.¹⁷³ Very little attention focused on what had been a winning argument in the Third Circuit in *City of Hazleton v. Lozano*¹⁷⁴—whether the state law was impliedly preempted by the federal statute because it stood as an obstacle to accomplishing IRCA’s carefully balanced policy goals.¹⁷⁵ In fact, when the U.S. government submitted its motion in support of the challengers’ Petition for Certiorari, which was shortly before *Hazleton* was decided, it indicated that “the petition for a writ of certiorari should be granted, limited to the first question presented” of whether 8 U.S.C.

169. 8 U.S.C. § 1324a(h)(2) (emphasis added).

170. Brief for the Petitioners at 2-3, 34-36, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (No. 09-115) [hereinafter *Brief for Petitioners*].

171. Brief for Petitioners, *supra* note 170, at 34-35; Brief for the United States as Amicus Curiae, *supra* note 168, at 18-20. The challengers also argued that the mandatory use of E-Verify was impliedly preempted, because it conflicted with the federal system, which provided for its voluntary use. Brief for Petitioners, *supra* note 170, at 47-51. Congress had made its intent clear that E-Verify should be voluntary. *Id.* at 47-49. It would overwhelm the current system were other states to follow Arizona’s lead and make the use of E-Verify mandatory, defeating the purpose of E-Verify to serve as a voluntary alternative to the I-9 system. *Id.* at 50-51.

172. Brief for Respondents at 29-30, *Chamber of Commerce v. Whiting*, 2010 WL 4216271 (Oct. 21, 2010).

173. See Transcript of Oral Argument at 6-9, 20, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (No. 09-115) (Scalia, J.: “So it all essentially comes down to—to the licensing issue, doesn’t it?”; Kennedy, J.: “I see no limitation on what the State can decide is a license in any jurisprudential principle that you cited”; Alito, J.: “Could I ask you this question to get back to the issue of whether this is a licensing law?”; Roberts, C.J.: “Just to pose [sic] there, we’ve had a little discussion about what licensing laws are, but we haven’t talked at all about those last two words, ‘and similar laws.’ It seems to me that whatever wiggle room or ambiguity there may be in saying whether this is a license or not, Congress swept pretty broadly. It said, not just licensing laws, but licensing and similar laws.”).

174. *Lozano v. City of Hazleton*, 620 F.3d 170, 219 (2011), *vacated and remanded*, *City of Hazleton v. Lozano*, 131 S. Ct. 2958 (2011).

175. There is only one explicit reference to implied preemption in the entire oral argument, and it is by Neil Katyal, Acting Solicitor General, who stated that, “State adjudication of a Federal violation is expressly preempted as well as impliedly so for three reasons” Tr. of Oral Arg. at *24 [emphasis added].

§1324a(h)(2) expressly preempts the provisions of the Legal Arizona Workers Act that sanction employers for knowingly or intentionally employing unauthorized aliens.¹⁷⁶ Indeed, in the U.S. government's brief, the Acting Solicitor General argued that while certiorari should be granted with respect to the first question, it was "unnecessary and unwarranted with respect to the E-Verify question" and with respect to the third question presented of whether the Arizona statute was impliedly preempted because it undermined a "comprehensive scheme" to regulate the employment of "unauthorized aliens".¹⁷⁷

The Court granted the Petition for Certiorari, without limiting its grant to any of the questions presented.¹⁷⁸ The emphasis on express preemption, however, was a fatal flaw in the challengers' argument. It bogged the Court down during oral argument in a highly technical and ultimately unsatisfying discussion of what Congress meant by licensing laws.¹⁷⁹ By focusing on express preemption during oral argument, the challengers failed to adequately address the claim that, even if the Arizona statute was not expressly preempted, it was impliedly preempted because it conflicted with IRCA.¹⁸⁰ IRCA had carefully balanced the interests of the government in sanctioning employers who hired unauthorized workers, employers in avoiding overly-burdensome verification requirements, and authorized workers in not being discriminated against on the basis of national origin.¹⁸¹ The Arizona statute, like the Hazleton ordinance, focused almost exclusively on the first interest, punishing employers who hire unauthorized workers, disregarding Congress' other objectives.

On May 26, 2011, a divided Court upheld these provisions.¹⁸² The Court, by a 5-3 vote,¹⁸³ found that they were neither expressly nor impliedly preempted by IRCA nor by IIRIRA.¹⁸⁴ The Court found that the license revocation provision was not *expressly* preempted by IRCA, because it fell

176. Brief for the United States as Amicus Curiae at 1, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (No. 09-115).

177. *Id.* at *9-10.

178. *Chamber of Commerce v. Candelaria*, 130 S. Ct. 3498 (2010).

179. *See supra* note 173.

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

181. *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 767 (10th Cir. 2010) (citing H.R. REP. NO. 99-682(I), at 56 (1986)).

182. *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968, 1987 (2011).

183. The Court's newest justice, Elena Kagan, had to recuse herself from the case, because while she was still Solicitor General, her office had filed a brief in favor of granting certiorari on the first question presented, whether the LAWA was expressly preempted by IRCA. Ruthann Robson, *Chamber of Commerce v. Whiting Oral Argument Analysis: An Arizona Immigration Statute Before the Supreme Court*, CONSTITUTIONAL LAW PROF BLOG, (Dec. 8, 2010), available at <http://lawprofessors.typepad.com/conlaw/2010/12/chamber-of-commerce-v-whiting-oral-argument-analysis-an-arizona-immigration-statute-before-the-supre.html>.

184. *Whiting*, 131 S.Ct at 1973.

within the express preemption provision's savings clause.¹⁸⁵ The Court also found that mandatory use of E-Verify was not conflict preempted, because nothing within the 1996 statute prevented states from making E-Verify mandatory; it only prevented the federal government from doing so.¹⁸⁶

It was somewhat surprising that a clear 5-3 majority of the Court upheld the mandatory use of E-Verify as not impliedly preempted,¹⁸⁷ despite concerns that Justice Kennedy and others had expressed during oral argument over its mandatory use.¹⁸⁸ Here, a tie vote, with Justice Kennedy joining the dissenting justices, had seemed likely. A tie would have meant that the Ninth Circuit decision upholding mandatory use of E-Verify would stand but would have no precedential value and could be challenged in later cases heard before the full Court. A clear 5-3 majority decision on E-Verify seemed likely to spark a new wave of copycat legislation around the country.

The Court also found that LAWA's licensing provisions were not conflict preempted. It relied on its findings that the license revocation provisions were not *expressly* preempted to conclude that the law should not be *obstacle* preempted.¹⁸⁹ Furthermore, Justice Roberts emphasized that LAWA's provision for verifying immigration status "closely tracks IRCA's provisions in all material respects."¹⁹⁰ Finally, and perhaps significantly for future cases, Justice Roberts distinguished the licensing laws at issue in *Whiting* from other cases where obstacle preemption was found, concluding that they "all involve[d] uniquely federal areas of regulation" whereas "regulating businesses through licensing laws has never been considered such an area of dominant federal concern."¹⁹¹ Rather than viewing IRCA as regulating immigration, historically an area where federal interests have been dominant,¹⁹² he focused on IRCA's savings clause as reserving an area for state control. He also noted that those cases where obstacle preemption

185. *Id.* at 1978.

186. *Id.* at 1985.

187. *Id.* at 1973 (indicating that Chief Justice Roberts delivered the opinion of the Court, except as to Parts IIB and IIIB, and that Scalia, J., Alito, J., and Kennedy, J., join the opinion in full and that Thomas, J., joins Part I, Part IIA and Part IIIA of the Court's opinion and concurs in the judgment). Part IIIA of the Court's opinion concludes that Arizona's statute requiring mandatory use of E-Verify does not conflict with the federal scheme because the consequences of not using the scheme under Arizona law are the same as the consequences under federal law—that the employer forfeits the rebuttable presumption that it complied with federal law. *Id.* at 1984-86.

188. Tr. of Oral Arg. at *37, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (No. 09-115) (Kennedy, J.: "But you are taking the mechanism that Congress said will be a pilot program that is optional and you are making it mandatory. It seems to me that's almost a classic example of a State doing something that is inconsistent with a Federal requirement").

189. *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968, 1981 (2011).

190. *Id.*

191. *Id.* at 1983.

