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Welcome to Hazelton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do about It

Karla Mari McKanders
Villanova Law School

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Welcome to Hazleton! “Illegal” Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It

*Karla Mari McKanders**

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*Reuschlein Clinical Teaching Fellow, Villanova Law School. Thanks to Leslie Book, Bridgette Carr, Michael Carroll, Marisa Cianciarulo, Paul Schoenhard, Beth Lyon, Dveera Segal, and Yolanda Vazquez for their insightful comments and guidance. Thanks also to Kathleen Dohn and Joshua Prince for their research assistance. Special thanks to my parents Kenneth and Carolyn McKanders for their encouragement.

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INTRODUCTION

Rosa and Jose Luis Lechuga immigrated to the United States from Mexico in 1981, and a decade later they began to work on farms in Hazleton, Pennsylvania.¹ By 1998, the Lechugas had succeeded in owning and operating a grocery store and restaurant in Hazleton.² Business was booming. The Lechugas were serving between forty-five and 130 customers per day at the restaurant and between ninety-five and 130 customers per day in the grocery store.³ On July 13, 2006, however, Hazleton made national news as the first municipality in the country to pass ordinances against illegal immigration,⁴ and, consequently, business for the Lechugas began to decline.

Hazleton passed three separate ordinances regarding illegal immigrants and undocumented workers. The first ordinance fines landlords who rent to illegal immigrants; the second ordinance suspends the licenses of businesses that employ undocumented workers; and the third ordinance makes English the city's official language.⁵ The illegal employment licensing ordinance adversely affected the Lechugas' business, causing them to lose revenue and profits and forcing them to close their restaurant.⁶ Under Hazleton's illegal employment ordinance, the Lechugas' business license will be suspended if they hire undocumented workers.⁷ Furthermore, an employer's business license could be suspended if an employer does not participate in Hazleton's immigration program, which requires electronic verification of the

1. Second Amended Complaint at 7, *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 3:06-cv-01586-JMM) [hereinafter Second Amended Complaint]. The American Civil Liberties Union ("ACLU") filed a complaint that challenged Hazleton's ordinance on several constitutional grounds that included the Supremacy Clause, Due Process, Equal Protection, and First Amendment violations. *See generally id.* (alleging constitutional violations).

2. *Id.* at 8.

3. *Id.* Since the enactment of the Illegal Immigration Relief Act Ordinance, the Lechugas have served between six and seven persons per day at the restaurant and twenty and twenty-three persons per day at the store. *Id.*

4. *See, e.g.*, Associated Press, *Pa. City Passes Law Against Illegal Immigrants: Hazleton City Council to Pass Law to Shift Laws in Property Rental Language*, MSNBC.com, July 13, 2006, <http://www.msnbc.msn.com/id/13850781> (stating that the ordinance has brought the city "to the fore of the national debate on illegal immigration").

5. Hazleton, Pa., Ordinance 2006-18, Illegal Immigration Relief Act Ordinance, (Sept. 21, 2006) [hereinafter Illegal Immigration Relief Act Ordinance] (citing 8 U.S.C. § 1324(a)(1)(A) (2000)) (providing criminal sanctions for harboring an alien); Hazleton, Pa., Ordinance 2006-35 (Dec. 13, 2006) (establishing a registration program for residential rental properties); Hazleton, Pa., Ordinance 2006-19, (Sept. 21, 2006) (declaring English as the official language of Hazleton).

6. Second Amended Complaint, *supra* note 1, at 8.

7. *Id.* at 8, 15-16.

immigration status of workers with the United States Department of Homeland Security. If it is subsequently determined that a business's employee is an "illegal alien," the employer's business license will be suspended, regardless of whether the employer has complied with federal immigration law in its hiring practices.⁸

The Lechugas' story chronicles many of the issues that arise when municipalities pass immigration ordinances that sanction employers for hiring undocumented workers. The Lechugas are an example of how such ordinances adversely impact immigrant populations across the United States. The municipalities' enactment of immigration regulations, an area traditionally reserved to the federal government, perpetuates stereotypes and permits discrimination against both documented and undocumented immigrants where municipalities do not have the proper training or resources to enforce immigration law.⁹ Certainly, the fact that local governments pass these ordinances is a sign that there is a need to reform the current federal immigration system or to enforce the existing federal provisions that sanction employers for hiring undocumented workers. The reforms and enforcement, however, should not originate in local governments.

This Article addresses the constitutionality of municipal ordinances that sanction businesses for employing undocumented immigrants. Part I explores the recent increase in municipal regulation of immigration and describes the content and structure of Hazleton's unconstitutional immigration employment ordinance.¹⁰ Part II describes how the federal government has encouraged local governments to fill in the gaps where federal legislation has fallen short.¹¹ This Part also compares and contrasts the Hazleton ordinance with the Federal Immigration Reform

8. *Id.* at 8–9; *see also* Illegal Immigration Relief Act Ordinance, *supra* note 5, § 3G (defining the Basic Pilot Program).

9. *See* Milan Simonich, *Triple Murder Prompts Law Against Illegal Immigrants*, PITTSBURGH POST-GAZETTE, Oct. 15, 2006, available at <http://www.post-gazette.com/pg/06288/730170-85.stm> (stating that many immigrants who are perceived to be illegal are actually naturalized citizens who hold jobs and pay taxes); *see also* INST. FOR SURVEY RESEARCH, TEMPLE UNIV., INS BASIC PILOT EVALUATION SUMMARY REPORT vi (2002) (finding that employers do not always follow procedure to prevent discriminatory action); STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE POLICY, CHAPTER ON UNDOCUMENTED MIGRANTS AND LAW ENFORCEMENT 1223 (4th ed. 2005) (stating that when the Federal Immigration Reform and Control Act ("IRCA"), 8 U.S.C. § 1324a (2000) was passed the concern was that employers would "reject Latinos, Asians, and others in order to reduce the risk of inadvertently hiring an unauthorized worker").

10. *See infra* Part I (describing the increase in local immigration legislation).

11. *See infra* Part II.A (considering the federal government's role in municipal immigration legislation).

and Control Act (“IRCA”), which regulates the employment of immigrants.¹²

Part III critically analyzes the employment ordinances within the current Supreme Court preemption framework of *DeCanas v. Bica*.¹³ This Part argues that, despite the presumption against preemption, which is supported in the IRCA’s preemption provision, municipal ordinances should be preempted because Congress has plenary power over immigration, and any other outcome would be inconsistent with the federal immigration regulatory scheme.¹⁴ Further, Part III explains why municipal ordinances stand as an obstacle to the goals of federal immigration law.¹⁵

Part IV examines the policy implications of the municipal ordinances.¹⁶ This Part first examines the effect of sanctions on documented immigrants.¹⁷ It then explores the potential effect of numerous municipalities regulating immigration.¹⁸ Further, this Part posits that local immigration legislation will not remedy the problem of employing undocumented workers where federal laws, specifically the IRCA, have failed to accomplish this goal.¹⁹

Part V proposes appropriate judicial and congressional actions addressing the constitutionality of municipal ordinances that regulate immigration.²⁰ First, federal courts may use the principles of federalism as a basis for addressing state and local immigration regulation. Second, Congress must take definitive action to implement comprehensive immigration legislation and enforce existing laws that sanction employers for hiring undocumented workers in order to avoid the adverse effects of piecemeal immigration legislation.

12. See *infra* Part II.B (comparing Hazleton’s ordinance with federal law).

13. See *infra* Part III.A (discussing *DeCanas v. Bica*, 424 U.S. 351, 363 (1976)).

14. See *infra* Part III.B.1 (arguing that local ordinances should be preempted).

15. See *infra* Part III.B.2 (explaining how local ordinances can interfere with federal immigration law).

16. See *infra* Part IV (analyzing the policy impact of local ordinances on federal law).

17. See *infra* Part IV.A (exposing the discriminatory impact local ordinances have on documented workers).

18. See *infra* Part IV.B (asserting that local ordinances can negatively influence foreign affairs).

19. See *infra* Part IV.C (arguing that local immigration ordinances merely further complicate “a broken federal system”).

20. See *infra* Part V (exploring federalism concepts as they relate to the state-federal immigration enforcement issue).

I. TAKING MATTERS INTO THEIR OWN HANDS: MUNICIPALITIES REGULATING IMMIGRATION

In 2006 and 2007, several states and municipalities across the country passed ordinances regulating immigration. The ordinances resulted from local perceptions that the federal government failed to enact comprehensive legislation. In 2006, 570 pieces of legislation concerning immigration were introduced in state legislatures around the country.²¹ The majority of legislation addressed the employment of undocumented workers.²² By the end of 2006, over one hundred cities and municipalities had either passed ordinances or were considering passing ordinances regulating immigration.²³ As of April 13, 2007, legislatures in eighteen states had enacted fifty-seven immigration-related bills, and at least 1169 bills had been introduced throughout all fifty states.²⁴ Employment of undocumented workers was again the most common focus of the introduced bills, as it was the subject of 199 of the 1169 bills.²⁵

Four types of unconstitutional employment ordinances have been passed across the country. The first type of ordinance imposes fines and sanctions on businesses that employ undocumented immigrants.²⁶ The sanctions range from significant fines to restrictions on obtaining a business license from the city.²⁷ Some ordinances establish an enforcement body, while others encourage local residents to report infringement to local enforcers.²⁸ The second type of ordinance "revokes the contracts of any city contractor that employs undocumented immigrants."²⁹ To enforce these provisions, some cities

21. Stephen Yale-Loehr & Ted Chiappari, *Immigration: Cities and States Rush in Where Congress Fears to Tread*, 12 BENDER'S IMMIGR. BULL. Mar. 15, 2007, at 341.

22. Leya Speasmaker, *Challenges to Federal Immigration Regulation: The Possible Consequences of State Imposed Employer Sanctions* 3 (Feb. 2, 2007), available at <http://lanic.utexas.edu/project/etext/llilas/ilassa/2007/speasmaker.pdf> (unpublished student paper, Student Conference on Latin America, University of Texas at Austin).

23. Fair Immigration Reform Movement, *Database of Local Anti-Immigration Ordinances*, http://64.243.188.204/CCCFTP/local/3.10.07_database.doc (last visited Mar. 10, 2007).

24. National Council of State Legislatures, *Overview of State Legislation Related to Immigration and Immigrants in 2007*, <http://www.ncsl.org/programs/immig/2007StateLegislationImmigration.htm> (last visited July 25, 2007).

25. *Id.*

26. Fair Immigration Reform Movement, *Types of Local Anti-Immigrant Ordinances*, <http://www.fairimmigration.org/learn/immigration-reform-and-immigrants/local-level/types-of-local-ordinances.html?print=t> (last visited Mar. 10, 2007).

27. *Id.*

28. *Id.*; see generally *Illegal Immigration Relief Act Ordinance*, *supra* note 5 (regulating employment of immigrants).

29. Fair Immigration Reform Movement, *supra* note 26.

require a signed form stating that a business entity does not employ undocumented workers, while other ordinances call for contractors to provide the paperwork for their employees.³⁰ The third type of ordinance “[r]equires those who hire off-site day laborers to register with the city, display a certificate in their car windows, and present written terms of employment to workers.”³¹ This type of ordinance mandates the use of the “Basic Pilot Program” to verify the documentation of workers.³² The Basic Pilot program is a voluntary, experimental program Congress created that permits employers to verify electronically a worker’s employment eligibility through the U.S. Department of Homeland Security and the Social Security Administration.³³ The program allows employers to obtain confirmation of a job applicant’s work authorization within seconds.³⁴

Hazleton’s employment ordinance is only the beginning of a sea of change in the manner in which immigrant workers are viewed in cities across the United States. Municipalities are passing immigration ordinances based on the unsupported belief that immigrants cause instability by contributing to higher crime rates and delinquency and by placing a drain on local resources.³⁵

30. *Id.*

31. *Id.*

32. *Id.*; see also National Immigration Law Center, *Why States and Localities Should Not Require Employer Participation in the Basic Pilot Program*, IMMIGRANTS’ RTS. UPDATE, Oct. 31, 2006, available at <http://www.nilc.org/pubs/iru/iru2006-10-31.htm> (stating that “the Basic Pilot program is a voluntary Internet-based program that was created to allow employers to electronically verify workers’ employment eligibility with the U.S. Dept. of Homeland Security (DHS) and the Social Security Administration (SSA)”).

33. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C.A. § 1324a (West 2005).

34. See LEGOMSKY, *supra* note 9, at 1221.

35. See, e.g., Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 942 (1995) (“[O]ne recurring manifestation of state involvement in foreign affairs is the regulation of aliens and immigration. Outsiders by definition, aliens are often viewed as threatening a state’s cultural and political identity, undermining its communitarian values and taxing its public resources.”).

A. “*Third World Cesspool*”³⁶: Hazleton’s Story

The Mayor of Hazleton, Louis Barletta, the son of an immigrant,³⁷ encouraged the passage of the immigration ordinance to address the recent influx of illegal immigrants that allegedly caused increases in violent crime and strained municipal services.³⁸ The Hazleton Illegal Immigration and Reform Act (“IIRA”) was enacted to sanction employers for hiring undocumented workers.³⁹ The ordinance sanctions employers by suspending their license to operate within the city.⁴⁰

The stated purpose of Hazleton’s IIRA⁴¹ is to prohibit the harboring of illegal aliens pursuant to the Federal Immigration and Nationality Act.⁴² The first portion of the IIRA provides that:

36. See James Sterngold, *San Bernardino Seeking ‘Relief’: Struggling city’s proposal targets illegal immigrants*, SAN FRANCISCO CHRON., June 11, 2006, at A4, available at <http://sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/06/11/MNGM5JCE0B1.DTL&type=politics> (explaining that the organization behind the San Bernardino initiative stated that illegal “invaders” are turning the city into “a Third World cesspool”).

37. David M. Brown, *Pennsylvania Poll Finds Support for Local Immigration Laws*, PITTSBURGH TRIB.-REV., Oct. 23, 2006, available at http://www.pittsburghlive.com/x/pittsburghtrib/s_476252.html.

38. Illegal Immigration Relief Act Ordinance, *supra* note 5, § 2F. According to the ordinance: 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. . . . [T]he City of Hazleton is authorized to abate public nuisances and empowered and mandated by the people of Hazleton to abate the nuisance of illegal immigration by diligently prohibiting the acts and policies that facilitate illegal immigration in a manner consistent with federal law and the objectives of Congress.

