UNFORGIVING OF THOSE WHO TRESPASS AGAINST U.S.: STATE LAWS CRIMINALIZING IMMIGRATION STATUS

*Karla Mari McKanders**

INTRODUCTION

Since around 2005, states and localities have been using criminal trespass laws to target undocumented immigrants for unlawful presence.[1] In New Hampshire, California, and Florida, local police officers have used state criminal trespass laws to prosecute undocumented immigrants.[2] For example, the New Hampshire criminal trespass laws provide that a person is guilty "if, knowing he is not licensed or privileged to do so, he enters or remains in any place."[3] New Hampshire has applied this law to immigrants it believes to be unlawfully present in violation of immigration laws. Specifically, in April 2010, Arizona passed SB 1070: Support Our Law Enforcement and Safe Neighborhoods Act.[4] SB 1070 creates crimes involving trespassing by "illegal aliens" and harboring or concealing unlawful aliens.[5] The Act's intent is to use state government actors to target undocumented immigrants to increase the attrition of immigrants it deems to be unlawfully present in Arizona.[6] "The provisions of this act . . . are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in

---

* J.D., Duke University School of Law; B.A. Spelman College. Special thanks to Joan Hemmingway and Kenneth McKanders for their insightful comments and feedback. Thank you to my research assistants Ashley Adams and Rachel Watson.

1. Pam Belluck, *Town Uses Trespass Law to Fight Illegal Immigration*, N.Y. TIMES, July, 13, 2005, *available at* www.nytimes.com/2005/07/13/national/13immigrants.html (last visited Jan. 20, 2011).

2. *Id.*

3. N.H. REV. STAT. ANN. § 635:2 (1971).

4. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010); ARIZ. REV. STAT. ANN. § 13-1509 (2010).

5. *Arizona State Senate, 49th Leg., 2d Reg. Sess. Fact Sheet for S.B. 1070* (Jan. 15, 2010), http://www.azleg.gov/legtext/49leg/2r/summary/s.1070pshs.doc.htm.

6. S.B. 1070, 49th Leg., 2d Reg. Sess., at 2 (Ariz. 2010).

the United States."[7] State trespass laws that criminalize unlawful presence of immigrants in the form of trespass statutes are unconstitutional regulations of immigration and are a preempted exercise of state power.

This paper is the first paper in legal academia to analyze the constitutionality of criminal trespass statutes as applied to immigrants. Thus far, immigration law scholars have taken various positions on state and local regulation of immigration.[8] For example, Michael Olivas believes that state, county, and local ordinances aimed at regulating general immigration functions are unconstitutional and a function of exclusive federal pre-emptory power.[9] He believes that shifting immigration powers to the sub-federal level will likely lead to weaker federal enforcement and less

---

7. *Id.*

8. Kai Bartolomeo, *Immigration and the Constitutionality of Local Self Help: Escondido's Undocumented Immigrant Rental Ban*, 17 S. CAL. REV. L. & SOC. JUST. 855, 857 (2008); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1600 (2008) ("[t]he transformation of immigration law from a focus on foreign affairs and national identity to a seemingly domestic issue, touching on center areas of state concern, has invited the states into the immigration arena"); *see also* Laurel R. Boatright, *"Clear Eye for the State Guy:" Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement*, 84 TEX. L. REV. 1633, 1645 n.63 (2006); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 53 (2007); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and The Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008) (positing that the issues regarding state and local regulation of immigration are not really about immigration at all; instead, they are about local resource allocation); L. Darnell Weeden, *Local Laws Restricting The Freedom of Undocumented Immigrants as Violations of Equal Protection and Principles of Federal Preemption*, 52 ST. LOUIS U. L.J. 479, 480 (2008). *But see* Roe v. Prince William County, 525 F. Supp. 2d 799 (E.D.Va. 2007) (In Prince William County, Virginia, a lawsuit was filed questioning the legality of an ordinance which permitted "police officers to question otherwise lawfully detained persons about their immigration status and authorizing county personnel to determine what services might be lawfully denied based on immigration status."); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (He advocates for strict removal of state and local involvement in regulation of immigration and alienage law and arguing against state and local participation in immigration enforcement on civil rights grounds. His article does not analyze the current state and municipal regulation of immigration, as it was written to critique the 1996 Personal Responsibility Work and Reform Act.). When discussing immigration and crimes most articles discuss the immigration consequences of criminal convictions. *See generally* Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119 (2009); Yolanda Vazquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L. J. 31 (2010).

9. Olivas, *supra* note 8.

effective national security resources aimed at immigration enforcement and administration.[10] Immigration law scholar Cristina Rodríguez posits that the issues regarding state and local regulation of immigration are not really about immigration at all; instead, they are about local resource allocation.[11] Accordingly, she advocates for state and local regulation.[12] In my article, *Welcome to Hazleton*, I proposed that Congress enact laws expressly preempting state and local action unless specifically provided for in the text of the federal law.[13] Similarly, in the context of state and local laws policing immigration status, I again maintain that states and localities can only act when Congress gives them express permission.

This symposium examines the recent increase in the involvement of state and local governments in enacting and enforcing laws targeting immigrant populations. This increase began in 2007 in Hazleton, Pennsylvania with the passage of ordinances targeting undocumented immigrants.[14] The main concern of state criminal laws that sanction unlawful presence is whether they are constitutionally preempted. Specifically, it has been alleged that the Arizona statute and Arizona-like laws restrain the liberty of U.S. citizens and documented immigrants and interfere with federal immigration policy.[15] State and local laws sanctioning unlawful presence substantially overlap with the Immigration and Nationality Act of 1952 ("INA"),[16] Immigration and Nationality Act's 1996 criminal provisions sanctioning unlawful entry and re-entry,[17] and civil immigration penalties for unlawful presence as a ground for deportation.[18]

In evaluating the constitutionality of state trespass laws that

10. *Id.*

11. Rodríguez, *supra* note 8.

12. *Id.*

13. Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 48-49 (2007) [hereinafter McKanders, *Hazleton*].

14. *Id.*; Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579 (2009) [hereinafter McKanders, Arkansas Symposium Piece].

15. *See, e.g.*, Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976 (9th Cir. 2008), *cert. granted by* Chamber of Commerce of U.S. v. Candelaria, 130 S.Ct. 3498 (Jun. 28, 2010) (No. 09-115).

16. 8 U.S.C. § 1101 (1952).

17. Immigration and Nationality Act § 275 (1996), 8 U.S.C. § 1325(a) (2010) (unlawful entry has been a crime since 1929, see Act of Mar. 4, 1929, § 2, 45 Stat. 1551); Immigration and Nationality Act § 276 (1996), 8 U.S.C. § 1326 (2010) (illegal re-entry provisions).

18. Immigration and Nationality Act § 212(a)(9)(B)-(C) (1996); 8 U.S.C. § 1182(a)(1)(B)-(C) (2010) (unlawful presence is a ground for deportation and is not subject to criminal penalty, except when an alien is present in the United States after having been removed).

criminalize immigration status, this paper proceeds in three parts. The first part of the paper details how as a sovereign nation, U.S. laws have excluded undesirable categories of people from admission and have attempted to criminalize specific immigration violations. Early immigration laws provided civil sanctions for unlawful presence, and also provided criminal sanctions for unlawful entry and re-entry.[19] The second part explains and critiques the sections of SB 1070[20] that create separate state criminal offenses for violating federal immigration laws—namely unlawful presence or criminal trespass. The third part analyzes the constitutionality of the criminal provisions of SB 1070 that make it a state crime to be unlawfully present in the state in relation to specific provisions of the INA and federal immigration policy. The paper concludes that state trespass laws that criminalize unlawful presence of immigrants and attempt to delegate immigration enforcement to state officials are unconstitutional regulations of immigration and are therefore a preempted exercise of state power.

I. HISTORY OF IMMIGRATION LAWS EXCLUDING "UNDESIRABLES"

Traditionally immigration laws are considered a nation's prerogative as a nation-state has the ability to discriminate against who is permitted to enter.[21] Immigration law is the social construct that creates illegality, which is subject to the values that the nation wants to inculcate through the admission or exclusion of certain populations.[22]

> The most straightforward way to define illegal migration is by reference to the migration law of the state doing the counting. Under this method, anyone who is currently in contravention of the law has an 'illegal' status. This will include people who enter the country in breach of the law and those who overstay their permission to remain. [I]llegality is a creation of the law.[23]

This part describes U.S. history on how the law, depending on the time period, has expanded or contracted regulating immigrants who are

---

19. *Id.*

20. ARIZ. REV. STAT. ANN. § 13-1509 (2010).

21. Chae Chan Ping v. United States, 130 U.S. 531, 603-04 (1889) (Supreme Court stating "[t]hat the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.").

22. CATHERINE DAUVERGENE, MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW 174 (2008).

23. *Id.* at 11-12.

permitted to enter and remain in the country. In describing recent state action regulating migration, this part critiques the desire of states to reassert control over immigration (after centuries of federal regulation) by criminalizing violations of immigration laws and identifies the problems that arise when civil immigration laws are converted into criminal offenses. The history of U.S. immigration regulation provides a framework for understanding constitutional and policy implications of current state and local laws that criminalize unlawful immigration status.