192. *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941).

was found “all concern state actions that *directly interfered* with the operation of the federal program.”¹⁹³

The majority’s decision in *Whiting* no doubt was a harbinger of things to come, both for *Arizona v. United States*, which was headed for the Supreme Court, and for other preemption cases. The plurality in finding that LAWA was not obstacle preempted, refused to engage in a “freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.”¹⁹⁴ Justice Thomas, by joining in the result but not in this part of the Court’s analysis,¹⁹⁵ appeared to be quietly trying to steer the Court away from traditional impossibility and obstacle preemption analysis and towards a new direct conflict test, as he had done in *Pliva v. Mensing*.¹⁹⁶ Finally, the majority, while showing deference to traditional areas of state concern, declined to explicitly invoke the presumption against preemption in upholding LAWA’s licensing scheme, relying instead on the text of the savings clause.¹⁹⁷

Immigration experts pointed out critical differences between the Legal Arizona Workers Act, which had been consistently upheld by the lower federal courts, and the provisions of Arizona’s S.B. 1070 which had been struck down.¹⁹⁸ While LAWA involved the regulation of immigrants in the area of employment, arguably a traditional area of state concern, S.B. 1070 and similar copycat laws, including Alabama’s H.B. 56, focus on state and local efforts to ensure that immigration laws are enforced.¹⁹⁹ Such measures include detaining and arresting persons believed to be unlawfully in the

193. *Whiting*, 131 S. Ct. at 1983 (emphasis added). Justice Thomas concurred in the judgment but not in this part of the Court’s analysis. *Id.* at 1973 (indicating that Justice Thomas joins Part I, Part IIA and Part IIIA of the Court’s opinion and concurs in the judgment). Although he did not explain his decision, it was no doubt due to his position, stated most clearly in 2009 in *Wyeth v. Levine*, that “purposes and objectives” preemption jurisprudence is incompatible with the Constitution because it involves the Court in “routinely invalidat[ing] state laws based on perceived conflicts with broad federal policy objectives . . . not embodied within the text of federal law.” *See, e.g., Wyeth v. Levine*, 129 S. Ct. 1187, 1205 (2009) (Thomas, J., concurring); *see also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 459 (2005) (Thomas, J., concurring in part and dissenting in part); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 677-78 (2003) (Thomas, J., concurring).

194. *Whiting*, 131 S. Ct. at 1985.

195. *Id.* at 1973.

196. *See, e.g., Pliva, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 (2011).

197. *Whiting*, 131 S. Ct. at 1984.

198. *See generally* Muzaffar Chiste & Claire Bergeron, Migration Policy Institute, *Supreme Court Upholds Legal Arizona Workers Act with Limited Implications for Other State Immigration Laws*, MIGRATION INFORMATION SOURCE (June 15, 2011), <http://www.migrationinformation.org/USFocus/display.cfm?ID=843>; Julia Preston, *Justices’ Arizona Ruling on Illegal Immigration May Embolden States*, N.Y. TIMES, May 28, 2011, at A14.

199. *United States v. Arizona*, 641 F.3d 339, 343-44 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (U.S. Dec. 12, 2011) (No. 11-182); *United States v. Alabama*, No. 11-CV-2746-SLB, 2011 WL 4469941, at *1-2 (N.D. Ala. Sept. 28, 2011). *Compare* ARIZ. REV. STAT. at §§ 23-211 *et seq. with* ARIZ. REV. STAT. ANN. §§ 11-1051(B); 13-1509; 13-2928(C); 13-3883 (2010); H.B. 56, Ala. Laws Act 2011-535 (2011); H.B. 87, GA.CODE ANN. § 17-5-100.

country or to have committed deportable offenses and then turning them over to the appropriate federal immigration authorities.²⁰⁰

Yet while the Ninth Circuit found in April 2011 that federal law preempted the Arizona S.B. 1070 provisions, and the Georgia and South Carolina district courts reached similar results, both the Alabama District Court and the Eleventh Circuit upheld comparable provisions of H.B. 56.²⁰¹ Moreover, Judge Bea authored a lengthy concurring and dissenting opinion in *United States v. Arizona*,²⁰² which was the basis for much of Judge Blackburn's analysis in the Alabama case.²⁰³ In light of the rationale in *Whiting* that Arizona had taken the route "least likely to cause tension with federal law,"²⁰⁴ it now was conceivable that the Supreme Court could uphold some or all of the provisions of S.B. 1070 that closely track federal law on the basis that Arizona was simply "cooperating" in federal immigration law enforcement. This would then lay the groundwork for defending similar measures in other states. The *Whiting* opinion, however, distinguished state laws implicating "uniquely federal areas of regulation" from those regulations that have "never been considered such an area of dominant federal concern."²⁰⁵ It also emphasized that obstacle preemption had been found where "*state actions directly interfered with the operation of the federal program*,"²⁰⁶ thus suggesting the emergence of a possible new standard for ruling on S.B. 1070 and other copycat laws.

II.

A FRAMEWORK FOR PREEMPTION ANALYSIS

The Court's decision in *Whiting*, its forthcoming decision in *Arizona*, and challenges to similar laws in Alabama, Georgia, South Carolina, and other states underscore the need to develop a taxonomy of preemption principles, consistent with precedent, for assessing different types of state laws regulating immigrants. In *Whiting*, the Supreme Court confirmed the distinction between laws regulating immigration and laws regulating immigrants as still having validity,²⁰⁷ despite the challengers' argument that the distinction from *DeCanas* was no longer legally relevant in light of the

200. *Arizona*, 641 F.3d at 379 (Bea, J., dissenting).

201. *United States v. Alabama*, No. 11-CV-2746, 2011 WL 4469941, at *19 (N.D. Ala. Sept. 28, 2011); *United States v. Alabama*, No. 11-14532, 2011 WL 4863957, at *6 (11th Cir. 2011).

202. *Arizona*, 641 F.3d at 369-91 (Bea, J., dissenting).

203. See, e.g., *United States v. Alabama*, No. 2:11-CV-2746-SLB, 2011 WL 4469941, at *18-19, 32-37 (N.D. Ala. Sept. 28, 2011); (quoting extensively from Justice Bea's dissent in *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011)).

204. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1987 (2011).

205. 131 S. Ct. at 1983.

206. *Id.* (emphasis added).

207. *Whiting*, 131 S. Ct. at 1974.

preemptive effect of IRCA's employment regulation provisions.²⁰⁸ Based on the Court's ruling in *Whiting*, whether state law that is not expressly preempted is nonetheless conflict preempted may turn in the future on 1) whether state law implicates a uniquely federal area of concern, and 2) the extent to which state law can be shown to interfere with federal enforcement.²⁰⁹ *Whiting* seems to have moved the Court further in the direction of a direct conflict test.

The provisions in Arizona's S.B. 1070 allowing police to detain an individual where there is *reasonable suspicion* to believe he or she is in the United States illegally, and to arrest without a warrant any person where there is *probable cause* to believe that he or she has committed a deportable offense, and those making it a *crime* for a noncitizen to fail to carry his or her immigration documents,²¹⁰ while written in the language of criminal law and thus implicating the state's police power, all arguably involve the exercise of the *immigration* power, "a uniquely federal area of concern." Indeed, Judge Noonan, in beginning his concurrence in *United States v. Arizona* with an analysis of Section 1 of S.B. 1070, underscores that the State of Arizona, in adopting S.B. 1070, fully intended to enact "its own immigration policy distinct from the immigration policy and the broader foreign policy of the United States."²¹¹ How broadly or narrowly the Supreme Court defines what constitutes the regulation of *immigration* is likely to be important in *Arizona v. United States* and in other challenges to state copycat laws. This final section proposes a taxonomy for analyzing state and local laws regulating immigrants within their borders, while discussing some of the most recent federal court decisions analyzing the constitutionality of S.B. 1070 and other state copycat laws on preemption grounds.

A. *Does the Law Involve the Regulation of Immigration or of Immigrants?*

Whether the law involves the regulation of immigration or of immigrants should be a central, if not the first, inquiry in any analysis of state or local laws. The Court is likely to draw a distinction, as it did in *DeCanas*, between, on the one hand, laws that involve a determination of who should be admitted to the country and the conditions under which they may remain and, on the other, laws that involve the regulation of immigrants in areas of traditional state concern, such as employment, health, safety, and education.²¹²

208. Brief for Petitioners, *supra* note 170, at 21, 46-47.

209. *Whiting*, 131 S. Ct. at 1983.

210. S.B. 1070, *supra* note 3.

211. *United States v. Arizona*, 641 F.3d 339, 366-67 (9th Cir. 2011) (Noonan, J., concurring), *cert. granted*, 132 S. Ct. 845 (U.S. Dec. 12, 2011) (No. 11-182).

212. See *DeCanas*, 424 U.S. at 354; *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941).

1. State Regulation of Immigration Implicates Field Preemption Analysis

The Court has said that the “[p]ower to regulate *immigration* is unquestionably *exclusively* a federal power,” precluding all state involvement.²¹³ Thus, if a state or local law is deemed to involve the regulation of immigration, field preemption principles apply and the federal statute should preempt state or local law unless the federal government has delegated or reserved power to the state or local government.²¹⁴ In 1996, as part of the IIRIRA, Congress delegated to the Attorney General the authority to enter into cooperative agreements with state and local governments to enforce the immigration laws, but under procedures designed to ensure that such officers were “qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention” of noncitizens and had “adequate training regarding the enforcement of relevant Federal immigration laws.”²¹⁵ Although the Clinton Administration chose not to enter into any such agreements, these § 287(g) agreements, as they became known, proliferated during the Bush Administration.²¹⁶ During the Bush presidency, several states, beginning with Florida, entered into Memoranda of Understanding with the federal government that deputized state and local police to enforce the immigration laws.²¹⁷ These agreements have not been without controversy, as underscored by Homeland Security’s recent decision to suspend its § 287(g) agreement with the Maricopa County Sheriff’s Office in Arizona²¹⁸ in light of civil rights abuses committed by Sheriff Arpaio and his staff.²¹⁹

213. *DeCanas*, 424 U.S. at 354 (emphasis added).