Id.; see also Peter Jackson, *Hazleton Mayor Says Law Aimed at Illegals, Not Every Immigrant*, THE INTELLIGENCER, Oct. 23, 2006, at B5. But see Greater Hazleton Community Profile, Can Do, Inc. and the Greater Hazleton Chamber of Commerce, at 2, <http://www.hazleton.org/communityprofile.pdf> (“The Hazleton/Scranton/Wilkes-Barre MSA [area] has the eleventh lowest crime rate of all 354 U.S. metropolitan areas.”) (last visited Aug. 9, 2007); Rob Paral, *Undocumented Immigration by Congressional District*, Immigration Policy Brief, Oct. 23, 2006, http://www.aifl.org/ipc/policybrief/policybrief_2006_101806.shtml (analyzing the increase in undocumented immigration by congressional district from 2000 to 2005 using U.S. Census Bureau data). Hazleton sits in the eleventh district. Pennsylvania’s 11th Congressional District Map, <http://www.govtrack.us/congress/findyourreps.xpd?state=PA&district=11> (last visited Aug. 9, 2007). In 2000, undocumented immigrants constituted .3% of the population (2000 total population) in the eleventh district. In 2005 there was a 200% increase to 1.2% of the population of undocumented immigrants (8000 total population). Paral, *supra* note 38.

39. Illegal Immigration Relief Act Ordinance, *supra* note 5, § 4.

40. *Id.* § 4B.

41. *Id.* § 2E (providing criminal sanctions for harboring an illegal alien).

42. 8 U.S.C. § 1324(a)(1)(A) (2000). The first federal provision that is cited within the IIRA is § 1324(a)(1)(A), which provides for criminal penalties to any person who knowingly or in reckless disregard conceals, harbors, or shields an alien from detection. This section also provides criminal penalties to any person who engages in a conspiracy to commit the acts under

It is unlawful for any business entity to recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City. Every business entity that applies for a business permit to engage in any type of work in the City shall sign an affidavit, prepared by the City Solicitor, affirming that they do not knowingly utilize the services or hire any person who is an unlawful worker.⁴³

Under this ordinance, all business entities must submit an affidavit stating that the business has not knowingly hired an unlawful worker in order to obtain a permit to operate within the city. To facilitate this process, the city is responsible for verifying whether a worker is unlawful. The IIRA provides that the city cannot conclude that a person is an illegal alien until an authorized representative of the city has verified with the federal government, pursuant to 8 U.S.C. § 1373(c),⁴⁴ that the person is an alien who is not lawfully present in the United States.⁴⁵

The mayor advocated for the passing of the IIRA and the other Hazleton ordinances after a shooting that culminated in the arrest of four undocumented immigrants from the Dominican Republic.⁴⁶ The mayor alleged that the illegal immigrants involved in criminal activity in Hazleton are Latinos, mostly from the Dominican Republic.⁴⁷ Referring to the alleged increase in crime, the mayor stated that “*our people* were afraid to walk down the street.”⁴⁸ Hazleton’s City Council

the statute or aids or abets the commission of acts within the statute. Under § 1324a(h)(3), the definition of unauthorized alien with respect to employment is “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 chapter or by the Attorney General.” The federal penalties for violating § 1324 include fines and imprisonment for up to twenty years depending on the provision violated. Specifically, § 1324(a)(3)(A) provides that “[a]ny person who, during any 12-month period, knowingly hires for employment at least ten individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under Title 18 or imprisoned for not more than five years or both.”

43. Illegal Immigration Relief Act Ordinance, *supra* note 5, at §§ 3A, 4 (defining business entity as “any person or group of persons performing or engaging in any activity, enterprise, profession, or occupation for gain, benefit, advantage, or livelihood, whether for profit or not for profit.”).

44. 8 U.S.C. § 1373(c) (2000) (“The Immigration and Naturalization Service shall respond to an inquiry by a Federal, 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 information.”).

45. Illegal Immigration Relief Act Ordinance, *supra* note 5, § 4B.

46. See Ellen Barry, *The Nation: City Vents Anger at Illegal Immigrants*, L.A. TIMES, July 14, 2006, at A1, available at 2006 WLNR 12126916.

47. See, e.g., Jackson, *supra* note 38.

48. Simonich, *supra* note 9 (emphasis added).

passed the ordinance with a 4–1 vote.⁴⁹ The lone dissenter believed that the ordinances “would not pass legal muster,” potentially resulting in costly legal fees for taxpayers.⁵⁰

Despite the Mayor’s blanket assertions, there is no statistical evidence supporting his statement that undocumented immigrants commit most of the crime in Hazleton.⁵¹ When asked to give empirical data to confirm the number of alleged illegal immigrants in Hazleton, Mayor Barletta replied:

I don’t need a number Numbers are important mostly to people from the outside who are trying to understand what’s happening. But if you lived in the city of Hazleton and you woke up to morning news such as this [referring to the crimes], you would understand that we have a major immigration problem.⁵²

Not everyone who lives in Hazleton shares the mayor’s “understanding.”⁵³ Ana Arias, a Latina resident of Hazleton, has resided in the area since 1992. Arias sits on the Pennsylvania Governor’s Committee for Hispanic Affairs. She readily disputes the mayor’s statistics and assertions as foundationless.⁵⁴ Arias’ family members were among the first Latino families to move to Hazleton. When Arias began visiting her family in 1987, Hazleton was not developed; it had only a few businesses, and many abandoned

49. Nichole Dobo, *Hazleton Adopts Immigration Measure*, *The Citizen’s Voice*, <http://www.prldef.org/Press/News%20Stories/Hazleton%20-%20Hazleton%20adopts%20immigration%20measure.htm>.

50. *Id.*

51. *Lozano v. City of Hazleton*, 459 F. Supp. 2d 332, 336 (M.D. Pa. 2006) The court stated “[the] potential harm to the city is not greater than the harm faced by the plaintiffs from enforcement of the ordinances.” *Id.* The court further noted:

Plaintiff has offered in the form of affidavits, statements of the concrete harm faced by various individuals from the enforcement of the ordinances. Defendant, to the contrary, has offered only assertions that violent crime in Hazleton is a product of illegal immigrants and that the city faces higher costs for social services because of the presence of undocumented persons. In a newspaper interview, the Mayor admitted that he had no statistics to support his claims of increased crime related to illegal immigration, nor even any numbers on how many illegals entered the city.

Id. (citing Barry, *supra* note 46). The total number of arrests in Hazleton decreased from 1458 in 2000 to 1263 in 2005. See Barry, *supra* note 46. In addition, the number of reported rapes, robberies, homicides, and assaults decreased in Hazleton between 2000 and 2005. *Id.*

52. Jackson, *supra* note 38; see also *Lozano*, 459 F. Supp. 2d at 336 (stating that “[a]t oral argument defense counsel argued that crime in the city increased by ten percent between 2004 and 2005, but offered no evidence to connect this increase to the presence of illegal immigrants”).

53. See Second Amended Complaint, *supra* note 1, at 2 (describing the ACLU’s allegations that the ordinances were unconstitutional).

54. Interview with Ana Arias, PICC Meeting, in Villanova, Pa. (Oct. 30, 2006) [hereinafter *Ana Arias Interview*]. Arias’ brother’s family was the fourth Latino family in Hazleton in 1987 and her mother’s was the fifth Latino family. *Id.*

buildings. She was attracted to Hazleton, however, because “she saw a respect in people’s faces and was always greet[ed] with a welcoming smile.”⁵⁵

Hazleton began to experience substantial economic growth in 2000 and 2001.⁵⁶ Latinos moved from New York to Hazleton because the cost of living was lower and there were jobs in the area. As the Latino community grew to constitute over thirty percent of the population in Hazleton, Arias began to observe a difference in the way people in the town reacted to the Latino community,⁵⁷ despite the fact that the influx of Latinos brought in new businesses, revitalized the downtown area and helped create a boom in Hazleton’s real estate market.⁵⁸ Arias believes that the backlash began after a murder was committed by two undocumented immigrants in Hazleton.⁵⁹ She strongly opposes the ordinances because they create the presumption that all Latinos are undocumented criminals.⁶⁰

Many immigrants, including the Lechugas, have moved out of Hazleton since the passage of the ordinances.⁶¹ Even the mayor agreed “that some of the illegal immigrants who were living in Hazleton have moved—‘some in the middle of the night, actually’—in anticipation of the ordinance taking effect.”⁶² The mayor “stressed that the ordinance is not aimed at a particular ethnic group but rather at rooting out foreigners who have entered the country illegally, adding to the pressure on police and other government services intended for citizens.”⁶³

55. *Id.*

56. Barry, *supra* note 46.

57. *See id.* (stating that the “Latino minority has grown over the last decade to constitute about 30% of the [Hazleton] population”).

58. *See id.* (explaining that the Latino immigrants built fifty to sixty new businesses in the city’s downtown and helped boost the value of homes to \$90,000 from \$40,000).

59. Ana Arias Interview, *supra* note 54; *see also* Nicole Dobo, *Plan to Ban Illegal Immigrants Divides Hazleton, Barletta’s Ordinance Gets Its First Approval from City Council*, THE CITIZEN’S VOICE, June 6, 2006.

60. Ana Arias Interview, *supra* note 54.

61. *See* Manheim, *supra* note 35, at 971 (disagreeing with state regulation of immigration arguing that in some instances, like California’s Proposition 187, it is a more subtle way of placing the entire state apparatus behind a directive to depart the country); *see also* Memorandum of Law in Support of Plaintiffs’ Opposition to Hazleton’s Motion to Dismiss and Cross Motion for Summary Judgment at 23, *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) [hereinafter Memorandum] (“Since the original ordinances were introduced, businesses have shut down, customers and renters have dwindled, and families have left or are planning to leave town.”).

62. Jackson, *supra* note 38.

63. *Id.*

On August 15, 2006, the American Civil Liberties Union (“ACLU”) filed a complaint against Hazleton.⁶⁴ The ACLU complaint challenged the ordinances on several constitutional grounds, including Supremacy Clause, Due Process, Equal Protection, and First Amendment violations.⁶⁵ The ACLU stated in its complaint that the challenges to Hazleton’s ordinance stem from the allegation that:

[i]f the ordinance is allowed to stand, anyone who looks or sounds foreign—regardless of their actual immigration status—will not be able to participate meaningfully in life in Hazleton, returning to the days when discriminatory laws forbade certain classes of people from owning land, running businesses or living in certain places.⁶⁶

The ACLU noted that:

[m]any of those affected by the overly broad ordinance are here legally and have lived, worked and worshiped in Hazleton for a long time. In desperation and fear, some of those residents have already decided to close their businesses, move out of Hazleton, or, simply hide as best they can behind closed doors.⁶⁷

On July 26, 2007, the District Court for the Middle District of Pennsylvania held that Hazleton’s ordinances were unconstitutional.⁶⁸ Specifically, the court found that the employment ordinance was constitutionally preempted by the IRCA.⁶⁹

B. California Impetus for Municipal Legislation: The Progression of Municipal Legislation

Hazleton is not the only city attempting to regulate immigration. The Hazleton ordinance was copied directly from an earlier ordinance that failed in San Bernardino, California—the San Bernardino Illegal Immigrant Relief Act.⁷⁰ In San Bernardino, the city council also perceived immigrants as a threat to the city’s resources. Joseph Turner, an aide to a Republican member of the California Legislature, drafted the illegal immigration legislation with the goal of saving “California

64. Second Amended Complaint, *supra* note 1, at 1–4.

65. *Id.*

66. *Id.* ¶ 2.

67. Letter from Plaintiffs in Suit Against City of Hazleton to City of Hazleton and Mayor Louis Barletta (Aug. 15, 2006) (on file with the U.S. District Court for the Middle District of Pennsylvania).

68. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 555 (M.D. Pa. 2007).

69. *Id.* at 520.

70. San Bernardino, Cal., Proposed City of San Bernardino Illegal Immigration Relief Act, available at http://firecoalition.com/downloads/San_Bernardino_Illegal_Immigration_Ordinance.doc [hereinafter San Bernardino Proposed Act].

from turning into a ‘Third World cesspool’ of illegal immigrants.”⁷¹ The proposed ordinance imposed a fine on property owners who rent or lease to undocumented immigrants, seized the vehicles of individuals who solicit day laborers, revoked the permits and contracts of businesses that employ undocumented immigrants, and required that all city business be conducted solely in English.⁷² The ordinance failed to pass in the San Bernardino City Council and Turner filed suit in a California district court seeking to have the ordinance placed on the city’s election ballot. On June 26, 2006, the California Superior Court dismissed the case because Turner could not obtain enough signatures in support of the ordinance.⁷³

Another Pennsylvania town, Altoona, took a similar approach. In 2006 the Altoona City Council passed an illegal immigration ordinance after an illegal immigrant, a non-resident of Altoona, murdered three Altoona residents.⁷⁴ The assailant had been present in the United States for seventeen years and had a driver’s license, a diploma from a local high school, and a police record.⁷⁵ This incident was an aberration.⁷⁶ Many municipalities, like Altoona, have begun to question the gaps in the federal system that permit isolated incidents such as this one. Obviously, the Altoona law would not have prevented the assailant’s criminal behavior because he did not reside in Altoona.⁷⁷ This incident, however, exposes the urgent need for Congress to enact a uniform, comprehensive system for detecting undocumented immigrants so that state and municipal governments do not have to enact their own legislation or enforce existing legislation. A uniform system would prevent municipalities from enacting legislation targeting undocumented workers that has a discriminatory impact on all immigrants.⁷⁸

71. Miriam Jordan, *Grassroots Groups Boost Clout in Immigration Fight*, WALL ST. J., Sept. 28, 2006, at 1, available at <http://www.post-gazette.com/pg/06271/725845-84.stm>.

72. San Bernardino Proposed Act, *supra* note 70, §§ 4–8.

73. *City of San Bernardino v. Garza*, SCVSS–138–507 (Cal. Super. Ct. 2006) (dismissing case).

74. Simonich, *supra* note 9.

75. *Id.* at 1–2.

