Immigrant Laws, Obstacle Preemption and the Lost Legacy of McCulloch

Lauren Gilbert, St. Thomas University

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Using Congress' perceived failure to enforce the immigration laws as a backdrop, this paper will explore how the Supreme Court's recent decision in Chamber of Commerce v. Whiting upholding the Legal Arizona Workers Act exposes some of the tensions and contradictions in modern preemption doctrine. Examining the relationship among express, field, impossibility and obstacle preemption, I explore three emerging trends, all evident in Whiting. The first is an increasing reluctance of the Court to find implied obstacle preemption. The second related trend is an inclination to expand the scope of impossibility preemption beyond the physical impossibility cases. The third is a tendency to no longer explicitly apply the presumption against preemption, and in some cases, to do exactly the opposite: presume preemption. The Court's decision in Whiting is a harbinger of things to come, as challenges to state and local laws regulating immigrants make their way to the Court and a growing number of states adopt their own versions of S.B. 1070 and the Legal Arizona Workers Act. I first offer a brief overview of preemption jurisprudence, focusing on the nearly-forgotten legacy of McCulloch v. Maryland in planting the roots of obstacle preemption. I also examine recent case law showing a predisposition on the Court’s part to substitute impossibility and obstacle preemption with the “logical contradiction” test. I examine how the Supreme Court in Whiting overlooked the case law interpreting the preemptive effect of the 1986 Immigration Reform and Control Act (“IRCA”) and on how it ignored the Third Circuit’s careful analysis of obstacle preemption in Hazleton v. Lozano. I then address the implications for S.B. 1070 and state and local copycat laws of the Court’s apparent willingness to uphold state laws modeled after federal law when enacted to redress a gap in federal enforcement. I conclude that, while unwise and contrary to precedent, adoption of the logical contradiction test would be a dramatic paradigmatic shift that would give the Court the means to uphold state and local laws regulating immigrants and immigration to the extent that these laws track federal enforcement measures.
INTRODUCTION

Over the last few years, and particularly since 2007, the year of the last major failed attempt at comprehensive immigration reform, lawmakers in states and communities across the nation have taken the regulation of immigrants and immigration into their own hands, introducing and enacting laws and ordinances targeting so-called illegal immigrants, but affecting virtually any person who looks or sounds foreign.\(^1\) The majority of these laws are generally of two types: laws regulating employers’ hiring of immigrants; and laws providing for State and local enforcement of U.S. immigration law.\(^2\) In April 2010, legislation of the latter type made national news when Jan Brewer, the Governor of Arizona, signed into law S.B. 1070, the Support Our Law Enforcement and Safe Neighborhoods Act.\(^3\) In so doing, she accused the Obama administration of failing to enforce the immigration laws: “Arizona did not ask for this fight with the federal government,” she said. “But now that we are in it, Arizona will not rest until our border is secured and federal immigration laws are enforced.”\(^4\) This law contained some of the harshest provisions to date regulating immigrants.\(^5\) It was quickly met with a series of challenges, including by the U.S. government, and in July 2010, U.S. District Judge Bolton enjoined enforcement of various provisions of the law,\(^6\) a decision which was later upheld by the Ninth Circuit in April 2011.\(^7\) The State of Arizona and

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


\(^5\) Among other things: 1) it required law enforcement officers to attempt to verify a person’s immigration status if there were reasonable suspicion to believe the person was not lawfully in the United States; 2) it made it a crime for a noncitizen to fail to carry proof of immigration status; and 3) it authorized the warrantless arrest of any person if there were probable cause to believe the person had committed a deportable offense. 703 F.Supp.2d at 985-986.

\(^6\) 703 F.Supp.2d 980, 986-987.

\(^7\) U.S. v. Arizona, 641 F.3d 339, 2011 WL 1346945 (9th Cir. 2011).
Governor Brewer filed a petition for certiorari on August 10, 2011, which was pending before the Supreme Court at the time of this writing.  

Before S.B. 1070, however, there was the Legal Arizona Workers Act of 2007 (“LAWA”), various provisions of which targeted employers who hired so-called “unauthorized aliens”. The LAWA essentially did two things: 1.) It allowed local Arizona government officials to revoke the business licenses of employers who knowingly or intentionally hired foreign nationals who were not authorized to work; and 2.) It required employers to use federal E-Verify, a voluntary Internet-based system for authenticating employment documents, to determine employment eligibility.

On May 26, 2011, in the first Supreme Court case to address the recent wave of state and local laws targeting immigrants, a divided Court upheld these provisions. The Court found that they were neither expressly nor impliedly preempted by the 1986 Immigration Reform and Control Act (“IRCA”), which gave the federal government the power to sanction employers who hire unauthorized foreign nationals, nor by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), which, among other things, created the Basic Pilot Program which later became known as E-Verify. The Court found that the license revocation provision was not expressly preempted by IRCA, which preempted “any state or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens”, because it fell within the express preemption provision’s savings clause. The Court also found that the LAWA was not impliedly preempted because Arizona had taken the route “least likely to cause tension with federal law”, relying on the federal

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9 2007 Ariz. Sess. Laws Ch. 279, codified at Ariz. Rev. Stat. §§ 23-211 to 23-216. The Arizona statute defined an “unauthorized alien” as one who “does not have the legal right or authorization under federal law to work in the United States as described in 8 U.S.C. §1324a(h)(3).” The Arizona definition was based on the federal definition, which defined an “unauthorized alien” as “[a foreign national who] is not at that time either A) an alien lawfully admitted for permanent residence, or B) authorized to be so employed by this Act or by the Attorney General.” 8 U.S.C. §1324a(h)(3). The term “alien” is used throughout the Immigration and Nationality Act. This article, however, will, wherever possible, avoid using that term, referring to such individuals either as noncitizens or foreign nationals. Several authors have underscored the dehumanizing effect of use of the term “alien”. See, e.g., Keith Cunningham-Parmeter, Alien Language: Immigration Metaphors and the Jurisprudence of Otherness, 79 Fordham L. Rev. 1545 (March 2011); Legomsky & Rodriguez, supra note 2 at 1140.
11 Id. at § 23-214(A).
13 Id. at 1973.
15 Whiting, 131 S.Ct at 1978.
standards in IRCA and IIRIRA for sanctioning employers.\textsuperscript{16} In effect, the Arizona statute was a mirror image of federal law.\textsuperscript{17}

The Court, affirming language from its 1976 decision in \textit{De Canas v. Bica},\textsuperscript{18} that not every regulation of \textit{immigrants} is necessarily a regulation of \textit{immigration}, and that “prohibit[ing] the knowing employment ... of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of [the State's] police power,”\textsuperscript{19} suggested that since Congress had regulated in an area within the States’ traditional police powers, the scope of IRCA’s express preemption provision should be interpreted narrowly and full effect given to the exception in the savings clause for “licensing and similar laws.”\textsuperscript{20} It thus appeared to apply the presumption against preemption, a standard tool in preemption analysis, albeit without explicitly doing so. Moreover, once the majority concluded that the Arizona statute was not \textit{expressly} preempted, it was unwilling to further explore whether it might be \textit{obstacle} preempted. Justice Roberts wrote: “Implied preemption analysis does not justify a ‘freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.’”\textsuperscript{21} In so doing, the Court ignored years of Supreme Court precedent, particularly its 1976 decision in \textit{Whiting},\textsuperscript{19} 131 S.Ct at 1974 (while the “power to regulate immigration is unquestionably a federal power” . . . “States possess broad powers under their police powers to regulate the employment relationship”).

\textsuperscript{16} Id. at 1987.
\textsuperscript{17} See, e.g., Carissa Hessick, \textit{Mirror image theory in state immigration regulation}, SCOTUSBlog, posted July 13, 2011 2:34 p.m. at http://www.scotusblog.com/2011/07/mirror-image-theory-in-state-immigration-regulation/ (last checked July 25, 2011)(discussing theory of Kris Kobach, intellectual author of Arizona’s S.B. 1070 and of other state copycat legislation, that to avoid federal preemption, state and local laws must not attempt to create new categories of noncitizens, must use terms consistent with federal law, and must not independently attempt to determine a noncitizen’s immigration status, without verification from the federal government).
\textsuperscript{18} 424 U.S. 351 (1976).
\textsuperscript{19} \textit{Whiting}, 131 S.Ct at 1974 (while the “power to regulate immigration is unquestionably a federal power” . . . “States possess broad powers under their police powers to regulate the employment relationship”).
\textsuperscript{20} Id. at 1981 (“IRCA expressly preempts some state powers dealing with the employment of unauthorized aliens and it expressly preserves others. We hold that Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted ”).
\textsuperscript{21} Id. at 1985. Eleven days after upholding the Legal Arizona Workers Act, the Supreme Court vacated and remanded, without opinion, the Third Circuit’s decision in \textit{Lozano v. Hazleton}, 620 F.3d 170 (3\textsuperscript{rd} Cir. 2010), which had struck down a Hazleton, Pennsylvania ordinance with language similar to Arizona’s license revocation provision on the basis that the local ordinance conflicted with IRCA’s carefully-balanced policy goals. City of Hazleton, PA v. Lozano, 131 S.Ct. 2958 (2011). Although the Third Circuit found that the license revocation provision was not \textit{expressly} preempted because it fell within the exception for “licensing and similar laws” in IRCA’s savings clause, it ruled that the Hazleton ordinance was \textit{impliedly} preempted because it stood as an obstacle to achieving Congress’ legislative goals, citing to several precedent decisions. \textit{Id.} at !76. \textit{See, e.g.,} Collins Foods Int’l, Inc. v. INS, 948 F.2d 549, 554 (9\textsuperscript{th} Cir. 1991) (IRCA is delicately balanced to “serve the goals of preventing unauthorized alien employment while avoiding discrimination against citizens and authorized aliens”); \textit{accord} Chamber of Commerce v. Edmondson, 594 F.3d 742, 767 (10\textsuperscript{th} Cir. 2010)(IRCA balances the goals of “preventing
Court precedent, including, most notably, the Supreme Court’s historic 1819 decision in *McCulloch v. Maryland*\(^{22}\), arguably the Court’s first implied obstacle preemption decision.\(^{23}\)

Using Congress’ perceived failure to enforce the immigration laws as a backdrop, this paper will explore how *Whiting* exposes some of the tensions and contradictions in modern preemption doctrine. These tensions include the tension between cases where the Court, implicitly or explicitly, has applied a presumption *against* federal preemption where Congress regulates in an area of “traditional state concern,” and those where the Court has appeared to *presume* preemption in certain cases where Congress (or a regulatory agency) has adopted a comprehensive regulatory regime. Examining the relationship among express, field, implied impossibility and obstacle (also known as “purposes and objectives”) preemption, it also will address the emerging tendency of a conservative majority of the Court to distance itself from without explicitly overruling implied obstacle preemption analysis.\(^{24}\)

Justice Clarence Thomas consistently has taken the position that “purposes and objectives” preemption jurisprudence is incompatible with the Constitution because it involves the Court in “routinely invalidat[ing] state laws based on perceived conflicts with broad federal policy objectives … not embodied within the text of federal law.”\(^{25}\) Several of the other conservative justices, however, including Justices Roberts, Alito, and Scalia, while raising similar concerns in *Whiting*,\(^{26}\) have invoked obstacle preemption jurisprudence to preempt state common law claims in favor of defendant manufacturers, including in the areas of food and drug law and vehicle safety.\(^{27}\) These justices’ lack of consistency in applying “purposes

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\(^{22}\) 17 U.S. (4 Wheat.) 316 (1819).

\(^{23}\) *Id.* (“It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempts its own operations from their own influence … [T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government”).

\(^{24}\) In his 2000 article, *Preemption*, Caleb Nelson makes a compelling argument, based on historical evidence and a close parsing of the language in the Supremacy Clause, that the presumption against preemption is inconsistent with the *non obstante* clause in the Supremacy Clause, which provides that the Constitution, federal laws and treaties shall be the Supreme Law of the land, and that state judges shall be bound thereby “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 245 (2000)(hereinafter, “Nelson, *Preemption*”).


\(^{26}\) *Whiting*, 131 S.Ct at 1985.