214. *See Hines*, 312 U.S. at 66-67.

215. Pub.L. 104-208, Div. C, Title I, Sec. 133, Title III, Sec. 308(d)(4)(L), (e)(1)(M), (g)(5)(A)(i), 110 Stat. 3009-563, 3009-618, 3009-619, 3009-623 (as codified at INA § 287(g)(1)-(9) (“[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 . . . may carry out such function . . .”).

216. LEGOMSKY & RODRÍGUEZ, *supra* note 2, at 1275 (Starting in 2002 and as of 2009, “DHS has entered into approximately 67 different MOAs, most after 2007”).

217. *See, e.g.* Memorandum of Understanding Between the United States Department of Justice and the State of Florida signed by Governor Jeb Bush (June 15, 2002) and Attorney General John Ashcroft (July 2, 2002).

218. Office of the Press Secretary, Statement by Secretary Napolitano on DOJ’s Findings of Discriminatory Policing in Maricopa County (Dec. 15, 2011), *available at* <http://www.dhs.gov/ynews/releases/20111215-napolitano-statement-doj-maricopa-county.shtm>.

219. *See* Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Division, to Bill Montgomery, Maricopa County Attorney (Dec. 15, 2011), finding that the Maricopa County Sheriff’s Office (MCSO) “through the actions of its deputies, supervisory staff, and command staff, engages in racial profiling of Latinos; unlawfully stops, detains, and arrests Latinos; and unlawfully retaliates against individuals who complain about or criticize MCSO’s policies or practices,” *available at* http://www.justice.gov/crt/about/sp/documents/mcso_findletter_12-15-11.pdf.

One of the central issues to be addressed by the Supreme Court in *Arizona v. United States* is the significance of this delegation of authority to the states. Does it provide the *exclusive* means by which state and local officials can assist in immigration enforcement? Or does it mean that field preemption principles no longer apply, since the federal government is no longer “occupying the field” but sharing the terrain? If so, which preemption principles do apply?

In light of the complexities of federal immigration law, a majority of the Ninth Circuit in *United States v. Arizona* concluded that, however imperfect, Congress intended these agreements to serve as the mechanism by which state and local law enforcement officers could assist the U.S. government in enforcing the immigration laws.²²⁰ The Ninth Circuit further found that other sections of the statute, like 8 U.S.C. §1357(g)(10), which allows state and local officers “otherwise to cooperate with the Attorney General in the identification, apprehension, detention or removal of aliens not lawfully present,” and § 1373(c), which requires immigration authorities to

respond to an inquiry by a . . . State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information²²¹

needed to be read in conjunction with this framework.²²² The panel also held that the states had no inherent authority to enforce the civil provisions of federal immigration law.²²³

Similarly, Judge Thrash in *Georgia Latino Alliance for Human Rights v. Deal*, found that Congress, in authorizing the Executive branch, in its discretion, to enter into written agreements with the states, not only legislated the contours of federal immigration law, but the means by which state and local officers could enforce those provisions.²²⁴ He found that Section 8 of Georgia’s H.B. 87, which closely resembles Arizona’s

220. *United States v. Arizona*, 641 F.3d 339, 348-50 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (U.S. Dec. 12, 2011) (No. 11-182) (“In sum, 8 U.S.C. § 1357(g) demonstrates that Congress intended for state officers to systematically aid in immigration enforcement *only* under the close supervision of the Attorney General”) (emphasis added).

221. 8 U.S.C. § 1373(c) (1996).

222. *See Arizona*, 641 F.3d at 350-51 (“We agree that § 1373(c) demonstrates that Congress contemplated state assistance in the identification of undocumented immigrants. We add, however, that Congress contemplated this assistance within the boundaries established in § 1357(g), not in a manner dictated by a state law that furthers a state immigration policy.”).

223. *Id.* at 362.

224. *Georgia Latino Alliance for Human Rights v. Deal*, 793 F. Supp.2d 1317, 1330-31 (N.D. Ga. 2011). Judge Gergel, a recently appointed district court judge in South Carolina, reached a similar result in December 2011 in *United States v. S. Carolina*, No. 11-CV-2958, 2011 WL 6973241 (D.S.C. Dec. 22, 2011), regarding South Carolina’s Act 69, although with a less carefully reasoned preemption analysis than that of Judge Thrash, relying on field preemption principles throughout. *See id.*

reasonable suspicion provision, involved the regulation of *immigration* because it “creates an endrun—not around federal criminal law—but around federal statutes defining the role of state and local officers in immigration enforcement.”²²⁵

Nonetheless, Judge Bea, in his concurring and dissenting opinion in *United States v. Arizona*, suggested that 8 U.S.C. §§ 1357(g)(10) and 1373(c) underscore that states do enjoy inherent authority to *enforce* federal immigration law, even absent a section 287(g) agreement or other authorized situation.²²⁶ Judge Bea (who uses the pejorative term “illegal alien” no fewer than thirty-five times in his opinion) appeared to distinguish the *regulation* of immigration, which involves policy decisions about “who can come into the country, what an alien may do while here, or how long an alien can stay,”²²⁷ from *enforcement*, concluding that Congress “has provided important roles for state and local officials to play in the *enforcement* of federal immigration law.”²²⁸ Thus, the exercise of enforcement authority by the states, either through § 287(g) agreements or the exercise of other auxiliary powers to “cooperate” with the federal government does not necessarily mean that states are *regulating* immigration. Judge Bea essentially concluded that the plain language of §§ 1373(c) and 1357(g)(10), when read together, indicated that Congress intended the states to have enforcement powers, regardless of whether the administration wanted their cooperation or not.²²⁹

Indeed, turning the idea of cooperative federalism on its head, Judge Bea stated repeatedly that § 1373(c) *required* that the *federal* government cooperate with the *states* in responding to inquiries regarding a particular individual’s immigration status. “How can simply informing federal authorities of the presence of an illegal alien,” he asked, “possibly interfere with federal priorities and strategies—unless such priorities and strategies are to avoid learning of the presence of illegal aliens?”²³⁰ He thus suggested that Arizona had a legitimate interest in ensuring that the immigration laws were enforced, particularly in situations where the federal government was seen as abdicating its authority, and even if it meant putting federal immigration authorities on the spot.²³¹

225. *Georgia Latino Alliance for Human Rights*, 793 F. Supp. 2d at 1332.

226. *Arizona*, 641 F.3d at 375 n.10 (Bea, J., dissenting).

227. *Id.* at 369.

228. *Id.*

229. *Id.* at 378.

230. *Id.* at 379.

231. *Id.* A similar logic was evident in Chief Justice Roberts’ questions during oral argument in *Arizona v. United States*. See, e.g., Transcript of Oral Argument at 48-50, *Arizona v. United States*, 132 S. Ct. 845 (2012) (No. 11-182).

Several months later, in Alabama, Judge Blackburn refused to enjoin Section 12 of H.B. 56, which, like Section 2B of S.B. 1070, gives state and local law officers the authority to attempt to verify the immigration status of persons subject to otherwise lawful stops, detentions, or arrests. That finding was later affirmed by the Eleventh Circuit. Judge Blackburn found that nothing in the INA expressly preempted states from legislating on issues of verification of status or reflected a Congressional intent to occupy the field.²³² She also found, as discussed further below, that section 12 was not obstacle preempted. She rejected the Ninth Circuit's conclusion that Congress intended for state officers to systematically aid in the immigration enforcement only under the close supervision of the Attorney General, as well as similar reasoning by the Georgia District Court.²³³ Quoting heavily from Judge Bea's dissent,²³⁴ that "[i]t is *Congress's* intent we must value and apply, not the intent of the Executive Department," and "Congress has clearly stated its intention to have state and local agents assist in the enforcement of federal immigration law, at least as to the identification of illegal aliens,"²³⁵ Judge Blackburn ultimately concluded that § 287(g)(10) of the INA

reveals that local officials have some inherent authority to assist in the enforcement of federal immigration law, so long as the local official "cooperates" with the federal government. H.B. 56 § 12 reflects an intent to cooperate with the federal government, in that all final determinations as to immigration status are made by the federal government, § (a), unlawful presence is defined by federal law, *id.* (e), and state law enforcement will only transfer illegal aliens to the federal government's custody at the federal government's request.²³⁶

The district court's denial of an injunction with regard to Section 12 was later upheld, without opinion, by the Eleventh Circuit.²³⁷

According to Judge Bea's and Judge Blackburn's analyses, to the extent that state and local laws providing for the enforcement of federal

232. *United States v. Alabama*, No. 11-CV-2746, 2011 WL 4469941, at *30 (N.D. Ala. Sept. 28, 2011).