A. CATEGORICAL IMMIGRATION EXCLUSIONS

For the first centuries of our country's existence, states regulated immigration.[24] Despite the federal government's current role in regulating immigration and enforcing immigration law, at the beginning of U.S. history, the state governments were primarily responsible for regulating immigrants within the state's border. The Constitution was not clear about which sector of government should regulate immigration.[25]

During the 1600s, the colonies began excluding immigrants they deemed undesirable for admission. Specifically, in 1639, "colonies began legislating to exclude 'paupers' and 'criminals.'"[26] Early immigration policies included the exclusion of public charges—persons that were likely to become dependent on the state for aid. Immigration rules "excluding 'public charges' embraced not only people sent by English courts but also the poor and the diseased who came voluntarily."[27] Early restrictions show the hostilities settlers began having towards immigrants, which resulted in blanket exclusions of certain undesirable categories.[28]

In the 1700s, the federal government began to regulate immigration. Specifically, in 1789, the United States Constitution granted the states broad power to regulate foreign commerce, which included immigration.[29] It was not until the Supreme Court construed federal power under the Commerce Clause of the Constitution broadly that immigration became a federal regulatory issue.[30] The Supreme Court did not begin to address state

---

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

25. *Id.* at 3.

26. *Id.* at 2.

27. *Id.*

28. *Id.*

29. U.S. CONST., art. I, § 8, cl. 4 (Congress has the power to establish a uniform rule of naturalization).

30. The Court determined that because of Congress's plenary power under the Commerce Clause of the Constitution, "[a] concurrent power in the States to regulate commerce is an anomaly not found in the Constitution." Smith v. City of Boston, 48 U.S. 283, 396 (1849) (*The*

regulation of immigration until the emergence of the *Passenger Cases*.[31] In *Passenger Cases*, "[t]he Supreme Court struck down laws enacted in Boston and New York that imposed special taxes on aliens and passengers arriving from foreign ports."[32]

In the 1840s, there was an increase in religious-based exclusions of immigrants. At the time, the country was predominately Protestant; Catholic Irish were excluded.[33] "Several groups and overlapping political parties, including social reformers, Protestant evangelicals, the Nativists, the Order of the Star-Spangled Banner, and the Know-Nothing Party, campaigned for legislation halting immigration and prohibiting naturalized immigrants from participating in the nation's political process."[34]

In 1875, the Supreme Court decided *Henderson v. Mayor of New York*[35] which definitively barred state restrictions on immigration.[36] At issue in *Henderson* was a tax that New York imposed on every immigrant who arriving in its ports.[37] *Henderson* held that the New York tax was an impermissible regulation of commerce with foreign nations.[38] The Court found that this regulation did not fall within the police power of the state.[39] This year marked the beginnings of pervasive federal regulation of immigration. In *Henderson*, the Court found state restrictions on immigration to be an unconstitutional infringement on the federal power over foreign commerce.[40]

In 1875, Congress also passed the first restrictive immigration statute.[41] Congress barred convicts and prostitutes from admission into the country.[42] "These limits were the first of many 'quality control' exclusions based on the nature of the immigrants themselves."[43] Following suit, in 1882, Congress enacted more legislation that excluded lunatics, idiots, and immigrants who were likely to become public charges.[44] In 1891, Congress

---

Passenger Cases); *see also* McKanders, *Hazleton*, *supra* note 13.

31. *See The Passenger Cases*, 48 U.S. 283.

32. *Id.*

33. WEISSBRODT & DANIELSON, *supra* note 24, at 5.

34. *Id.*

35. Henderson v. Mayor of New York, 92 U.S. 259 (1875).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 263.

40. WEISSBRODT & DANIELSON, *supra* note 24, at 4.

41. Act of March 3, 1875, 18 Stat. 477 (1875).

42. *Id.*

43. WEISSBRODT & DANIELSON, *supra* note 24, at 4.

44. An Act to Regulate Immigration, Act of Aug. 3, 1882, 22 Stat. 214 (1882); *see also* Edye

also enacted legislation barring diseased individuals, paupers, and polygamists from admission.[45] Most of the legislation prohibited these categories of immigrants from migrating as they were thought to be a burden on the U.S. economy.[46]

During the 1900s the United States expanded the immigration laws to limit the migration of "undesirable" populations. For example, the Immigration Act of 1917 excluded certain nationalities from Asia, Southern and Eastern Europe, and anarchist nations.[47] Further, in 1892, the Geary Act excluded persons of Chinese decent.[48] In 1921, Congress passed the first quotas that limited the migration of specific nationalities to three percent.[49] In addition in 1903, Congress passed a law that excluded epileptics, the insane, beggars, and anarchists from admission.[50] Congress continued to exclude undesirable populations including migrants who were deemed feebleminded, the tubercular, and those persons with a mental or physical defect that "may affect" their ability to earn a living.[51]

These exclusions were facilitated, in part, by the Immigration Commission's 1911 report. The report:

---

v. Robertson, 112 U.S. 580, 590-91, 249-50 (1884) (citing 1882 Immigration Act stating that "[i]t directs that such officers shall go on board vessels arriving from abroad, and if, on examination, they shall find any convict, lunatic, idiot, or any person unable to take care of himself or herself, without becoming a public charge, they shall report to the collector, and such person shall not be permitted to land. It is also enacted that convicts, except for political offenses, shall be returned to the nations to which they belong. And the secretary is directed to prepare rules for the protection of the immigrant who needs it, and for the return of those who are not permitted to land. This act of congress is similar, in its essential features, to many statutes enacted by states of the Union for the protection of their own citizens, and for the good of the immigrants who land at sea-ports within their borders. That the purpose of these statutes is humane, is highly beneficial to the poor and helpless immigrant, and is essential to the protection of the people in whose midst they are deposited by the steam-ships, is beyond dispute").

45. An Act in amendment to the various Acts relative to immigration and the importation of aliens under contract or agreement to perform Labor, Act of March 3, 1891, 26 Stat. 1086 (1891); *see also* Moffitt v. United States, 128 F. 375, 378 (9th Cir. 1904) (citing 1891 Act stating that section one provided that "[t]he following classes of aliens shall be excluded from admission into the United States, in accordance with the existing acts regulating immigration, other than those concerning Chinese laborers: All idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another or who is assisted by others to come, unless it is affirmatively and satisfactorily shown on special inquiry that such person does not belong to one of the foregoing excluded classes.").

46. WEISSBRODT & DANIELSON, *supra* note 24, at 4.

47. Act of 1917, 39 Stat. 889 (1917).

48. The Geary Act, ch. 60, §§ 2-9, 27 Stat. 25 (1892).

49. The Quota Act, ch. 8, § 2(a), 42 Stat. 5 (1912-1923).

50. Act of March 3, 1903, 32 Stat. 1213 (1903).

51. Immigration Act of February 20, 1907, 34 Stat. 898 (1907).

> concluded that twentieth century immigration to the U.S. was significantly different from earlier immigration and that the new immigration was dominated by the so-called 'inferior' and 'less desirable' groups. As a result, the Commission concluded that the United States no longer benefited from a liberal immigration policy and should impose further entry restrictions. The Commission recommended a literacy test as one such restriction.[52]

Even though these restrictions were in place, they were extremely hard to enforce because the Immigration Commission had limited power and resources to enforce the immigration laws.[53] The United States also had a pattern of excluding certain racial and ethnic groups. For example, in 1907, Japanese immigration was restricted.[54] The philosophy behind the immigration restrictions were based on whether particular immigrant groups would be able to assimilate into America.[55]

The exclusion of certain racial and ethnic populations was halted during the Civil Rights Movement in the 1960s.[56] Specifically, in 1965, the Immigration Act was passed which abolished all racial quotas and racial considerations from influencing whether a person could immigrate to the United States.[57] Before that happened, however, in 1952, Congress passed the INA which solidified the federal government's control over immigration.[58] The INA created an in-depth system to govern immigrants' entrance into and exit out of the United States and the conditions under which immigrants could remain in the United States.[59] Today, the INA regulates the conduct of immigration judges in conducting hearings,[60] the conditions under which an immigrant may be removed from the country,[61] and crimes for unlawful entry and re-entry into the United States.[62]

---

52. WEISSBRODT & DANIELSON, *supra* note 24, at 9. *See generally* DILLINGHAM COMMISSION REPORTS, REPORTS OF THE IMMIGRATION COMMISSION, WASHINGTON: GOVERNMENT PRINTING OFFICE: 1911, VOL. 1-2, 650.

53. *Id.*

54. Immigration Act of 1907, 34 Stat. 898 (1907).

55. WEISSBRODT & DANIELSON, *supra* note 24, at 10.

56. *Id.*

57. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 917 (1965).

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

59. *Id.*

60. 8 U.S.C. § 1103 (2009).