\(^{27}\) *Wyeth* S.Ct. at 1219-1222 (Alito, Roberts and Scalia, J., dissenting).
and objectives’ preemption jurisprudence and the presumption against preemption is hard to explain as anything other than ideologically driven.\textsuperscript{28} Recently, however, some scholars and conservatives on the Court have begun to explore the outer boundaries of implied conflict preemption beyond the physical impossibility cases and to examine whether a “direct conflict” or a “logical contradiction” test might replace the current impossibility and obstacle preemption tests as a new paradigm.\textsuperscript{29}

The Supreme Court’s decision in \textit{Chamber of Commerce v. Whiting} is no doubt a harbinger of things to come, as challenges to state and local laws regulating immigrants, including S.B. 1070 and the local ordinance struck down by the Third Circuit in \textit{Lozano v. Hazleton},\textsuperscript{30} make their way to the Supreme Court and a growing number of states adopt their own versions of S.B. 1070 and LAWA.\textsuperscript{31} Part IA offers an overview of preemption jurisprudence, focusing in particular on the nearly-forgotten legacy of \textit{McCulloch v. Maryland} in planting the seeds of implied obstacle preemption. Part IB looks at how preemption jurisprudence has been applied to laws regulating immigrants and immigration, focusing in particular on the 1986 Immigration Reform and Control Act and on the Supreme Court’s decisions in \textit{Whiting} and \textit{Hazleton}, which virtually ignored obstacle preemption analysis. Part II addresses the implications for S.B. 1070 and copycat legislation of the Court’s apparent willingness to uphold state laws modeled after federal law when enacted to redress a gap in federal enforcement and develops a taxonomy of preemption rules for analyzing these laws. It concludes that if the Court adopts a “direct conflict” or “logical contradiction” test to replace impossibility and obstacle

\textsuperscript{28} For a helpful discussion of the political nature of the conservative majority’s preemption decisions see Chemerinsky, \textit{Empowering States When it Matters: A Different Approach to Preemption}, 69 BROOK. L. REV. 1313, 1315 (2001). \textit{See also} Jamelle C. Sharpe, Toward (a) Faithful Agency in the Supreme Court’s Preemption Jurisprudence, 18 GEO. MASON L. REV. 367, 368 (2011)(arguing that the “more insistently the Court disavows any independent role in formulating preemption policy, the more it actually assumes the role of policymaking principal”).

\textsuperscript{29} Caleb Nelson argues that none of the historical evidence supports the doctrine of implied obstacle preemption, proposing the logical contradiction test to replace it. Nelson, \textit{Preemption}, \textit{supra} n. 24, at 265. This article appears to have had a significant impact on Justice Thomas’ thinking on preemption and possibly on that of a conservative plurality of Justices. \textit{See, e.g.}, Wyeth v. Levine, 129 S.Ct. 1187, 1205 (2009) (Thomas, J., concurring in judgment); Pliva, Inc. v. Mensing, 131 S.Ct. 2567, 2579 (2011).

\textsuperscript{30} 620 F.3d 170 (3d Cir. 2010), \textit{vacated and remanded}, City of Hazleton v. Lozano, 131 S.Ct. 2958 (2011).

\textsuperscript{31} At the time of this writing at least fifteen states, including Alabama, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Mississippi, Missouri, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, and Virginia, had adopted or introduced some version or combination of either the Legal Arizona Workers Act or S.B. 1070. This author, together with Michele Vargas, a private attorney and member of the Hispanic National Bar Association, had organized a team of over a dozen students from St. Thomas University School of Law and Florida International University Law School to research Arizona copycat legislation throughout the country.
preemption analysis, it will not only be contrary to nearly two centuries of preemption jurisprudence, but will result in carefully-crafted state and local laws regulating immigrants and immigration being upheld. I also propose adding a separate “dominant federal interest” test to the preemption tool chest, rather than subsuming it into obstacle preemption analysis.

LAWA, S.B. 1070, the Hazleton ordinance, and copycat legislation all implicate distinct preemption analyses. In challenging these laws on preemption grounds, it becomes critical to analyze which frameworks, express, conflict, and/or field preemption, apply. In Whiting, the Justices’ choice of interpretive principles seemed to reflect the jurisprudential theories of Justices embracing traditional state prerogatives versus those favoring a strong national policy. The majority’s decision also appeared to implicitly apply the presumption against preemption in preserving a zone of activity for the states in an area implicating their traditional police powers. Yet, somewhat ironically, the Court appeared to be doing so in this particular field less because the state law touched on historic police powers than because of the perceived failure of the national government to enforce federal immigration law.

Indeed, with the apparent exception of Justice Thomas, conservative Justices have continued to invoke obstacle preemption to overturn state jury verdicts against manufacturers of arguably unsafe products on the basis that state tort remedies stand as obstacles to achieving the purposes and objectives of the federal statute or regulation. Theories of cooperative federalism, concurrent enforcement and states’ rights only are persuasive in explaining Whiting and Hazleton when viewed in a vacuum, isolated from these other preemption opinions, which are the antithesis of a concern with states’ rights.

I. PREEMPTION AND THE REGULATION OF IMMIGRANTS

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

Preemption doctrine is rooted in the Supremacy Clause of the U.S. Constitution, the Judiciary Act of 1789, and Justice Marshall’s 1819 decision in McCulloch v. Maryland, which reflects much of the modern-

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33 Whiting, 131 S.Ct. at 1974, 1981.
34 Cf. Pliva, Inc. v. Mensing, 131 S.Ct. 2567 (2011) (in decision authored by Thomas, J., and joined by Roberts, C.J., Scalia, J., Alito, J. and in all but Part III-B-2, by Justice Kennedy, Court found that state tort remedy was impliedly preempted by food and drug regulations, because compliance with both state tort remedy and federal law was a physical impossibility).
36 17 U.S. 316 (1819).
day discourse of obstacle preemption analysis. Article VI, clause 2 provides that the Constitution, treaties, and laws of the United States “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Section 25 of the Judiciary Act of 1789, which established the federal court system, gave the Supreme Court appellate jurisdiction to hear any suit from State court where is drawn in question the validity of a statute, or an authority exercised under any State, on the grounds of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favour of their validity…

Section 25 thus provided the Court with jurisdiction to invalidate state law as preempted by federal law on the basis of its repugnancy with the federal statute. In McCulloch v. Maryland, Justice Marshall refers to the “great principle” that the “constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them.” He writes that

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

At the end of the opinion, in striking down Maryland’s tax on the Bank of the United States, he writes that

the states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government.

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37 U.S. Const. art. VI, cl. 2.
38 The Judiciary Act of 1789, ch. 20, §25, 1 Stat. 73, 85-86 (codified as amended at 28 U.S.C. 1257). Note that this provision did not give the Supreme Court appellate jurisdiction to hear any such case where the highest state court had found in favor of federal law. See Paul Taylor, Congress’s Power to Regulate the Federal Judiciary, 37 PEPP. L. REV. 847, 861 (2010).
39 17 U.S. at 426.
40 Id. at 427 (emphasis added).
41 Id. at 436 (emphasis added).
According to doctrine, the Supremacy Clause ensures that when Congress is acting within the scope of its powers, and either expresses or implies an intent to preclude certain state or local legislation, offending enactments cannot stand.\textsuperscript{42} The Court has said repeatedly that “the purpose of Congress is the ultimate touchstone in every preemption case.”\textsuperscript{43} It has identified three principal, albeit sometimes overlapping, forms of preemption: express, field and implied conflict preemption.\textsuperscript{44}

Express preemption occurs when Congress expressly declares a law’s preemptive effect, usually through an express preemption provision. In such cases, the Court still must determine the scope of what has been preempted.\textsuperscript{45} In so doing, the court will focus principally “on the plain wording of the [express preemption] clause, which is deemed to contain the “best evidence’ of Congress’ preemptive intent.”\textsuperscript{46} In express preemption cases, it has also considered the “structure and purpose of the statute as a whole . . . as revealed not only in the text, but through [the court’s] reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to [operate].”\textsuperscript{47}

Field preemption occurs where the state or local law regulates in an area where Congress has made its intent to occupy the field unmistakably clear. Field preemption can be inferred where a federal regulatory scheme is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”\textsuperscript{48} It also will be inferred where a federal law “touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”\textsuperscript{49}

Even if a state or local statute is not expressly preempted or field preempted, it may still be conflict preempted. Implied conflict preemption occurs when either it is impossible to comply with both the federal and state law,\textsuperscript{50} or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”\textsuperscript{51} The test for impossibility preemption has frequently been stated as whether it is “physically impossible” to comply with both federal law and state law. Until fairly recently, the instances where the Court has found impossibility preemption have been rare.\textsuperscript{52} Obstacle conflict preemption has required a

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\bibitem{43} \textit{Wyeth}, 129 S.Ct. at 1194; \textit{Medtronic}, 518 U.S. at 485.
\bibitem{44} Crosby, 530 U.S. at 372-373.
\bibitem{45} Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001).
\bibitem{47} Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1996).
\bibitem{49} Rice v. Santa Fe Elevator Corp, 331 U.S. 218, 230 (1947).
\bibitem{51} Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
\bibitem{52} But see \textit{Pliva}, 131 S.Ct at 2590 (Sotomayor, J., dissenting).
\end{thebibliography}
broader inquiry into the purposes underlying a federal statute and whether a state law interferes with the accomplishment of those purposes.\textsuperscript{53}

The Court’s preemption decisions, while frequently reiterating these basic principles, are hard to reconcile. Consistent with the emphasis on states’ rights in modern commerce clause and Tenth Amendment cases, the Court has tended over the last fifteen years to narrow the availability of field preemption\textsuperscript{54} and obstacle preemption, absent clear evidence of Congressional intent.\textsuperscript{55} At the same time, in interpreting express preemption provisions, it has looked carefully at the scope of what Congress intended to preemp\textsuperscript{56} In many of these cases, in both cases involving express preemption and cases involving conflict preemption, it has invoked the presumption against preemption as a rule of statutory interpretation.\textsuperscript{57} As it stated most recently in \textit{Wyeth}

in all preemption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.\textsuperscript{58}

\textsuperscript{53}Crosby, 530 U.S. at 373.
\textsuperscript{55}Hines is often read as establishing that immigration law is an area where Congress has preempted the field, precluding enforcement of state laws on the same subject. See, \textit{e.g.}, \textit{ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES} (2011)(“Hines v. Davidowitz is a classic example of preemption of state regulation in the field of immigration”). In fact, \textit{Hines} may be more accurately classified as an obstacle preemption case. See \textit{Hines}, 312 U.S. at 67 (“Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania’s law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).
\textsuperscript{56}\textit{Whiting}, 131 S.Ct. at 1980; \textit{Lorillard Tobacco}, 533 U.S. at 541. [Other cases?]
\textsuperscript{57}See \textit{Wyeth}, 129 S.Ct. at 1194-95. See also Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)(preemption analysis starts with assumption that “the historic police powers of the states [a]re not to be superceded unless that was the clear and manifest purpose of Congress”); Jones v. Rath packing Co., 430 U.S. 519 (1977)(“This assumption provides assurance that “the federal balance” will not be disturbed unintentionally by Congress or unnecessarily by the courts”); Medtronic Inc. v. Lohr, 518 U.S. 470 (1996), (Court have “long presumed that Congress does not cavalierly preempt state law cases of action”); Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005)(“where the text of a preemption clause is open to more than one plausible reading, courts ordinarily “accept the reading that disfavors preemption”); Riegel v. Medtronic, Inc., 552 U.S. 312, 334-337 (2008)(Ginsburg, J. dissenting)(criticizing majority for not applying a presumption against preemption).
\textsuperscript{58}See \textit{Wyeth}, 129 S.Ct. at 1194.
Yet at the same time, it has invoked obstacle preemption to overturn state jury verdicts against manufacturers of arguably unsafe products on the basis that state tort remedies stand as obstacles to achieving the purposes and objectives of the federal statute or regulation.\textsuperscript{59}

More recently, at least three emerging trends, all evident in \textit{Chamber of Commerce v. Whiting}, are worth noting. The first is an increasing reluctance of the Court to find implied obstacle preemption.\textsuperscript{60} The second related trend is an inclination to expand the scope of impossibility preemption beyond the physical impossibility cases.\textsuperscript{61} The third is a tendency to no longer explicitly apply the presumption against preemption, and in some cases, to do exactly the opposite: presume preemption.\textsuperscript{62}

The first trend is consistent with an increasing emphasis on textualism and the view of the more conservative justices, particularly Justices Scalia, Thomas and Roberts, that “purposes and objectives” preemption analysis involves the Court in invalidating state laws based on perceived conflicts with federal policy objectives, legislative history, or congressional purpose that are not embodied in the actual text of the statute.\textsuperscript{63} Furthermore, a significant body of scholarly writing over the last decade has concluded that the Court’s continuing use of obstacle preemption analysis has allowed it to justify its decisions based on policy preferences rather than demonstrated Congressional intent.\textsuperscript{64} This conclusion has been reached both by conservative scholars embracing states’ rights and by liberal scholars advocating for stronger state consumer protection laws.\textsuperscript{65}


\textsuperscript{60} \textit{Whiting}, 131 S.Ct. at 1985; \textit{Pliva}, 131 S.Ct at 2579 n. 6, 2590 n. 13 (J. Sotomayor, dissenting) (expressing concern Justice Thomas’ theory that obstacle preemption is unconstitutional is being used to justify Court’s novel expansion of impossibility preemption).

\textsuperscript{61} \textit{Pliva}, 131 S.Ct at 2590 (J. Sotomayor, dissenting) (criticizing Court for novel expansion of impossibility preemption beyond the physical impossibility cases).