233. *Id.* at *31-32.

234. *Id.* at *30-37.

235. *Id.* at *32-33 (emphasis in original).

236. *Id.* at *37.

237. *United States v. Alabama*, No. 11-14532, 2011 WL 4863957, at *5-6 (11th Cir. 2011). In contrast, Judge Gergel points out in his opinion in the South Carolina case examples of South Carolina legislators enacting Act 69 in clear defiance of federal authority, rather than in a spirit of cooperation. One supporter stated that, since there was a severability clause, "I want to go ahead and be as muscular and push as hard as we can in terms of what our states rights are." *United States v. S. Carolina*, No. 11-CV-2958, 2011 WL 6973241, at *2 (D.S.C. Dec. 22, 2011). Rather than negotiating with the federal government to enter into a Section 287 agreement, the State elected to go forward with its own bill because "it was 'really important' to have state 'control.'" *Id.* at *3. Supporters voiced the hope that the bill would encourage persons unlawfully present to "find another state to go to." *Id.*

immigration law track federal standards and rely on federal officials' determination of a noncitizen's immigration status, such laws should survive. Judge Bea's dissent and Judge Blackburn's opinion reflect a disturbing trend among conservative judges to embrace the logic espoused by proponents of S.B. 1070 and other copycat laws, who argue that state and local laws, even those that regulate immigration, should be upheld if they are "mirror images" of federal law.²³⁸ The fact that the Supreme Court in *Whiting* upheld the Legal Arizona Workers Act because Arizona had taken the route "least likely to cause tension with federal law"²³⁹ suggests that at least some members of the current Court may embrace this approach as well. As Carissa Hessick points out, this has been the argument advanced by Kris Kobach, currently Secretary of State of Kansas, former law professor at the University of Missouri–Kansas City, and principal author of much of the copycat legislation sweeping the country.²⁴⁰ According to this theory, to avoid preemption, a state or local law must: 1) create no new categories of "aliens" not recognized by federal law; 2) use terms consistent with federal law; and 3) not attempt to authorize state or local officials to independently determine a person's immigration status.²⁴¹ This theory of state authority is grounded in jurisprudence on cooperative federalism. Yet as Margaret Stock points out, states cannot assist in enforcing immigration law if the United States does not seek that assistance.²⁴²

As the Court did in *Whiting* when it focused on the language in IRCA's savings clause, states appear to be gaining ground with some judges by focusing on the textual support in § 1373(c) and § 1357(g)(10) for limited state enforcement of the immigration laws, even absent memoranda of understanding, and while ignoring one of the central purposes behind § 287(g) agreements, which is to ensure that state and local officials engaged in immigration enforcement were adequately trained.²⁴³ Requiring state officials to seek verification from federal authorities before making any final determinations does not solve the problem. Determining immigration status or whether a noncitizen is deportable are complex judgments that

238. Carissa Hessick, *Mirror image theory in state immigration regulation*, SCOTUSBLOG, (July 13, 2011), available at <http://www.scotusblog.com/2011/07/mirror-image-theory-in-state-immigration-regulation/>.

239. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1987 (2011).

240. Julia Preston, *Lawyer Leads an Immigration Fight*, N.Y. TIMES, June 21, 2009, at A10; Editorial, *Romney's Hard Line*, N.Y. TIMES, Jan. 12, 2012, at A26.

241. Hessick, *supra* note 238. See also Kobach, *supra* note 50, at 820-21.

242. Margaret Stock, *Arizona v. United States: The Tail Wagging the Dog on Regulating Immigration Enforcement*, SCOTUSBLOG (July 14, 2011), <http://www.scotusblog.com/2011/07/arizona-v-united-states-the-tail-wagging-the-dog-on-regulating-immigration-enforcement>.

243. 8 U.S.C. § 1357(g)(1)-(5) (1996).

state and local officers untrained in the intricacies of federal immigration law are ill-suited to make. For this reason, as the Ninth Circuit pointed out in *Arizona*, in deputizing state officials, “not only must the Attorney General approve of each *individual* state officer, he or she must delineate which functions each individual officer is permitted to perform.”²⁴⁴ Requests by untrained state and local officers under S.B. 1070 and state copycat laws will likely overwhelm immigration authorities and interfere with federal enforcement priorities.²⁴⁵

Field preemption principles, therefore, still remain relevant. The Court must ultimately decide whether Congress intended § 287(g) agreements to be the exclusive means of state and local enforcement of the immigration laws, thus preempting unilateral efforts by the states. That Congress created § 287(g) agreements to ensure that state and local officers were properly trained, and identified other narrow circumstances when the states could act, such as in emergency situations involving mass influx²⁴⁶ or the arrest and detention of “an alien illegally present” who

has previously been convicted of a felony in the United States and deported or left the United States after such conviction, *but only after the State or local law enforcement official obtains appropriate confirmation* [from immigration authorities] *of the status* of such individual²⁴⁷

suggests that Congress intended to delineate the specific circumstances where state and local officers were authorized to act.

That § 287(g)(10)(B) of the INA allows state and local governments to “*cooperate* with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States”²⁴⁸ absent a written agreement does not give state and local authorities the power to enforce the immigration laws unilaterally. Additionally, it is worth noting that section 287(g)(10)(A), the immediately preceding provision, allows state and local officials to unilaterally “communicate” with federal authorities regarding their “knowledge that a particular alien is not lawfully present,”²⁴⁹ which is distinct from cooperating in the

244. *Arizona*, 641 F.3d at 348.

245. *Georgia Latino Alliance for Human Rights*, 793 F. Supp. 2d at 1354 (declaration of Daniel H. Ragsdale, Executive Associate Director for Management and Administration at U.S. Immigration and Customs Enforcement).

246. 8 U.S.C. § 1103(a)(10) (“[i]n the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, *the Attorney General may authorize any State or local law enforcement officer*, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service”) (emphasis added).

247. 8 U.S.C. § 1252(c) (emphasis added).

248. *Id.* at § 1357(g)(10) (emphasis added).

249. *Id.* at § 1357(g)(1)(A).

“identification, apprehension, detention or removal of aliens not lawfully present.”²⁵⁰ Cooperation should mean something more than, “We’ve got an illegal in custody. Come pick him up.” The language in 8 U.S.C. § 1373(c) requiring immigration authorities to respond to state or local officials seeking to verify an individual’s immigration status should not change this, because any such request must be “for any purpose authorized by law.”²⁵¹ If state laws regulating immigration are preempted by federal law under field or conflict preemption principles, such requests are not “authorized by law.”

If the Court is reluctant to find field preemption because the federal government no longer “occupies the field” but shares the terrain under § 287(g) agreements, state and local laws like S.B. 1070, H.B. 56, H.B. 87, and Act 69 should still be conflict preempted on the basis of obstacle preemption or dominant federal interest preemption. While the latter test has often been viewed as a form of field or obstacle preemption, it shares features of each and should be recognized as a separate tool in the preemption toolbox. In the event the Court chooses to avoid obstacle preemption analysis or replaces impossibility and obstacle preemption with a direct conflict test, as Justice Clarence Thomas has urged and Chief Justice Roberts seems prepared to do, dominant federal interest preemption should be applied where state law implicates a uniquely federal area of regulation such as foreign affairs²⁵² and where state actions interfere with, impede, burden or in any manner control the operations of federal law. This test, which draws on the standard articulated by Chief Justice Roberts in *Whiting*,²⁵³ is also more consistent with the obstacle preemption analysis in *McCulloch* than with a narrow direct conflict test. It would preserve obstacle preemption for those situations where the executive’s capacity to “speak for the nation with one voice” is critical.²⁵⁴

250. *Id.* at § 1357(g)(1)(B).

251. *Id.* at § 1373(c).

252. *Crosby v. Nat’l Foreign Trade Council*, 120 S. Ct. 2288 (2000).

253. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1983 (2011).

254. *Id.* Indeed, Judge Noonan’s concurrence in *Arizona* focused almost exclusively on S.B. 1070’s incompatibility with federal foreign policy. *Arizona*, 641 F.3d 339, 366 (9th Cir. 2011) (Noonan, J., *concurring*). He emphasized that there can be only one federal foreign policy and that immigration policy is a subset of such policy, dealing as it does with the admission, regulation and control of foreigners. *Id.* Immigration policy affects the nation’s interaction with foreign populations and nations: “[W]hat is done to foreigners here has a bearing on how Americans will be regarded and treated abroad.” *Id.* at 367. Judge Noonan goes on to emphasize the unique responsibility of the executive in conducting foreign policy, as recognized in a long line of cases. *Id.* at 368-69. By focusing on *Arizona*’s intent, as set forth in Section 1 of S.B. 1070, he concludes that it is “a singular entry into the foreign policy of the United States as a single state” and thus preempted by federal law. *Id.* at 369.