76. *See id.* at 2 (stating that Altoona has no discernable immigrant base, legal or illegal, and that “illegal immigration has not been an issue in Altoona”).

77. *See id.* at 2–3 (explaining how the Altoona law is “fundamentally flawed”).

78. *See* Manheim, *supra* note 35, at 942 (stating that in “times of social and economic stress, aliens are prime targets of reaction”); *see also* Chris Nwachukwu Okeke & James A.R. Nafziger, *United States Migration Law: Essentials for Comparison*, 54 AM. J. COMP. L. 531, 532 (2006) (declaring that migrants are often “treated as scapegoats for the ills of society and subjected to differential treatment and abuse.”). Furthermore, “[t]he brunt of mass migration must be borne by impoverished states unable to absorb new settlers.” *Id.*

II. FEDERAL ENCOURAGEMENT TO REGULATE WHERE THE FEDERAL GOVERNMENT FALLS SHORT

The federal government's failure to achieve comprehensive immigration reform and enforce existing laws that recognize the economic and social realities on both sides of the border, has motivated local governments to implement their own immigration laws. This Part describes the impetus for local regulation and compares and contrasts the Hazleton employment ordinance with the Federal Immigration Reform and Control Act.⁷⁹

A. Federal Encouragement

There has been constant tension between federal and state governments over immigration regulation.⁸⁰ One scholar notes that "until the end of the nineteenth century, immigration (both interstate and international) was the subject of state-level regulation in the face of a federal legislative vacuum."⁸¹ The Supreme Court addressed whether states should be permitted to regulate immigration as early as 1875, when the Court struck down a proposed state law prohibiting state regulation of immigration.⁸²

79. The Immigration Reform and Control Act, 8 U.S.C. § 1324a (2000).

80. See Memorandum of Law in Support of Defendant's Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6) at 51, *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) [hereinafter Memorandum of Law] ("[I]t would be unreasonable to suppose that [the federal government's] purpose was to deny itself any help that the states may allow.") (quoting *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928)); *Manheim*, *supra* note 35, at 952–55 (citing early state exclusion laws including: regulation of criminals, public health, regulation of movement of the poor, regulation of slavery, land rights excluding Chinese workers, and other policies of racial subordination dating back to the late 19th century). See generally Laure R. Boatright, "Clear Eye for the State Guy": Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement, 84 TEX. L. REV. 1633 (2006) (discussing the history of and arguments for and against nonfederal immigration enforcement).

81. Peter Spiro, *Symposium: Lady Liberty's Doorstep: Status and Implications of American Immigration Law, Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1628 (1997).

82. *Manheim*, *supra* note 35, at 968 (stating that states had the power to regulate immigration until 1875 when the Supreme Court in *Henderson v. Mayor of New York*, 92 U.S. 259 (1875), struck down a state law stating that immigration required a uniform system or plan of regulation beyond the power of any state); see also *State of California v. United States*, 104 F.3d 1086, 1095 (9th Cir. 1997) (affirming lower court's dismissal); Memorandum of Law, *supra* note 80, at 48 ("Effective immigration law enforcement requires a cooperation effort between all levels of government. The acquisition, maintenance and exchange of immigration related information by State and local agencies is consistent with and potentially of considerable assistance to the federal regulation of immigration and the achieving of the purposes and objectives of the [INA]."); *Manheim*, *supra* note 35, at 957 ("[S]tates have [in the past] sued the federal government, demanding more effective enforcement of federal immigration laws.").

The current debate on immigration regulation centers on the federal government's failure to enact comprehensive immigration reform.⁸³ States began to legislate when gaps in the immigration system were exposed after the terrorist attacks on September 11, 2001.⁸⁴ Instead of fixing the problem, the federal government—through Memoranda of Understanding, proposed legislation, and various policy statements—has encouraged state and local authorities to help with enforcement.⁸⁵ After September 11, the Office of the Legal Council of the Department of Justice authored a legal memorandum stating that states have the inherent authority as sovereigns to enforce immigration laws.⁸⁶ Further, in his 2005 State of the Union addresses, President George W. Bush “called for comprehensive immigration reform to support the economy and national security.”⁸⁷

Even before September 11, Congress passed laws delegating its responsibility to regulate immigration. One such law, the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”)⁸⁸ provides that:

83. See Nicole Dobo, *Hazleton Adopts Immigration Measure*, Puerto Rican Legal Defense and Education Fund, June 16, 2006 (critiquing the federal government's response to illegal immigration).

84. Boatright, *supra* note 80, at 1633, 1642.

85. See generally Tiffany Walters Kleinert, Comment, *Local and State Enforcement of Immigration Law: An Equal Protection Analysis*, 55 DEPAUL L. REV. 1103, 1106–07 (2006) (citing Memorandum from Teresa Wynn Rosenborough, Deputy Assistant Attorney General, Office of Legal Counsel, Assistance by State and Local Police in Apprehending Illegal Aliens (Feb. 5, 1996), available at <http://www.usdoj.gov/olc/immstopo1a.htm>) (discussing the federal government's call for the cooperation of state and local police officers in apprehending illegal aliens); see also Memorandum from Teresa Wynn Rosenborough, Deputy Assistant Attorney General on Immigration Emergency Fund, to Stephen R. Colgate, Assistant Attorney General for Administration (Jan. 26, 1996), available at <http://www.usdoj.gov/olc/iefalt.twr.htm> (providing “\$20 million in the Immigration Emergency Fund for the reimbursement of states and localities for certain immigration-related assistance” on an annual basis).

86. Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1374 (2006) (“[A]fter 9/11 when the holes in the United States Immigration system became painfully apparent, the federal government began a concerted push to get local authorities involved in the enforcement of immigration laws.”); see also Boatright, *supra* note 80, at 1636–67 (citing the Comprehensive Enforcement Act as evidence of federal government's voluntary approach reassuring states and localities that they have congressional permission to assist with immigration enforcement).

87. Alyssa Garcia Perez, Comment, *Texas Rangers Resurrected: Immigration Proposals After September 11th*, 8 SCHOLAR 277, 278 (2006) (citing George W. Bush, President of the United States, Address Before a Joint Session of the Congress on the State of the Union (Feb. 2, 2005), in 41 WKLY. COMP. PRES. DOC., Feb. 2005, at 127–28, available at <http://www.gpoaccess.gov/wcomp/v41no05.html>).

88. Illegal Immigration Reform & Immigrant Responsibility Act, Pub. L. No. 104–208, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1373 (2000)).

[n]otwithstanding any provisions of Federal, State or local law, a federal, state or local government entity or official may not prohibit, or in any way restrict any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.⁸⁹

This law also provides that the Department of Homeland Security will respond to any inquiries from local government agencies seeking to verify the citizenship status of an individual.⁹⁰ The law unequivocally allows unrestricted communication between local authorities and the federal government. It dispels any notion that Congress does not welcome local participation in regulating immigration. Accordingly, cities like Hazleton enacted ordinances directly citing this provision for authority to regulate the employment of undocumented workers.

The same year that the IIRIRA was passed, Congress also enacted the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA").⁹¹ This law denies forms of public assistance to most legal immigrants for five years, or until they attain citizenship.⁹² In regards to state participation, § 1601(7) provides, in pertinent part:

[A] State that chooses to follow the Federal classification in determining the eligibility of such aliens for public assistance shall be considered to have chosen the least restrictive means available for achieving the compelling government interest of assuring that aliens be self-reliant in accordance with national immigration policy.⁹³

This law permits discriminatory conduct against aliens as a means of distributing public benefits.⁹⁴ The law also encourages state and local governments to enact discriminatory legislation against immigrants when providing public assistance.⁹⁵

89. 8 U.S.C. § 1373(a) (2000).

90. 8 U.S.C. § 1373(c) (2000).

91. Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (codified at 8 U.S.C. § 1601 (2000)).

92. 8 U.S.C. § 1613(a) (2000).

93. 8 U.S.C. § 1601(7) (2000).

94. Spiro, *supra* note 81, at 1627 (stating that under the Personal Responsibility Act "[s]tate governments will now enjoy, at least in the realm of public benefits eligibility, the capacity to discriminate or not to discriminate—at their option—on the basis of alienage.").

95. Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, And Federalism*, 76 N.Y.U. L. REV. 493, 494-95 (2001) (disagreeing with the Personal Responsibility and Work Opportunity Reconciliation Act as attempting to pass the buck to states and authorizing states to discriminate).

The executive branch has also made known its desire to work with state and local governments on immigration matters.⁹⁶ The Department of Homeland Security's Immigration and Customs Enforcement Division has a Law Enforcement Support Center ("LESC").⁹⁷ LESC is a National Enforcement Operations Center that provides immigration status and identity information to local, state, and federal law enforcement agencies concerning aliens suspected, arrested, or convicted of criminal activity.⁹⁸

Recently, the House introduced the Clear Law Enforcement for Criminal Alien Removal Act ("CLEAR Act"),⁹⁹ which would require state officers to assist and cooperate with federal immigration law enforcement.¹⁰⁰ The goal of the CLEAR Act is to encourage state and local police to assist federal immigration authorities in apprehending undocumented immigrants.¹⁰¹ The proposed Act also expands the Basic Pilot Program for employment eligibility to permit all fifty states to participate.¹⁰²

The reaction to the federal immigration push has been two-fold.¹⁰³ First, some states and municipalities have deliberately refused to cooperate with federal immigration laws.¹⁰⁴ Even more state and municipal governments have begun to exercise unfettered discretion by

96. Spiro, *supra* note 81, at 1628 ("[P]rovisions of recent immigration reform legislation suggest that state and local participation in immigration law enforcement may now be welcomed by federal authorities whose resources, even in an era of growing INS budgets, will always be stretched.").

97. 8 U.S.C.A. § 1103 (West 2005); *see also* System Notice for Law Enforcement Support Center Database, Justice/INS-023, available at <http://www.uscis.gov/portal/site/uscis> (follow "About USCIS" hyperlink; then follow "Freedom of Information and Privacy Acts (FOIA)" hyperlink; then follow "System Notices" hyperlink).

98. *See generally* 8 U.S.C.A. § 1103 (West 2005); Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief, 8 U.S.C.A. § 1252 (West 2005). Congress gives the Executive branch the power to establish ICE and LESC. *Id.*

99. Clear Law Enforcement for Criminal Alien Removal Act, H.R. 3137, 109th Cong. (2005).

100. Kleinert, *supra* note 85, at 1109.

101. *Id.* at 1104.

102. *See generally* Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156 (codified at 8 U.S.C.A. § 1324a (West 2005)) (expanding the operation of the program to all fifty states and instituting a method for the Secretary of Homeland Security to report to the House of Representatives and the Senate).

103. *See* Boatright, *supra* note 80, at 1663-64 (acknowledging that some states want to get involved in regulating immigration while other states shun involvement).

104. Pham, *supra* note 86, at 1374; *see also* Boatright, *supra* note 80 at 1663-64 (stating that a significant number of local governments passed non-cooperation laws to signal their disagreement with local government involvement in immigration law enforcement).

enacting immigration legislation.¹⁰⁵ The Hazleton ordinance is a perfect example of the latter type of legislation.

B. Hazleton's Unconstitutional Immigration and Reform Act Versus the Federal Immigration Reform and Control Act

Hazleton's IIRA mirrors the federal statute that regulates the employment of undocumented workers, the IRCA.¹⁰⁶ The IRCA was passed in 1986 in response to the large number of immigrants moving to the United States to find work.¹⁰⁷ The policy behind the IRCA recognizes that greater federal control and enforcement mechanisms are necessary to address the problem of illegal immigration.¹⁰⁸ The premise of the IRCA is that illegal immigration can be "controlled by decreasing or eliminating the U.S. jobs magnet."¹⁰⁹ Accordingly, the IRCA criminalizes the act of knowingly hiring an unauthorized alien.¹¹⁰ An employer who hires an undocumented immigrant may be subject to civil or criminal penalties.¹¹¹ The law requires employers to verify hired, recruited, or referral employees' citizenship status.¹¹² Under the law, employers must verify a worker's employment eligibility by viewing a U.S. passport, resident alien card, or other documents that the Attorney General designates.¹¹³ Employers are responsible for examining documentation, establishing identity and employment eligibility, and ensuring that the documents presented reasonably appear on their face to be genuine and relate to the individual.¹¹⁴

To ensure compliance with the IRCA, the government may audit any business.¹¹⁵ Immigration officers and administrative law judges are responsible for evaluating any evidence of the employer being

105. National Council of State Legislatures, *supra* note 24; *see also* Puerto Rican Legal Defense and Education Fund, Latino Justice Campaign, *available at* <http://www.prldef.org/Civil/Latino%20Justice%20Campaign.htm> (last visited Oct. 28, 2006) (listing immigration-related bills passed by or pending before municipal governments).

106. 8 U.S.C. § 1324a (2000).

107. *See generally* Philip L. Martin, *Select Commission Suggests Changes in Immigration Policy—A Review Essay*, 105 MONTHLY LAB. REV. 31 (Feb. 1982) (stating that almost all undocumented workers are attracted to U.S. jobs that pay relatively high wages, often five to ten times the earnings that the alien could expect at home, and noting that prior to the enactment of the IRCA, it was not a crime to knowingly hire an undocumented worker in thirty-eight states).

108. 8 U.S.C. § 1324a (2000).

109. INSTITUTE FOR SURVEY RESEARCH, *supra* note 9, at 9.

110. 8 U.S.C. § 1324a(a)(1)(A) (2000).

111. 8 U.S.C. § 1324a(e)–(f) (2000).

112. 8 U.S.C. § 1324a(b) (2000); *see also* 8 C.F.R. § 274a.2 (1987).

113. 8 U.S.C. § 1324a(b)(1)(B) (2000).

114. 8 U.S.C. § 1324a(b)(1)(A) (2000).