\textsuperscript{62} \textit{Pliva}, 131 S.Ct at 2579-80 (plurality of Court, in decision by Justice Thomas, found that Supremacy Clause’s “notwithstanding” language is a \textit{non obstante} provision, and that the Court should not strain to reconcile federal law with seemingly conflicting state law or apply the presumption against preemption); \textit{Whiting}, 131 S.Ct. at 1974, 1981 (upholding state licensing law without applying the presumption against preemption).

\textsuperscript{63} \textit{See Wyeth}, 129 S.Ct. at 1205 (Thomas, J., concurring); \textit{Crosby}, 530 U.S. at 388-391 (Scalia, J., concurring) (criticizing majority’s reliance on legislative history to discern statutory intent when intent was “perfectly obvious on the face of the statute”); \textit{Whiting}, 131 S.Ct at 1985 (“Implied preemption analysis does not justify a ‘freewheeling judicial inquiry into whether a state statute is in tension with federal objectives’”).

\textsuperscript{64} \textit{See}, e.g., Chemerinsky, \textit{supra} note 28 at 1327; Sharpe, \textit{supra} note 28 at 391-395; Nelson, \textit{supra} note 33 at 288.

\textsuperscript{65} Cite to this language in Nelson’s Preemption piece.
The second tendency is a natural outgrowth of the first. To the extent that an emerging conservative majority of Justices increasingly regards “purposes and objectives” preemption analysis as a form of judicial activism, the Court may feel the need to expand the scope of impossibility preemption beyond those cases where compliance with state and federal law is a “physical impossibility.” Indeed, in Wyeth v. Levine, Justice Thomas, in his concurrence, questioned why a narrow impossibility standard was the best test for determining whether state and federal laws were in direct conflict. In that case, the Court, in an opinion joined by the liberal justices, upheld a state tort claim brought against the manufacturer of a name-brand drug on the basis that it was not impossible under federal food and drug regulations for the manufacturer to change its labeling to comply with state law standards. A plurality also found that state law was not obstacle preempted by federal food and drug law.

In his concurrence, Justice Thomas rejected obstacle preemption analysis as without basis in the Constitution. He agreed with the plurality, however, that it was possible to comply with both state and federal law because the name-brand manufacturer could enhance its labeling without pre-approval from the FDA. Rather than apply the physical impossibility test, Justice Thomas would have applied a more general “direct conflict” standard, favoring the “logical contradiction” test advocated by Caleb Nelson in his Preemption article. Justices Alito, Roberts and Scalia, in contrast, would have found that the tort claim was obstacle preempted by food and drug regulations, because the FDA, not state tort juries, was ultimately responsible for determining the adequacy of warning labels for prescription drugs.

Less than two years later, in Pliva v. Mensing, in another FDA case with facts similar to Wyeth v. Levine, Justice Thomas joined the dissenters from Wyeth v. Levine to find that a state tort claim against the manufacturer of a generic drug was impliedly preempted by federal food and drug law where it was impossible for the generic manufacturer to change its labeling

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66 Wyeth, 129 S.Ct. at 1209 (describing how Court has articulated narrow impossibility standard because of availability of obstacle preemption). See also Crosby, 530 U.S. at 372-373; Florida Lime & Avocado Growers, 373 U.S. at 142-143; Sprietsma v. Mercury Marine, 537 U.S. at 64-65; United States v. Locke, 529 U.S. 89, 109 (2000).

67 Wyeth, 129 S.Ct. at 1199.

68 Id. at 1204.

69 Id. at 1205, 1207 (J. Thomas, concurring).

70 Id. at 1204-1205 (J. Thomas, concurring).

71 Id. at 1209 (“The Court, in fact, has not explained why a narrow ‘physical impossibility’ standard is the best proxy for determining when state and federal law ‘directly conflict’ for purposes of the Supremacy Clause . . . [I]f federal law gives an individual the right to engage in certain behavior that state law prohibits, the laws would give contradictory commands notwithstanding the fact than an individual could comply with both by electing to refrain from the covered behavior.”)

72 Id. at 1227.
to comply with state law standards without pre-approval from the FDA.\textsuperscript{73} Justice Thomas authored the opinion, which relied on impossibility preemption rather than obstacle preemption, thus joining the other conservative justices without sacrificing his belief that obstacle preemption is being unconstitutionally applied.\textsuperscript{74} These cases suggest that to the extent an emerging mostly conservative majority is willing to chip away at obstacle preemption, this is likely to be accompanied by a redefinition of conflict preemption to focus on whether there is an actual conflict between state and federal law.\textsuperscript{75}

As a jurisprudential matter, it would be a dramatic development for the Supreme Court to eliminate obstacle preemption from its arsenal of preemption tools. Obstacle preemption analysis, as discussed above, finds its roots in the granddaddy of all preemption cases, \textit{McCulloch v. Maryland}.\textsuperscript{76} That case is best known to generation of law students and law professors for establishing the broad scope of Congress’ powers under Article I, Sec. 8 and the Necessary and Proper Clause, as well as the principle of federal immunity from State taxation. As discussed above, a close rereading of Part II of Justice Marshall’s opinion, regarding whether the State of Maryland could tax the Bank of the United States, also reveals much of the discourse of modern day obstacle preemption analysis.\textsuperscript{77}

\textit{McCulloch v. Maryland} was not merely the first preemption decision; it was the first case of implied obstacle preemption. If the Court had applied the narrower logical contradiction test urged by Caleb Nelson in his \textit{Preemption} article,\textsuperscript{78} it is likely that the Maryland statute would have been upheld. There was no express preemption provision in the law creating the Bank of the United States.\textsuperscript{79} Nor was this a case of field preemption: the Court recognized that Maryland’s power of taxation was of “vital importance”, that it was “retained by the states; that it is not abridged by the grant of a similar power to the [national] government…”\textsuperscript{80} Moreover, it was not \textit{impossible} for Mr. McCulloch, the cashier of the Maryland branch, to pay Maryland’s 2% tax on its notes and continue to run the bank.\textsuperscript{81} The Court, however, in emphasizing that the power to tax was the power to destroy,\textsuperscript{82} concluded that Maryland did not have the power to enact any

\begin{itemize}
  \item \textsuperscript{73} \textit{Pliva}, 131 S.Ct at 2577-2578.
  \item \textsuperscript{74} \textit{Wyeth}, 129 S.Ct. at 1209.
  \item \textsuperscript{75} \textit{Wyeth}, 129 S.Ct. at 1228 (J. Alito, Roberts and Scalia, dissenting)(“the sole question is whether there is an ‘actual conflict’ between state and federal law; if so, then preemption follows automatically by operation of the Supremacy Clause”).
  \item \textsuperscript{76} 17 U.S. at 426-427, 436.
  \item \textsuperscript{77} See discussion \textit{infra} at n. 34-38.
  \item \textsuperscript{78} Nelson, \textit{Preemption}, supra note 24, at 260.
  \item \textsuperscript{79} 17 U.S. at 426.
  \item \textsuperscript{80} \textit{Id.} at 425.
  \item \textsuperscript{81} \textit{Id.} at 427-428
  \item \textsuperscript{82} \textit{Id.} at 436.
\end{itemize}
laws that would in any way interfere with the execution of laws enacted by the U.S. Congress for running the federal government. In his article, Preemption, which was favorably cited by Justice Thomas in his opinions in Wyeth v. Levine and Pliva v. Mensing, Caleb Nelson argues that there is no historical evidence supporting any general doctrine of obstacle preemption. Even McCulloch, he argues, does not “compel a general doctrine of obstacle preemption” but is consistent, he argues, with his logical contradiction test. He writes that

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

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

Justice Thomas also justifies the “logical contradiction” test as consistent with Justice Joseph Story’s Constitutional Commentary, where he states that a state law is preempted by the Supremacy Clause when it is ‘repugnant to the constitution of the United States’.” The use of that term in both Justice Marshall’s ruling in Osborn and in Justice Story’s Commentary was no doubt a reference to Sec. 25 of the Judiciary Act of 1789, which gave the Court jurisdiction to overturn state court decisions upholding state laws that were “repugnant” to federal law, and not as setting out a precise legal standard.

83 Id. at 427.
84 Nelson, Preemption, supra note 24, at 265.
85 Id. at 270.
86 Id.
88 Id. at 868 (emphasis added).
89 Wyeth, 129 S.Ct. at 1209 (J. Thomas, concurring), citing with approval 3 Story §1836 at 701 (emphasis added).
90 Moreover, the term “repugnant” did not necessarily always mean “contradictory” to federal law, as Nelson and Thomas suggest. The Oxford English Dictionary includes a
Furthermore, in response to Justice Thomas’ bold assertion in the *Wyeth* case that Justice Story embraced something akin to the “logical contradiction test”, it is worth underscoring that Justice Story believed in a strong national government, dedicating his Constitutional Commentary to Justice Marshall, whom he admired profoundly. Indeed, in *Martin v. Hunter’s Lessee*, an 1816 case which established the Supreme Court’s power to rule on the constitutionality of state laws, Justice Story wrote that federal review of state laws was essential because:

state attachments, state prejudices, state jealousies and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.

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

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

Nelson interprets the language in *Osborn* as Marshall reading the law creating the Bank as *contradicting* state laws taxing its operations, and argues that this is consistent with Nelson’s logical contradiction test. The language in *Osborn*, however, clearly embraces implied as well as express preemption, incorporates the “repugnancy” standard from Sec. 25 of the Judiciary Act, and is consistent with the obstacle preemption analysis Marshall embraced in *McCulloch*. The concern of Justices Marshall and Story was not just with state laws *contradicting* federal law, but with state laws that undermined the federal government’s authority.

In short, Nelson’s argument that there is no historical support for a general doctrine of obstacle preemption ignores critical language from this seminal decision, from the Judiciary Act of 1789, and from decisions and commentary by leading jurists of the time. If the Court were to substitute

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*definition of “repugnant” during that time period as “making or offering resistance or opposition (to a thing); hostile, antagonistic rebellious.”


92 *Id.*

93 *Letter from Justice Story to his Wife*, Jan. 28, 1831.

94 *McCulloch*, 17 U.S. at 427, 436.
the logical contradiction test for current conflict doctrine, it not only would be contrary to nearly two centuries of precedent, but would be an cynical way of ensuring that state and local laws regulating immigrants that track federal enforcement standards, even those passed in clear defiance of federal authorities, could be upheld.95

B. Preemption Doctrine and the Regulation of Immigrants

The Legal Arizona Workers Act, S.B. 1070, and other state copycat laws all exhibit a growing frustration with the federal government’s perceived failure to enforce the federal immigration laws. For many state and local leaders, institutional failure on the part of Homeland Security has justified the entrance by state and local governments into a field long considered a federal domain. While such an approach may be rooted in theories of federalism, state sovereignty, and the Court’s modern approach to federal powers, it is not well grounded in preemption jurisprudence and is untethered from the Constitution’s Supremacy Clause.96 If the Court were to allow states to act where there is federal agency failure, as long as state law tracks federal law, it would require a dramatic paradigmatic shift in preemption doctrine, similar to that which we saw in standing doctrine in Massachusetts v. EPA, which stressed the “special position and interest of Massachusetts”, in enforcing environmental laws.97 For the Court to use the current preemption toolbox to uphold state and local laws like S.B. 1070, however, would be intellectually dishonest, a threat to national immigration policy, and contrary to established jurisprudence.

Throughout the 20th Century, the Supreme Court has emphasized that in the field of immigration, federal interests are paramount, and “that the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution ...”.98 While this might suggest that any state or local laws targeted at immigrants in areas within the federal domain should be field preempted, the answer is not so simple. The Supreme Court in 1976 said that not every regulation of immigrants is necessarily a regulation of immigration.99 In De Canas v. Bica, a decision that predated the

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95 Similar to State copycat legislation, in McCulloch, one rationale for striking down Maryland’s tax on the Bank of the United States was because it and many other state laws passed at the time, appeared motivated by a desire to undermine the Bank’s authority, in light of the Bank’s failure to solve the country’s economic problems. See 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 499-540 (1st ed. 1922).
96 See, e.g., Gillian Metzger, Federalism and Federal Agency Reform, 111 COLUM. L. REV. 1, 5 (2011) (in context of state tort claims, discusses extent to which recent preemption decisions are concerned with using preemption analysis to improve federal agency performance and address agency failure).
98 Hines, 312 U.S. at 62; Toll v. Moreno, 458 U.S. 1, 10 (1982).
99 De Canas, 424 U.S. at 355.
Immigration Reform and Control Act, the Supreme Court looked at whether a state law prohibiting the employment of persons unlawfully in the United States was preempted by the Immigration and Nationality Act (“INA”). The Court found that while the “[p]ower to regulate immigration is unquestionably exclusively a federal power” precluding all state involvement, not “every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted . . .” Rather a state law only regulates immigration if it is “essentially a determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain.” In that case, the Court found that the California law was not field preempted by the INA because states have “broad authority under their police powers to regulate the employment relationship to protect workers within the State” and the California law fell “within the mainstream of such police power regulation.” Furthermore, the INA as it then existed did not indicate a clear congressional intent to preclude state regulation in the field of employees here unlawfully.