61. Immigration and Nationality Act §§ 231-41 (1996), 8 U.S.C. § 1103 (2009).

62. Immigration and Nationality Act § 275 (1996), 8 U.S.C. § 1325(a) (2010) (unlawful entry has been a crime since 1929, see Act of Mar. 4, 1929, § 2, 45 Stat. 1551); Immigration and Nationality Act § 276, 8 U.S.C. § 1326 (2010) (illegal re-entry provisions).

The history of American immigration laws demonstrates that the United States has not utilized neutral, egalitarian methods to decide which persons are admitted into the country. Immigration law scholar Michael Olivas finds a striking similarity between current state and local immigration regulation and older racial exclusionary immigration laws.[63] Government immigration policies have historically excluded persons in a sometimes arbitrary and discriminatory fashion. The characteristics used to exclude undesirable persons have been based on a person's race and nationality (i.e. Chinese exclusion Act);[64] religion (Catholic); and their economic standing (public charge concept).[65] When we view current state and local laws that target immigrants in light of the past exclusionary immigration laws, current state and local laws demonstrate repeating patterns that exclude unfavorable groups based on arbitrary and discriminatory characteristics.[66]

As this section demonstrates, depending on the time period, immigration laws can reinforce stereotypes about which immigrant populations are deserving of membership.

> The minimal content of the term 'illegal' obscures the identities of those to whom it is affixed. While any number of people may infringe migration laws and regulations, the label adheres better to some than to others. We imagine illegals as poor and brown and destitute, not a backpacking tourist that overstays a visa.[67]

It is in this context that the law reifies the exclusion of certain populations, sometimes on arbitrary and biased grounds.[68] Immigration law Scholar

---

63. Olivas, *supra* note 8, at 55 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886) (striking down anti-Chinese ordinances)); Ho Ah Kow v. Nunan, 12 F. Cas. 252 (C.C. Cal. 1879) (No. 6,546) (striking down local ordinance regulating hair length); *see also* BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990 (Stanford Univ. Press 1993).

64. The Geary Act, ch. 60, §§ 2-9, 27 Stat. 25 (1892); Aliens and Nationality, ch. 14, §§ 1, 2, 28 Stat. 7 (1893).

65. *See, e.g.*, Karla McKanders, *Unspoken Voice of Indigenous Women in Immigration Raids*, 14 J. GENDER RACE & JUST. 1 (2010) [hereinafter McKanders, *Unspoken Voice*]; Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1 (2009); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509 (1995).; *see also* Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 986 (1988) (for legal scholarship on the undocumented).

66. McKanders, *Unspoken Voice*, *supra* note 65.

67. DAUVERGENE, *supra* note 22, at 16.

68. *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163 (2010).

Kevin Johnson has stated: "[i]mmigration law offers a helpful gauge for measuring this nation's racial sensibilities."[69] Certainly, the history of America's immigration laws gives us insight into categories of people who were undesirable during a particular moment in our nation's history and justification for closely monitoring the constitutionality of laws that target immigrant populations.

B. FEDERAL CRIMINAL SANCTIONS FOR UNLAWFUL PRESENCE

Early immigration laws attempted to impose criminal sanctions on persons unlawfully present. Criminalizing behavior serves the normative function of punishing immigrants who violate immigration laws. The Chinese Exclusion Act[70] exemplifies how categorical racial immigration exclusions can be used to render a particular group invisible to the law[71] when criminal penalties are imposed in connection with civil immigration violations.

The infamous Chinese Exclusion Act[72] barred persons of Chinese descent from immigrating to the United States. In 1892, the Geary Act sanctioned Chinese nationals who did not have permission to reside in the United States.[73] Chinese nationals unlawfully present were ordered deported, imprisoned and sentenced to hard labor for up to one year.[74]

> Section 3 of the Geary Act established deportation proceedings before a federal judge or commissioner, and Section 4 decreed: That any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period of not exceeding one year and

---

69. Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness,* 73 IND. L. J. 1111, 1148 (1998).

70. The Geary Act, ch. 60, §§ 2-9, 27 Stat. 25 (1892); Aliens and Nationality, ch. 14, §§ 1, 2, 28 Stat. 7 (1893).

71. *See generally* McKanders, *Unspoken Voice, supra*, note 65, at 6-7 (explaining terminology "invisible" in reference to undocumented immigrants as a group is not offered safeguards under the law as a protected classification or will not come forward to see protection under the law because fear of retaliation for their undocumented status).

72. The Geary Act, ch. 60, §§ 2-9, 27 Stat. 25 (1892); Aliens and Nationality, ch. 14, §§ 1, 2, 28 Stat. 7 (1893).

73. The Geary Act, ch. 60, 27 Stat. 25 (1892).

74. Gabriel J. Chin, et. al., *The Origins of Plenary Power, in* IMMIGRATION STORIES 7, 22 (David A. Martin & Peter H. Schuck eds., 2005) ("Any Chinese person accused of being unlawfully in the United States could be taken before a federal judge or commissioner, and if found to be unlawfully present shall be imprisoned in a penitentiary for a term of not exceeding five years, and at the expiration of such term of imprisonment be removed from the United States." *Id.* at 32.).

thereafter removed from the United States, as hereinbefore provided.[75]

In addition, the exclusion act sanctioned unlawful migration with a sentence of forced labor for Chinese nationals remaining in the country after the laws were passed. The Geary Act authorized a sentence of hard labor after a hearing before a federal judge or commissioner.[76] The judges were subordinate, non-article III judges.[77] The provision essentially permitted the judges to bypass the due process rights associated with criminal prosecutions.[78]

In 1896, the constitutionality of the Geary Act was challenged in *Wong Wing v. United States*.[79] The Supreme Court "addresse[d] congressional power over migration, constitutional protection of aliens against the federal government, the rights of *illegal* aliens, the distinction between civil detention and criminal punishment, and the character of hard labor as punishment."[80] The Supreme Court found the hard labor provisions unconstitutional, but upheld Congress' power to imprison as part of its power to control immigration.[81] Specifically, the Court held that when Congress provides punishment by hard labor for unlawful presence then it must provide a trial to establish guilt.[82] This is the first case to hold that the Bill of Rights protects undocumented immigrants.[83] The Court also upheld the general principle that as a sovereign the United States has the unilateral power to exclude immigrants from its jurisdiction.[84]

---

75. *Id.* at 33.

76. *Id.* at 32.

77. *Id.*

78. *Id.* at 33.

79. Wong Wing v. United States, 163 U.S. 228, 238 (1896) (citing Yick Wo v. Hopkins, 118 U.S. 369 ("The Fourteenth Amendment to the constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty or property without due process of the law. . . . These provisions are universal in their application. . . without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws.' Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guarantied [sic] by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.")).

80. Gerald L. Neumann, *Wong Wing v. United States: The Bill of Rights Protects Illegal Aliens*, *in* IMMIGRATION STORIES 31, 41 (David A. Martin & Peter H. Schuck, eds., 2005).

81. *Wong Wing*, 163 U.S. 228.

82. *Id.* at 237.

83. *Id.* at 238.

84. *Id.* at 237 ("The United States can, as a matter of public policy, by congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials.").

Wong demonstrates that even prior to the removal/deportation of an immigrant, Congress attempted to institute a policy that was punitive and included criminal labor consequences. The Geary Act gave the government the right to remove criminal due process protections if an immigrant was in the country in violation of the Act.[85] This is an example of how Congress' unregulated power over immigration, if left unchecked, can attempt to exploit a vulnerable racial category (Chinese) of persons who were arbitrarily excluded from the country. Congress sanctioned Chinese immigrants for their immigration violation and subjected them to criminal sanctions in their moment of vulnerability. The *Wong* case established a distinction between criminal and civil immigration proceedings. The Court found that Congress can authorize the detention of an unauthorized immigrant pending civil deportation proceedings, but concluded that Congress may not append criminal sanctions onto civil deportation without providing due process.[86]

Since 1875, Congress has been given deferential authority over immigration.[87] When Congress's statutory enactments are given deference, there is more justification for strict examination of the motivations and legality of recent state and local laws, especially recent criminal trespass laws that attempt to impose criminal sanctions, like the provisions in *Wong*.[88]

---

85. Neumann, *supra* note 80, at 32-33.

86. *Id.*; *see also Wong Wing*, 163 U.S. 228.

87. Courts are typically deferential to Congressional enactments involving immigration. *See generally* Chae Chan Ping v. United States, 130 U.S. 581, 603-04 (1889) (laying out the plenary powers doctrine which attributed the power as inherent to a sovereign nation); Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens") (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)). *See also* Peter Spiro, *Symposium: Lady Liberty's Doorstep: Status and Implications of American Immigration Law, Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1630 (1997) ("[T]he federal government has enjoyed a virtual carte blanche on immigration matters."); Chris Nwachukwu Okeke & James A.R. Nafzinger, *United States Migration Law: Essentials for Comparison*, 54 Am. J. Comp. L. 531, 544 (2006) (stating that "[a] cardinal doctrine of United States constitutional law is that Congress has an inherent, plenary power in matters of immigration") (footnote omitted), ("Over no conceivable subject is the legislative power of Congress more complete than it is [over the admission of non-citizens]." (quoting *Oceanic Navigation*, 214 U.S. at 339)).