115. 8 U.S.C. § 1324a(e)(1) (2000).

investigated.¹¹⁶ The IRCA also establishes hearing procedures to ensure that the employer receives proper due process.¹¹⁷ The federal regulations further enumerate rules on the employment of aliens.¹¹⁸ Pursuant to this process, the administrative law judge can enter cease and desist orders for violations and order civil monetary penalties for hiring, recruiting, and referral violations.¹¹⁹

Section 1324a(h)(2) of the IRCA provides that “[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”¹²⁰ Hazleton’s IIRA references this preemption provision for the authority to suspend the business license of employers who hire undocumented workers.¹²¹

Relying on this authority, Hazleton’s IIRA allows officials, business entities, or residents to file complaints against a business that employs unlawful workers.¹²² It establishes an enforcement body to field complaints, entitled the Hazleton Code Enforcement Office (“Code Office”).¹²³ When a complaint is received, the Code Office submits the identifying information to the federal government’s Immigration and Customs Enforcement (“ICE”) to verify the worker’s immigration status through the Basic Pilot Program.¹²⁴ The business must comply with the Code Office’s request for information within three business days.¹²⁵ Failure to comply will result in the mandatory suspension of the business license.¹²⁶ This determination is independent of a determination that a violation has occurred.¹²⁷ This complaint procedure is similar to § 1324a(e) of the IRCA, which provides for

116. 8 U.S.C. § 1324a(e)(2) (2000).

117. 8 U.S.C. § 1324a(e)(3) (2000).

118. 8 C.F.R. § 274a.2 (2006).

119. 8 U.S.C. § 1324a(e)(4) (2000).

120. 8 U.S.C. § 1324a(h)(2) (2000). The legislative history of this provision does not clarify Congress’s intent in adding this preemptive language; it merely provides evidence of congressional desire to allow states to have full authority to regulate agricultural workers.

121. See generally *Illegal Immigration Relief Act Ordinance*, *supra* note 5 (suspending a business’ permit where it employs an unlawful worker).

122. *Id.* § 4B(1) (stating that a valid complaint must be “initiated by means of a written signed complaint,” and “include an allegation which describes the alleged violator(s), as well as the actions constituting the violation, and the date and location where the actions occurred”).

123. *Id.* § 4B(3) (requiring Hazleton Code Enforcement to submit identity information, required by the federal government, pursuant to 8 U.S.C. § 1373, to verify immigration status).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* § 4B(3).

individuals and entities to file written, signed complaints regarding violations of the Act.¹²⁸ Further, the creation of a Code Office is similar to § 1324a(e)(2)¹²⁹ of the IRCA, which provides immigration officers and administrative law judges with the power to adjudicate any complaints and issue orders for non-compliance.¹³⁰

The Code Office will reinstate the business permit one business day after a legal representative for the business submits an affidavit stating that the violation has ended.¹³¹ The affidavit must state the specific remedial measures taken to end the violation, specifically identify the unlawful workers, and enroll the business in Hazleton's Basic Pilot Program for the duration of its business permit.¹³² If the business violates the IIRA again, the Code Office will suspend the business license for twenty days and reinstate the business permit only upon the previously stated conditions.¹³³ The Code Office will also forward the affidavit, complaint, and associated documents to the appropriate federal enforcement agency, pursuant to 8 U.S.C. § 1373.¹³⁴

III. CHALLENGING STATUTES: PREEMPTION FRAMEWORK

The main issue in analyzing the validity of municipal employment ordinances is whether the Immigration Reform and Control Act preempts the municipal ordinance that regulates the employment of immigrants. This Part addresses the main Supreme Court preemption case, *DeCanas v. Bica*, and discusses how federal courts may analyze Hazleton-like ordinances.¹³⁵ Specifically, this Part reviews the current preemption framework and assesses whether it is adequate for analyzing whether federal law preempts state and local attempts to regulate immigration.¹³⁶

A. Preemption Doctrine

The preemption doctrine derives from the Supremacy Clause of the Constitution, which states that the "Constitution [] and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing

128. 8 U.S.C. § 1324a(e) (2000).

129. 8 U.S.C. § 1324a(e)(2) (2000).

130. 8 U.S.C. § 1324a(e)(2) (2000).

131. Illegal Immigration Relief Act Ordinance, *supra* note 5, § 4B(6).

132. *Id.*; see also 8 U.S.C. §§ 1373, 1324a (2000) (explaining the Basic Pilot Program).

133. See Illegal Immigration Relief Act Ordinance, *supra* note 5, § 4B(7) (stating the procedures to be followed by the Code Office for a second violation).

134. *Id.*

135. See *infra* Part III.A–B (highlighting key statements from *DeCanas v. Bica*).

136. See *infra* Part III.B (analyzing preemption doctrine framework).

in the Constitution or Laws of any state to the Contrary notwithstanding.”¹³⁷ The Supremacy Clause “invalidates state laws that ‘interfere with or are contrary to federal law.’”¹³⁸

Under the preemption doctrine, federal law or regulations can expressly or implicitly preempt state law. In the immigration context, a state statute is expressly preempted if it clearly attempts to regulate immigration.¹³⁹ In the alternative, a state statute can be impliedly preempted.

Under the field preemption doctrine, a state statute is impliedly preempted if Congress intends to occupy a field which the state statute attempts to regulate.¹⁴⁰ A state statute will be preempted under the field preemption test if there is a showing that it was “the clear and manifest purpose of Congress” to effect a “complete ouster of state power—including state power to promulgate laws not in conflict with federal laws” with respect to the subject matter.¹⁴¹ Under the conflict preemption doctrine, the state statute is also impliedly preempted where it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁴²

Under the obstacle to federal purposes test, concurrent state and federal enforcement activities are authorized when they do not impair federal regulatory interests.¹⁴³ Courts “resort to principles of implied preemption—that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law” as a last resort.¹⁴⁴ Under the implied preemption test, the court’s task is essentially one of statutory construction.

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

138. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 518 (M.D. Pa. 2007) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824)).

139. *DeCanas v. Bica*, 424 U.S. 351, 354 (1976); see also Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2100 (2000) (defining express preemption as “Congress legislat[ing] according to one of its enumerated powers, such as the Commerce Clause. Such legislation includes a provision preempting all state law within a defined scope. The Supremacy Clause then makes clear that the preemption provision takes precedence over conflicting state laws, just as any other federal law provision would.”).

140. *DeCanas*, 424 U.S. at 356.

141. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995) (quoting *DeCanas*, 424 U.S. 351, 357 (1976)); see also Dinh, *supra* note 139, at 2105–06 (stating that field preemption occurs when Congress “displaces state law even where it may not frustrate any purpose of Congress or conflict in any way with some federal statutory provision”).

142. *DeCanas*, 424 U.S. at 363 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

143. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

144. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 532 (1992) (Blackmun, J., concurring).

States have traditionally used their Tenth Amendment police powers to exercise control over immigrants within their communities.¹⁴⁵ Municipalities have the power to enact ordinances that govern licensing businesses under their Tenth Amendment police powers in the Constitution.¹⁴⁶ The Tenth Amendment states that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁴⁷ States and localities have used their Tenth Amendment police powers to regulate employment and impose criminal sanctions for the unlawful employment of illegal aliens with no federal right to employment within the country.¹⁴⁸ In *DeCanas v. Bica*, the Supreme Court characterized employment matters as local problems due to the state’s interest in protecting its own workers.¹⁴⁹ Accordingly, Hazleton and other cities have used this authority to enact immigration regulations that regulate the employment of undocumented workers.

In the immigration context, *DeCanas v. Bica* is the seminal Supreme Court preemption case.¹⁵⁰ In *DeCanas*, the Supreme Court held unconstitutional a California statute that prohibited an employer from knowingly employing an alien who was not entitled to lawful residence in the United States.¹⁵¹ The case arose when migrant farm workers brought an action against farm-labor contractors alleging that the contractors unlawfully terminated their employment.¹⁵² The farm workers argued, and the California courts agreed that state regulatory power over immigration was foreclosed because “Congress ‘as an

145. See, e.g., Boatright, *supra* note 80, at 1666 (stating that even though the federal government possesses the clearest authority to enforce immigration laws, states bear most of the costs of failed immigration policy).

146. See Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 554 n.83 (M.D. Pa. 2007) (stating generally that cities have the power to enact ordinances under their police powers as long as the ordinance does not violate the Constitution). See generally Boatright, *supra* note 80 at 1653-54 (stating that although the federal government was delegated the power to regulate immigration, “the Tenth Amendment ensures that the general state police power to enforce the law of the land was not so delegated and continues to reside squarely within the purview of the states”).

147. U.S. CONST. amend. X.

148. *DeCanas v. Bica*, 424 U.S. 351, 356-57 (1976).

149. *Id.* at 356.

150. *Id.* at 351-65. It is important to understand *DeCanas* because under most circumstances courts have not found state regulation in an area already regulated by Congress *ipso facto* preempted. Accordingly, any legal form would reject current arguments that narrowly state that because Congress enacted the Immigration and Nationality Act (“INA”), states and municipalities should not be able to regulate immigration. After *DeCanas*, the trend in federal court has been to strike down state laws that attempt to regulate immigration law, while upholding substantially similar federal laws.

151. *Id.* at 353-54.

152. *Id.* at 353.

incident of national sovereignty,' enacted the INA as a comprehensive scheme governing all aspects of immigration and naturalization, including the employment of aliens"¹⁵³

The Supreme Court rejected this argument.¹⁵⁴ The Court explained that it has never held that every state enactment dealing with immigrants is a regulation of immigration and is *per se* preempted.¹⁵⁵ The Court reasoned that "standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration"¹⁵⁶ The Court found that Congress did not express an intention to fully occupy the field of employing undocumented immigrants.¹⁵⁷ In addition, the Court held that the California statute did not regulate immigration; instead, it narrowly regulated employing undocumented immigrants under the state's police powers.¹⁵⁸ Other scholars have acknowledged that "because *DeCanas* establishes a preemption analysis favorable to state and local regulations—including invoking a presumption against federal preemption and holding that the INA does not completely occupy the immigration field—it is clear that few state and local [immigration] laws will actually be preempted by the INA."¹⁵⁹

After *DeCanas*, the next major case to analyze the issue of preemption in the immigration context was *League of United Latin American Citizens v. Wilson*.¹⁶⁰ There, the federal district court, interpreting *DeCanas*, found that California's Proposition 187 constituted a prohibited regulation of immigration because it had a "direct and substantial impact on immigration."¹⁶¹ Proposition 187 was an initiative measure that "provid[ed] for cooperation between [the] agencies of state and local government with the federal government, and [] establish[ed] a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California."¹⁶² The district court overturned the law, holding that California could not implement a

153. *Id.* at 354 (quoting *DeCanas v. Bica*, 115 Cal. Rptr. 444, 446 (Cal. Ct. App. 1974), *rev'd*, 424 U.S. 351 (1976)).

154. *Id.* at 354–56.

155. *Id.* at 355.

156. *Id.*

157. *Id.* at 357–58.

158. *Id.* at 356–57.

159. Jay T. Jorgensen, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 BYU L. REV. 899, 918–19 (1997) (acknowledging that federal laws will only preempt state laws in the most unusual circumstances).

160. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

161. *Id.* at 769.

162. *Id.* at 763 (quoting Proposition 187, § 1).

law requiring state employees to inquire about an individual's immigration status, inform illegal immigrants that they must leave the United States, and report illegal immigrants to the INA.¹⁶³ The District Court for the Central District of California found Proposition 187 unconstitutional and preempted by INA's comprehensive scheme because Proposition 187 was an under inclusive classification scheme that conflicted with the federal eligibility scheme for immigrant benefits and services.¹⁶⁴

B. Preemptive Language in the Immigration Reform and Control Act

Under Supreme Court precedent setting forth the preemption doctrine, the validity of a Hazleton-like ordinance depends on whether the IRCA provides unambiguous evidence of congressional intent to displace such employment ordinances. Courts have recognized that the preemption analysis is governed entirely by the express language of the statutes' preemptive provisions.¹⁶⁵ Typically, where there is a specific preemption provision, the court need only look to the statute.¹⁶⁶ The interpreting court must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.¹⁶⁷ If the express language of the statute provides no support, then courts must analyze whether the ordinance is impliedly preempted.¹⁶⁸

When the Supreme Court decided *DeCanas*, Congress had not passed any laws regulating the employment of immigrants.¹⁶⁹ The Court cited the absence of such federal laws as evidence that Congress did not intend to fully preempt the state from acting in this area.¹⁷⁰ After *DeCanas*, however, Congress enacted the IRCA, which provides a detailed system for regulating the employment of aliens. Hazleton's

163. *Id.* at 768–70.

164. *Id.* at 779.

165. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (stating that “Congress’ intent may be ‘explicitly stated in the statute’s language or implicitly contained in its structure and purpose’”).

166. *See, e.g., Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (evaluating statutory language to determine whether Congress intended to preempt state regulation of pension plans under the National Labor Relations Act).

167. *Cipollone*, 505 U.S. at 532 (Blackmun, J., concurring) (quoting *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990)).

168. *Id.* at 504.

169. *DeCanas v. Bica*, 424 U.S. 351, 361 & n.9 (1976) (“Congress’ failure to enact . . . general [employer] sanctions reinforces the inference that may be drawn from the congressional action that Congress believes this problem does not yet require uniform national rules . . .”).

170. *Id.* at 361–63.

employment ordinance mirrors the IRCA and cites section 1324a as authority to sanction businesses for hiring undocumented workers. Section 1324a(h)(2) provides that “[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”¹⁷¹ This provision appears to give Hazleton the power to regulate immigration through business licensing provisions.

Typically, the analysis ends here with the plain language of the preemption provision. In analyzing a statute, when “Congress does not clearly state in its legislation whether it intends to preempt state laws . . . the courts normally sustain local regulation of the same subject matter unless it conflicts with federal law or would frustrate the federal scheme”¹⁷² Opponents argue, however, that reliance on the plain language of the preemption provision in the IRCA would not produce a solution congruent with immigration policy. According to this argument, the plain language of the IRCA’s preemption provision should not be applied to Hazleton-like employment ordinances.

In the ACLU-Hazleton case, the district court held that the express language of the IRCA preempted “[s]tate or local laws dealing with the employment of unauthorized aliens.”¹⁷³ Hazleton argued that under the IRCA’s preemption provision, it could impose any immigration-related rule on employers as long as the sanction only resulted in a suspension of the employer’s business license.¹⁷⁴ The district court noted that such an interpretation was “at odds with the plain language of the express pre-emption provision” because it would allow municipalities to enforce the ultimate sanction against employers and render the express preemptive clause nearly meaningless.¹⁷⁵ Further, the court analyzed the legislative history of the IRCA and found that “[t]he ‘licensing’ that the statute discusses refers to revoking a local license for a violation of the federal IRCA sanction provisions, as opposed to revoking a business license for violation of local laws.”¹⁷⁶ The court found that the preemptive language in the statute provided that a city could only take away the license of a business for violating the IRCA, not its own

171. 8 U.S.C. § 1324a(h)(2) (2000) (emphasis added).

172. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157–58 (1978)).

173. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 518 (M.D. Pa. 2007).

174. *Id.* at 519.

175. *Id.*

176. *Id.* (citing H.R. REP. NO. 99–682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662).

ordinance.¹⁷⁷ Even if the plain language were not enough, the result of finding the Hazleton ordinance constitutional would be inconsistent with immigration policy.

Typical preemption cases involve issues where national uniformity is desired for practical purposes; with immigration matters, however, the stakes are higher because immigrants' civil rights are implicated, especially when a municipality tries to enact its own immigration laws for employers to enforce. Under these circumstances, the plenary powers doctrine should be applied to broadly preclude municipal regulation.¹⁷⁸ Moreover, the complexity of immigration law supports the notion that municipalities should not be able to create a system parallel to the substantial body of federal laws and regulations. For these reasons, reliance on the plain language of the IRCA is not enough; a municipal law that has an indirect effect on immigration should also be impliedly preempted.

1. Plenary Powers Doctrine: Congress Has Unfettered Discretion to Broadly Regulate Immigration

Congress has plenary powers over immigration.¹⁷⁹ In the past, the plenary powers doctrine has been used to give the legislative and executive branches broad authority over immigration.¹⁸⁰ Recently, however, the use of the plenary powers doctrine has diminished. One scholar argues that it only exists "as a reminder that immigration statutes often reflect sensitive policy judgments by political branches."¹⁸¹ The Supreme Court has held that the federal government's power to control immigration is inherent in the nation's sovereignty.¹⁸² Thus, any local or state statute that directly regulates

177. *Id.*

178. U.S. CONST. art. I, § 8, cl. 4.

179. *Chae Chan Ping v. U.S.*, 130 U.S. 581, 603–04 (1889) (laying out the plenary powers doctrine which attributed the power as inherent to a sovereign nation); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)); see also *Spiro*, *supra* note 81, at 1630 ("[T]he federal government has enjoyed a virtual *carte blanche* on immigration matters."); *Okeke & Nafzinger*, *supra* note 78, at 544 (stating that a cardinal doctrine of United States constitutional law is that Congress has an inherent, plenary power in matters of immigration).

180. *LEGOMSKY*, *supra* note 9, at 230.

181. *Id.* at 231.

182. *Plyler v. Doe*, 457 U.S. 202, 225 (1982) ("Drawing upon [its Article I, section 8] power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders."); see also *Fiallo*, 430 U.S. at 787, 792 ("Our cases 'have long recognized the power to expel or exclude aliens as a fundamental

immigration typically would be constitutionally proscribed under the plenary powers doctrine.¹⁸³ This Part will examine arguments that the plenary powers doctrine could be used to limit local and state authority over immigration.

In *DeCanas*, the Supreme Court defined immigration as “essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”¹⁸⁴ The regulation of immigration status has traditionally been defined as immigration policy.¹⁸⁵ In reality, however, Congress has much broader power over immigrant and alienage law and policy, including the ability to regulate, “conditions of residence such as access to education, welfare benefits, and employment.”¹⁸⁶ Yet, the *DeCanas* Court’s interpretation leaves room for state regulation in almost any area related to immigrants and the conditions of their residence while in the United States.¹⁸⁷ The *DeCanas* finding does not consider that states “can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.”¹⁸⁸

The Supreme Court has repeatedly invalidated state statutes that amount to an “assertion of a right, inconsistent with federal policy, to deny entrance and abode” to aliens.¹⁸⁹ Even the *DeCanas* Court stated that “[t]he central concern of the INA is with the terms and conditions of admission to the country *and the subsequent treatment of aliens*

sovereign attribute excised by the Government’s political departments”); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995) (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (recognizing the inherent power of a sovereign nation to control its borders)); *see generally* *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893) (pointing out that the Constitution vests the national government with absolute control over international relations); *Chae Chan Ping*, 130 U.S. at 581 (stating that the government’s power to exclude aliens from the United States is not open to controversy).

183. *DeCanas v. Bica*, 424 U.S. 351, 355 (1976); U.S. CONST. art. I, § 8, cl. 4.

184. *DeCanas*, 424 U.S. at 355.

185. Anil Kalhan, *Immigration Enforcement and Federalism After September 11, 2001*, in *IMMIGRATION, INTEGRATION, AND SECURITY: EUROPE AND AMERICA IN COMPARATIVE PERSPECTIVE 3* (Ariane, Chebel d’Appollonia & Simon Reich eds. forthcoming 2008).

186. Evangeline G. Abriel, *Rethinking Preemption for Purposes of Aliens and Public Benefits*, 42 UCLA L. REV. 1597, 1626–27 n.151 (1994–95); *see also* Kalhan, *supra* note 185, at 3 (stating that “‘alienage’ or immigrant policy [regulates] the day-to-day rights and obligations of non-U.S. citizens who already are present in the United States, and in many cases have been enacted as an indirect form of immigration regulation”).

187. *League of United Latin Am. Citizens*, 908 F. Supp. at 769; *see also* *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (“[T]he States enjoy no power with respect to classification of aliens.”).

188. *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948).

189. *Graham v. Richardson*, 403 U.S. 365, 380 (1971); *see* *Traux v. Raich*, 239 U.S. 33, 36 (1915) (invalidating an Arizona anti-alien labor law).

'lawfully in the country.'¹⁹⁰ The INA was not as extensive when *DeCanas* was decided as it is today, but it was clear at the time that Congress had dominion and control over immigrants' entrance and exit to and from the United States.¹⁹¹ When the Supreme Court decided *DeCanas*, Congress had not passed any laws regulating the employment of immigrants. The Court cited the absence of a federal law regulating employment as evidence that Congress did not intend to fully preempt states from acting in this area.¹⁹² Today, by contrast, there are federal immigration laws that regulate the employment of immigrants, the distribution of benefits to immigrants, and police enforcement. Congress no longer limits its own authority to the entrance and exit of immigrants. Accordingly, more focus should be placed on the "conditions under which a legal entrant can remain."¹⁹³ Under this definition of federal power to regulate immigration, the Hazleton ordinance may be constitutionally preempted. The extremely narrow interpretation of immigration regulation, to exit and enter, leaves too much leeway for states to enact legislation, even if the legislation only indirectly impacts immigration.¹⁹⁴

Even though ordinances like Hazleton's IIRA do not explicitly address the admission, naturalization, and residence of aliens in the United States, they will have a direct and substantial effect on the admission and conditions under which an entrant may remain.¹⁹⁵ Once Congress determines that an immigrant may remain in the country,¹⁹⁶ municipalities and states may not enact legislation that excludes immigrants on the grounds that they cannot support the financial burden of having immigrants in their communities.¹⁹⁷ Municipal legislation excluding immigrants, albeit indirectly, conflicts with Congress' power

190. *DeCanas v. Bica*, 424 U.S. 351, 359 (1976) (emphasis added).

191. *Id.* at 355 (stating that Congress had the power to determine "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain").

192. *Id.* at 362 ("[T]he INA should not be taken as legislation by Congress expressing its judgment to have uniform federal regulations in matters affecting employment of illegal aliens and therefore barring state legislation . . .").

193. *DeCanas*, 424 U.S. at 355.

194. For a discussion of how the conflict and field preemption tests should address this issue, see *supra* notes 97–122 and accompanying text.

195. *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 578 (S.D. Tex. 1980) ("Measures intended to increase or decrease immigration, whether legal or illegal, are the province of the federal government.").

196. 8 U.S.C. § 1181 (2000).

197. See *Yale-Loehr & Chiappari*, *supra* note 21, at 341 (illustrating how many state and local immigration laws are being challenged in court).

to determine the conditions under which an immigrant can remain in the United States.¹⁹⁸

2. Civil Immigration Law and Regulations are too Complex for Municipal and Federal Law to Coexist

There are numerous statutory provisions and regulations relating to immigration.¹⁹⁹ The Court of Appeals for the Ninth Circuit addressed the complexity of immigration law in *Gonzales v. Peoria*, another case involving whether federal laws preempt local police enforcement of immigration laws.²⁰⁰ The ninth circuit held that local governments can enforce the more complex criminal provisions of immigration laws but cannot enforce the civil provisions.²⁰¹ The court reasoned that criminal immigration provisions are few and narrow and are unsupported by a complex administrative structure.²⁰² Therefore, there is a reasonable inference that the federal government did not occupy the field of immigration enforcement with respect to the criminal provisions.²⁰³

In reaching this conclusion, the court found it imperative to distinguish between criminal and civil immigration violations.²⁰⁴ The court explained that criminal violations apply to aliens who have illegally entered the country.²⁰⁵ In contrast, civil violations also apply to aliens who are illegally present in the United States.²⁰⁶ The court found that there are numerous reasons why a person might be illegally present in the United States without having entered in violation of § 1325.²⁰⁷ For example, the expiration of a visitor's visa, change of student status, or acquisition of prohibited employment could all cause an alien to be illegally present in the country without having violated any criminal provision.²⁰⁸ The court found that the arrest of a person

198. *Id.*

199. *See* *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) (stating that immigration laws are ranked only second to the Internal Revenue Code in terms of complexity).

200. *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983), *overruled on other grounds by* *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999).

201. *Gonzales*, 722 F.2d at 476–77. *But see generally* *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1294 (10th Cir. 1999) (holding that local police officers can enforce criminal and civil immigration laws).

202. *Gonzales*, 722 F.2d at 475.

203. *Id.*

204. *Id.* at 477.

205. *Id.* at 476 (citing 8 U.S.C. § 1325, which establishes criminal violations for unlawful entry and unlawful presence).

206. *Id.* at 476–77.

207. *Id.*

208. *Id.*

for illegal presence would exceed the authority granted to the local police by state law.²⁰⁹ The court held that “nothing in federal law precluded the [local police] from enforcing the criminal provisions of the [INA],” specifically § 1325, “where there is probable cause to believe that the arrestee has illegally entered the United States.”²¹⁰ The court found that the “enforcement procedures must distinguish illegal entry from illegal presence and must comply with all arrest requirements imposed by the federal Constitution.”²¹¹ *Peoria* does not read *DeCanas* narrowly in holding that local governments, namely local police officers, are barred from enforcing the civil provisions of immigration laws.²¹²

Like the statute at issue in *Peoria*, the IRCA contains comprehensive civil and criminal provisions, federal regulations, sanctions, and penalties for employers who hire undocumented workers.²¹³ The provisions adequately provide for an immigration officer or an administrative law judge to adjudicate disputes over hiring undocumented workers.²¹⁴ The complexity of civil provisions like the IRCA precludes Hazleton-like ordinances from coexisting with federal immigration laws. Such ordinances act as obstacles to the accomplishment of federal purposes.

Moreover, Hazleton-like ordinances will likely frustrate the purposes of federal immigration laws particularly where the enforcement bodies are not trained as law enforcement officers intended to administer criminal laws. Municipal appointed officials do not have the training to enforce the complex classification system of the IRCA.²¹⁵ Federal

209. *Id.*

210. *Id.* at 477.

211. *Id.*

212. Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 219 (2005–06) (disagreeing with the fact that “civil provisions of federal immigration law create a pervasive regulatory scheme indicating congressional intent to preempt” and stating that the ninth circuit only mentioned in dicta that the civil immigration laws create a pervasive regulatory scheme).

213. 8 U.S.C. § 1324a (2000 & West. Supp. 2007).

214. 8 U.S.C. § 1324a(e)(2) (2000).

215. Manheim, *supra* note 35, at 976 (“[E]stablishing [whether an individual] is not a resident or otherwise lawfully present in this country . . . could entail a herculean task of reviewing voluminous documentation of separate distinct governmental entities to determine whether a defendant has received a visa, temporary or permanent resident alien status, etc.”) (citing *People v. Adolfo*, 275 Cal. Rptr. 619, 623 (Cal. Ct. App. 1990)); *see also* Second Amended Complaint, *supra* note 1, ¶ 22 (“It is impossible for Plaintiffs Lechuga and Jane Doe 1 to determine whether each new worker they may hire or customer they may serve is an ‘illegal alien’ as defined by the Ordinance. They have received no guidance or training from Hazleton or others regarding how to determine whether an individual is an ‘illegal alien.’ Plaintiffs Lechuga and Jane Doe 1 have no

immigration officers and even police officers, unlike Hazleton Code Officers, receive a great deal of training to deal with the issues that were raised in *Peoria*. Thus, a Hazleton Code Officer acting under the IIRA should not be permitted to interpret and apply the civil provisions of the IRCA, just as the local court in *Peoria* found that the local police should not be able to arrest immigrants for civil violations of the INA.²¹⁶

There is further reason for barring the Hazleton Code Officer from making determinations about an immigrant's unlawful presence where the enforcement body does not consist of police officers trained to enforce criminal laws. The Hazleton Code Officer has no formal governmental training to make a determination about an employee's lawful or unlawful immigration status.²¹⁷ Because the officers who enforce the IIRA have inadequate training to deal with complex immigration issues, the IIRA clearly frustrates the purposes of the IRCA.

In *League of United Latin American Citizens v. Wilson*, the District Court for the Central District of California, interpreting *DeCanas*, found that a state or local law constitutes a prohibited regulation of immigration if it impacts immigrants in a "direct and substantial" manner.²¹⁸ The district court held that California could not implement a law requiring state employees to inquire about an individual's immigration status, inform illegal immigrants that they must leave the United States, or report illegal immigrants to federal and state authorities.²¹⁹

Similarly, the Hazleton laws and similar proposed ordinances raise concerns regarding the regulation of "illegal immigrants" who may actually have protected status to remain in the United States. The Hazleton statute broadly defines illegal aliens as those individuals described in 8 U.S.C. § 1101 and prevents employers from hiring such

expertise in determining the authenticity of immigration-related documentation."); Boatright, *supra* note 80, at 1636 (acknowledging that even for criminal enforcement, voluntariness, authority, clarification systematic incentives, a liability shield and training resources are necessary for state participation in immigration enforcement). For further discussion of the complexities of the INA, see *infra* notes 226–232 and accompanying text.