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

1) It made it unlawful “to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien…with respect to such employment” and gave the federal government the power to impose sanctions on employers who knowingly or intentionally hire unauthorized workers;

2) It created the I-9 system for verifying a worker’s eligibility for employment;

3) It made it an unfair employment practice and imposed sanctions on employers who discriminated against individuals with respect to hiring because of their national origin or citizenship status.

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

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100 424 U.S. at 354.
101 424 U.S. at 355.
102 424 U.S. at 355.
103 424 U.S. at 356.
104 424 U.S. at 361.
108 See 8 U.S.C. §1324b(a) and (g)(2). The protections of this provision did not extend to “unauthorized aliens”, as defined in §1324a(h)(3).
employers of verifying employment eligibility, and protecting workers who “look foreign” from employment discrimination.\textsuperscript{109} Yet it also involved Congress regulating in an area – employment-- within the state’s historic police powers. The Supreme Court and lower courts frequently have applied the presumption against preemption where Congress “legislates in a field which the states have traditionally occupied”, absent a “clear and manifest” congressional intent to the contrary.\textsuperscript{110} Although Congress had created a pervasive regulatory regime in enacting IRCA, the presumption against preemption has been said to turn on the historic presence of state law.\textsuperscript{111} Moreover, the savings clause in IRCA’s express preemption provision for “licensing and similar laws” indicated that Congress did not intend to preempt the entire field.\textsuperscript{112}

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

The I-9 employment verification system was, and remains, a central component of IRCA’s scheme for regulating employers. As anyone who has taken a job has experienced, new employees must complete the I-9 form and present certain identity and work eligibility documents.\textsuperscript{113} Employers must examine these documents and attest that they appear to be genuine.\textsuperscript{114} If these documents, on their face, appear genuine, employers who act in good faith will fall within a safe harbor if it later turns out that an employee is not authorized to work.\textsuperscript{115} This provision in the statute was seen as minimizing the burden on employers of verifying employment eligibility while at the same time reducing the chances that employees with proper documents would be turned away simply because they looked foreign.\textsuperscript{116}

In 1996, in light of growing concerns about the use of fraudulent employment documents, Congress supplemented the I-9 system for verifying employment eligibility with a Basic Pilot Program which later became known as E-Verify. E-Verify was and remains, at the time of this writing, a voluntary system of employment verification adopted as part of the sweeping Illegal Immigration Reform and Immigrant Responsibility Act

\textsuperscript{109} Edmondson, 594 F.3d at 767.
\textsuperscript{110} See infra at n. 57.
\textsuperscript{111} Wyeth, 129 S.Ct. at 1195 n. 3 (presumption against preemption emerged out of “respect for the states as independent sovereigns in our federal system”).
\textsuperscript{112} Lozano v. Hazleton, 620 F.3d. at 210, n. 32 (existence of savings clause negates inference that Congress left no room for state causes of action), reversed on other grounds, City of Hazleton v. Lozano, 131 S.Ct. 2958 (2011).
\textsuperscript{113} 8 U.S.C. §1324a(b)(1)(A).
\textsuperscript{114} Id.
\textsuperscript{115} 8 U.S.C. §1324a(a)(3), (b)(6).
\textsuperscript{116} The provisions making it an unfair labor practice to discriminate against workers based on national origin and imposing sanctions on employers virtually identical to the sanctions on employers who hired unauthorized workers further ensured that this policy goal would be achieved. See Whiting, 131 S.Ct. at 2003-2004 (J. Sotomayor, dissenting).
(IIRIRA).\textsuperscript{117} Since then, it has been expanded to all 50 states, and there are ongoing state and congressional efforts to make the program mandatory.\textsuperscript{118} E-Verify is an internet-based system that permits an employer to authenticate an employee's identity and employment documents by submitting information provided on the I-9 form to the Social Security Administration and/or Department of Homeland Security.\textsuperscript{119} The Government will issue either a confirmation that an employee is authorized to work or a tentative nonconfirmation.\textsuperscript{120} Employers who use E-Verify and comply with its requirements will fall within a safe harbor if it later turns out that an employee is not authorized to work.\textsuperscript{121}

One reason E-Verify has remained voluntary is because of various flaws in the system identified by Westat, the outside auditor.\textsuperscript{122} Due to delays in getting up-to-date, accurate information into the system, as many as one-fifth of workers receiving tentative nonconfirmations (“TNCs”), including naturalized U.S. citizens, are in fact authorized to work.\textsuperscript{123} Additionally, a number of employers whose employees receive TNCs are not communicating this to the employee or not providing the employee with necessary information regarding how to contest a TNC.\textsuperscript{124} If an employee does contest the TNC, the employer is prohibited from taking adverse


\textsuperscript{118} At the time of this writing, Rep. Lamar Smith (R-Tex.) had just introduced legislation into Congress to make E-Verify mandatory for all employers. See Legal Workforce Act, H.R. 2164, 112\textsuperscript{th} Cong., June 14, 2011.

\textsuperscript{119} Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 862 (9\textsuperscript{th} Cir. 2009).

\textsuperscript{120} Whiting, 131 S.Ct. at 1975.

\textsuperscript{121} Whiting, 131 S.Ct. at 1984.

\textsuperscript{122} Westat Report, supra n. Error! Bookmark not defined. at xli (“care should be taken not to expand the Program so rapidly as to create problems with USCIS and SSA implementation and monitoring of the Program") .

\textsuperscript{123} Id. at 21 (Breyer, J., dissenting). See also Westat, Findings of the E-Verify Program Evaluation xxxi, 210, 246 (Dec.2009). E-Verify's accuracy rate is even worse “in states that require the use of E-Verify for all or some of their employees.” Id., at 122.

\textsuperscript{124} Westat Report, supra note Error! Bookmark not defined., at 153-154.
action against the employee while the contest is pending.\textsuperscript{125} If an employee does not contest the TNC within eight days, it becomes a final nonconfirmation (“FNC”). No mechanism exists for contesting or appealing a FNC and, in such cases, an employer must terminate an employee or risk sanctions and lose the safe harbor.\textsuperscript{126} Thus, an employee not advised by his or her employer of a TNC is likely to face dismissal.

Also, employers have improperly used E-Verify to check a potential employee’s immigration status before a decision is made to hire the employee.\textsuperscript{127} The most recent Westat Report has raised concerns that, while the E-Verify system has been improved to address many of its earlier problems, there are still instances of discrimination by employers against workers who receive tentative nonconfirmations but are legally authorized to work.\textsuperscript{128} In some instances, these individuals are not hired; in others the employee is discouraged from contesting the TNC;\textsuperscript{129} in others, their employment is postponed until questions regarding a TNC are resolved.\textsuperscript{130} All of these practices violate E-Verify’s requirement that an employer not take any adverse action against an employee while the contest of a TNC is pending.\textsuperscript{131} The persistence of these problems has been identified as a key reason for not making the program mandatory.\textsuperscript{132}

Although the E-Verify system is voluntary for most employers at the federal level (except for businesses and non-profits receiving federal government contracts and those subject to sanctions for hiring unauthorized workers) many states have been moving in the direction of making E-Verify mandatory.\textsuperscript{133} Many state legislators see E-Verify as a more fool-proof method for identifying unauthorized workers, since it requires the federal government to authenticate identity and employment documents, rather than depending on an employer’s cursory review of documents that may later prove fraudulent.\textsuperscript{134} Yet critics of E-Verify have underscored the burdensome nature of the system, which restricts what employers can do during the contest period, the large numbers of persons wrongly identified as “unauthorized aliens”; and the voluntary nature of what still remains a Pilot Program.\textsuperscript{135} The argument is that mandatory use of E-Verify, while

\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 149.
\textsuperscript{128} Id. at 154.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 153.
\textsuperscript{131} Id. at 153-154.
\textsuperscript{132} Id. at 246. \textit{See also}, \textit{Whiting}, 131 S.Ct. at 1991 (Breyer, J. dissenting).
\textsuperscript{133} \textit{Whiting}, 131 S.Ct. at 1976 n. 2 (listing state statutes requiring use of E-Verify).
\textsuperscript{135} \textit{Arizona Contractors Ass’n v. Candelaria}, Plaintiffs/Appellants’ Consolidated Opening Brief, 2008 WL 2131124 (9th Cir. 2008) at 38-44.
not expressly preempted by IRCA, is conflict preempted because it interferes with the carefully balanced goals built into IRCA and IIRIRA for the regulation of unauthorized workers.\textsuperscript{136}

D. \textit{Lozano v. Hazleton}: Preemption Principles in Action

During the first decade of the 21\textsuperscript{st} century, the City of Hazleton in northeastern Pennsylvania experienced a major influx of Latino families, many from the Dominican Republic. Although many were U.S. citizens, lawful permanent residents, or otherwise in the United States legally, others were undocumented or no longer in valid status.\textsuperscript{137} In response to this influx and community leaders’ perception that many of these newer residents were to blame for increased crime rates and a drain on social services, in July 2006, city officials began enacting a series of ordinances to address these concerns.\textsuperscript{138} Two of these ordinances, the Illegal Immigration Relief Act Ordinance (“IIRAO”)\textsuperscript{139} and the Rental Registration Ordinance (“RO”)\textsuperscript{140} attempted to regulate the employment of “unlawful workers” and the provision of rental housing to noncitizens lacking lawful immigration status. The IIRAO, whose license revocation provisions are strikingly similar to those in the Legal Arizona Workers Act, did two distinct things: it allowed the City to revoke the business license of any business hiring or

\textsuperscript{136} \textit{Id.} at 40-42.

\textsuperscript{137} \textit{Lozano v. Hazleton}, 620 F.3d at 176, vacated and remanded, City of Hazleton v. Lozano, 131 S.Ct. 2958 (2011). Although less pejorative than “illegal alien”, the term “undocumented immigrant” does not always accurately reflect the status of immigrants not authorized to work in the United States. Some of those persons may have entered without inspection (“EWI”), and thus lack proper immigration documents. Others may have overstayed nonimmigrant visas. Still others may have acquired fraudulent documents which have enabled them to work. Yet still others may be in a status, such as an asylum applicant, VAWA self-petitioner, or U nonimmigrant applicant, which allows them to be lawfully in the United States but does not yet authorize them to work. \textit{Cf. Whiting}, Slip Op. at 33 (Sotomayor, J., dissenting). \textit{See also} Beth Lyon, \textit{When More “Security” Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers}, 6 U. PA. J. LAB. & EMP. L. 571, 577-578 (Spring 2004)(“The word ‘unauthorized’ avoids the overbroad and criminal connotations associated with the word ‘illegal’ by tying directly to the specific immigration violation committed: the law limits the right to work to people who possess ‘employment authorization’).\textsuperscript{138}

\textsuperscript{138} \textit{Lozano v. Hazleton}, 620 F.3d at 176-177 vacated and remanded, City of Hazleton v. Lozano, 131 S.Ct. 2958 (2011).

\textsuperscript{139} Ordinance 2006-18, as amended by Ordinances 2006-40 and 2007-7 (hereinafter “IIRAO”). The Illegal Immigration Relief Act Ordinance begins with a statement of the findings and purposes behind the ordinance: “[t]hat unlawful employment, the harboring of illegal aliens in dwelling units in the City of Hazleton, and crime committed by illegal aliens harm the health, safety and welfare of authorized U.S. workers and legal residents in the City of Hazleton. Illegal immigration leads to higher crime rates, subjects or hospitals to fiscal hardship and legal residents to substandard quality of care, contributed to other burdens on public services, increasing their cost and diminishing their availability to legal residents, and diminishes our overall quality of life.” IIRAO § 2C.

\textsuperscript{140} Ordinance 2006-13 (hereinafter “RO”).
continuing to employ “unlawful workers”, and it made it unlawful for landlords to “harbor” persons here in violation of the immigration laws. The RO operated in conjunction with the anti-harbor provisions of IIRAO, requiring any prospective occupant of rental housing to apply for and receive a residency permit, and prohibiting a landlord from renting to anyone without such a permit.