88. Angela M. Banks, *Comprehensive Immigration Reform Symposium: Problems, Possibilities and Pragmatic Solutions: Proportional Deportation*, 55 WAYNE L. REV. 1651, 1651-52, 1681-82 (2009) (stating "[a]t the time that Fong Yue Ting was decided, deportation was only used to correct admissions mistakes. Deportation grounds were based on inadmissibility rather than post-entry behavior. Within the last 117 years, the purpose of deportation has expanded. Now it not only serves to remedy incorrect admissions decisions and deal with those who evaded the admission process, but it also seeks to regulate the post-entry behavior of noncitizens. The vast majority of the grounds upon which a noncitizen can be deported are based on post-entry criminal activity . . . . The growing use of deportation for post-entry behavior,

II. ARIZONA SB 1070: STATE CRIMINAL TRESPASS LAWS

The highly publicized local and national debate over Arizona's SB 1070 provides insight into current public opinions on immigrants. In April 2010, Arizona passed Senate Bill 1070, which is titled the "Support Our Law Enforcement and Safe Neighborhoods Act."[89] Shortly thereafter, five states introduced similar bills.[90] The Arizona legislature indicated that "[t]he provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States."[91] While many states were using criminal trespass laws to target immigrants, Arizona was the first to codify a criminal trespass law that specifically targets undocumented immigrants. Arizona Governor Jan Brewer claimed that the law was in reaction to the federal government's unwillingness to pass comprehensive immigration legislation, effectively forcing the states to enact and enforce their own immigration laws.[92]

There are many sections to Arizona SB 1070. The law essentially modifies various provisions of Arizona's existing laws. The new provisions address human trafficking, criminalize hiring day laborers, and provide sanctions for employers who hire undocumented workers, and penalize

---

particularly criminal behavior indicates that deportation is no longer a remedial measure; it is now also a punitive measure. Historically, communities have used deportation, also referred to as banishment or transportation, to remove 'undesirables' from the communities' borders."); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1686 (2009) (arguing that deportation as a sanction eschews proportionality and attempts to create a remedial scheme that would align immigration law with the broader landscape of legal sanctions; stating that "[w]hile the enforcement of immigration law has imported substantive criminal law norms, it has left behind the procedural protections of criminal law. Immigration proceedings do not trigger the constitutional rights due to defendants in the criminal justice system: the right to a trial by a court established under Article III of the Constitution, the right to counsel at government expense, the right not to incriminate oneself, protection against double jeopardy, and the prohibition of cruel and unusual punishment, among others. Procedurally, immigration law is a civil proceeding subject only to the protections of the Fifth Amendment's Due Process Clause.").

89. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

90. Belluck, *supra* note 1.

91. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

92. Laura Sullivan, *Prison Economics Help Drive Arizona Immigration Law*, NAT'L PUB. RADIO, Oct. 28, 2010, *available at* http://www.npr.org/templates/story/story.php?storyId=130833741&ps=cprs (A recent investigative report on National Public Radio, however, revealed that the American Legislative Exchange Council ("ALEC"), a group of state legislatures along with the Corrections Corporation of America, paused for the passing of SB 1070. Disclosures from the meetings reveal "talk [about] how positive [the bill] was going to be for the community . . . the amount of money that we would realize from each prisoner on a daily rate." The question is whether the Corrections Corporation of America's involvement gives us insight into the true motivations behind the law.) *see also id.*, *available at* http://www.npr.org/player/v2/mediaPlayer.html?action=1&t=1&islist=false&id=130833741&m=130878467 (last visited Jan. 20, 2011).

smuggling and harboring undocumented immigrants.[93] This paper focuses on the SB 1070 provisions that create state crimes relating to immigration status and permit state and local officials to enforce immigration provisions. Specifically, these provisions call for mandatory determination of immigration status upon arrest, creation of a state criminal trespass law for failure to carry alien registration documents, and creation of a state crime for civil violations of federal immigration law.[94]

Section two of SB 1070, "trespassing by illegal alien, if present on any public or private land in this state," requires officers to determine an individual's immigration status. Subsection 2(B) requires officers to make a reasonable attempt, when practicable, to determine an individual's immigration status during any lawful stop, detention, or arrest where reasonable suspicion exists that the person is unlawfully present in the United States.[95] Subsection 2(B) also requires that all persons who are arrested have their immigration status verified prior to release.[96] Subsections 2(B) and 2(E) provide the process for verifying immigration status and list documents that create a presumption of lawful presence.[97]

Section three of SB 1070 criminalizes the failure to carry an alien registration document.[98] This section provides that "[a] person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of [8 U.S.C. §§] 1304(e) or 1306(a)," which are federal statutes that require aliens to carry documentation of registration and penalize the willful failure to register.[99]

The first offense is a class one misdemeanor, punishable by up to six months of jail time and an additional $500 fine, as well as jail costs, with the assessments to be applied toward the Gang and Immigration Intelligence Team Enforcement Mission ("GIITEM") Fund.[100] The second offense is a class four felony, which is also punishable by up to six months of jail time, but with an additional $1000 fine and jail costs.[101] Persons who, in the past five years, have accepted voluntary removal or who have been deported from the United States would be subject to a class four

93. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).
94. *Id.*
95. ARIZ. REV. STAT. ANN. § 11-1051(B) (2010).
96. *Id.*
97. *Id.* §§ 11-1051(B), (E).
98. *Id.* § 13-1509(A).
99. *Id.*
100. *Id.* § 13-1509.
101. *Id.* § 13-1509(H)(2)(a).

felony charge upon their first arrest under this section.[102] A person found in possession of dangerous drugs or deadly weapons would face a class three felony charge upon his or her first arrest.[103]

III. CONSTITUTIONAL CHALLENGES TO STATE CRIMINALIZING UNLAWFUL IMMIGRANT PRESENCE

Since 2007, states and localities have been passing anti-immigrant laws.[104] State and localities should not be able to enforce immigration laws.[105] The INA is a comprehensive federal law that typically dominates over state anti-immigrant laws. The immigration supremacy arguments against state and local immigration regulation are centered on the premise that states and localities, in enacting laws and ordinances that target immigrants, are encroaching on an area that is subject to federal control.[106] Generally, anti-immigrant laws are being challenged in state and federal courts on federal preemption grounds.[107] Before analyzing whether state trespass laws that criminalize unlawful presence of immigrants are unconstitutionally preempted this section explains the constitutional preemption doctrine. Part A explains general preemption doctrine and how the larger preemption doctrine relates to immigration preemption doctrine. Part B builds on Part A in that it specifically addresses the constitutionality of Arizona's SB 1070 trespass laws.

A. THE CONSTITUTIONAL PREEMPTION DOCTRINE

The Supremacy Clause of the Constitution preempts state action where federal law expressly or impliedly precludes state action.[108] The Supremacy Clause, Article VI § 1, clause 2 of the Constitution, provides:

> [t]he Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.[109]

---

102. *Id.* § 13-1509(H)(2)(b).

103. *Id.* § 13-1509(H)(1)(a)-(c).

104. McKanders, *Hazleton*, *supra* note 13, at 6.

105. *Id.* at 4.

106. McKanders, Arkansas Symposium Piece, *supra* note 14, at 590-99.

107. *See* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (9th Cir. 2009) *cert. granted by* Chamber of Commerce of U.S. v. Candelaria, 130 S. Ct. 3498 (Jun. 28, 2010) (No. 09-115); Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007).

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

109. U.S. CONST. art. VI, § 1, cl. 2.

The preemption analysis "starts with an assumption that the historic police powers of the state[s are] not [to] be superseded by Federal Act unless that [is] the clear and manifest purpose of Congress."[110] A state or local law can be expressly or impliedly preempted.

First, under the doctrine of express preemption, a state or local statute is preempted if it clearly attempts to regulate immigration where Congress has direct regulatory authority.[111] Second, the doctrine of implied preemption governs field preemption and conflict preemption.[112] Under the implied preemption test, the court's task is essentially one of statutory construction.[113]

Field preemption exists when Congress intends to occupy the field of immigration and leaves no room for state or local action.[114]

> A state statute will be preempted under the field preemption test if there is a showing that it was the clear and manifest purpose of Congress to effect a complete ouster of state power—including state power to promulgate laws not in conflict with federal laws with respect to the subject matter.[115]

Courts "resort to principles of implied preemption—that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law" as a last resort.[116]

Conflict preemption occurs when a state or local statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[117] Under the conflict preemption doctrine, the state statute is also impliedly preempted in a situation where compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[118] Concurrent state and federal enforcement activities are authorized when they do not impair federal

---

110. McKanders, *Hazleton*, *supra* note 13, at 45 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

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

112. *See generally id.*

113. *Id.* at 356, 358.

114. *See id.* at 360.

115. McKanders, *Hazleton*, *supra* note 13, at 21.

116. *Id.*

117. *De Canas*, 424 U.S. at 363.