2. *State Regulation of Immigrants May Be Expressly or Conflict Preempted*

If the state or local law regulates *immigrants* in matters other than questions of who may enter the United States and the conditions under which they may remain, the Court should still determine whether *express* or *conflict* preemption principles apply. As long as Congress acts within the scope of its Article I powers, a federal statute regulating immigrants may either *expressly* or *impliedly* preempt state or local law. In determining whether a state or local law is preempted, the court should examine whether Congress has legislated in a field which the States have traditionally occupied.²⁵⁵ Sufficient weight should be given, however, to any express preemption provisions, and savings clauses preserving a zone of state authority interpreted consistently with the law's structure and purpose. In determining Congress's intent, a savings clause should not be read so broadly that it permits the law to "defeat its own objectives"²⁵⁶ or so narrowly that it renders the clause a nullity.²⁵⁷ The next section will discuss express preemption in the context of state and local laws regulating immigrants. The final section will discuss a framework for conflict preemption, analyzing the interrelationship among impossibility preemption, obstacle preemption, the emerging direct conflict test, and the dominant federal interest test advocated above.

B. Is the State or Local Law Expressly Preempted by Federal Law?

Federal law will expressly preempt a state or local law regulating immigrants if there is an express preemption provision and the state or local law falls within its scope. In determining the scope of an express preemption provision, the Court is likely to rely largely on its plain wording, which is deemed to contain the "'best evidence' of Congress' preemptive intent."²⁵⁸ Where the plain wording does not resolve the issue, it should also consider the structure and purpose of the statute as revealed in the text and in the courts' understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to operate.²⁵⁹

255. See *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009).

256. See *Geier v. Am. Honda Motor Co.*, 120 S. Ct. 861, 872 (2000).

257. See Sandi Zellmer, *When Congress Goes Unheard: Savings Clauses' Rocky Judicial Reception*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION* 144, 156-57 (William W. Buzbee, ed. 2009).

258. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002).

259. *Lozano v. City of Hazleton*, 620 F.3d 170, 203, *vacated and remanded*, *City of Hazleton v. Lozano*, 131 S. Ct. 2958 (2011).

1. *Does IRCA's Express Preemption Provision Apply?*

The scope of IRCA's express preemption provision will be an issue in future cases involving state or local regulation of employers who hire undocumented workers. In examining a state or local law regulating the employment of immigrants, parties and the courts should address the following questions:

a. *Is it a law regulating employers who hire "unauthorized aliens"?*

If the state or local law regulates *employers* who hire unauthorized foreign workers, it will implicate IRCA and require express preemption analysis. In 1986, IRCA created a pervasive federal scheme for regulating employers who hire "unauthorized aliens."²⁶⁰ Courts must determine whether the state or local law falls within IRCA's express preemption provision, which preempts "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,"²⁶¹ or whether the law is precluded by the savings clause.

b. *Does it involve civil or criminal sanctions imposed on employers who hire the undocumented?*

A state or local law imposing civil or criminal sanctions on employers who hire unauthorized foreign workers should be preempted by IRCA's express preemption provision. Thus, a law that makes it a crime for an employer to hire an unauthorized worker, or which imposes civil penalties or sanctions on such an employer, such as through a fine, the denial of a tax deduction, or the creation of a civil cause of action, should be expressly preempted by the plain language in IRCA. Indeed, in *United States v. Alabama*, Judge Blackburn, while upholding other provisions of the statute, enjoined both sections 16 and 17 of H.B. 56 on the basis that they were likely sanctions expressly preempted by IRCA.²⁶² Section 16 forbade employers from claiming as a business tax deduction wages paid to "unauthorized aliens."²⁶³ Section 17 created a civil cause of action against employers who failed to hire or discharged a U.S. citizen or "authorized alien" while hiring or retaining an "unauthorized alien."²⁶⁴ Judge Blackburn

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260. See 8 U.S.C. § 1324a(h)(3) (2005) (defining "unauthorized alien" as an "alien [that] is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General").

261. 8 U.S.C. § 1324a(h)(2) (emphasis added).

262. *United States v. Alabama*, No. 11-CV-2746, 2011 WL 4469941, at *46, 59 (N.D. Ala. Sept. 28, 2011).

263. *Id.* at *46.

264. *Id.* at *48-49.

concluded that both sections fell within IRCA's express preemption provision because they effectively sanctioned employers who employed "unauthorized aliens."²⁶⁵

Many states and local governments wishing to regulate employers' hiring of foreign workers will likely attempt to do so through license revocation provisions similar to those in LAWA and the Hazleton ordinance. Any sanctions on employers must be carefully examined to determine how closely they track the license revocation provisions in LAWA or whether they are distinguishable. In *Whiting*, the Court interpreted IRCA's savings clause broadly as indicating Congress' intent that some state or local laws would be preempted while others, such as licensing laws, would be allowed, even if they were used to regulate employers in an area where Congress had acted.²⁶⁶ The savings clause exception in *Whiting* should be read narrowly. It should not be enough that the criminal or civil sanction has a connection to licensing laws. To the extent that the licensing scheme is a mere pretext for avoiding federal preemption, such laws should be struck down as inconsistent with Congress's intent.²⁶⁷

2. *Are Any Other Express Preemption Provisions Applicable?*

If the state or local law involves the regulation of immigrants in an area outside of the hiring of undocumented workers, such as in the area of health, safety, education, or housing, the parties should examine whether the federal government has acted, and whether any other express preemption principles may apply. Even if IRCA's express preemption provision is not applicable, there may be other express preemption provisions that are. For example, the Employee Retirement Income Security Act ("ERISA"), expressly preempts "any and all State laws insofar as they . . . relate to any employee benefit plan"²⁶⁸ while the Patient Protection and Affordable Care Act ("PPACA") preempts state laws not meeting minimum federal standards.²⁶⁹ Thus, state attempts to regulate the

265. *Id.*

266. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1981 (2011).

267. The Court in *Whiting* found that Arizona's procedures "simply implement the sanctions that Congress expressly allows Arizona to pursue through licensing laws." *Id.* It paid insufficient attention to whether the licensing scheme was being employed as a pretext to avoid preemption. The Court has long held that a savings clause should not be read so broadly that it "would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives." *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 872 (2000).

268. 29 U.S.C. § 1144(a) (2006).

269. Pub. L. 111-148 (2011). Section 1321(d) of the PPACA provides that "Nothing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title." This provision permits states to adopt and enforce laws and regulations affording greater consumer protections while guaranteeing a basic level of protections across the country. It essentially means that any state law not meeting federal minimum standards will be preempted.

health care system by, for example, excluding certain noncitizens from that system, could be expressly preempted by ERISA or PPACA. Moreover, it is likely that, in the future, Congress will consider including express preemption provisions in immigration legislation, especially if the Supreme Court upholds challenged provisions of Arizona's S.B. 1070 and other copycat laws. Thus, some of these issues may be resolved—or at least debated—through the political process.

C. *Is the Law Conflict Preempted by Federal Law?*

Even if the state or local law is not *expressly* preempted or *field* preempted by federal law, the Court should still examine whether conflict preemption principles apply. In *Whiting*, once the 5-3 majority determined that LAWA's licensing provision was not *expressly* preempted by IRCA because it fell within IRCA's savings clause," the Court was unwilling to find that these provisions were *impliedly* preempted.²⁷⁰ Chief Justice Roberts underscored that obstacle preemption had typically been found in situations involving a "uniquely federal area of regulation" where state laws "*directly interfered*" with the operation of federal law, suggesting the emergence of a new direct conflict standard for conflict preemption analysis.²⁷¹ Nonetheless, a clear majority of justices continue to recognize the validity of impossibility preemption, and there still appears to be a majority who, in certain cases, will engage in obstacle preemption analysis.²⁷² Yet an emerging majority also seems to recognize that federal preemption may occur where there is a direct conflict between state and federal law, even if it is not physically impossible to comply with both.²⁷³ Direct conflict preemption could eventually replace impossibility and obstacle preemption analysis as the standard, which I believe would be a dangerous development in the context of immigration laws. Absent a broad express preemption provision in the INA, which would be difficult to get through Congress, replacing obstacle preemption with a direct conflict test would allow for a patchwork of state and local laws regulating immigrants as long as they did not directly contradict federal law.

To address this potential threat, I would propose modifying Chief Justice Roberts' test in *Whiting* to focus first, on whether the state or local law implicates a "uniquely federal area of regulation"; and, if so, whether

270. *Whiting*, 131 S. Ct. at 1983. See *supra* note 189 and accompanying text.

271. *Id.*

272. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000) (Breyer, J., O'Connor, J., Rehnquist, C.J., Kennedy, J. & Scalia, J.); *Wyeth v. Levine*, 129 S. Ct. 1187, 1217 (2009) (Alito, J., Roberts, C.J., & Scalia, J., dissenting); *Whiting*, 131 S. Ct. at 1987, 1998 (Breyer, J., Ginsburg, J. & Sotomayor, J., dissenting).