Suit was brought for injunctive relief in district court by several individual plaintiffs and the Hazleton Hispanic Business Association challenging the validity of the IIRAO and RO as violating the Supremacy Clause, the Due Process Clause and the Equal Protection Clause of the U.S. Constitution. The district court granted a preliminary injunction, and after a nine-day bench trial, an order permanently enjoining the City of Hazleton

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141 IIRAO § 4B.
142 IIRAO §5A.
143 RO §§6(a); 7(b); 10(b). Specifically, Section 4 of IIRAO made it unlawful for any business to recruit, hire or continue to employ an “unlawful worker”, IIRAO §4A, defined as a person “who does not have the legal right or authorization to work due to any provision of federal, state or local law, including but not limited to . . . an unauthorized alien as defined by [8 U.S.C. Sec. 1324a(h)(3)]”. IIRAO §3E. It allowed a City resident, city official or business entity to file a complaint with Hazleton’s Code Enforcement Office, IIRAO §4B(1), and required the Code Enforcement Office to investigate and to suspend the business license of any business that did not provide requested identity information about the alleged unlawful worker within three business days. IIRAO §4B(3). If it was subsequently determined that a worker lacked authorization to work in the United States, the business had to terminate the person within three business days or the City would suspend its license. IIRAO §4B(4). A business whose license was suspended would regain its license after submitting an affidavit affirming that it had terminated any unlawful worker. IIRAO §4B(6). If an employer were found to have employed two or more unlawful workers, it would also have to confirm enrollment in E-Verify to regain its license. IIRAO §4B(6)(b). A second violation of Section 4 would result in license suspension for at least 20 days and the reporting of any violation to the federal government. IIRAO §4B(7). Section 4 also created a private cause of action for treble damages, costs and attorneys’ fees for any lawful workers discharged if on the date of the discharge the business entity 1.) employed an unlawful worker and 2.) was not participating in E-Verify. IIRAO §4E(2). Section 5 of IIRAO made it unlawful “for any person or business entity that owns a dwelling unit in the City to harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law.” IIRAO §5A. Harboring was broadly defined; the ordinance stated that “to let, lease, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, shall be deemed to constitute harboring.” IIRAO §5A(1). Under the RO, in order to receive an occupancy permit, any prospective occupant was required to pay a $10 fee and submit “[p]roper identification showing proof of legal citizenship and/or residency” to Hazleton’s Code Enforcement Office, which would issue the permit. RO § 7(b). A landlord found guilty of renting to someone without a permit would be subject to an initial $1000 fine per unauthorized occupation and an additional fine of $100/day until the violation was corrected. RO § 10(b). Authorized occupants permitting someone without a rental permit to live with them would be subject to the same fine. RO § 10(c).
from enforcing the ordinances.\textsuperscript{144} This decision was later affirmed by the Third Circuit in all but one respect, although applying somewhat different reasoning.\textsuperscript{145}

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

has enacted a regulatory scheme that is designed to further the single objective of federal law that it deems important – ensuring unauthorized aliens do not work in the United States. It has chosen to disregard Congress’ other objectives – protecting lawful immigrants and others from employment discrimination, and minimizing the burden imposed on

\textsuperscript{144} Lozano v. City of Hazleton, 496 F.Supp. 2d 477 (M.D.Pa. 2007). The District Court found that eight of the eleven plaintiffs had standing to challenge the IIRAO and the RO, and that it was appropriate for the John and Jane Doe plaintiffs to proceed anonymously.

\textsuperscript{145} The Third Circuit found that Pedro Lozano, the named plaintiff, a lawful permanent resident who rented out half of his duplex in Hazleton and who hired contractors to perform repairs on his property, as well as Rudolfo Espinal, the President of the Hazleton Hispanic Business Association (“HHBA”), who also owned and rented out property and hired contractors to perform repairs, had standing to challenge both the employment provisions and housing provisions of IIRAO, that the HHBA had standing to challenge the employment provisions, and that the Doe plaintiffs had standing to challenge the housing provisions of IIRAO and the RO. \textit{Lozano v. Hazleton}, 620 F.3d at 187, 192, \textit{vacated and remanded}. City of Hazleton v. Lozano, 131 S.Ct. 2958 (2011). It found, however, that the challengers lacked standing to challenge IIRAO’s private cause of action, because they had not established that they feared prosecution under that provision or had any reason to fear such prosecution. \textit{Id.} at 177-178.
employers. Regulatory ‘cherry picking’ is not concurrent enforcement, and it is not constitutionally permitted.\(^{146}\)

Eleven days after upholding the Legal Arizona Workers Act in \textit{Whiting}, the Supreme Court vacated and remanded, without opinion, the Third Circuit’s decision in \textit{Lozano v. Hazleton}, in light of its ruling in \textit{Whiting}.\(^{147}\)

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

Ironically, the Legal Arizona Workers Act of 2007 did not generate nearly the same national controversy as its 2010 counterpart, S.B. 1070, the Support Our Law Enforcement and Safe Neighborhoods Act. The LAWA directly impacted employers who hired unauthorized workers, and indirectly, the workers they fired or refused to hire because of issues regarding their immigration status. S.B. 1070, on the other hand, imposed a tangible threat to virtually anyone in Arizona who looked or sounded foreign, including Arizona residents and persons just passing through who were identified by State or local police as present in violation of the immigration laws. Indeed, when the U.S. Supreme Court upheld the Legal Arizona Workers Act, many casual observers believed that it had ruled on S.B. 1070. Yet the LAWA’s provisions are similar to others enacted and introduced around the country, both locally and at the State level, and potentially at least as far reaching as S.B. 1070.\(^{148}\) The LAWA, which would generate copycat legislation as it gained momentum, including in the State of Florida,\(^{149}\) essentially did two things:

1.) It allowed the superior courts of Arizona to revoke the business licenses of employers hiring “unauthorized aliens”;\(^{150}\) and

2.) It required employers to use the federal E-Verify system for determining an employee’s eligibility to work.\(^{151}\)

Within days of its passage, the Legal Arizona Workers Act was challenged in federal court in various lawsuits brought by businesses and immigrant advocacy groups. These suits were consolidated into \textit{Chicanos por la Causa, Inc. v. Napolitano}, which eventually became \textit{Chamber of

\[^{146}\text{Lozano v. Hazleton, 620 F.3d at 219.}\]
\[^{147}\text{Hazleton v. Lozano, 131 S.Ct. 2958 (2011).}\]
\[^{148}\text{See, e.g., Illegal Immigration Relief Act Ordinance (‘IIRAO’), Ord. # 2006-18, as amended by Ord. 2006-40 and Ord. 2006-18; and the Rental Registration Ordinance (‘RO’), Ord. 2006-13, which attempted to regulate the employment of unauthorized immigrants and the provision of rental housing to immigrants lacking lawful immigration status, within Hazleton.}\]
\[^{149}\text{S.B. 2040, Committee on the Judiciary, Florida Senate (2011)(introduced by Anitere Flores, a Republican from Miami, legislation passed Judiciary Committee but was defeated on Senate floor).}\]
\[^{150}\text{Ariz. Rev. Stat. §23-211, 212.}\]
\[^{151}\text{Ariz. Rev. Stat. §23-214.}\]
Immigrant Laws, Obstacle Preemption and the Lost Legacy of McCulloch

Commerce v. Whiting, the case decided by the Supreme Court. The District Court upheld LAWA, and the Ninth Circuit affirmed in 2008. The case was appealed to the U.S. Supreme Court, which granted certiorari in 2010. Oral argument was held on December 8, 2010, and on May 26, 2011, the Supreme Court, in a decision penned by Chief Justice Roberts, affirmed the lower court rulings.

For the Supreme Court majority that upheld LAWA, one of its saving features, compared to similar state and local legislation, was that violations of the state statute were defined in terms of federal law, and thus, were, according to the Court, consistent with IRCA. For example, under the state statute, the term “unauthorized alien” was defined as an alien that “does not have the legal right or authorization under federal law to work in the United States as described in 8 U.S.C. §1324a(h)(3).” The federal statute defined an “unauthorized alien” as “with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.” An “authorized alien” was thus under federal law either a lawful permanent resident (“LPR”) or one with a valid employment authorization document (“EAD”).

The LAWA allows “any person” to submit a complaint to the Arizona Attorney General or a county attorney. If, however, a complaint is filed against an employer alleging that the employer has hired an “unauthorized alien”, the county attorney must first request the federal government to verify the immigration status of the employee. The Arizona statute expressly prohibits state, county or local Arizona officials from attempting to “independently make a final determination on whether an alien is authorized to work in the United States.” LAWA imposes a graduated series of sanctions for violations. A first violation requires the employer to terminate the employment of all unauthorized aliens, file quarterly reports of new hires for a probationary period, and file an affidavit stating that it terminated all unauthorized aliens and will not intentionally or knowingly hire any others. A second violation during the probationary

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153 Chicanos por la Causa, 558 F.3d at 869.
159 Ariz. Rev. Stat. §23-212(B). If the inquiry to the federal government reveals that the worker is not authorized to work, the Arizona attorney general or county attorney must notify U.S. Immigration and Customs Enforcement (“ICE”) and local law enforcement officers and begin an action against the employer. Ariz. Rev. Stat. §23-212(C)(1)-(3), (D).
160 Ariz. Rev. Stat. §§23-212(F)-212.01(F).
period results in permanent revocation of the employer’s business license.\textsuperscript{161}

The challengers in \textit{Chamber of Commerce v. Whiting}, like those in the \textit{Hazleton} case, had argued that the Arizona statute was preempted\textsuperscript{162} by the Immigration Reform and Control Act of 1986 (IRCA).\textsuperscript{163} In \textit{Whiting}, the challengers, together with the U.S. Solicitor General appearing as amicus, argued that LAWA’s license revocation provisions were \textit{expressly} preempted by IRCA, which preempted “any state or local law imposing civil or criminal sanctions (\textit{other than through licensing and similar laws}) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”\textsuperscript{164} They argued that Arizona’s license revocation provision did not fall within the savings clause exception for “licensing and similar laws” because the Arizona statute was not a licensing law at all since it did not provide for the licensing of anyone.\textsuperscript{165}

Arizona argued that the “savings clause” for licensing laws allowed it to revoke the license of a business that hired unauthorized workers, even if it could not otherwise impose civil or criminal sanctions. The challengers and the U.S. government, which appeared as amicus,\textsuperscript{166} argued that the savings clause did NOT apply, and therefore IRCA expressly preempted the Legal Arizona Workers Act, which essentially imposed a death penalty on businesses that hired unauthorized workers.\textsuperscript{167} The challengers also argued that the mandatory use of E-Verify was impliedly preempted, because it conflicted with the federal system, which provided for its voluntary use.\textsuperscript{168} Congress had made its intent clear that E-Verify should be voluntary;\textsuperscript{169} it did so for good reasons in light of the high rates of erroneous nonconfirmations;\textsuperscript{170} and it would overwhelm the current system were other states to follow Arizona’s lead and make the use of E-Verify mandatory, defeating the purpose of E-Verify to serve as a voluntary alternative to the I-9 system.\textsuperscript{171}

Oral argument before the Supreme Court centered around what Congress meant when it excepted licensing laws from the express

\textsuperscript{161} Ariz. Rev. Stat. §§23-212(F)(2)-212.01(F)(2), (3).
\textsuperscript{162} Chicagos por la Causa, Inc. v. Napolitano, 558 F.3d 856, 860 (9th Cir. 2009), amending 554 F.3d 976 (9th Cir. 2008).
\textsuperscript{164} 8 U.S.C. §1324a(h)(2)(emphasis added).
\textsuperscript{166} Brief for the United States as Amicus Curiae, Chamber of Commerce v. Candelaria, 2010 WL 2190418 (May 28, 2010).
\textsuperscript{167} Brief for Petitioners, supra note 165 at 34-35.
\textsuperscript{168} Brief for Petitioners, supra note 165 at 47-51.
\textsuperscript{169} Brief for Petitioners, supra note 165 at 47-48.
\textsuperscript{170} Brief for Petitioners, supra note 165 at 48-49.
\textsuperscript{171} Brief for Petitioners, supra note 165 at 50-51.
preemption provision.\textsuperscript{172} Very little attention was focused on what had been a winning argument in the Third Circuit in \textit{Hazleton v. Lozano}:\textsuperscript{173} whether the state law was impliedly preempted by the federal statute because it stood as an obstacle to accomplishing IRCA’s carefully balanced policy goals.\textsuperscript{174} In fact, when the U.S. government submitted its motion in support of the challengers’ Petition for Certiorari, which was shortly before the Hazleton case was decided, it indicated that “the petition for a writ of certiorari should be granted, limited to the first question presented [of whether 8 U.S.C. §1324a(h)(2) expressly preempts the provisions of the Legal Arizona Workers Act that sanction employers for knowingly or intentionally employing unauthorized aliens].”\textsuperscript{175} Indeed, in its brief, the Acting Solicitor General argued that while certiorari should be granted with respect to the question of whether the Arizona statute was expressly preempted, it was “unnecessary and unwarranted with respect to the E-Verify question” and “with respect to the third question presented [of whether the Arizona statute was impliedly preempted because it undermined a ‘comprehensive scheme’ to regulate the employment of ‘unauthorized aliens’].”\textsuperscript{176}

The focus on express preemption was a fatal flaw in the Petitioner’s and U.S. government’s arguments. It bogged the Court down during oral argument in a highly technical and ultimately unsatisfying discussion of what Congress meant by licensing laws.\textsuperscript{177} By focusing on express preemption the Petitioners failed to adequately address the argument that, even if the Arizona statute was not expressly preempted because it fell within the savings clause, it was impliedly preempted because it conflicted with IRCA.\textsuperscript{178} IRCA had carefully balanced the interests of the Government

\textsuperscript{172} See Transcript of Oral Argument, Chamber of Commerce v. Whiting, 2010 WL 4974382 (Dec. 8, 2010) at *6-9 (Scalia, J: “… So it all essentially comes down to –to the licensing issue, doesn’t it?”; Kennedy, J: “… I see no limitation on what the State can decide is a license in any jurisprudential principle that you cited”; Alito, J: “Could I ask you this question to get back to the issue of whether this is a licensing law?”); Tr. of Oral Arg. at *20 (Roberts, CJ: “Just to pose [sic] there, we’ve had a little discussion about what licensing laws are, but we haven’t talked at all about those last two words, “and similar laws.” It seems to me that whatever wiggle room or ambiguity there may be in saying whether this is a license or not, Congress swept pretty broadly. It said, not just licensing laws, but licensing and similar laws.”)