118. Lorillard Tobacco v. Reilly, 533 U.S. 525, 541 (2001) (stating that field preemption occurs where the "depth and breadth of a congressional scheme . . . occupies the legislative field").

regulatory interests.[119]

The United States Constitution contains no language that expressly grants Congress the power to regulate immigration.[120] The Constitution only gives Congress the express power to create a uniform rule of naturalization.[121] Under this power, Congress enacts laws that the Executive branch (i.e., the Department of Justice and the Department of Homeland Security) enforces. Despite its lack of express congressional power under the Naturalization Clause of the Constitution, Congress has exercised complete control over the regulation of immigration. The conflict between federal immigration law and state laws touching on immigration stems from a tension between the federal power granted under the Nationalization Clause and the states' Tenth Amendment police powers to exercise control over immigrants within their communities.[122]

Laws that conflict, or stand as an obstacle to the enforcement of federal immigration laws and policy, are invalid under the preemption doctrine.[123] In analyzing the constitutionality of state and local immigration laws, the plenary powers doctrine requires federal courts to give deference to federal immigration law and policy.[124]

In the immigration field, *De Canas v. Bica* is the seminal Supreme Court preemption case.[125] In *De Canas*, the Court held unconstitutional a California statute that prohibited an employer from knowingly employing an alien who was not entitled to lawful residence in the United States.[126] This case arose when migrant farm workers brought an action against farm-labor contractors alleging that the contractors unlawfully terminated their

119. *Id.*

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

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

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

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

124. Chae Chan Ping v. United States, 130 U.S. 581, 603-04 (1889) (laying out the plenary powers doctrine which attributed the power as inherent to a sovereign nation); Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete than over the admission of aliens" (quoting Oceanic Navigation Co. v. Stranaham, 214 U.S. 320, 339 (1909))); Okeke & Nafzinger, *supra* note 87, at 544 (stating that a cardinal doctrine of United States constitutional law is that Congress has an inherent, plenary power in matters of immigration).

125. *De Canas*, 424 U.S. 351.

126. *Id.* at 352.

employment.[127] The farm workers argued, and the California courts agreed, that state regulatory power over immigration was foreclosed because "Congress 'as an incident of national sovereignty,' enacted the INA as a comprehensive scheme governing all aspects of immigration and naturalization, including the employment of aliens . . . ." [128]

The Supreme Court rejected this argument. The Court explained that it has never held that every state enactment dealing with immigrants is a regulation of immigration and is *per se* preempted.[129] The Court reasoned, "standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration . . . ."[130] The Court found that Congress did not express an intention to fully occupy the field of employing undocumented immigrants.[131] In addition, the Court held that the California statute did not regulate immigration; instead, it narrowly regulated employing undocumented immigrants under the state's police powers.[132]

Scholars have acknowledged, "because *De Canas* establishes a preemption analysis favorable to state and local regulations—including invoking a presumption against federal preemption and holding that the INA does not completely occupy the immigration field—it is clear that few state and local [immigration] laws will actually be preempted by the INA."[133] *De Canas* has been interpreted for establishing that "the power to regulate immigration is unquestionably exclusively a federal power."[134] As a result in *De Canas*, the Supreme Court narrowly defined immigration as ". . . essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[135]

Two other recent immigration federal preemption cases are *Chamber of Commerce of the U.S. v. Whiting* (formerly entitled *Chicanos Por La Causa, Inc. v. Napolitano),*[136] and *Lozano v. City of Hazleton.*[137] In

---

127. *Id.* at 353.

128. *Id.*

129. *Id.* at 355.

130. *Id.*

131. *De Canas*, 424 U.S. at 357.

132. *Id.* at 351.

133. McKanders, *Hazleton*, *supra* note 13, at 23 (quoting Jay T. Jorgensen, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 BYU L. REV. 899, 918-19 (1997)).

134. *De Canas*, 424 U.S. at 354. .

135. *Id.* at 355.

136. Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976 (9th Cir. 2008), *opinion amended and superseded on denial of rehearing by* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (2008), *sub nom.* Chamber of Commerce of U.S. v. Candelaria, 130 S. Ct. 3498

Napolitano, the Ninth Circuit upheld the Legal Arizona Workers Act.[138] On December 8, 2010 this case was argued before the United States Supreme Court.[139] The Legal Arizona Workers Act permits Arizona to revoke the business license of employers who hire undocumented immigrants.[140] The Act also requires employers to use the e-verify system.[141] The e-verify is a database that the United States government maintains which permits businesses to verify whether their employees are authorized to work in the United States[142] It is an alternative to the paper based I-9 verification system whereby employers must obtain documentation from prospective employees to verify their citizenship status prior to hiring.[143] Similarly, in *Lozano,* the city of Hazleton's ordinances addressed the presence and employment of undocumented immigrants and a housing ordinance that prohibited landlords from renting to undocumented immigrants.[144] Like the Arizona statute in *Napolitano,* Hazleton's employment ordinance sanctioned businesses for hiring undocumented workers.[145]

In *Napolitano,* the Ninth Circuit found that the INA did not expressly preempt the Legal Arizona Workers Act.[146] The court first held that the Act falls within the Immigration Reform and Control Act's savings clause.[147] The savings clause provides that "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment of unauthorized aliens."[148] Relying on the language of this provision, the Ninth Circuit found that the law does not

---

(2010).

137. Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Penn. 2007) *on appeal to* 620 F.3d 170 (3d Cir. 2010).

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

139. Chamber of Commerce of U.S. v. Whiting, No. 09-115, 2010 WL 4974382 (U.S. 2010) (oral argument).

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

141. *Id.* §§ 23-211, 213.

142. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 402 (IIRIRA), 8 U.S.C. § 1324a (a)(1)(A) (1996) (pursuant to IIRIRA pilot programs were established for employers to verify the employment eligibility of their employees. IIRIRA states "[n]o person or entity participating in a pilot program shall be civilly or criminally liable under any law for any action taken in good faith reliance on information provided through the confirmation system." Under IIRIRA, the e-verify system was created).

143. Chicanos Por La Causa, Inc. v. Napolitanao, 544 F.3d 976, 981 (9th Cir. 2008).

144. Lozano v. City of Hazleton, 620 F.3d 170, 176-80 (3d Cir. 2010).

145. *Id.*

146. *Napolitano,* 544 F.3d at 982-85.

147. *Id.* at 982.

148. *Id.*; 8 U.S.C. § 1324a(h)(2) (2006).

attempt to define who is eligible and ineligible to work in the country.[149] The court found that the savings clause provided states and localities with the option of suspending the business license of an employer who hires undocumented immigrants.[150]

Contrastingly, the Third Circuit court in *Lozano*, analyzing the same savings clause in IRCA, held that Hazleton's ordinances were unconstitutional and expressly and impliedly preempted.[151] The court found:

> By imposing additional sanctions on employers who hire unauthorized aliens, while not penalizing those who discriminate, Hazleton has elected to place all of its weight on one side of the regulatory scale. This creates the exact situation that Congress feared: a system under which employers might quite rationally choose to err on the side of discriminating against job applicants they perceive to be foreign. This is inconsistent with IRCA and therefore cannot be tolerated under the Supremacy Clause.[152]

Moreover, the court found that Hazleton failed to take into account the complexities of federal immigration law; where there are many categories under which an immigrant may fall that would make the immigrant unlawfully within the country.[153] The court noted that: "Hazleton attempts to regulate residence based solely on immigration status. Deciding which aliens may live in the United States has always been the prerogative of the federal government. Hazleton purposefully chose to enter this area of significant federal presence."[154] The Third Circuit found Hazelton's ordinance unconstitutionally attempted to regulate immigration—a federal power.[155]

The Third Circuit's opinion conflicts with the Ninth Circuit. Both cases are interpreting the same savings clause in IRCA but interpret the savings clause differently. The conflict will finally be resolved when the Supreme Court issues its decision on the Ninth Circuit *Napolitano* case.[156]

---

149. *Napolitano*, 544 F.3d at 985.

150. *Id.* at 984-85.

151. *Lozano*, 620 F.3d at 218-19.

152. *Id.* at 218.

153. *Id.* at 220.

154. *Id.*

155. *Id.* at 218-19.

156. Chamber of Commerce of U.S. v. Candelaria, 130 S. Ct. 3498 (2010) (when the case went up on appeal to the Supreme Court Chicanos Por La Causa, Inc. v. Napolitano became Candelaria).

Where the *Napolitano* and *Hazelton* cases focus on local and state employment and housing provisions and a specific savings clause in IRCA, another Circuit Court case, *Gonzalez v. Peoria*, addresses whether the INA preempts states and local police officers from enforcing the civil and criminal provisions of the INA.[157] In *Peoria*, the Ninth Circuit held that local governments can enforce the more complex criminal provisions of immigration laws, but they cannot enforce the civil provisions.[158] The court reasoned that criminal immigration provisions are few, narrow, and unsupported by a complex administrative structure.[159] This case differs from *Napolitano* and *Hazleton* in that states and localities enacted their own immigration statutes and were attempting to create state and local immigration enforcement regimes. Whereas, in *Peoria*, the state officers were enforcing the INA's criminal provisions without enacting a state or local statute. Therefore, there is a reasonable inference that the federal government did not occupy the field of immigration enforcement with respect to the criminal provisions.