216. *Gonzales*, 722 F.2d at 477.

217. Second Amended Complaint, *supra* note 1, ¶ 233–34 ("The employees of the Code Office have had no training whatsoever in the operation of the Basic Pilot Program, SAVE or any other Federal government immigration status verification system [and] [t]he employees of the Code Office have had no practical experience reviewing immigration status documents.") (emphasis added).

218. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 769 (C.D. Cal. 1995).

219. *Id.*

persons.²²⁰ Hazleton's enforcement body may improperly categorize aliens who are legal as illegal aliens without proper adjudication.²²¹ Yet the IRCA provides for an immigration officer or an administrative law judge to make a determination about employment status after a complaint is made.²²² Essentially, in making determinations about an immigrant's legal status, the Hazleton Code Officer unconstitutionally acts as an immigration officer or administrative law judge as defined in § 1372a(e) of the IRCA.²²³

In *Wilson*, a California district court also found Proposition 187 unconstitutional and preempted by the INA because it was an underinclusive classification scheme that conflicted with the federal eligibility scheme for immigrant benefits and services.²²⁴ The provisions of Proposition 187 required:

[L]aw enforcement, social services, health care and public education personnel to (i) verify the immigration status of persons with whom they come in contact; (ii) notify certain defined persons of their immigration status; (iii) report those persons to state and federal officials; and (iv) deny those persons social services, health care, and education.²²⁵

The court examined 8 U.S.C. § 1251(a), which creates an administrative body to adjudicate deportation claims.²²⁶ It establishes a procedure for adjudicating such claims and vests the administrative body with the sole and exclusive procedure for determining the deportability of an alien.²²⁷ The procedure requires, among other things, that only an immigration judge may conduct deportation proceedings.²²⁸ The INA's accompanying regulations require every proceeding to determine the deportability of an alien in the United States to be commenced by the filing of an order to show cause with the

220. Illegal Immigration Relief Act Ordinance, *supra* note 5, at § 3–D.

221. 8 U.S.C. § 1324a(e)(3) (2000).

222. *Id.* § 1324a(e).

223. *Id.* § 1324a(e)(2) (“In conducting investigations and hearings under this subsection—(A) immigration officers and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated, (B) administrative law judges may, if necessary, compel by subpoena the attendance of witnesses and the production of evidence at any designated place or hearing . . .”).

224. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 787 (C.D. Cal. 1995).

225. *Id.* at 763.

226. 8 U.S.C. § 1251(a) is now 8 U.S.C. § 1227(a), which states that “[a]ny alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens”

227. 8 U.S.C. § 1229a (2000).

228. *Id.*

Office of the Immigration Judge.²²⁹ The authority to issue such orders is delegated to a discrete list of federal officers.²³⁰ Only specified federal officials can commence deportation proceedings, and only an immigration judge in deportation proceedings can determine that an alien is deportable and order the alien to leave the United States.²³¹ Then, after a final order of deportation issues, only the Attorney General may “effect the alien’s departure from the United States.”²³² Under federal law, the following groups may be authorized to remain in the U.S.: “refugees, asylees, persons granted withholding of deportation, parolees, persons protected by family unity status, persons present under temporary protected status . . . and battered immigrant women and children.”²³³

Like the state law in *Wilson*, the IIRA requires private employers and the Hazleton Code Office to: (i) verify the immigration status of their workers; (ii) report to federal officers; and (iii) deny business permits to operate within the city.²³⁴ These actions are the responsibility of the immigration officer or administrative law judge under the IRCA. The ACLU complaint against Hazleton challenges the IIRA, alleging that it

229. *Id.*

230. 8 C.F.R. § 242.1(a) (2000).

231. *Id.*

232. 8 U.S.C. § 1252(c) (2000). *See generally* *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995) (detailing the Attorney General’s authority).

233. *League of United Latin Am. Citizens*, 908 F. Supp. at 778 (citing 8 U.S.C. §§ 1101(a)(42), 1157 (2000)) (stating that refugees are persons determined by the INS to have been persecuted or to have a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group of political opinion); *see also* 8 U.S.C. § 1253(h) (2000) (stating that a person is eligible for withholding of deportation if his/her “life or freedom would be threatened in [the home] country on account of race, religion, nationality, membership in a particular social group, or political opinion.”); *see also* 8 U.S.C. § 1182(d)(5) (2000) (stating that an alien paroled by the United States for humanitarian or public interest considerations may be authorized for indefinite stays); 8 U.S.C. § 1154 (2000) (stating that a battered spouse or child of a U.S. citizen may self-petition for legalization); 8 C.F.R. § 242.6 (“[T]he spouses and children of aliens legalized under the Immigration Reform and Control Act’s (“IRCA”) amnesty provisions are protected from deportation by family unity status.”); 8 U.S.C. § 1254a (1996) (repealed by Pub. L. 104–28, 110 Stat. 3009–615 (1996)) (stating that Aliens living in the United States may be granted temporary protected status where returning to their country of origin “would pose a serious threat to their personal safety”); 8 U.S.C. §§ 1105a(a)(3), 1254 (1996) (repealed by Pub. L. 104–28, 110 Stat. 3009–612 (1996) (stating that the Attorney General may temporarily parole an alien into the United States for “urgent humanitarian reasons or significant public benefit”).

234. Illegal Immigration Relief Act Ordinance, *supra* note 5. *See League of United Latin Am. Citizens*, 908 F. Supp. at 778 (finding specific portions of Proposition 187, which gave an enforcement body the ability to make determinations about an immigrant’s status, unconstitutional). The court noted that there are “several federal categories of persons who are not citizens, not admitted as permanent residents and not admitted for a temporary period of time but who are nevertheless present in the United States, authorized to remain here and eligible for certain benefits in accordance with federal law.” *Id.* at 778.

is impossible for businesses “to determine whether each new worker they may hire or customer they may serve is an illegal alien as defined by the ordinance. They have received no guidance or training from Hazleton regarding how to determine whether an individual is an illegal alien.”²³⁵ Although business owners may have no expertise in determining the authenticity of immigration related documents, the IIRA penalizes business employers for hiring “illegal immigrants” as defined under the Act.²³⁶ Like California’s Proposition 187, Hazleton requires its Code Officers to act as immigration officers or administrative law judges as defined under the IRCA.²³⁷ The municipal ordinance thus stands as an obstacle to federal purposes because it creates a dual system of adjudication—one at the local level and one at the federal level.

Federal immigration law is not only concerned with keeping people out; it is also concerned with bringing people in. Many immigrants are lawfully present but do not have a green card or visa stamped in their passport. Having untrained municipal employees verifying the immigration status of aliens based on their understanding of what is “legal” can lead to the unlawful treatment of persons legally present, who may decide to leave the United States as a result. This is contrary to Congress’ purpose in enacting the IRCA and establishing the administrative law judge as the exclusive governmental body regulating employment of undocumented workers.

235. Complaint ¶ 22, *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 3:06-cv-01486-JMM) [hereinafter Original Complaint]; see also Manhiem, *supra* note 35, at 976 (“[E]stablishing whether an individual is not a resident or otherwise lawfully present in this country . . . could entail a herculean task of reviewing voluminous documentation of separate distinct governmental entities to determine whether a defendant has received a visa, temporary or permanent resident alien status, etc.”).

236. Illegal Immigration Relief Act Ordinance, *supra* note 5. See also Original Complaint, *supra* note 229, ¶ 22 (“It is impossible for Plaintiffs Lechuga and Jane Doe 1 to determine whether each new worker they may hire or customer they may serve is an ‘illegal alien’ as defined by the Ordinance. They have received no guidance or training from Hazleton or others regarding how to determine whether an individual is an ‘illegal alien.’ Plaintiffs Lechuga and Jane Doe 1 have no expertise in determining the authenticity of immigration-related documentation.”); Boatright, *supra* note 80, at 1664 (acknowledging that voluntariness, authority clarification, systematic incentives, a liability shield, and training resources are necessary for state and local participation in immigration enforcement).

237. Illegal Immigration Relief Act Ordinance, *supra* note 5, § 4B (listing the responsibilities of the Hazleton Code Enforcement Office).

IV. IMPLICATIONS OF MUNICIPAL ORDINANCES ON IMMIGRATION REGULATION

Regulations making it a state or local offense to violate federal immigration statutes can be compared to registration and exclusion laws.²³⁸ The primary motivation behind such laws is either dissatisfaction with federal enforcement of federal laws or the desire to burden immigration.²³⁹ This Part analyzes the policy impact of municipal ordinances regulating immigration if they are found constitutional.²⁴⁰

A. Discrimination Against Documented Workers Results When Local Government Attempts to Regulate the Employment of Undocumented Workers

Even though ordinances like Hazleton's IIRA do not explicitly address the admission, naturalization, and residence of aliens in the United States, the ordinance will have an effect on documented workers.²⁴¹ The right to work is tantamount to the right to reside in a state or city, and thereby the right to reside in the United States. When this right is denied, immigrants, documented and undocumented, are forced to move. Hazleton's mayor has already acknowledged that immigrants began to move out of the city when the ordinances were initially proposed.²⁴² It is clear that the employment immigration ordinances have the effect of forcing immigrants to migrate from cities where they are not welcome.²⁴³

238. Manhiem, *supra* note 35, at 985 ("Laws making it a state offense to violate federal immigration statutes are the modern version of state registration and exclusion laws.").

239. *Id.* ("The only reasons to do so are either dissatisfaction with the federal government's enforcement of its own laws or to further burden immigration."). *But see* Spiro, *supra* note 81, at 1640 ("Although some states may adopt policies unfavorable to aliens, there will be interests on the other side of the balance sufficient in most cases to overcome the perceived political and economic gains of denying public benefits to aliens and otherwise discouraging them from taking up residence.").

240. *See infra* Part IV.A–C.

241. *See In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 578 (S.D. Tex. 1980) (stating that "[m]easures intended to increase or decrease immigration, whether legal or illegal, are the province of the federal government").

242. Jackson, *supra* note 38, at B5 (noting Mayor Barletta's statement that most immigrants have left Hazleton since the enactment of the ordinances); Memorandum of Law in Support of Plaintiffs' Opposition to Hazleton's Motion to Dismiss and Cross Motion for Summary Judgment at 23, *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (stating that "[s]ince the original ordinances were introduced, businesses have shut down, customers and renters have dwindled, and families have left or are planning to leave town").

243. *See* Manheim, *supra* note 35, at 971 (stating that "badge and display of state authority has the avowed purpose and obvious practical impact as an order of deportation"); *see also id.* at

After the IRCA was passed, the federal government acknowledged that its own system of sanctioning employers for hiring undocumented workers resulted in a widespread pattern of discrimination against *authorized* workers.²⁴⁴ Municipal ordinances like Hazleton's will inevitably lead to discrimination similar to that experienced under the IRCA.

This point was recently noted in *Lozano v. City of Hazleton*.²⁴⁵ In *Lozano*, counsel for plaintiffs argued that the IIRA:

violates the due process rights of landlords, employers, and business owners by placing them in the intractable position of having on the one hand, to demand proof of status from every suspected 'illegal alien' to avoid the risk of incurring fines and losing municipal operating permits and licenses or, on the other hand, denying service to lawful residents as a precaution against violating the Ordinances, thereby risking liability for violating Federal and state anti-discrimination laws. The Ordinance is vague and overbroad, making compliance thoroughly impossible.²⁴⁶

The Hazleton ordinance prohibits employers from hiring illegal aliens. However, it does not properly define "illegal alien" or provide a mechanism to properly train employers to identify illegal aliens.²⁴⁷ Without this essential training, employers are left to discern on their own whether a potential employee or tenant is an illegal alien. As a result, employers fearing possible sanctions will likely discriminate against people "whom they believe to be illegal immigrants based on their race, color, or national origin."²⁴⁸ This practice is in direct violation of Title VII of the Civil Rights Act of 1964.²⁴⁹ Thus,

985 (stating that "laws making it a state offense to violate federal immigration statutes are the modern version of state registration and exclusion laws. The only reasons to do so are either dissatisfaction with the federal government's enforcement of its own laws or to further burden immigration").

244. See INSTITUTE FOR SURVEY RESEARCH, *supra* note 9, at 3 (stating that a state study also reported significant and disturbing incidents of workplace discrimination that could be tied to confusion or lack of understanding about the employment verification provisions).

245. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007); see also Original Complaint, *supra* note 235, at 2 ("If the Ordinance is allowed to stand, anyone who looks or sounds 'foreign'—regardless of their actual immigration status—will not be able to participate meaningfully in life in Hazleton, returning to the days when discriminatory laws forbade certain classes of people from owning land, running businesses or living in certain places.").

246. Original Complaint, *supra* note 235, at 2.

247. *Id.* at 3; see also, Mexican American Legal Defense and Educational Fund (MALDEF), *Legal and Policy Analysis: Local Illegal Immigration Relief Act Ordinances*, at 5 [hereinafter MALDEF], available at <http://www.maldef.org/publications/index.cfm>.

248. MALDEF, *supra* note 247, at 6.

249. *Id.* at 6–7 (citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et. seq.*, 42 U.S.C. §§ 3601 *et. seq.*).

employers are stuck between fear of sanctions from municipal ordinances and fear of federal prosecution.²⁵⁰

The concept that imposing sanctions on employers will infringe upon the rights of legal immigrants is not new. A study conducted by the Institute for Public Representation at the Georgetown University Law Center for the 1981 Select Commission on Immigration and Refugee Policy clearly delineated how such a provision would violate legal immigrants' rights.²⁵¹ Specifically, the study demonstrated that employer sanctions would encourage both discriminatory hiring and law enforcement practices.²⁵² Obviously, the discriminatory effects will be felt by those who "look or sound 'foreign.'"²⁵³ The story of the Lechugas is evidence of this discriminatory effect.²⁵⁴

B. The Implications of Municipal Ordinances on Foreign Affairs

It is important for a sovereign nation to speak with one voice regarding the treatment of foreign nationals. Different applications and interpretations of federal immigration law in various municipalities may affect the country's relations with foreign governments.²⁵⁵ For example, after California passed Proposition 187, which contained anti-immigrant provisions, Mexico publicly opposed the measure and called for political and civic leaders after the election to boycott California commercially.²⁵⁶ This is a clear example of how a local ordinance regulating immigration can embroil the United States in disputes with foreign nations.