\textsuperscript{173} 620 F.3d at 219, vacated and remanded, City of Hazleton v. Lozano, 131 S.Ct. 2958 (2011).

\textsuperscript{174} There is only one explicit reference to implied preemption in the entire oral argument, and it is by Neil Katyal, Acting Solicitor General, who stated the following: “State adjudication of a Federal violation is expressly preempted \textit{as well as} impliedly so for three reasons. . .” Tr. of Oral Arg. at *24 [emphasis added].

\textsuperscript{175} Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari, Chamber of Commerce v. Candelaria, 2010 WL 2190418 (May 28, 2010) at *1.

\textsuperscript{176} Id. at *9-10.

\textsuperscript{177} See supra note 172.

\textsuperscript{178} Hazleton, 620 F.3d at 219 vacated and remanded, City of Hazleton v. Lozano, 131 S.Ct. 2958 (2011).
in sanctioning employers who hired unauthorized workers, employers in avoiding overly-burdensome verification requirements, and authorized workers in not being discriminated against on the basis of national origin.\textsuperscript{179} The Arizona statute, like the Hazleton ordinance, focused almost exclusively on the first interest, punishing employers who hire unauthorized workers, disregarding Congress’ other objectives.

Ultimately, the Supreme Court, upholding the Ninth Circuit’s decision, found that LAWA was neither expressly nor impliedly preempted.\textsuperscript{180} By a 5-3 vote,\textsuperscript{181} it found that the license revocation provision was not expressly preempted by IRCA, because it fit squarely within IRCA’s savings clause as a “licensing or similar law”.\textsuperscript{182} By a 5-3 vote, the Court also found that the mandatory use of E-Verify was not conflict preempted, because nothing within the 1996 statute prevented states from making E-Verify mandatory; it only prevented the federal government from doing so.\textsuperscript{183} The Court also found that LAWA’s license revocation provisions were not impliedly preempted, with Justice Thomas joining in the result but not in the Court’s decision.\textsuperscript{184} Although Justice Thomas did not explain his failure to join in this part of the Court’s decision, it was no doubt due to his position, stated most clearly in 2009 in \textit{Wyeth v. Levine}, that “purposes and objectives” preemption jurisprudence is incompatible with the Constitution because it involves the Court in “routinely invalidat[ing] state laws based on perceived conflicts with broad federal policy objectives … not embodied within the text of federal law.”\textsuperscript{185}

Somewhat surprisingly, a clear majority of the court upheld the mandatory use of E-Verify on implied preemption grounds,\textsuperscript{186} despite

\textsuperscript{179} \textit{Edmondson}, 594 F.3d at 767.
\textsuperscript{180} \textit{Whiting}, 131 S.Ct. at 1973.
\textsuperscript{181} The Court’s newest justice, Elena Kagan, had to recuse herself from the case, because while she was still Solicitor General, her office had filed a brief in favor of granting certiorari on the first question presented, whether the LAWA was expressly preempted by IRCA. Constitutional Law Prof Blog, Chamber of Commerce v. Whiting Oral Argument Analysis: An Arizona Immigration Statute Before the Supreme Court (Dec. 8, 2010) at \url{http://lawprofessors.typepad.com/conlaw/2010/12/chamber-of-commerce-v-whiting-oral-argument-analysis-an-arizona-immigration-statute-before-the-supre.html} (last checked June 5, 2011).
\textsuperscript{182} \textit{Whiting}, 131 S.Ct. at 1973.
\textsuperscript{183} \textit{Whiting}, 131 S.Ct. at 1985.
\textsuperscript{184} \textit{Whiting}, 131 S.Ct. at 1973 n* (indicating that Justice Thomas joins Part 1, Part IIA and Part IIIA of the Court’s opinion and concurs in the judgment).
\textsuperscript{186} \textit{Whiting}, 131 S.Ct. at 1973 (indicating that Justice Roberts delivered the opinion of the Court, except as to Parts IIB and IIIB, and that Scalia, Alito and Kennedy, JJ, join the opinion in full and that Thomas, J, joins Part 1, Part IIA and Part IIIA of the Court’s opinion and concurs in the judgment); *16 (Part IIIA of the Court’s opinion concludes that
concerns that Justice Kennedy and others had expressed with its mandatory use during oral argument. The Court emphasized that the state consequences of not using E-Verify were the same as the federal consequences: the employer would forfeit the rebuttable presumption that it had complied with federal law. Yet throughout oral argument, Mary O’Grady, counsel for the State of Arizona, seemed to be obscuring the fact that, even though no State sanctions are imposed on employers, the use of E-Verify subjects employers to federal sanctions, if and when a tentative nonconfirmation becomes final and the employer does not take steps to remove the employee. Here a tie vote, with Justice Kennedy joining the dissenting justices, had seemed likely. A tie would have meant that the decision to uphold mandatory use of E-Verify would have no precedential value and could be challenged later. The clear 5-3 majority decision on this issue likely has sparked a new wave a copycat legislation around the country.

II. A TAXONOMY FOR PREEMPTION ANALYSIS

If the Court’s decision in Chamber of Commerce v. Whiting is a harbinger of things to come, it is critical that challengers in future cases be able to distinguish the facts of Whiting from the features of other state and local laws that come before the Supreme Court and lower federal courts. Immigration experts have pointed out critical differences between the Legal Arizona Workers Act, which was upheld by the Supreme Court and the lower federal courts, and the provisions of S.B. 1070 which have been struck down by the lower courts. While LAWA arguably involved the Arizona’s statute requiring mandatory use of E-Verify does not conflict with the federal scheme because the consequences of not using the scheme under Arizona law are the same as the consequences under federal law: that the employer forfeits the rebuttable presumption that it complied with federal law).

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187 Tr. of Oral Arg. at *37 (KENNEDY, J: “But you are taking the mechanism that Congress said will be a pilot program that is optional and you are making it mandatory. It seems to me that's almost a classic example of a State doing something that is inconsistent with a Federal requirement.”)


189 Tr. of Oral Arg. at *50 (Ginsburgh, J: “Can you also explain the I-9? You said it's the same as in the Fed. Home free if you have documents, Social Security, driver's license. But you also require the E-Verify. So how -- does the E-Verify information modify the I-9? How -- how do those two...”; MS. OGRADY: “They work in our system, Your Honor, as they do under the Federal law, under -- that you get a rebuttable presumption if you -- in your favor if you used E-Verify, the affirmative defense if you used I-9. And I am -- there is that caution; it is good faith use of -- of the I-9 system...”)

regulation of immigrants in the area of employment, a traditional area of state concern. S.B. 1070 and similar copycat legislation involve State and local efforts to enforce the immigration laws, such as by detaining and arresting persons believed to be unlawfully in the country or to have committed deportable offenses. In 1976 the Court in *De Canas v. Bica* indicated that the “[p]ower to regulate immigration is unquestionably exclusively a federal power” precluding all state involvement, but distinguished the regulation of immigration from the regulation of immigrants.\(^1\) The Supreme Court in *Chamber of Commerce v. Whiting* confirmed this distinction as still having validity,\(^2\) despite the challengers’ argument that *De Canas* was no longer legally relevant in light of the preemptive effect of IRCA’s employment regulation provisions.\(^3\) How narrowly the Supreme Court defines what constitutes the regulation of immigration is likely to be critical in future cases, and will require on the part of challengers careful explication of what makes a particular law a regulation of immigration. This final section will thus lay out a taxonomy for analyzing state and local laws, and identify the preemption principles that apply.

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

This should be a central, if not the first, inquiry in any analysis of state or local laws. The Court will likely draw a distinction, as it did in *De Canas*, between, on the one hand, laws that involve a determination of who should be admitted to the country and the conditions under which they may remain and, on the other, laws that involve the regulation of immigrants in areas of traditional state concern, such as employment, health, safety and education.\(^4\)

1. State Regulation of Immigration Implicates Field Preemption Analysis

The Court has said that the power to regulate immigration is “unquestionably exclusively a federal power, precluding all state involvement.”\(^5\) Thus, if a state or local law is deemed to involve the regulation of immigration, field preemption principles still should apply and the state or local law should be preempted by the federal statute unless the federal government has delegated or reserved power to the state or local

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\(^1\) 424 U.S. at 354.
\(^2\) *Whiting*, 131 S.Ct. at 1984.
\(^3\) Brief for Petitioners, *supra* note 165, at 21, 45-46.
\(^4\) *De Canas*, 424 U.S. at 354; *Hines*, 312 U.S. at 66-67.
\(^5\) *De Canas*, 424 U.S. at 354.
government to regulate.\textsuperscript{196} During the Bush Administration, several states, beginning with the State of Florida, entered into Memoranda of Understanding with the federal government that allowed state and local police to enforce the immigration laws, but under carefully delineated procedures laid out by federal law.\textsuperscript{197} Since then, several states and local governments have taken it upon themselves to perform this function, but without the requisite delegation of authority by the federal government. Such laws should be field preempted.

S.B. 1070 is an example of such a statute. The provisions allowing police to detain an individual where there is \textit{reasonable suspicion} to believe he or she is in the United States illegally, to arrest without a warrant any person where there is \textit{probable cause} to believe he or she has committed a deportable offense, and those making it a \textit{crime} for a noncitizen to fail to carry his or her immigration documents,\textsuperscript{198} while written in the language of criminal law and procedure, all involve the exercise of the \textit{immigration} power, an exclusively federal power. Indeed, the State of Arizona, in adopting S.B. 1070, has explicitly taken it upon itself to regulate immigration because of the perceived failure of the U.S. government to control its borders.\textsuperscript{199}

To the extent that the Court is reluctant to find field preemption, such laws should be conflict preempted on the basis of “dominant federal interest preemption”. While this test has often been viewed as a form of obstacle preemption, it should be recognized as a separate tool in the preemption tool box. In the event the Court distances itself from obstacle preemption analysis or attempts to replace impossibility and obstacle preemption with the logical contradiction test, it is essential that dominant federal interest preemption be applied where state law undermines the Executive’s capacity to “speak for the nation with one voice”, particularly in matters, like immigration law, implicating foreign affairs.\textsuperscript{200}

Under current doctrine, nothing in the Constitution, short of a constitutional amendment, should allow states to assume a federal function because they perceive the federal government is not properly doing its job. This is not an area where Congress’ powers have laid dormant, allowing States to act under the dormant commerce clause. It is conceivable that some of the more conservative justices on the Court could define state

\textsuperscript{196} See \textit{Hines}, 312 U.S. at 66-67.

\textsuperscript{197} See INA § 287(g)(“[T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer . . . may carry out such function . . . .”). See also Memorandum of Understanding Between the United States Department of Justice and the State of Florida signed by Governor Jeb Bush ( June 15, 2002) and Attorney General John Ashcroft (July 2, 2002).

\textsuperscript{198} S.B. 1070, supra note 3.

\textsuperscript{199} Arizona Sues Federal Government, supra note 4.

regulation of immigration narrowly to only involve situations where the state is actually deciding who can enter and physically removing individuals who it deems deportable, but it is doubtful that such a position would command a majority. Rather, if a state law like S.B. 1070 allows state or local law enforcement officers to question, detain and arrest individuals based on their determination that such persons are not lawfully in the United States and to criminalize the failure to carry proper immigration documents, such a law should be deemed to involve state regulation of immigration in an area where the federal power is exclusive and be struck down on either field preemption grounds or under the dominant federal interest test.