273. *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567, 2577, 2580-81 (2011).

state law *impedes, burdens or in any manner controls the operation of federal law*. At least in cases involving a dominant federal interest, such as immigration enforcement, rather than requiring a showing that state law *directly* interferes with federal law, as urged by Justice Thomas, this test would draw on the language from *McCulloch v. Maryland* that “the states have no power, by taxation *or otherwise*, to retard, impede, burden or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.”²⁷⁴ A state law can be repugnant to the Constitution not only where it directly conflicts with federal law, but where it is passed in opposition to or defiance of federal authority.

1. *Is Compliance with Both State and Federal Law Impossible?*

The situations where the Court has found that state law was conflict preempted because compliance with both federal and state law was impossible have been rare.²⁷⁵ The Court frequently has stated that compliance with both federal and state law must be “physically impossible” in order for this preemption doctrine to apply.²⁷⁶ One such situation would be where state law penalizes what federal law requires.²⁷⁷

Nonetheless, recent preemption decisions of the Court indicate that it has moved away from a strict “physical impossibility” test. In his concurrence in *Wyeth v. Levine*, Justice Thomas had suggested that a direct conflict test should replace both the physical impossibility test, which he believed was too narrow, and the obstacle preemption test.²⁷⁸ He appeared close to achieving that result in *Pliva v. Mensing*, where he cited to his own concurrence in *Wyeth* that “where state and federal law ‘directly conflict,’ state law must give way.”²⁷⁹ Justice Sotomayor noted in her dissent that *Pliva* was not a case of physical impossibility, and in a footnote described the Court’s decision as a “novel expansion of impossibility preemption.”²⁸⁰

274. *McCulloch*, 17 U.S. 316, 436 (1819).

275. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963). See also Robert S. Peck, *A Separation of Powers Defense of the Presumption Against Preemption*, 84 TULANE L. REV. 1185, 1195 (2010).

276. *Boggs v. Boggs*, 520 U.S. 833, 844 (1997); *Gade v. Nat’l Solid Wastes Mgmt. Ass’n.*, 505 U.S. 88, 98 (1992); *Florida Lime & Avocado Growers*, 373 U.S. at 142-43.

277. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000).

278. *Wyeth v. Levine*, 129 S. Ct. 1187, 1205 (2009) (Thomas, J., concurring).

279. *Pliva*, 131 S. Ct. at 2577.

280. *Id.* at 2590 n.13.

2. *Does the State or Local Law Stand as an Obstacle to Achieving the Purposes of the Federal Immigration Statute?*

The Supreme Court has frequently ruled that a state or local law may be preempted if it stands as an obstacle to achieving the purposes and objectives of the federal statute.²⁸¹ The Third Circuit relied on this reasoning in *Lozano v. Hazleton* when it found that Hazleton's license revocation ordinance was not *expressly* preempted because it fell within IRCA's savings clause, but that it was *conflict* preempted because, by focusing solely on enforcement, it stood as an obstacle to achieving IRCA's carefully balanced, competing policy goals.²⁸² In *Whiting*, however, a plurality of the Court, in addressing the implied preemption claim, recognized that "Congress did indeed seek to strike a balance among a variety of interests when it enacted IRCA," but that part of that balance involved "allocating authority between the federal government and the States."²⁸³ The plurality concluded that IRCA has "preserved state authority over a particular category of decisions—those imposed through 'licensing and similar laws.'"²⁸⁴ In focusing on the seven words in the savings clause in an otherwise comprehensive regulatory regime, the Court overlooked the text, legislative history, and overall structure of IRCA as well as its own precedent to conclude that LAWA was neither expressly nor impliedly preempted.²⁸⁵

It is critical that in future cases, conflict preemption analysis be carefully developed and grounded in precedent. It is also critical that challengers respond to the Court's suggestion in *Whiting* that it may be not appropriate to engage in *conflict* preemption analysis once it has been determined that a state or local statute is not *expressly* preempted because it falls within a savings clause.²⁸⁶ At the same time, savings clauses should not be read so broadly that they swallow up an express preemption provision in an otherwise comprehensive statute. This final discussion will set forth a framework for identifying the circumstances under which the Court should still engage in obstacle preemption analysis, and propose breaking out "dominant federal interest" preemption as a separate category of conflict preemption.

281. *Geier*, 529 U.S. at 869 (Like the express pre-emption provision, "savings clause does *not* bar the ordinary working of conflict pre-emption principles.").

282. *Lozano v. City of Hazleton*, 620 F.3d 170, 210-11 (2011), *vacated and remanded*, *City of Hazleton v. Lozano*, 131 S. Ct. 2958 (2011).

283. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1984 (2011).

284. *Id.*

285. *Cf. Id.* at 1998-2001 (Sotomayor, J., dissenting).

286. *Whiting*, 131 S. Ct. at 1981.

a. *How should the court determine the purposes of the federal statute?*

In *Whiting*, the majority, in examining Congress' purpose, engaged in a *textual* analysis of the specific language in IRCA's express preemption provision, and more particularly, the language in the savings clause, while ignoring the *structure, content, legislative history, and case law* interpreting IRCA. It stated that while it would look at the legislative history to interpret any ambiguities, it would not use the legislative history to create ambiguities.²⁸⁷ In future cases challenging state and local laws regulating immigrants as conflict preempted, the Court should consider not only the narrow *text* of the savings clause, which is relevant for express preemption purposes, but other evidence of Congressional purpose, including any *statement of purpose, the content of the legislation as a whole, the structure of the legislation, how the various provisions of a comprehensive regulatory regime relate to one another, the legislative history, and case law*. In an ideal world, the law's purpose should be laid out in its preamble, but absent a preamble, the Court should consider other evidence of purpose.

The legislative history of IRCA, whose importance was downplayed by the majority in *Whiting*,²⁸⁸ was more than just a gloss on the statute. The Court stated that

Whatever the usefulness of relying on legislative history materials in general, the arguments against doing so are particularly compelling here Only one of the four House Reports on the law touches on the licensing exception . . . and we have previously dismissed that very report as "a rather slender reed" from "one House of a politically divided Congress."²⁸⁹

Yet any merit to the Court's argument regarding the limited value of the House Report in interpreting the savings clause's licensing language for express preemption purposes should not have been extended to the legislative history as a whole for implied preemption analysis. In *Geier*, a majority of the Court found that a "savings clause (like the express preemption provision) does *not* bar the ordinary working of conflict preemption principles."²⁹⁰ The Court in that case indicated that it had repeatedly "decline[d] to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law."²⁹¹ The Court in *Geier* wrote that a savings clause should not be interpreted to

287. *Whiting*, 131 S. Ct. at 1980 (stating that Congress' "authoritative statement is the statutory text, not the legislative history").

288. *Id.*

289. *Id.* at 1981.

290. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000).

291. *Id.* at 870.

permit a federal law to “defeat its own objectives,” or to potentially “destroy itself.”²⁹²

Justice Sotomayor indicated in her thoughtful dissent in *Whiting* that the Court’s reading of IRCA’s savings clause “cannot be reconciled with the rest of IRCA’s comprehensive scheme.”²⁹³ IRCA’s legislative history described the content, structure, and overall purpose of IRCA, which balanced sanctions on employers who *hire* undocumented workers against identical sanctions on employers who *discriminate* against workers on the basis of national origin.²⁹⁴ In future cases, this evidence of Congressional purpose should be considered in any analysis of whether state law stands as an obstacle to accomplishing IRCA’s purposes.

b. *When does a state law stand as an obstacle to achieving federal purposes?*

i. *Does it elevate one of the purposes of a federal statute over all others?*

One way a state law may stand as an obstacle to achieving the purposes of a federal statute is when it elevates one purpose of a federal statute over all others. The majority in *Whiting* upheld LAWA because it found that LAWA was “least likely to cause tension with federal law,” because it relied on federal standards to sanction employers.²⁹⁵ Yet LAWA focused entirely on sanctioning employers who hire unauthorized workers, ignoring the other policy concerns built into IRCA, including minimizing the burden on employers and preventing discrimination against workers.²⁹⁶

ii. *Does it strike the balance differently than federal law?*

Similarly, the Court has found that a state law is conflict preempted where it strikes the balance differently than federal law. In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*,²⁹⁷ the Court found that Florida law was preempted because it struck the balance differently between “the encouragement of invention and free competition in unpatented ideas.”²⁹⁸ In *Buckman Co. v. Plaintiffs’ Legal Committee*,²⁹⁹ the Court found that

292. *Id.* at 872.

293. *Whiting*, 131 S. Ct. at 1998 (Sotomayor, J., dissenting).

294. *Id.* at 1987 (Breyer, J., dissenting).

295. *Whiting*, 131 S. Ct. at 1987.

296. *Id.* at 1988-91 (Breyer, J. dissenting).

297. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 144 (1989).

298. *Id.* at 144.