250. Original Complaint, *supra* note 235, at 2.

251. INSTITUTE FOR PUBLIC REPRESENTATION GEORGETOWN UNIVERSITY LAW CENTER, SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY US IMMIGRATION POLICY AND THE NATIONAL INTEREST: DISCRIMINATORY EFFECTS OF EMPLOYER SANCTIONS, at APP. E (1981) ("[S]uch schemes cannot be effected without severe discriminatory impacts upon Hispanic, Asian, black, and other minority Americans and legally resident aliens.").

252. *Id.*

253. *Id.* at 490; *see also*, Ana Arias Interview, *supra* note 54.

254. For a discussion of the Lechuga's story, *see supra* notes 1–8 and accompanying text.

255. Manheim, *supra* note 35, at 988 ("Where the purpose and effect of a state law is to reach a matter within its police power, and it does not seriously implicate the nation's need to speak with a single voice, the state law should be upheld. In contrast, if any adverse effects from the state law might fall on the nation as a whole, the need for national uniformity is great. States should not have the opportunity to control national policy in this manner.").

256. *See* Timothy J. Mattimore, Jr., *Dual Citizenship Legislation Could End Pragmatic Mexican Response to California's Proposition 187*, 9 GEO. IMMIGR. L.J. 391, 393 (1995) (disputing the effectiveness of the Mexican call for a boycott where U.S. President Bill Clinton opposed Proposition 187 and Mexican businesses continued to conduct business with California).

Accordingly, the varied applications will inevitably result in many different formulations of how immigrants should be treated.²⁵⁷ According to one scholar, “immigration power’s presumed effect on foreign affairs further supports its characterization as an exclusive federal power because of the nation’s need to speak with one voice on [immigration] issues.”²⁵⁸ The Constitution affirms this principle by giving the federal government exclusive power to regulate foreign affairs.²⁵⁹

In 1876, the Supreme Court clearly stated that when states draft laws that are inconsistent with federal law, “a silly, an obstinate, or a wicked [state] commissioner may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend.”²⁶⁰ The Court further acknowledged that “a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.”²⁶¹

In *DeCanas v. Bica*, the Supreme Court stated that when national uniformity is the goal, there may be a policy reason for preempting state regulation.²⁶² The Court, however, found that national uniformity was not a goal of the INA because it addresses only the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country,²⁶³ not employment. Allowing Hazleton and other states and municipalities to enact legislation in the same area is bad policy, especially where the motivations for enacting the legislation stem from inaccurate local perceptions about a lack of adequate

257. Pham, *supra* note 86, at 1381.

258. *Id.* at 1381; *see also* Manheim, *supra* note 35, at 958 n. 129 (“It is an accepted maxim of international law that every sovereign nation has the power as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”) (quoting *Ekiu v. United States*, 142 U.S. 651, 659 (1892)). *But see* Manheim, *supra* note 35, at 947 (stating that state action that “merely has foreign resonances but does not implicate foreign affairs is not per se invalid”) (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983)).

259. Manheim, *supra* note 35, at 940 (“State and local governments have no constitutional power to regulate foreign affairs Power over foreign affairs is a concomitant of national sovereignty, a feature never possessed by the individual states.”).

260. *Chy Lung v. Freeman*, 92 U.S. 275, 279 (1876); *see also*, Manheim, *supra* note 35, at 946–47 (stating that because immigration policy is inextricably tied to conduct of foreign relations immigration is a matter of exclusive federal control); Spiro, *supra* note 81, at 1641–42 (“As the Proposition 187 campaign intensified, the government of Mexico weighed in against the measure with public statements, but also with not-so-veiled threats to go slow on California-Mexican economic relations if the proposition were to pass.”).

261. *Chy Lung*, 92 U.S. at 280; *see also* Manheim, *supra* note 35, at 962 (illustrating the principal that state laws that are offensive to foreign governments may bind a nation diplomatically).

262. *DeCanas v. Bica*, 424 U.S. 351, 358 (1976).

263. *Id.* at 359.

resources.²⁶⁴ The existence of over 600 different government agencies regulating immigration creates fragmented immigration policy where the individual policies of one municipality could be mistaken as the policy of the United States.

C. The Federal System Cannot be Fixed with Imprudent Municipal Legislation

The passage of the IRCA in 1986 instituted a federal system for monitoring the employment of undocumented workers.²⁶⁵ Since its inception, this system has been criticized for its ineffectiveness.²⁶⁶ It has also been criticized because employer sanctions have resulted in discrimination, the laws are ineffective and easily evaded, and the laws have resulted in worker exploitation and a growing underground economy of undocumented workers.²⁶⁷ Critics of the system recognize “a need for more effective enforcement of labor and employment rights to eliminate exploitation of immigrant workers and unfair competition against good employers.”²⁶⁸

Municipal intervention in the sanctioning of employers for hiring undocumented workers is not the solution to these problems. The creation of numerous state and local parallel enforcement systems only adds more chaos to a broken federal system.²⁶⁹

V. FEDERALISM FIX FOR THE IMMIGRATION PREEMPTION CONUNDRUM

This Part analyzes what federal courts and Congress must do to address the piecemeal legislation being passed in various municipalities

264. See *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (discussing “[t]he Nation’s need to ‘speak with one voice’ on immigration matters”); see also *Graham v. Richardson*, 403 U.S. 365, 382 (1971) (permitting “state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity”).

265. Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359 (1986) (codified at 8 U.S.C. § 1324a (2000)).

266. See, e.g., National Employment Law Project, *More Harm Than Good: Responding to States’ Misguided Efforts to Regulate Immigration*, Mar. 22, 2006, at 9 [hereinafter National Employment Law Project] (“Federal employer sanctions have made a bad situation worse.”); see also, INSTITUTE FOR SURVEY RESEARCH, *supra* note 9, at 12 (stating that soon after the IRCA was enacted, a March 29, 1990 GAO report “found that the implementation of employer sanctions had resulted in a widespread pattern of discrimination against eligible workers”).

267. National Employment Law Project, *supra* note 266, at 8–9.

268. *Id.* at 4; see also, Speasmaker, *supra* note 22, at 11 (stating that in 2004, only fifty-three employers were fined for work authorization violations and only four criminal penalties were imposed. Further, only two percent of the INS’s budget was allotted for INA enforcement).

269. National Employment Law Project, *supra* note 266, at 4 (“Employer sanctions laws in effect since 1986 have not solved the problem of undocumented migration.”).

in light of the policy implications, the structure of the municipal ordinances, and the current preemption framework.

A. Federalism Principles

The federal government must take direct action to curtail state and local regulation of immigration. The current system is a labyrinth of laws and regulations that is arcane and hard to follow.²⁷⁰ Federalism principles may be employed to simplify the system and safeguard immigrants' rights. Federalism principles draw a delicate balance between the federal government and the government of each state.²⁷¹ It is important to find the correct balance between federal control and state participation in immigration regulation. The principles of federalism help determine this balance.²⁷² In fact, most Supreme Court preemption cases clearly address federalism as the underlying basis for their decisions.²⁷³

There are two basic federalism models: traditional and cooperative.²⁷⁴ Under the traditional view of federalism, the federal government's power is limited.²⁷⁵ Federal and state governments are separate sovereigns that operate within separate zones of authority.²⁷⁶ Therefore, the judiciary's role is to protect the states by interpreting and enforcing the Constitution to protect the zone of activities reserved to the states.²⁷⁷ Supporters of the traditional federalist view believe that it has created positive state social programs such as anti-discrimination

270. See, e.g., *id.* at 10 (discussing the complexity of immigration law). As the National Employment Law Project notes:

It would be unfairly burdensome to ask state agents to navigate the complex web of immigration law. Laypeople often believe there is a bright line between U.S. citizenship and undocumented immigrants. There is no such bright line. In addition to citizenship and legal permanent residence (green card holder), our immigration system is an alphabet of visa categories from A to V as well as status as asylee, temporary resident, or temporary protected status. A person can transition from one status to another over time. It would be unfairly burdensome to ask state and local agents to take on the additional responsibility of acting as immigration agents.

Id. at 11.

271. See WEBSTER'S DICTIONARY 426 (11th ed. 2003) (defining federalism as "the distribution of power in an organization (as a government) between a central authority and the constituent units").

272. Spiro, *supra* note 81, at 1627–28.

273. Dinh, *supra* note 139, at 2085.

274. Erwin Chemerinsky, *Federalism Not as Limits, But as Empowerment: Federalism in the 21st Century: Theories of Federalism*, 45 U. KAN. L. REV. 1219, 1240 (1997).

275. See *id.* at 1240 ("Throughout American history, federalism has been invoked by conservatives as a way of trying to limit federal power to prevent changes that they opposed.").

276. See *id.* at 1224 (stating that the term and idea of "dual federalism" was coined in 1937).

277. *Id.*

laws, no-fault insurance, and unemployment compensation.²⁷⁸ Accordingly, the traditionalist federalist viewpoint supports state regulation of immigration law under the Tenth Amendment, arguing that federal power must be balanced with the state's power to effectively police matters within its borders.²⁷⁹

The traditionalist model is based on the principal that, if left unchecked, the federal government will act in a tyrannical manner that usurps states' Tenth Amendments police powers.²⁸⁰ The *DeCanas* case illustrates this model. The Court first affirmed the constitutionality of the California statute, stating that California's Tenth Amendment police powers²⁸¹ empower it to regulate employment and impose criminal sanctions for the employment of illegal aliens who have no federal right to employment within the country.²⁸² The Court characterized employment matters as local problems because a state has an interest in protecting its own workers.²⁸³

Some scholars who are more sympathetic to state and local regulation of immigration argue that using diverse resources to implement immigration policies versus diverse substantive state laws is constitutional.²⁸⁴ Peter Spiro, an immigration law scholar, argues that a "steam valve" model of federalism occurs when state and local laws are struck down in court, leading to pressure at the federal level by state

278. In fact, some argue that a blanket rule preempting all state activity would not be helpful because some states have enacted legislation that protects the rights of undocumented and documented workers.

279. LEGOMSKY, *supra* note 9, at 120 (explaining that the "[s]tate can constitutionally exclude non-citizens who were found to be 'lunatics, idiots, [etc.]' and who did not post security against becoming public charges") (quoting *Smith v. Turner (Passenger Cases)*, 48 U.S. 283, 410 (1849)).

280. Pham, *supra* note 86, at 1402; *see also* Boatright, *supra* note 80, at 1666–67 (stating that "[a]n underlying assumption of federalism is that 'if one government is not doing what the people want,' they can seek it from a different government") (quoting Kevin Arcenaux, *Does Federalism Weaken Democratic Representation in the United States?* PUBLIUS, Spring 2005, at 297).

281. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

282. *DeCanas v. Bica*, 424 U.S. 351 (1976); *see also* Dinh, *supra* note 139, at 2086 (stating that one of the bedrock principles of the constitutional preemption doctrine is that a Federal Act may not supersede the police powers of the states unless Congress enacts a statute that clearly manifests this intent).

283. *DeCanas*, 424 U.S. at 355 ("In this case, California has sought to strengthen its economy by adopting federal immigration legislation.").

284. Kobach, *supra* note 212, at 232 ("[W]hile state enactments might well impede federal plenary authority to regulate immigration, state assistance in the form of arrests enhances the federal government's ability to enforce its laws.").

lobbyists to enact similar legislation.²⁸⁵ A system where Congress delegates decisions to the states under this view presents a middle of the road option that allows aliens to enjoy public benefits.²⁸⁶ This view considers the battle over immigration suited to the state level, “where the concrete economic advantages will often outweigh the costs presented by alien populations.”²⁸⁷ Although supporters of state action believe that states and municipalities provide diverse resources that are necessary to address the gaps in federal immigration laws, they still acknowledge that one uniform federal law governing the distribution of state and localities’ resources would be beneficial.²⁸⁸ Scholars like Cristina Rodriguez support the traditional federalist model for creating pro-immigrant legislation such as granting in-state college tuition to immigrants, creating sanctuary laws protecting immigrants, and creating day labor centers to protect immigrant rights.²⁸⁹ Other scholars acknowledge that several state enactments may impede federal plenary authority over immigration.²⁹⁰

The second model of federalism, the cooperative model, is articulated by the constitutional law scholar Erwin Chemerinsky. Professor Chemerinsky proposes a federalist model that balances the state’s interest in exercising its police powers with the protection of individual rights.²⁹¹ Under his model, one can argue that there is no reason to permit states to experiment with immigration ordinances when immigrants’ rights are at stake.²⁹²

Professor Chemerinsky proposes cooperation between “multiple levels of government” that have institutions empowered to solve problems.²⁹³ His idea of federalism, based on his interpretation of the

285. Spiro, *supra* note 81, at 1632–38 (arguing that the federal government must expressly approve the delegation of state authority to regulate immigration based on California’s Proposition 187 (which was struck down in federal court) and a subsequent federal law (the Personal Responsibility and Work Opportunity Reconciliation Act) which was enacted in Congress to limit immigration eligibility for benefits).

286. *Id.* at 1638 (arguing that “[s]uch delegation would almost certainly be consistent with the case law”).

287. *Id.* at 1646.

288. Kobach, *supra* note 212, at 229.

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

290. *Id.* at 231 (acknowledging that local laws may assist but not contradict or undermine federal law).

291. Chemerinsky, *supra* note 274, at 1240.

292. *Id.*

293. *Id.* at 1220; Okeke & Nafziger, *supra* note 78, at 540 (acknowledging that the Department of Labor, through the process of labor certification on behalf of immigrants, relies on state cooperation in enforcing the law; but recognizing that under the preemption doctrine, “the

Supremacy Clause of Article VI of the Constitution,²⁹⁴ aims to protect “the interests of both the federal and state government.”²⁹⁵

It can be inferred from Chemerinsky’s cooperative federalist model that the states should be able to enact immigration laws where the federal government has fallen short.²⁹⁶ Chemerinsky, however, places limits on his cooperation federalist model. For example, he criticizes the Supreme Court case *Hammer v. Dagenhart*.²⁹⁷ In *Hammer*, the court refused to allow Congress to regulate child labor laws.²⁹⁸ Chemerinsky rejects the Court’s reasoning in that case, stating that “[t]here certainly was no reason to allow states to experiment with exploiting children or to question Congress’s judgment that national uniformity was desirable in this area.”²⁹⁹

Similarly, in regards to immigration laws, there is no reason to allow states or municipalities to experiment with immigrants’ rights. Like child labor laws, immigration is an area where national uniformity is highly desirable. It has already been noted that even at the federal level employment sanctions can result in discrimination.³⁰⁰ Even though Chemerinsky’s federalist model encourages cooperation between states and the federal government, there are limits to the model where there exists a need for national uniformity to protect individual rights.³⁰¹

states may not interfere with the federal power over immigration”).