Proponents of State copycat laws like S.B. 1070 have argued that state and local laws, even those that regulate immigration, should be upheld if they are “mirror images” of federal law. Indeed, as Carissa Hessick points out, this has been the argument advanced by Kris Kobach, currently Secretary of State of Kansas, former law professor at the University of Missouri -- Kansas City, and principle author of much of the copycat legislation sweeping the country. According to this theory, to avoid preemption, a state or local law must 1) create no new categories of “aliens” not recognized by federal law; 2) use terms consistent with federal law; and 3) not attempt to authorize state or local officials to independently determine a person’s immigration status. This theory of state authority is grounded in jurisprudence on cooperative federalism. Yet as Margaret Stock points out, states cannot be “assisting” in enforcing immigration law if the United States does not seek that assistance.

The Supreme Court in Whiting, however, seemed persuaded by the State of Arizona’s “mirror image”-type argument that LAWA was not impliedly preempted because its sanctions matched those in federal law, and because it relied on the federal government to determine an individual’s immigration status. That, together with the Court’s reluctance to apply implied obstacle preemption analysis, suggests that state and local laws regulating immigration that do not directly conflict with federal law might be upheld. Although a dramatic break with the past and with the plenary power doctrine, it is not inconceivable that the Court could find that state and local enforcement of immigration is no longer field preempted since the federal government has entered into memoranda of understanding

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201 Hines, 312 U.S. at 66-67.
203 Id.
specifically delegating enforcement authority to states and local government. For this reason, a new distinct “dominant federal interest” test may be required.

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

If the state or local law regulates immigrants in matters other than questions of who may enter the United States and the conditions under which they may remain, the Court should still determine whether express or conflict preemption principles apply. As long as Congress acts within the scope of its Article I powers, a federal statute regulating immigrants may either expressly or impliedly preempt state or local law. In determining whether a state or local law is preempted, the court should also examine whether it implicates a traditional zone of state authority. Sufficient weight should be given, however, to any express preemption provisions, and savings clauses interpreted consistent with the law’s structure and purpose. In determining Congressional intent, a savings clause should not be read so broadly that it swallows up an express preemption provision in a comprehensive federal statute. The next section will discuss express preemption analysis in the context of state and local laws regulating immigrants. The final section will discuss a framework for conflict preemption analyses, including impossibility preemption, obstacle preemption the emerging logical contradiction test and the dominant federal interest test proposed above.

B. Is the Law Expressly Preempted by Federal Law?

A state or local law regulating immigrants will be expressly preempted by federal law if there is an express preemption provision and the state or local law falls within its scope. In determining the scope of the express preemption provision, the Court is likely to rely largely on its plain wording, which is deemed to contain the “best evidence” of Congress’ preemptive intent.”205 Where the plain wording does not resolve the question, it should also consider the structure and purpose of the statute as revealed in the text and in the courts’ understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to operate.206

1. Does IRCA’s express preemption provision apply?

206 Hazleton, 620 F.3d at 203.
It is likely that the scope of IRCA’s express preemption provision will be an issue in future cases involving state or local regulation of employers who hire the undocumented. In examining a state or local law regulating the employment of immigrants, parties and the courts should address the following questions:

a. Is it a law regulating the employment of “unauthorized aliens”?

If the state or local law regulates employers who hire unauthorized foreign workers, it will implicate IRCA and require express preemption analysis. Although in 1986 IRCA created a pervasive federal scheme for regulating employers who hire “unauthorized aliens”207 Congress was also regulating in an area—employment—considered to be within the mainstream of the states’ police powers.208 Courts must determine whether the state or local law falls within IRCA’s express preemption provision, which preempts “any state or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens”,209 or whether it is saved by the savings clause.

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

A state or local law imposing civil or criminal sanctions on employers who hire unauthorized foreign workers should be preempted by IRCA’s express preemption provision. Where, as here, the statute contains an express preemption provision, where Congress has made its intent to preempt state law clear, it is arguably not appropriate to apply a “presumption against preemption” in interpreting the scope of the express preemption clause and any savings clause, particularly if Congress is regulating in an area, like immigration, implicating dominant federal interests. Thus, a law that makes it a crime for an employer to hire an unauthorized worker, or which imposes civil penalties on such an employer, such as through a fine, should be expressly preempted by the plain language in IRCA. Many states and local governments wishing to regulate employers’ hiring of foreign workers will likely attempt to do so through license revocation provisions similar to those in LAWA and the Hazleton ordinance. Any sanctions on employers must be carefully examined to

207 See 8 U.S.C. §1324a(h)(3)(defining “unauthorized alien” as an “alien [that] is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.”)
208 Chamber of Commerce v. Whiting, supra note 12 at *5.
determine how closely they track the license revocation provisions in the Legal Arizona Workers Act or whether they are distinguishable.

In *Whiting*, the Court interpreted IRCA’s savings clause broadly as indicating Congress’ intent that some state or local laws would be preempted while others, such as licensing laws, would be allowed, even if they were used to regulate employers in an area where Congress had acted.\(^{210}\) The exception in *Whiting* should be read narrowly. It should not be enough that the criminal or civil sanction has a connection to licensing laws. To survive IRCA’s express preemption provision, the principle penalty under state or local for hiring unauthorized workers should be loss or suspension of the employer license to operate. Also, to the extent that the licensing scheme is a pretext for avoiding federal preemption, such laws should be struck down.

2. Are any other express preemption provisions applicable?

If the state or local law involves the regulation of immigrants in an area outside of the hiring of undocumented workers, such as in the area of health, safety, education, or housing, the parties should examine whether the federal government has acted, and whether any other express preemption principles may apply. For example, ERISA, the Employee Retirement Income Security Act, expressly preempts “any and all state laws insofar as they relate to any employee benefit plan.”\(^{211}\) Thus, state attempts to reform the health care system and, for example, to exclude certain noncitizens from that system, could be expressly preempted by ERISA. Even if IRCA’s express preemption provision is not applicable, there may be other express preemption provisions that apply. Moreover, it is likely that Congress will consider including more explicit express preemption provisions in immigration legislation, especially if the Supreme Court upholds challenged provisions of Arizona’s S.B. 1070 and other copycat laws. Thus, some of these issues may be resolved (or at least debated) through the political process.

C. Is the Law Impliedly Preempted by Federal Law?

Even if the state or local law is not *expressly* preempted or *field* preempted by federal law, the Court still should examine whether conflict preemption principles apply. In *Chamber of Commerce v. Whiting*, once the 5-3 majority determined that LAWA was not *expressly* preempted by IRCA because it fell within IRCA’s savings clause for “licensing and similar laws”, the Court was unwilling to engage in a thorough analysis of whether LAWA was *impliedly* preempted. A plurality of four Justices stated that

\(^{210}\) *Chamber of Commerce v. Whiting*, supra note 12 at *11.

“[i]mplied preemption analysis does not justify a ‘freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.’”\textsuperscript{212} The fifth, Justice Thomas, who declined to join in this part of the decision,\textsuperscript{213} has argued that obstacle preemption analysis is unconstitutional.\textsuperscript{214}

Nonetheless, a clear majority of justices continue to recognize the validity of impossibility preemption, and there still appears to be a majority of justices who, in certain cases, will engage in obstacle preemption analysis.\textsuperscript{215} An emerging majority also recognizes that federal preemption may occur where there is a direct conflict between state and federal law, even if it is not physically impossible to comply with both. Direct conflict preemption or the logical contradiction test could eventually replace impossibility and obstacle preemption analysis as the standard, which, in this author’s opinion, would be a dangerous development in the context of immigration laws. Absent a broad express preemption provision in the INA, which would be difficult to get through Congress, it would allow for a patchwork of state and local laws regulating immigrants as long as they did not directly contradict federal law, and would be inconsistent with traditional interpretations of the Supremacy Clause. To address this potential threat to established preemption jurisprudence, this author proposes a distinct dominant federal interest test to add to the conflict preemption tool chest, which would apply even where field or obstacle preemption was not found. The next section proposes an analytical framework, based on recent decisions, for conducting conflict preemption analysis.

1. Is compliance with both state and federal law impossible?

The situations where the Court has found that the law is conflict preempted because compliance with both federal and state law is impossible have been rare. The Court frequently has stated that compliance with both federal and state law must be “physically impossible” in order for this preemption doctrine to apply.\textsuperscript{216} One such situation would be where state law penalizes what federal law requires.\textsuperscript{217} If, however, federal law is found

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\textsuperscript{212} \textit{Whiting}, 131 S.Ct at 1985. \\
\textsuperscript{213} Id. at 1973 n. *.
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\textsuperscript{214} \textit{Chamber of Commerce v. Whiting}, supra note 12 at *15.
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\textsuperscript{217} \textit{Geier}, 529 U.S. at 873.
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to establish a floor below which state laws cannot fall, then state laws that impose a higher standard are likely to be upheld.\textsuperscript{218}

Nonetheless, recent preemption decisions of the Court suggest that it may be moving away from a strict “physical impossibility” test. In his concurrence in \textit{Wyeth v. Levine}, Justice Thomas suggested that the “logical contradiction” test should replace both the physical impossibility test, which he believed was too narrow, and the obstacle preemption test, which he argued allowed the Court to “routinely invalidate[] state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law.”\textsuperscript{219} Although Justice Thomas later wrote the majority decision in \textit{Pliva v. Mensing}, finding that the state tort claim was impossibility preempted by food and drug law, Justice Sotomayor noted in her dissent that \textit{Pliva} was not a case of physical impossibility, since the generic manufacturer could have taken steps to change its labeling to comply with state safety standards.\textsuperscript{220} In a footnote, she described the Court’s decision as a “novel expansion of impossibility preemption.”\textsuperscript{221}

\begin{enumerate}
\item \textbf{Does the state or local law stand as an obstacle to achieving the purposes of the federal immigration statute?}
\end{enumerate}

The Supreme Court frequently has ruled that a state or local law may be conflict preempted if it stands as an obstacle to achieving the purposes and objectives of the federal statute.\textsuperscript{222} The Third Circuit relied on this reasoning in \textit{Lozano v. Hazleton} when it found that Hazleton’s license revocation ordinance was not \textit{expressly} preempted because it fell within IRCA’s savings clause, but that it was \textit{conflict} preempted because, by focusing solely on enforcement, it stood as an obstacle to achieving IRCA’s carefully balanced, competing policy goals.\textsuperscript{223} In \textit{Whiting}, however, a plurality of the Court, in addressing the implied preemption claim, recognized that “Congress did indeed seek to strike a balance among a variety of interests when it enacted IRCA” but that part of that balance involved “allocating authority between the federal government and the States.”\textsuperscript{224} The plurality concluded that IRCA has “preserved state authority over a particular category of decisions —those imposed through ‘licensing and similar laws.’”\textsuperscript{225} In focusing on the seven words in the savings clause

\begin{itemize}
\item \textit{Florida Lime & Avocado Growers}, 373 U.S. at 144-145.
\item \textit{Wyeth}, 129 S.Ct. at 1205 (J. Thomas, concurring).
\item \textit{Pliva}, 131 S.Ct at 2588-2589.
\item \textit{Id.} at 2590 n. 13.
\item \textit{Geier}, 529 U.S. at 874 (“savings clause, like the express pre-emption provision, does not bar the ordinary working of conflict pre-emption principles”).
\item \textit{Hazleton}, 620 F.3d at 210-211.
\item \textit{Id.}
\end{itemize}
in an otherwise comprehensive regulatory regime, it ignored the text, legislative history and overall structure of IRCA as well as its own precedent to conclude that LAWA was neither expressly nor impliedly preempted.\textsuperscript{226} It refused to engage in what it described as a “freewheeling judicial inquiry into whether a state statute is in tension with federal objectives”.\textsuperscript{227} Perhaps equally disturbingly, eleven days after its decision in \textit{Whiting}, it vacated and remanded, \textit{without opinion}, the Third Circuit’s decision in \textit{Lozano v. Hazleton}, in light of its ruling in \textit{Whiting},\textsuperscript{228} despite the fact that the Third Circuit had much more thoughtfully addressed the implied preemption claim than either the challengers or the Ninth Circuit in the \textit{Whiting} case.\textsuperscript{229}

It is critical that in future cases, conflict preemption analysis be carefully developed and grounded in precedent. It is also critical that challengers meet head on the Court’s suggestion in \textit{Whiting} that it is generally not appropriate to engage in conflict preemption analysis once it has been determined that a state or local statute is not \textit{expressly} preempted because it falls within a savings clause.\textsuperscript{230} Similarly, savings clauses should not be read so broadly that they swallow up an express preemption provision in an otherwise comprehensive statute. This final discussion will set forth a framework for identifying the circumstances under which the Court should still apply obstacle preemption analysis, and propose breaking out “dominant federal interest” preemption as a separate category of conflict preemption.