In reaching this conclusion, the court found it imperative to distinguish between criminal and civil immigration violations. The court explained that criminal violations apply to aliens who have illegally entered the country.[160] In contrast, civil violations also apply to aliens who are illegally present in the United States.[161] The court found that there are numerous reasons why a person might be illegally present in the United States without having entered in violation of § 1325 which is a criminal provision.[162] For example, the "expiration of a visitor's visa, change of student status, or acquisition of prohibited employment" could all cause an alien to be illegally present in the country without having violated any criminal provision.[163] The court found that the arrest of a person for illegal presence would exceed the authority granted to local police by state law.[164] The court held that "nothing in federal law precluded the [local police] from enforcing the criminal provisions of the [INA]," specifically § 1325, "where there is probable cause to believe the arrestee has illegally entered the United States."[165] The court found that the "enforcement procedures must distinguish illegal entry from illegal presence and must comply with all

157. Gonzales v. Peoria, 722 F.2d 468 (9th Cir. 1983).
158. *Id.*
159. *Id.* at 475.
160. *Id.* at 476.
161. *Id.*
162. *Gonzales*, 722 F.2d at 476.
163. *Id.*
164. *Id.*
165. *Id.* at 477.

arrest requirements imposed by the federal Constitution."[166] *Peoria* does not read the *De Canas* case as narrowly holding that local governments, namely local police officers, are barred from enforcing the criminal provisions of immigration laws.[167]

Federal immigration laws do delegate some authority to state and local officers. The delegated authority includes the ability to enter into Memorandums of Understanding with state and local law enforcement to detain undocumented immigrants.[168] Further, 8 U.S.C. § 1324 grants the right to make an arrest for a violation of the harboring provisions to officers whose duty it is to enforce criminal laws.[169] State and local law enforcement officials also enter into cooperation agreements to share data on undocumented immigrants.[170] Most people are aware of 287(g) agreements which provide for state and local law enforcement non-emergency assistance in the enforcement of immigration laws.[171] "None of these provisions or any other such narrow cooperative arrangement implicates core immigration functions, and neither exemplifies inherent authority. Thus, this limited cooperation assistance is carefully set out by Congress as a modest delegation, and even so, one that very few jurisdictions have undertaken."[172]

B. CONSTITUTIONALITY OF SB 1070 CRIMINALIZING UNLAWFUL IMMIGRATION STATUS

Numerous lawsuits have been filed challenging the constitutionality of SB 1070.[173] In *United States v. Arizona*, the plaintiffs argued that "the power to regulate immigration is vested exclusively in the federal government and that the provisions of SB 1070 are therefore preempted by Federal law."[174] The U.S. Department of Justice further argued that "the overall statutory scheme of SB 1070 is preempted because it attempts to set immigration policy at the state level and interferes and conflicts with

166. *Id.*

167. *Id.* at 474-75.

168. Olivas, *supra* note 8, at 52.

169. 8 U.S.C. § 1324 (2006).

170. 8 U.S.C. § 1105 (2001).

171. Immigration and Nationality Act § 287(g) (1996), 8 U.S.C. § 1357(g) (2006).

172. Olivas, *supra* note 8, at 53 (stating that "Congress does not want, and the separation of powers and preemption theory do not allow, a substantial subcontracting of this basic immigration authority to state and local governments").

173. Ann Morse, *Arizona's Immigration Enforcement Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES (2010), *available at* http://www.ncsl.org/default.aspx?tabid=20263 (last visited Jan. 20, 2011).

174. United States v. Arizona, 703 F. Supp. 2d 980, 986 (D. Ariz. 2010).

federal immigration law, foreign relations and foreign policy."[175] On July 6, 2010, the United States District Court for the District of Arizona ordered that the enforcement of SB 1070 be stayed pending the litigation of the statute's constitutionality.[176]

This section addresses the constitutional preemption arguments against SB 1070's provisions that criminalize unlawful presence. The constitutionality of the criminal provisions of SB 1070 is contingent upon: (1) whether a state law can validly permit the Arizona police to detect and arrest for civil immigration violations; and (2) whether states can create separate state criminal trespass laws for violating federal civil immigration provisions. These two functions that Congress statutorily assigned to the Departments of Justice and Homeland Security in the INA and are thus constitutionally preempted.

First, state and local government officials are constitutionally preempted from making a mandatory determination of immigration status upon arrest as this is a function typically exercised by the Federal Government under the INA. As the *Lazano* court correctly stated, there are many categories under which an immigrant may fall that would make the immigrant unlawfully within the country.[177] The second provision of SB 1070 permits state government officials to determine the immigration status of a person upon arrest is constitutionally preempted because it conflicts with the Immigration and Nationality Act as permitting state officials to make determinations regarding immigration status implicates a core immigration function reserved for the federal government. *De Canas* expressly holds that the power to regulate immigration, the entrance and exit of immigrants, is exclusively a federal power.[178]

Section two of SB 1070, subsection 2(B) requires officers to make a reasonable attempt, when practicable, to determine an individual's immigration status during any lawful stop, detention, or arrest where reasonable suspicion exists that the person is unlawfully present in the United States.[179] Subsection 2(B) also requires that all persons who are arrested have their immigration status verified prior to release.[180] Subsections 2(B) and 2(E) provide the process for verifying immigration status and list documents that create a presumption of lawful presence.[181]

175. *Id.* at 992.
176. *Id.* at 1008.
177. *Lazano*, 620 F.3d at 218-19.
178. De Canas v. Bica, 424 U.S. 351, 354 (1976).
179. ARIZ. REV. STAT. § 11-1051(B) (2010).
180. *Id.*
181. *Id.* §§ 11-1051(B), (E).

The issue is whether a local police officer can determine a person's immigration status when this is a function normally reserved for immigration judges and immigration officials. Depending on the situation, it would be extremely difficult from looking at a person to tell whether they are lawfully in the country as unlawful presence is a legal construct.[182]

> U.S. citizenship is not a characteristic apparent to the eye or dependent upon a person's appearance insofar as it is a *legal* determination. U.S. citizens are not required to carry proof of their citizenship while inside of the United States. Therefore, it is unlikely that in a routine encounter with law enforcement a U.S. citizen will possess a birth certificate, U.S. passport, naturalization certificate, or certificate of citizenship demonstrating citizenship. . . .[183] Birth in the United States certainly is a clear indicator that a person is not an alien.[184]

> But, foreign-birth is not a certain indicator of alienage. Acquisition of citizenship at birth depends on numerous factors, such as the parents' respective citizenships; the duration and timing of their residence in the United States; their marital status at the time of the individual's birth; the year in which the person was born; the place where the person was born, and in some situations, even the date on which a child born out of wedlock was legitimated—none of which can be ascertained or observed by police in any contact or that could give rise, constitutionally, to any suspicion of alienage.[185]

When states enforce immigration, anyone who looks or sounds "foreign" will be targeted. State and local officials lack training to identify undocumented immigrants, which leads to racial profiling and discrimination.[186] Undoubtedly, enforcement of the Arizona law will lead to arbitrary requests of persons to produce identity documents.[187]

On its face, having a police officer make a reasonable attempt, when practicable, to determine an individual's immigration status during any

---

182. Brief for American Immigration Lawyers Association as Amicus Curiae Supporting Petitioner at 5, United States v. Arizona, No. CV10-1413-PHX-SRB (D. Ariz. July 6, 2010), *available at* http://www.aila.org/content/default.aspx?docid=32246.

183. *Id.* at 3.

184. *Id.* (citing U.S. CONST. amend. XIV, §1).

185. *Id.* (citing 8 U.S.C. § 1401(c) (1994); 8 U.S.C. § 1401(h) (1994) (establishing conditions under which children born in wedlock outside of the United States acquire U.S. citizenship at birth); § 1409 (1994) (establishing conditions under which children born out-of-wedlock outside of the United States acquire U.S. Citizenship at birth)).

186. McKanders, *Hazleton*, *supra* note 13, at 30-31.

187. *ACLU of Arizona Section by Section Analysis of SB 1070 "Immigration; Law Enforcement; Safe Neighborhoods,"* ACLU OF ARIZONA 1, http://www.courthousenews.com/2010/04/16/ACLUAZImmig.pdf [hereinafter *ACLU Analysis*].

lawful stop, detention, or arrest where reasonable suspicion exists that the person is unlawfully present in the United States is an immigration function that is typically left to trained administrative law judges within the Department of Justice, not state government officials. Accordingly, this provision creates a conflict with existing federal law and is constitutionally preempted.