294. U.S. CONST. art. VI, §1, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every states shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”).

295. Chemerinsky, *supra* note 274, at 1226.

296. Manheim, *supra* note 35, at 946 (drawing an analogy between the dormant commerce clause and federal power over immigration arguing that “[s]tate entry into an exclusively federal domain usurps congressional authority and undermines our federalist[] scheme”).

297. 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 657 (1941) (invalidating, as an impermissible extension of Congress’s constitutional authority to regulate interstate commerce, a law that regulated child labor by prohibiting interstate commerce of goods made by children under certain conditions).

298. *Hammer*, 247 U.S. at 276–77.

299. Chemerinsky, *supra* note 274, at 1236.

300. INSTITUTE FOR SURVEY RESEARCH, *supra* note 9, at 3 (stating that right after the IRCA was enacted, a March 29, 1990 GAO report found “that the implementation of employer sanctions had resulted in a widespread pattern of discrimination against eligible workers” and that a substantial amount of these discriminatory practices had resulted from the implementation of the IRCA).

301. See generally Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69 (2005) (criticizing the Supreme Court’s framework for analyzing preemption issues and proposing a straightforward express and implied preemption analysis of the issues).

As stated above, the Constitution gives Congress plenary power over naturalization, and local laws only serve as an obstacle to the purposes of federal legislation enacted pursuant to this power.³⁰² Courts should use the plenary powers doctrine to effectuate a cooperative model of federalism that, congruent with Chemerinsky's model, protects the rights of immigrants. Immigration law scholar Anil Kalhan acknowledges that the dominant modern view is that "limitations on state and local authority have been explained as resting, at least in part, on the premise that non citizens are more likely to face hostility, discrimination, or disadvantage at the hands of state or local institutions than at the hands of the federal government."³⁰³ Accordingly, the Supreme Court should step outside of the normal preemption framework and consider: (1) the text of the Constitution which gives Congress power over immigration and therefore the power to protect immigrant rights;³⁰⁴ (2) that migration affects immigrants' ability to remain within a state or municipality when state and local governments assert control over immigrants; (3) the complexity of immigration law; and (4) that state and municipal actors have no training to enforce immigration law when determining whether federal law preempts Hazleton-like employment ordinances. The United States District Court for the Middle District of Pennsylvania found the Hazleton ordinance unconstitutional.³⁰⁵ The Court found that the ordinance was expressly and impliedly preempted by the IRCA.³⁰⁶ It is likely that Hazleton will appeal.³⁰⁷ Given the recent Supreme Court jurisprudence in this area, it is difficult to determine how the Supreme Court will handle the preemption issue.³⁰⁸

B. Federal Courts Cannot Fix the Immigration Problem: Congress Must Take Definitive Action

The most effective way to clarify the law in this area is for Congress to expressly state its intent to preempt state law. There is no rigid test

302. For a discussion of the plenary powers doctrine, see *supra* notes 179–192 and accompanying text.

303. Kalhan, *supra* note 185, at 3.

304. U.S. CONST. art. I, § 8, cl. 4.

305. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 555 (M.D. Pa. 2007) (finding that the ordinance provisions violated the Supremacy Clause).

306. *Id.* at 521–22.

307. Julia Preston, *Judge Voids Ordinance on Illegal Immigrants*, N.Y. TIMES, July 27, 2007, at A14 ("Mr. Barletta [Mayor of Hazleton] said the city would appeal and would fight to the United States Supreme Court if necessary.").

308. See generally Chemerinsky *supra*, note 274 (stating that the Rehnquist Court was inconsistent in evaluating constitutional preemption issues).

that the courts can apply every instance to determine whether a state or municipal law will be preempted.³⁰⁹ Rather, the same preemption test applies to all conflicts between federal and state law.³¹⁰ Some scholars have proposed that in analyzing any preemption case “[t]he task for the court is to discern what Congress has legislated and whether such legislation displaces concurrent state law—in short, [the courts’ task is one] of statutory construction.”³¹¹

The preemption analysis centers on an examination of congressional purposes.³¹² It starts with an “assumption that the historic police powers of the state will not be superseded by Federal Act unless that was the clear and manifest purpose of Congress.”³¹³ Therefore, Congress must clearly show “intent to displace state and municipal action.”³¹⁴ The federal courts will not be able to respond to the problem of regulating immigration unless Congress enacts legislation that expressly preempts state or local action.³¹⁵ The preemption doctrine is

309. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (“There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress.”).

310. *See generally* *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 105, 108 (1992) (finding several Illinois provisions for licensing workers who handled hazardous waste preempted by federal occupational safety and health administration regulations even though federal regulations aimed only at worker safety and the state regulation aimed both at worker safety and public health); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) (holding that the Federal Cigarette Labeling and Advertising Act did not preempt state law damages actions); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 232 (1983) (holding that the federal Atomic Energy Act did not preempt the California State Energy Commission finding because even though the Nuclear Regulatory Commission has control over safety aspects of nuclear energy generation, the Act did not extend to regulation of economic concerns within the state); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (holding that the California Agricultural Code did not conflict with the Federal Agricultural Adjustment Act); *McDermott v. Wisconsin*, 228 U.S. 115, 134 (1913) (holding that Wisconsin law conflicted with the Food and Drug Act where joint compliance with federal and state law was impossible); *Cook v. Rockwell*, 273 F. Supp. 2d 1175, 1188–97 (D. Colo. 2003) (holding that Congress did not expressly or impliedly intend to preempt the state tort law standards of care in enacting the Price-Anderson Act and federal nuclear safety provisions). *But see* *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941) (holding that the Pennsylvania Alien Registration Act was federally preempted because the federal government had already enacted a comprehensive immigration scheme); *Maynard v. Revere Copper Prods., Inc.*, 773 F.2d 733, 735 (6th Cir. 1985) (holding that “[t]he duty of fair representation relates to an area of labor law which has been so fully occupied by Congress as to foreclose state regulation”).

311. *Dinh*, *supra* note 139, at 2092.

312. *Id.* at 2085.

313. *Id.* at 2086 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

314. *Id.* at 2093 (stating that “the Court held that Congress had not done enough to show its intent to include state judges in the prohibition and thus to displace the state constitutional provision; it had to include a clear statement of intent”).

315. *See* *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947) (holding that if a state acts in an area regulated by the federal government, “the federal scheme prevails [even if] it is a more

subject to the political climate at the federal level. Accordingly, the doctrine needs to be removed from the “ebbs and flows of politics, which hardly favor immigrants who generally become the scapegoat for economic and national security concerns.”³¹⁶

Congress must act to fix the current system. First, Congress must enact legislation that clearly manifests its intent to occupy the field of employment regulation of undocumented workers. Congress must do so in a way that specifically directs the actions of local governments. The Basic Pilot Program, the PRWORA, and the IIRIRA have only moved immigration reform in the opposite direction.³¹⁷ Congress must make enforcement provisions more detailed, specifically as they relate to employing undocumented immigrants. When Congress manifests its clear purpose, the courts, states, and municipalities will be able to clearly follow Congress’s lead in regulating undocumented workers.

Congress must find ways to address the problems of hiring undocumented workers and day laborers. Many economic factors draw immigrants to the United States.³¹⁸ Once here, immigrants aid the U.S. economy in several key ways.³¹⁹ First, immigrants provide a supply of labor, commonly in low-wage jobs where the supply of native-born labor is limited.³²⁰ Second, immigrants are “consumers as well as workers.”³²¹ Immigrants increase demand for goods and services in the areas where they settle, thus boosting the local economy.³²²

More educated immigrants have provided expertise in areas such as science and engineering, and will help the U.S. preserve its “strength in technological innovation, especially as other countries (like China and India) become more competitive in these areas.”³²³ One scholar

modest, less pervasive regulatory plan than that of the State”); Dinh, *supra* note 139, at 2094 (“[W]hether federal law can intrude into a core zone of state sovereignty presents a difficult constitutional question, and the doctrine of constitutional avoidance favors a clear statement rule when Congress treads into constitutionally suspect territory.”).

316. Raquel Aldana, *On Rights, Federal Citizenship, and the “Alien”*, 46 WASHBURN L.J. 263, 290 (2007).

317. For a discussion of the Basic Pilot Program, the PRWORA, and the IIRIRA, see *supra* notes 88–102 and accompanying text.

318. See generally INSTITUTE FOR SURVEY RESEARCH, *supra* note 9 (evaluating the INS Basic Pilot Program).

319. *Id.* at 9.

320. *Economic Impact of Immigration: Hearing Before the H. Comm. on Education and the Workforce*, 109th Cong. 2–3 (2005) (statement of Harry J. Holzer, Professor of Public Policy, Georgetown University).

321. *Id.* at 2.

322. *Id.* at 2–4.

323. *Id.* at 2 (“[A]bout a fourth [of immigrants] are college graduates. Immigrants constitute large fractions of the current population of U.S. graduate students, especially in science and

predicts that immigration will be increasingly significant in the growth of the U.S. labor force in the coming century, and that future immigrants will have higher levels of education.³²⁴

It is helpful to look at what happens when immigrants are not allowed into the country. One possible repercussion is exemplified by the labor shortages California farmers experienced in 2006.³²⁵ Following the tightening of the borders, farmers were unable to hire the labor they needed to pick their crops at the appropriate time.³²⁶ California farms typically employ around 450,000 people at the “peak of harvest,” but the state was short 70,000 workers in 2006.³²⁷ As a result, farmers lost a great deal of money due to spoilage.³²⁸ California pear farmers alone are estimated to have lost at least ten million dollars due to the labor shortage.³²⁹ Congressional acknowledgment that the U.S. economy benefits from immigration is key to enforcing existing laws and reforming the current system.

Congressional action is necessary in the area of employment because municipalities are enacting ordinances addressing these problems. One way to lessen the perceived need for municipal action is to bring more enforcement actions against employers hiring undocumented workers under 8 U.S.C. § 1324a(e).³³⁰ Undocumented workers should not be targeted. If this provision were consistently enforced, there would be no need for municipal regulation.

Undoubtedly, immigrants have a positive impact on our economy. Congress must unequivocally acknowledge that several economic factors favor bringing outside labor to the United States.³³¹ Congressional action is necessary to affect change, rather than traditional political means, because many immigrants do not have the right to vote.³³²

engineering.”).

324. Joel Feinleib and David Warner, Social Security Advisory Board, *Issue Brief #1: The Impact of Immigration on Social Security and the National Economy*, Dec. 2005, available at <http://www.ssab.gov/brief-1-immigration.pdf>.

325. Julia Preston, *Pickers Are Few, and Growers Blame Congress*, N.Y. TIMES, Sept. 22, 2006, at A1.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. Speasmaker, *supra* note 22, at 5 (stating that employment sanctions in the United States and nineteen other countries have failed).

331. See Holzer, *supra* note 320, at 2–3 (stating that immigrants provide a supply of labor, commonly in low-wage jobs where the supply of native-born labor is limited).

332. See Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the*

CONCLUSION

Targeting immigrants through municipal laws that exclude immigrants from a city should not be tolerated. Once immigrants have lawfully arrived in the United States, they are free to migrate from state to state. Municipalities cannot lawfully prohibit poor people from entering their communities by enacting ordinances allegedly justified by the depletion of local resources.³³³ Similarly, municipalities cannot use immigration law to affect the removal of lawful immigrants from the community.³³⁴ As the District Court for the Middle District of Pennsylvania stated perfectly, “[w]hatever frustrations officials of the City of Hazleton may feel about the current state of federal immigration enforcement, the nature of the political system in the United States prohibits the City from enacting ordinances that disrupt a carefully drawn federal statutory scheme.”³³⁵ Violation of the law by entering the United States in the first place is a federal issue, which must be addressed through federal immigration reform and the enforcement of existing laws, not municipal anti-immigration legislation.³³⁶

The enforcement of existing laws is critical to comprehensive employer and documented employee protections. At the same time, Congress must prevent the enactment of municipal regulatory schemes addressing the same area by clearly and unequivocally stating that state and local laws are preempted. Further legislation sanctioning employers who hire undocumented workers on the municipal level will only serve to entrench the current fragmented federal system that causes unlawful discrimination against prospective employees. Congress can and must take definitive action to enforce and strengthen existing employer sanctions and anti-discrimination laws. The federal courts

Prospects for a New Civil Rights Movement, 42 HARV. C.R.-C.L. L. REV. 99 (2007) (evaluating the “efficacy of a new, multiracial civil rights movement seeking social justice”).

333. *Gambone v. Commonwealth*, 101 A.2d 634, 637 (Pa. 1954) (arguing that an ordinance like Hazleton’s “must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means . . . employ[ed] must have a real and substantial relation to the objects sought to be attained”); Memorandum, *supra* note 61, at 23.

334. *See Am. Ins. Assoc. v. Garamedi*, 539 U.S. 396, 423, 427 (2003) (overturning a California insurance scheme for Holocaust survivors because it was preempted by the federal government’s conduct of foreign affairs). The Court said that California could not “employ[] ‘a different, state system of economic pressure’” to address an issue touching on foreign relations. *Id.* at 423 (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 376 (2000)). The Court also said that California could not “use an iron fist where the [federal government] has consistently chosen kid gloves.” *Id.* at 427.

335. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 555 (M.D. Pa. 2007).

336. *Yale-Loehr & Chiappari*, *supra* note 21, at 343 (“Most of the measures attempt to encourage foreign nationals to leave by making life and work within their states and communities effectively impossible without proper documentation.”).

must assist this process by moving beyond the statutory presumption against preemption in immigration matters. This action on the part of the courts would promote federal enforcement of existing laws in the area of immigration, obviating the need for state and municipal regulations.