299. *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341 (2001); *see also* *Wyeth v. Levine*, 129 S. Ct. 1187, 1220 (2009) (Alito, J., dissenting) (“Where FDA determines, in accordance with its

where the FDA had struck a “somewhat delicate balance of statutory objectives” and determined that petitioner had submitted a valid application to manufacture a medical device, a state could not use its common law to negate it.³⁰⁰ In *Lozano v. Hazleton*, the Third Circuit found that the Hazleton license revocation struck the balance differently than federal law in at least four ways: 1) it increased the burden on employers by creating a separate and independent adjudicative system for determining whether an employer had hired an unauthorized worker;³⁰¹ 2) it altered the employment verification scheme created by IRCA (the I-9 system) and supplemented by IIRIRA (E-Verify) by requiring use of E-Verify under certain circumstances;³⁰² 3) it required employers to verify the employment status of independent contractors;³⁰³ and 4) it failed to balance its sanctions with anti-discrimination provisions.³⁰⁴ The Third Circuit was troubled by the fact that Hazleton had established an alternate adjudication system at all, since Congress had created a carefully balanced prosecution and adjudication system.³⁰⁵ If Hazleton’s ordinance were permissible, then each and every state and locality in the nation would be free to implement similar schemes.³⁰⁶

Recently, both the Ninth Circuit and the Alabama District Court ruled against provisions in S.B. 1070 and H.B. 56 making it a crime for an “unauthorized alien” to knowingly apply for, solicit, or perform work as an employee or independent contractor.³⁰⁷ Even though these laws were not *expressly* preempted because IRCA only preempted state and local sanctions against *employers*, and even though the presumption against preemption was deemed to apply because the laws involved the regulation of employment, a matter of traditional state concern,³⁰⁸ the Ninth Circuit panel unanimously found that state criminalization of unauthorized *workers* conflicted with Congress’ intent in enacting IRCA. Congress had considered sanctioning employees, but ultimately decided to focus on

statutory mandate, that drug is on balance, ‘safe,’ our conflict preemption cases prohibit any state from countermanding that determination”).

300. *Id.* at 348.

301. *Lozano v. City of Hazleton*, 620 F.3d 170, 212 (3rd Cir. 2011), *vacated and remanded*, City of Hazleton v. *Lozano*, 131 S. Ct. 2958 (2011).

302. *Id.* at 214.

303. *Id.* at 216.

304. *Id.* at 217.

305. *Id.* at 213. Justice Sotomayor made similar arguments in her dissent in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 2000-01 (2011) (Sotomayor, J., dissenting).

306. *Lozano*, 620 F.3d at 213.

307. *United States v. Arizona*, 641 F.3d 339, 359 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (U.S. Dec. 12, 2011); *United States v. Alabama*, No. 11-CV-2746-SLB, 2011 WL 4469941, at *25 (N.D. Ala. Sept. 28, 2011)

308. *Arizona*, 641 F.3d at 357.

employers.³⁰⁹ The Ninth Circuit found that “[w]here a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, then the preemptive inference can be drawn—not from federal inaction alone, but from inaction joined with action.”³¹⁰ It concluded that a “conflict in technique can be fully as disruptive to the system . . . as conflict in overt policy.”³¹¹ The Alabama District Court agreed, finding that section 11(a) of Alabama’s H.B. 56 was preempted by IRCA, which reflected a deliberate decision not to criminalize unauthorized workers but to focus on sanctioning employers.³¹² Even though no direct conflict existed between IRCA and these state laws, the Ninth Circuit found in *Arizona* that Congress had “deliberately crafted a very particular calibration of force which does not include the criminalization of work,” and both courts agreed that the state laws stood as obstacles to achieving Congress’ purposes and objectives in enacting IRCA.³¹³ Both Courts invoked obstacle preemption in striking down these state laws, where neither express nor impossibility preemption, nor even the direct conflict test would have sufficed. These recent decisions underscore the continuing need for obstacle preemption analysis in situations where it may be necessary to look beyond the text to the overall structure and purpose of the statute as well.

iii. Does the state or local law implicate individual rights and liberties?

The Court has also suggested that it will be more likely to find federal preemption where a state or local law implicates the “rights, liberties and personal freedoms of human beings” as opposed to state or local tax laws, labeling laws, or similar matters.³¹⁴ In such cases, where state laws like S.B. 1070 infringe on basic constitutional rights, not only does the State potentially violate the 14th Amendment, these state laws presumably are preempted under the Supremacy Clause as well where they allow discrimination against a discrete and insular minority or infringe on a fundamental right in violation of the Constitution.³¹⁵ In some cases, these laws may discriminate on their face. In many others, they

309. *Id.* at 360.

310. *Id.* at 360 (quoting *Puerto Rico Dep’t of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988)).

311. *Id.* at 360 (quoting *Wisconsin Dept. of Indus., Labor and Human Relations v. Gould Inc.* 475 U.S. 282, 286 (1986)).

312. *United States v. Alabama*, No. 11-CV-2746-SLB, 2011 WL 4469941, at *25 (N.D. Ala. Sept. 28, 2011)

313. *Arizona*, 641 F.3d at 360; *Alabama*, No. 11-CV-2746, 2011 WL 4469941, at *25.

314. *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941).

315. See Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1730-31(2010).

disproportionately impact immigrant groups and appear to be driven not just by an animus towards the undocumented, against whom they are nominally targeted, but towards particular classes of foreigners.³¹⁶ I would argue that evidence of impact and animus should be enough to create a presumption *in favor of* preemption, which the state can overcome only by showing that a particular law is sufficiently related to an important enough government interest. In some cases where a law discriminates based on alienage, strict scrutiny should apply³¹⁷ while in other cases involving laws targeted against the undocumented, perhaps an intermediate standard or heightened rational basis review may be appropriate.³¹⁸

iv. *Does it infringe on an area that requires the exercise of broad national authority?*

Where state or local laws are in a field that affects our international relations, the Court has been more likely to find that they stand as obstacles to the accomplishment and execution of the full purposes of Congress.³¹⁹ Any concurrent state power that may exist has been restricted to the narrowest of limits.³²⁰ *Hines v. Davidowitz* frequently has been categorized in the literature as a field preemption case, even though the Court used the language of obstacle preemption in striking down Pennsylvania's registration requirements.³²¹ In 1939, Pennsylvania passed the Alien Registration Act, which required adult noncitizens to register annually, pay a fee, carry their identification card at all times, and show it upon request. Noncitizens who failed to register or carry their card were subject to fines. A year later Congress enacted the federal Alien Registration Act, which required all noncitizens over the age of 14 to register with the federal government and be fingerprinted. The federal law did not require that the noncitizen carry a registration card, and only willful failure to register was

316. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (rational basis test used in all three cases to strike down laws driven by an animus towards a particular group, respectively gays, the poor, and the mentally retarded).

317. *Graham v. Richardson*, 403 U.S. 365, 371-372 (1975) ("classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny").

318. *Plyer v. Doe*, 457 U.S. 202, 223-24 (1982) (Although the undocumented could not be treated as a suspect class, the Court found that discrimination in a statute barring undocumented children from a public education could not be considered rational unless it furthered "some substantial goal of the State").

319. *Hines*, 312 U.S. at 68; *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288, 2295-96.

320. *Hines*, 312 U.S. at 68.

321. *Id.* at 67 ("Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."). Indeed, it expressly left open the question whether "the federal power in this field . . . is exclusive." *Id.* at 62.

made a crime.³²² In its 1941 decision, the Court emphasized that rules and regulations touching on “the rights, privileges, obligations or burdens of aliens” implicate the national foreign affairs power, and that where the federal government has created a comprehensive scheme for regulating immigrants, “states cannot, inconsistently with the purposes of Congress, conflict or interfere with, curtail or *complement* the federal law, or enforce *additional* or *auxiliary* regulations.”³²³

Most recently, the Ninth and Eleventh Circuits have ruled against state laws imposing criminal penalties on noncitizens that fail to comply with federal alien registration requirements. Section 3 of Arizona’s S.B. 1070 made it a state crime for “unauthorized aliens” to violate federal registration laws, while section 10 of Alabama’s H.B. 56 made it a misdemeanor for a person unlawfully present to willfully fail to complete or carry an alien registration document. Both statutes defined violations in terms of federal registration requirements. The Ninth Circuit found that the Arizona provision was inconsistent with the Supreme Court’s decision in *Hines*.³²⁴ It found that, even though the state requirement was essentially the same as the federal standard, there was “a history of a significant federal presence” in the area of alien registration, and the state statute usurped federal authority.³²⁵ Furthermore, the Ninth Circuit was troubled by the detrimental effect on foreign affairs and the potential danger of “[fifty] different state immigration schemes piling on top of the federal scheme.”³²⁶

The district court in Alabama upheld section 10 of H.B. 56, finding that it was consistent with the Supreme Court’s decision in *Whiting* in that it expressly deferred to the federal alien registration scheme by: 1) requiring that immigration status be determined through verification with the federal authorities; 2) exempting persons not unlawfully present; and 3) providing penalties that closely tracked federal law.³²⁷ Judge Blackburn read *Hines* as an obstacle preemption case, not a field preemption case.³²⁸ She concluded that the *comprehensiveness* of the registration scheme was not evidence of intent to preempt all state laws, particularly where state laws were consistent with the national standard.³²⁹ The issue, she said, was not whether federal law was *exclusive* in this area, but rather, whether state laws

322. *Id.* at 60-61.