On this issue, the U.S. Department of Justice argued "that this section is preempted because it will result in the harassment of lawfully present aliens," will burden federal resources and will impede federal immigration enforcement priorities.[188] In the Arizona district court order granting the stay, the court found, with respect to unifying naturalization and immigration laws, "Congress manifested a purpose to regulate immigration in such a way as to protect the personal liberties of law-abiding aliens through one uniform national . . . system [] and to leave them free from the possibility of inquisitorial practices and police surveillance."[189] The court predicted that this section of SB 1070 will be invalidated based on the restriction of the liberty interests of documented immigrants and the burden the law places on federal resources.[190] The court also agreed with the United States that this section of SB 1070 would place immigrants in "continual jeopardy of having to demonstrate their lawful status to non-federal officials."[191] The court reasoned that "the federal government has long rejected a system by which aliens' papers are routinely demanded and checked" as this would constitute an unlawful restriction of liberty.[192]

Second, Arizona is constitutionally preempted from enacting a criminal trespass statute that makes it a state crime for an immigrant to fail to comply with federal alien registration laws. Section three of SB 1070 impliedly conflicts with 8 U.S.C. § 1304 which governs failure to register. Section three, "trespassing by illegal aliens," creates a state crime for presence on any public or private land in the state for "willful failure to complete or carry an alien registration document in violation of 8 U.S.C. § 1304(e) or 1306(a)."[193] Section 1304(e) provides that an alien may be subject to criminal liability for willful failure to comply with the registration laws.[194] An immigrant who has never registered or applied for a certificate of alien registration cannot be charged with violating the

188. United States v. Arizona, 703 F. Supp. 2d 980, 993 (D. Ariz. 2010).

189. *Id.* at 994 (quoting Hines v. Davidowitz, 312 U.S. 52, 74 (1941)).

190. *Id.* at 997-98.

191. *Id.* at 996-98.

192. *Id.* at 997.

193. ARIZ. REV. STAT. § 13-1509(A) (2010).

194. 8 U.S.C. § 1304(e) (1996).

statute, which requires that the immigrant have in his or her possession any registration documents issued to him or her.[195]

This section of the statute is impliedly preempted because it is not possible to comply with both the federal and state statute. Conflict preemption occurs when a state or local statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[196] Under the conflict preemption doctrine, the state statute is also impliedly preempted in a situation where compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[197]

Under the federal scheme, the Attorney General can prepare forms which require an immigrant to notify the government when they entered the United States, their place of entry, their purpose for entering the country, how long they will be in the country, and their criminal record.[198] After registration, the immigrant is provided with a certificate.[199] The INA provides a penalty for failing to carry the certificate which include: a misdemeanor, a fine not to exceed $100 and/or imprisonment for no more than thirty days.[200] Arizona's statute is an impermissible state regulation of immigration as it creates a dual state crime of trespassing on state land without carrying the certificate. An immigrant in violation of SB 1070 will also be in violation of § 1304. Thus, it directly conflicts with federal law as it creates new penalties for violating the federal law. Specifically, the Arizona District Court found that the plaintiffs were likely to be successful on the merits of challenging the constitutionality of this provision because SB 1070 "alters the penalties established by Congress under the federal alien registration scheme."[201] Again, the court also relied on the resources that it will take to enforce this provision and the restraint on liberty to U.S. citizens and lawful permanent residents to support the unconstitutionality of this provision.[202]

Third, Arizona is constitutionally preempted from enacting a statute that provides state governmental officials to make a determination as to

---

195. *See* United States v. Mendez-Lopez, 528 F. Supp. 972 (N.D. Okla. 1981).

196. De Canas v. Bica, 424 U.S. 351, 363 (1976).

197. Lorillard Tobacco v. Reilly, 533 U.S. 525, 541 (2001) (stating that field preemption occurs where the "depth and breadth of a congressional scheme . . . occupies the legislative field").

198. 8 U.S.C. § 1304(a) (1996).

199. *Id.* § 1304(d).

200. *Id.* § 1304(e).

201. United States v. Arizona, 703 F. Supp. 2d 980, 999 (D. Ariz. 2010).

202. *Id.* at 994, 997-98.

whether an immigrant has committed a removable offense as this is a direct exercise of federal immigration power. Field preemption exists when Congress intends to occupy the field of immigration and leaves no room for state or local action.[203] *De Canas* clearly provides that the power to regulate immigration, the entrance and exit of immigrants is exclusively a federal power.[204] Accordingly, Congress has clearly occupied the field of making a determination of which immigrants are removable from the United States.

SB 1070 provides that an officer may make a warrantless arrest if he or she has probable cause to believe that an individual has "committed any public offense that makes the person removable from the United States."[205] This provision gives state officers the authority to arrest immigrants on the basis of civil deportability. Under this provision, officers would engage in a two-step inquiry; first, determining what Arizona law has been violated; and second, determining whether the crime is a deportable offense.[206] This is clearly an attempt to permit state officers to make immigration determinations.

This section provides that immigration status may be determined by a law enforcement officer authorized by the federal government or pursuant to 8 U.S.C. § 1373(c).[207] This federal statute provides that the federal government has a duty to respond to inquiries by state or local government agencies attempting to verify the immigration status of a person within their jurisdiction for any purpose authorized by law.[208] Pursuant to section three of SB 1070, law enforcement officers are not permitted to consider race, color, or national origin in implementing the provisions of this act.[209] This section was added after complaints that SB 1070 would cause discrimination against persons perceived to look or sound foreign—namely Latino immigrants. Section six of SB 1070 states "[a] peace officer, without a warrant, may arrest a person if the officer has probable cause to believe the person to be arrested has committed any public offense that makes the person removable from the United States."[210]

These three provisions criminalize under state law the unlawful

203. *See Arizona*, 703 F. Supp. 2d 980.

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

205. S.B. 1070, 49th Leg., 2d Reg. Sess. § 6 (Ariz. 2010) (amending § 13-3883(A)(5) of Arizona Revised Statutes).

206. *Arizona*, 703 F. Supp. 2d at 987.

207. ARIZ. REV. STAT. § 13-1509(B)(1)(2) (2010).

208. 8 U.S.C. § 1373(c) (1996).

209. ARIZ. REV. STAT. § 23-212(B) (2008).

210. *Id.* § 13-3883(A)(5) (2010).

presence of undocumented immigrants. This law overlaps with the INA. The main preemption issue with this provision of SB 1070 is that it requires all state and local law enforcement officers to investigate a person's immigration status when certain indicators exist that give rise to reasonable suspicion that a person is unlawfully in the country, even if that person is not suspected of a state crime or unrelated immigration offense. This is a federal power.[211] Under this law, a person is effectively presumed to be in the United States unlawfully unless he or she can present valid government identification.[212] Unlike the early exclusionary immigration laws that were hard to enforce, laws like Arizona's seek to use state and local officials, namely police officers, to detect unlawful presence and enforce federal immigration laws. SB 1070 seeks to have anyone who is suspected of being an immigrant produce documentation showing that he or she is lawfully in the United States and subjects immigrants who fail to comply with the law to criminal penalties.

The 8 U.S.C. § 1252(a)(5) establishes the procedure and vests the administrative body with the "sole and exclusive procedure for determining the deportability of an alien."[213]

> The procedure requires, among other things, that only a 'special inquiry officer' (an immigration judge) may conduct deportation proceedings. Only specified federal officials can commence deportation proceedings, and only an immigration judge in deportation proceedings can determine that an alien is deportable and order the alien to leave the United States.[214]

The district court in *United States v. Arizona* relied on Justice Alito's concurrence in *Padilla v. Kentucky* in granting the stay on SB 1070 and articulated that determining whether a crime is a deportable offense is a very complex task in which federal judges and immigration judges are specifically tasked with performing.[215] Under this rationale, state officers cannot adequately determine whether an individual is lawfully present in the United States, and certainly cannot do so by observing a person's conduct because immigration status is a legal construct that is not readily apparent when viewing a person. For example, the list of categories for lawful presence in the United States may include: refugees, withholding of

---

211. 8 U.S.C. § 1227 (2008).

212. *ACLU Analysis*, *supra* note 187, at 1.

213. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 777 (C.D. Cal. 1995); *see also* Omnibus Consolidated Appropriations Act, 8 U.S.C. § 1252(a)(5) (1996).

214. *Wilson*, 908 F. Supp. at 777; *see also* 8 C.F.R. § 242.1(a); 8 U.S.C. § 1252a (1996).

215. United States v. Arizona, 703 F. Supp. 2d 980, 1000-07 (D. Ariz. 2010). *See generally* Vazquez, *supra* note 8 (discussing the immigration consequences of criminal convictions).

deportation, humanitarian parole, spouses and children of aliens, legalized temporary protected status, Salvadorans granted Deferred Enforcement Departure status, emergent or humanitarian reasons, and women who qualify under the Violence Against Women Act of 1994.[216] These categories of persons exemplify the difficulties in allowing state officers to determine immigration status.