\textit{a. How should the court determine the purposes of the federal statute?}

In \textit{Whiting}, the majority, in examining Congress’ purpose, engaged in a \textit{textual} analysis of the specific language in IRCA’s express preemption provision, and more particularly, the language in the savings clause, virtually ignoring the \textit{structure, content, legislative history and case law} interpreting IRCA. It stated that while it would look at the legislative history to interpret any ambiguities, it would not use the legislative history to create ambiguities.\textsuperscript{231} In future cases challenging state and local laws regulating immigrants as conflict preempted, the Court must consider not only the narrow \textit{text} of the savings clause, which is relevant for express preemption purposes, but other evidence of Congressional purpose,

\textsuperscript{227} \textit{Id.} at 1985.
\textsuperscript{228} \textit{Hazleton v. Lozano}, 131 S.Ct. 2958 (2011).
\textsuperscript{229} \textit{Chamber of Commerce v. Whiting}, 131 S.Ct. at 2958.
\textsuperscript{231} \textit{Chamber of Commerce v. Whiting}, 131 S.Ct. at 1980 (Congress’ “authoritative statement is the statutory text, not the legislative history”).
including any statement of purpose, the content of the legislation as a whole, the structure of the legislation, how the various provisions of a comprehensive regulatory regime relate to one another, the legislative history, and case law. In an ideal world, the law’s purpose should be laid out in its preamble, but absent a preamble, the Court should consider other evidence of purpose.

The legislative history of IRCA, whose importance was dramatically downplayed by the majority in Whiting,232 was more than just a gloss on the statute. The Court stated that

Whatever the usefulness of relying on legislative history, the arguments against doing so are particularly compelling here . . . Only one of the four House Reports touches on the licensing exception . . . and we have previously dismissed that very report as “a rather slender reed” from “one House of a politically divided Congress.”233

Yet any merit to the Court’s argument regarding the limited value of one House Report in interpreting the savings clause’s licensing language for express preemption purposes should not have been extended to the legislative history as a whole for implied preemption analysis. In Geier, a majority of the Court found that a “savings clause (like the express preemption provision) does not bar the ordinary working of conflict preemption principles.”234 The Court in that case indicated that it had repeatedly “decline[d] to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law.”235 The Court in Geier wrote that a savings clause should not be interpreted to permit a federal law to “defeat its own objectives”, or to potentially “destroy itself”.236

As Justice Sotomayor indicated in her thoughtful dissent in Whiting, the Court’s reading of IRCA’s savings clause “cannot be reconciled with the rest of IRCA’s comprehensive scheme.”237 IRCA’s legislative history aptly described the content, structure and overall purpose of IRCA, which balanced sanctions on employers who hire undocumented workers against identical sanctions on employers who discriminate against workers on the basis of national origin.238 This evidence of Congressional purpose should have been considered in any analysis of whether state law stood as an obstacle to accomplishing IRCA’s purposes.

233 Chamber of Commerce v. Whiting, 131 S.Ct. at 1981.
234 Geier, 529 U.S. at 869.
235 Id. at 870.
236 Id. at 872.
237 Chamber of Commerce v. Whiting, 131 S.Ct. at 1998 (Sotomayor, J, dissenting).
238 Chamber of Commerce v. Whiting, 131 S.Ct. at 1987 (Breyer, J. dissenting).
b. When does State law stand as an obstacle to achieving federal purposes?

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

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

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

Similarly, the Court has found that a state law is conflict preempted where it strikes the balance differently than federal law. In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, the Court found that Florida law was preempted because it struck the balance differently between “the encouragement of invention and free competition in unpatented ideas.” In *Buckman Co. v. Plaintiffs’ Legal Comm.*, the Court found that after the FDA had struck a “somewhat delicate balance of statutory objectives” and determined that where petitioner had submitted a valid application to manufacture a medical device, a State could not use its common law to negate it. In *Lozano v. Hazleton*, the Third Circuit found that the Hazleton license revocation struck the balance differently than federal law in at least four ways: 1.) it increased the burden on employers by creating a separate and independent adjudicative system for determining whether an employer had hired an unauthorized worker; 2.) it altered the employment verification scheme created by IRCA (the I-9 system) and supplemented by IIRIRA (E-Verify) by requiring use of E-Verify under certain circumstances; 3.) it required employers to verify the employment

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239 489 U.S. 141, 144 (1989).
240 Id. at 144.
241 531 U.S. 341 (2001). See also *Wyeth v. Levine*, 129 S.Ct. at 1220 (Alito, J., dissenting) (“Where FDA determines, in accordance with its statutory mandate, that drug is on balance, “safe”, our conflict preemption cases prohibit any state from countermanding that determination.”)
242 Id. at 348.
244 Id. at 214.
status of independent contractors;\textsuperscript{245} and 4.) it failed to balance its sanctions with anti-discrimination provisions.\textsuperscript{246} The Third Circuit was particularly troubled by the fact that Hazleton had established an alternate adjudication system at all. Congress had created a carefully balanced prosecution and adjudication system. If Hazleton’s ordinance were permissible, then each and every state and locality in the nation would be free to implement similar schemes.\textsuperscript{247}

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

The Court has also suggested that it will be more likely to find federal preemption where a state or local law implicates the “rights, liberties and personal freedoms of human beings” as opposed to state or local tax laws, labeling laws, or similar matters.\textsuperscript{248} Even if the Court were to find that S.B. 1070 and similar laws were not field preempted, perhaps it should presume preemption where such laws infringe on certain fundamental rights and freedoms, including freedom from arbitrary arrest, unreasonable searches and seizures and discrimination based on national origin. In addition to preemption, other constitutional principles may come into play and such laws may violate separate provisions of the Constitution, including the Equal Protection Clause and the Due Process Clause.

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

Even where a state or local law is not field preempted, the court should examine whether it infringes on an area that implicates a dominant federal interest. Where state or local laws are in a field that affects our international relations, the Court has been more likely to find that they stand as obstacles to the accomplishment and execution of the full purposes of Congress.\textsuperscript{249} Any concurrent state power that may exist has been restricted to the narrowest of limits.\textsuperscript{250}

Given the vulnerable position that both obstacle and field preemption appear to be in, I would propose separating out dominant federal interest preemption from obstacle preemption, making it a separate tool in the conflict preemption tool chest. \textit{Hines v. Davidowitz} frequently has been categorized in the literature as a field preemption case, when in

\textsuperscript{245} Id. at 216.
\textsuperscript{246} Id. at 217.
\textsuperscript{247} Id. at 213. Justice Sotomayor made similar arguments in her dissent in \textit{Whiting}, 131 S.Ct. at 1999-2000 (Sotomayor, J., dissenting).
\textsuperscript{248} \textit{Hines}, 312 U.S. at 68.
\textsuperscript{249} \textit{Hines}, 312 U.S. at 68; \textit{Crosby}, 120 S.Ct. at 2295-2296.
\textsuperscript{250} \textit{Hines}, 312 U.S. at 68.
fact, the Court used the language of obstacle preemption in striking down Pennsylvania’s registration requirements.\(^{251}\) In that 1941 case, the Court emphasized that rules and regulations touching on “the rights, privileges, obligations or burdens of aliens” implicate the national foreign affairs power, and that where the federal government has created a comprehensive scheme for regulating immigrants, “states cannot, inconsistently with the purposes of Congress, conflict or interfere with, curtail or complement the federal law, or enforce additional or auxiliary regulations.”\(^{252}\)

Nearly sixty years later, in *Crosby v. National Foreign Trade Council,* the Court unanimously overturned a Massachusetts law that barred state agencies from buying goods or services from companies doing business in Burma. Justice Souter, writing for the Court, found that Congress’ passage of a federal law imposing sanctions on Burma preempted the Massachusetts law because it stood as “an obstacle to the accomplishment of Congress’ full objectives.”\(^{253}\) He rejected Massachusetts argument that there was no real conflict because the federal and state statutes shared a common end. He wrote that the “fact of a common end hardly neutralizes conflicting means”\(^{254}\) and that the “inconsistency of sanctions here undermines the congressional calibration of force.”\(^{255}\) In addition, the Massachusetts statute was at odds with the President’s authority to speak for the United States on foreign policy matters, and his “power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exceptions for enclaves fenced off willy-nilly by inconsistent political tactics.”\(^{256}\) Similarly where a patchwork of state and local laws regulating immigrants and immigration are passed “willy-nilly” and are likely to interfere with the development and execution of a national immigration policy requiring the exercise of broad national authority, the Court should apply the dominant federal interest test to strike such laws down.

**CONCLUSION**

The Court’s decisions in *Whiting* and *Hazleton* have sent a shock wave through the immigrant advocacy community, raising the specter that the Court might uphold S.B. 1070 and other Arizona copycat legislation making their way through the federal system. The reality is that the two statutory schemes are quite different, and the Supreme Court’s holding in *Whiting* may have limited implications for the constitutionality of S.B. 1070

\(^{251}\) *Hines*, 312 U.S. at 67 (“Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania’s law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”)
\(^{252}\) Id. at 66-67.
\(^{253}\) *Crosby*, 120 S.Ct. at 2294.
\(^{254}\) Id. at 2297-2298.
\(^{255}\) Id. at 2298.
\(^{256}\) Id. at 2298-2299.
and similar copycat laws. Nonetheless, immigration foes see the Whiting decision as creating a blueprint for state and local lawmakers around the country.

The current Supreme Court’s attempt, through sleight of hand, to eliminate consideration of obstacle preemption by focusing its textual analysis on IRCA’s savings clause should not serve as the basis for upholding other state and local laws attempting to fill the void in federal enforcement. The Court should be reminded that obstacle preemption analysis is rooted in its seminal decision in McCulloch and in early jurisprudence and cannot be casually cast aside through the creation of a new logical contradiction test. While there may be some rationale for a “direct conflict” test to fill the void between the physical impossibility and obstacle preemption cases, such a test should be framed as an addition to rather than as a replacement of current standards. Similarly, the dominant national interest test should arguably become its own distinct category of conflict preemption analysis rather than subsumed into obstacle or field preemption analysis.

Finally, I would note that one major reason these laws have been enacted over the last few years is because of the failure of comprehensive immigration reform. Perhaps IRCA provides a valuable lesson in this regard. The last year that Congress introduced and seriously pursued comprehensive immigration reform was in 2007. That year, the legislation was voted out of committee but failed a Senate cloture vote. Like IRCA, the proposal that year attempted to balance a whole series of competing policy goals, including border enforcement and the legalization of undocumented workers. Since then, all proposals for CIR have been largely symbolic, to win political points during elections.

It took many years and various Congressional sessions before IRCA was ultimately enacted into law, and the legislation was seen as a success at the time largely because it balanced various policy considerations. Like the movie Groundhog Day, our lawmakers need to go back to the drawing board and try yet again to get CIR right. In light of the challenges to field

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258 Id. at 111-112.


260 See Lauren Gilbert, Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the Ag Jobs Bill of 2003, 42 HARV. J. ON LEGIS 419, 476-478 (2005)(proposing new pluralist model of “biennial factionalism” for analyzing immigration reform, which focuses on the “tendency of the political process to renew or reinvent itself every two years, in a somewhat cyclical repetition of new attempts at legislative reform”). Indeed, as this article was being completed, Senators Robert Menendez (D-NJ), Harry Reid (D-Nev.), Patrick Leahy (D-Vt.), Charles Schumer (D-NY), Kristin Gillibrand (D-NY) and John Kerry (D-Mass.), introduced the Comprehensive Immigration Reform Act of 2011, S. 1258 (June 22, 2011)(proposing a balance of solutions, including enhanced enforcement
and obstacle preemption principles, Congress may want to incorporate an express preemption provision into the INA for state and local laws regulating immigrants and immigration absent a specific delegation of authority by the federal government to state and local governments.

A real danger exists that, if the Court replaces impossibility preemption and obstacle preemption with the logical contradiction test, many state and local laws regulating immigrants will be upheld as long as the state or local standard is consistent with federal standards. Such a paradigm shift would have disastrous consequences for the federal government’s ability to set a national immigration policy and potentially for our relations with immigrant-producing nations. It would likely result in a patchwork of state and local laws regulating immigrants and immigration and in escalating xenophobia. Some scholars have suggested that it would be akin to the Jim Crow laws adopted in the South during the post-Plessy v. Ferguson era. In light of the Supreme Court’s recent decision in Whiting, a Congressional response may be the only way to prevent the proliferation of more laws like LAWA and S.B. 1070.

measures and a mandatory E-verify program, strategies to address the population of undocumented workers, improvements to regulating future flows of legal immigration, a commission to study and regulate temporary worker programs, and efforts to support the integration of immigrants into America.

See, e.g. Alabama v. United States, __ F.Supp.2d at *13 (preliminary injunction would not issue where United States was not likely to succeed on merits of its claim that Alabama statute making it a misdemeanor to fail to carry an alien registration document was conflict preempted where no clear conflict existed between Alabama statute and federal statutes to which it referred). See also Campbell Robertson, After Ruling Hispanics Flee an Alabama Town, N.Y. TIMES, Oct. 3, 2011, at A1 (“The vanishing began Wednesday night, the most frightened families packing up their cars as soon as they heard the news.”)