323. *Id.* at 66-67 (emphasis added).

324. *United States v. Arizona*, 641 F.3d 339, 355 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (U.S. Dec. 12, 2011).

325. *Id.* at 356 n.16.

326. *Id.* at 356.

327. *United States v. Alabama*, No. 11-CV-2746, 2011 WL 4469941, at *13 (N.D. Ala. Sept. 28, 2011).

328. *Id.*, at *12.

329. *Id.*, at *14.

were *uniform* with federal law.³³⁰ In terms of H.B. 56's implications for foreign policy, she refused to recognize an automatic correlation between the immigration power and executive authority over foreign affairs, claiming that the executive needed to be able to point to some specific conflict and "some evidence of a national foreign policy—either some evidence of Congress's intent or a treaty or international agreement establishing the national position."³³¹ She said that the administration could not just allege that H.B. 56 interfered with the executive branch's "fundamental authority to conduct foreign affairs."³³² The Eleventh Circuit without opinion reversed the district court on section 10, without specifically addressing the foreign policy concerns.³³³

A more recent case indicating that *Hines* is still good law is *Crosby v. National Foreign Trade Council*, in which the Supreme Court unanimously overturned a Massachusetts law that barred state agencies from buying goods or services from companies doing business in Burma.³³⁴ Justice Souter, writing for the Court, found that Congress' passage of a federal law imposing sanctions on Burma preempted the Massachusetts law because the state law stood as "an obstacle to the accomplishment of Congress' full objectives."³³⁵ He rejected Massachusetts' argument that there was no real conflict because the federal and state statutes shared a common end. He wrote that the "fact of a common end hardly neutralizes conflicting means"³³⁶ and that the "inconsistency of sanctions here undermines the congressional calibration of force."³³⁷ In addition, the Massachusetts statute was at odds with the President's authority to speak for the United States on foreign policy matters, and his "power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exceptions for enclaves fenced off willy-nilly by inconsistent political tactics."³³⁸ Similarly, where a patchwork of state and local laws regulating immigrants and immigration are passed "willy-nilly" and are likely to interfere with the development and execution of a national immigration policy requiring the exercise of broad national authority, the Court should apply conflict preemption principles to strike such laws down.

330. *Id.*

331. *Id.*, at *18.

332. *Id.*

333. *United States v. Alabama*, No. 11-14532, 2011 WL 4863957, at *6 (11th Cir. 2011).

334. *Crosby v. Nat'l Foreign Trade Council*, 120 S. Ct. 2288 (2000).

335. *Id.* at 2294.

336. *Id.* at 2297-98.

337. *Id.* at 2298.

338. *Id.* at 2298-99.

CONCLUSION

The Court's decisions in *Whiting* and *Hazleton* sent a shock wave through the immigrant advocacy community, raising the specter that the Supreme Court might uphold S.B. 1070 and other copycat laws. Although the statutory schemes are quite different, the Supreme Court's specific holding in *Whiting* will undoubtedly have implications for S.B. 1070's constitutionality. Indeed, immigration foes see *Whiting* as having created a blueprint for state and local lawmakers around the country.

If the Court replaces impossibility preemption and obstacle preemption with a direct conflict test, it seems increasingly likely that many state and local laws regulating immigrants will be upheld as long as the state or local provision tracks federal standards. Indeed, on April 25, 2012, during oral argument in *Arizona v. United States* and just as this article was going into final production, several justices on the Supreme Court indicated that they were not particularly troubled by Arizona's policy of attrition through enforcement or by Section 2(B), the provision of S.B. 1070 that allowed Arizona law enforcement officers to verify with immigration authorities the status of individuals subject to lawful stops where reasonable suspicion existed that the person was unlawfully present.³³⁹ Such a paradigm shift will have disastrous consequences for the federal government's ability to set a national immigration policy and for our relations with immigrant-producing nations. It will likely result in a patchwork of state and local laws regulating immigrants and immigration and in escalating xenophobia. Some scholars have suggested that it would be akin to the Jim Crow laws adopted in the South during the post-*Plessy v. Ferguson* era.³⁴⁰

339. See Transcript of Oral Argument at 34, 40, 44-45, 51-52, 60-61, *Arizona v. United States*, 132 S.Ct. 845 (2012) (No. 11-182) (Scalia, J.: "[T]he [federal] Government can set forth the rules concerning who belongs in this country. But if in fact somebody does not belong in this country, Arizona has no power? What does sovereignty mean if it does not include the ability to defend your borders?"; Roberts, C.J.: "And what the state is saying, here are people who are here in violation of Federal law, you make the decision. And if your decision is you don't want to prosecute those people, fine, that's entirely up to you. That's why I don't see the problem with section 2(B)"; Sotomayor, J.: "[W]e're going to stay just in 2(B), if the [federal] government says, we don't want to detain the person, they have to be released for being simply an illegal alien, what's wrong with that?"; Alito, J.: "How can a state officer who stops somebody or who arrests somebody for a nonimmigration offense tell whether that person falls within the Federal removal priorities without making an inquiry to the Federal Government?"; and Kennedy, J.: "Also hypothetical is that the State of Arizona has - has a massive emergency with social disruption, economic disruption, residents leaving the state because of [sic] flood of immigrants . . . [C]an they go to their legislature and say, we're concerned about this, and ask the legislature to enact laws to correct this problem?").

340. See Karla M. McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 164 (2010) (arguing that state and local anti-immigrant laws lead to the segregation of Latinos in the same way that Jim Crow laws marginalized African Americans); Keith Aoki & John Shuford, *Welcome to Amerizona - Immigrants Out!: Assessing "Dystopian Dreams" and "Usable Futures" of Immigration Reform and Considering Whether "Immigration Regionalism" is an Idea Whose Time Has Come*, 48 FORDHAM URB. L.J. 1, 38 (2010).

The plurality's opinion in *Whiting*, however, also allows for another path, consistent with its holdings in *Hines* and *Crosby* and its historic decision in *McCulloch v. Maryland*. Under dominant national interest preemption, the Court should look first at whether the state or local law implicates an area requiring the exercise of broad national authority, and if so, whether the state or local law impedes, burdens or in any manner controls the operation of federal law. While there may be some rationale for a "direct conflict" test in certain contexts to fill the void between the physical impossibility and obstacle preemption cases, the court should apply a test consistent with the language in *McCulloch* where dominant national interests are at stake. This would deter the states from creating a patchwork of laws likely to interfere with federal enforcement priorities.

Finally, I would note that one major reason these laws have been enacted over the last few years is because of the failure of comprehensive immigration reform. Perhaps IRCA provides a valuable lesson in this regard. The last year that Congress introduced and seriously pursued comprehensive immigration reform was in 2007. That year, the legislation was voted out of committee but failed a Senate cloture vote.³⁴¹ Like IRCA, the proposal that year attempted to balance a whole series of competing policy goals, including border enforcement and the legalization of undocumented workers.³⁴² Since then, all proposals for comprehensive immigration reform have been largely symbolic, designed to win political points during elections.³⁴³ It took many years and various Congressional sessions before IRCA was ultimately enacted into law, and the legislation was seen as a success at the time largely because it balanced various policy considerations. Our lawmakers need to try yet again to get comprehensive immigration reform right.³⁴⁴ In light of the Supreme Court's recent decision in *Whiting* and its forthcoming decision in *Arizona v. United States*, a

341. Lauren Gilbert, *National Identity and Immigration Policy in the U.S. and the European Union*, 14 COLUM. J. EUR. L. 99, 113-14 (2008).

342. *Id.* at 111-12.

343. See, e.g., Peter Baker, *Obama Urges Fix to 'Broken' Immigration System*, N.Y. TIMES, July 2, 2010, at A12; Julia Preston, *Democrats Reach Out to Hispanics on Immigration Bill*, N.Y. TIMES, Sept. 16, 2010, at A15.

344. See Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417, 476-78 (2005) (proposing new pluralist model of "biennial factionalism" for analyzing immigration reform, which focuses on the "tendency of the political process to renew or reinvent itself every two years, in a somewhat cyclical repetition of new attempts at legislative reform"). Indeed, as this article was being completed, Senators Robert Menendez (D-NJ), Harry Reid (D-Nev.), Patrick Leahy (D-Vt.), Charles Schumer (D-NY), Kristin Gillibrand (D-NY) and John Kerry (D-Mass.), introduced the Comprehensive Immigration Reform Act of 2011, S. 1258, 112th Cong. (1st Sess. 2011) (proposing a balance of solutions, including enhanced enforcement measures and a mandatory E-verify program, strategies to address the population of undocumented workers, improvements to regulating future flows of legal immigration, a commission to study and regulate temporary worker programs, and efforts to support the integration of immigrants into America).

Congressional response may be the only way to prevent the proliferation of more laws like Arizona's LAW A and S.B. 1070, Georgia's H.B. 87, and Alabama's H.B. 56.