Arizona argues that this provision only targets those who are removable from the United States and will only affect those immigrants unlawfully present.[217] However, Arizona is impermissibly exercising federal immigration functions because in order to detain a person the police officer must make a preliminary determination as to the person's immigration status.[218] Arizona also argues that the federal government encourages state and local involvement in enforcement of immigration programs.[219] For example, 287(g) programs encourage state participation in regulating unlawful immigration.[220] As articulated above, the Naturalization Clause of the United States Constitution provides Congress with the responsibility for setting immigration policy. Congress can

---

216. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 778. This case construes various immigration statutes as follows: 8 U.S.C. §§ 1101(a)(42) (2010), 1157 (2005) ("[r]efugees are persons determined by the INS to have been persecuted or to have a well founded fear of persecution based on race, religion, nationality, membership in a particular social group, or [sic] political opinion" *id.* at n.15); 8 U.S.C. §§ 1105a(a)(3) (2006), 1254 (1996) ("[a]n alien found deportable and ordered deported by an immigration judge may be eligible for suspension or stay of deportation for emergent or humanitarian reasons" *id.* at n.22); 8 U.S.C. § 1154 (1996) ("[t]he Violence Against Women Act of 1994 (Title IV of the Violent Crime Control and Law Enforcement Act of 1994) provides that battered immigrant women and children may become legalized by self-petition for immediate relative or second preference status under the INA or by application for suspension of deportation on the basis of abuse" *id.* at n.23); 8 U.S.C. § 1182(d)(5) (1996) ("[p]ersons paroled by the INS into the United States based on humanitarian or public interest considerations may be authorized for indefinite stays" *id.* at n.18); 8 U.S.C. § 1253(h) (1996) ("[a] person is eligible for withholding of deportation if his or her 'life or freedom would be threatened in [the home] country on account of race, religion, nationality, membership in a particular social group, or political opinion'" *id.* at n.17); 8 U.S.C. § 1254a (1996) ("[a]liens living in the United States may be granted temporary protected status where unsafe conditions in their countries of origin make it a hardship to return" *id.* at n.20); 8 C.F.R. § 242.6 ("[t]he spouses and children of aliens legalized under the Immigration Reform and Control Act's ("IRCA") amnesty provisions are protected from deportation by family unity status" *id.* n.19); Deferral of Enforced Departure for Salvadorans, 57 Fed. Reg. 28, 700-28, 701 (June 26, 1992) ("Salvadorans granted DED status that officially expired at the end of 1994 remain in the United States with the permission of the INS on the basis of family relationships, continuing eligibility for work authorization and other grounds." *id.* at n.21).

217. *Arizona*, 703 F. Supp. 2d 993-94.

218. *Id.* at 994-95.

219. Immigration and Nationality Act § 287(g) (1996), 8 U.S.C. 1357(g) (2006).

220. Olivas, *supra* note 8, at 51 (MOUs entered into between states and federal government to apprehend undocumented immigrants).

determine how it, as an institution, wants to integrate state and local resources. This should not be reversed by permitting states and localities to set immigration policy and determine how they would like to contribute to establishing federal immigration policy.

There is an issue of implied preemption when examining SB 1070's provision that imposing state penalties for unlawful presence conflict with the INA's criminal provisions sanctioning unlawful entry and re-entry[221] and civil immigration penalties for unlawful presence as a ground for deportation.[222] The INA specifically provides a civil remedy for unlawful presence in the United States (i.e. detention and deportation after a hearing). In the same way that the court in *Peoria* found that the arrest of a person for civil immigration violations would exceed the authority granted to the local police by state law,[223] similarly states cannot enact statutes that create criminal sanctions for civil immigration violations where there is no violation in the INA. In *Peoria*, the Ninth Circuit held that "nothing in federal law precluded [the local police] from enforcing the criminal provisions of the [INA]," specifically § 1325, "where there is probable cause to believe that the arrestee has illegally entered the United States."[224] The court found that the "enforcement procedures must distinguish illegal entry from illegal presence and must comply with all arrest requirements imposed by the federal Constitution."[225] In this case, SB 1070 makes it a criminal offense to be unlawfully present in the in the United States, which directly conflicts with the INA.

Further, under the INA, unlawful presence is a civil violation, not a criminal violation.[226] SB 1070 makes it a criminal violation to be in the United States unlawfully. This creates a conflict with existing federal law. The constitutionality of state and local laws must be viewed in light of the concept that violations of immigration law are civil, not criminal, violations. The Supreme Court, in finding that the Geary Act was unconstitutional, stated:

---

221. Immigration and Nationality Act § 275 (1996), 8 U.S.C. § 1325(a) (2010) (unlawful entry has been a crime since 1929, see Act of Mar. 4, 1929, § 2, 45 Stat. 1551); Immigration and Nationality Act § 276 (1996), 8 U.S.C. § 1326 (2010) (illegal re-entry provisions).

222. Immigration and Nationality Act § 212(a)(9)(B)-(C) (1996); 8 U.S.C. 1182(a)(1)(B)-(C) (2010) (unlawful presence is a ground for deportation and is not subject to criminal penalty, except when an alien is present in the United States after having been removed).

223. Gonzales v. Peoria, 722 F.2d 468, 477 (9th Cir. 1983).

224. *Id.*

225. *Id.*

226. Immigration and Nationality Act § 212(a)(9)(B)-(C) (1996); 8 U.S.C. 1182(a)(1)(B)-(C) (2010) (unlawful presence is a ground for deportation and is not subject to criminal penalty, except when an alien is present in the United States after having been removed).

> The order of deportation is not a punishment for crime. It is not a banishment in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend.[227]

There is no section in the INA that makes unlawful presence a crime. Catherine Dauvergene appropriately states:

> The illegality of people erases entitlements to human rights by rendering people invisible to the law . . . . [t]his is the contemporary equivalent of civil death . . . . A few decades ago, crossing borders in contravention of the law was regarded as a transgression that was not truly criminalized. It has now become a transgression more condemned than criminal acts removing all rights.[228]

Further, a conflict between SB 1070 and the INA arises where the methods in which state and local police officers use to establish an individual's immigration status differs from federal immigration judges and officials. On April 29, 2010, Arizona amended its statute to

> specify that law enforcement officials cannot consider race, color or national origin when implementing the provisions of [SB 1070] except as permitted by the U.S. or Arizona Constitution. The law clarified the original law's language around 'reasonable suspicion' by requiring state and local law enforcement to reasonably attempt to determine the immigration status of a person only while in the process of a lawful stop, detention or arrest (the original language referred to 'lawful contact'). [The law] also stipulated that a lawful stop, detention or arrest must be in the enforcement of any other law or ordinance of a county, city or town of this state.[229]

Despite of the different arguments regarding which level of government should regulate immigration; there is no question that when a state or locality passes a law in which the federal government has expressly stated that the states and localities cannot act, the states and local laws are constitutionally preempted. Less clear are areas where the federal government is silent or where states and localities are legislating pursuant to

---

227. Wong Wing v. United States, 163 U.S. 228, 236 (1896) (quoting Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893)).

228. DAUVERGENE, *supra* note 22, at 174.

229. Morse, *supra* note 173.

their Tenth Amendment police powers.[230] The legislatures passing state and local laws targeting immigrants state that they are legislating pursuant to their Tenth Amendment police powers, but the laws affect whether documented and undocumented immigrants will remain in their state and sometimes within the country. When this occurs, the doctrine of implied preemption should apply to bar state and local laws targeting immigrants under the guise of protecting the health, safety, and welfare of the state and localities.

The traditional implied preemption justification for why states and localities should not be permitted to target immigrants is that the United States, as a national sovereign, has the authority to decide which persons should enter and exit the United States. The foreign policy justification is another reason why states and localities have traditionally been excluded from regulating immigrants. The rationale is that the federal government does not want states and localities to unnecessarily embroil the country in arguments with other countries by their treatment of foreign nationals.[231]

The INA supplies another justification for preemption. The INA is a comprehensive act that provides a system for managing who is lawfully within the country, adjusting the status of immigrants, and providing guidance for immigration officers and judges making determinations as to who fits the criteria under the INA. The expansiveness of the INA leaves no room for state and local regulation of immigration.[232]

CONCLUSION

State trespass laws that criminalize unlawful presence of immigrants are unconstitutional regulations of immigration and are a preempted exercise of state power. State and local governments cannot cite the failure of the federal government to pass comprehensive immigration reform as the rationale for adopting unconstitutional state immigration laws.[233] As U.S. immigration history demonstrates, immigration laws can arbitrarily exclude certain races, religions and "undesirable" populations.[234] Throughout the history of immigration regulation, laws have been used to differentiate between those who are deemed worthy of inclusion and "others." The standards utilized may be based on societal bias and capitalize on the unworthy population of the time. Similarly, states, like Arizona, cannot use

---

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

231. McKanders, *Hazleton*, *supra* note 13, at 37-39.

232. *See generally id.*

233. Sullivan, *supra* note 92.

234. *See* discussion *supra* Part I.

state and local laws to cause the attrition of immigrants from the community as the control of the entrance and exit of immigrants into the United States is a clearly federal power. If states and localities are permitted to enact laws enforcing federal immigration laws, our country will have fifty different iterations of pro- and anti- immigrant laws.[235] This will cause the unequal regulation and enforcement of immigration laws which will lead to violations of immigrants' rights.[236]

235. *See generally* McKanders, *Hazleton*, *supra* note 13.

236. *Id.*