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Notes

IS IMMIGRATION STILL EXCLUSIVELY A FEDERAL POWER? A PREEMPTION ANALYSIS ON LEGISLATION BY HAZLETON, PENNSYLVANIA REGULATING ILLEGAL IMMIGRATION

“We do not care where they come from, we do not care what language they speak, but an illegal alien is not welcome in Hazleton!”

I. INTRODUCTION

Although regulating immigrants entering into the United States is exclusively within the power of the federal government, the power to regulate illegal aliens already in the country may be shifting to cities and states as federal immigration officers are unable to enforce all immigration laws effectively. The United States has attempted to control the influx of illegal aliens, but it has struggled to slow the migration rate and has done


2. See, e.g., Immigration & Small-Town Justice: Locals Step In When Washington Can’t Get Its Act Together, PHILA. DAILY NEWS, Aug. 28, 2006, at 13 (discussing how federal government’s failure to enact immigration reform led to Hazleton enacting immigration ordinance); Diane Solis, Cities, States Tackle Illegal Immigration on Their Own: Conflicting Laws and a Bitter Divide Emerge, DALLAS MORNING NEWS, Aug. 26, 2006, at 1A (“Efforts by cities and states to crack down on illegal immigration are gaining traction across the country as an overhaul of the nation’s immigration laws stalls in Congress.”).

An immigrant is defined as “A person who arrives in a country to settle there permanently.” BLACK’S LAW DICTIONARY 765 (8th ed. 2004). Immigration is defined as “[t]he act of entering a country with the intention of settling there permanently.” Id.; see also De Canas v. Bica, 424 U.S. 351, 355 (1976) (defining regulation of immigration as determination of who is permitted to be admitted into United States and whether or not person is permitted to remain).

A note on terminology: The term “illegal alien” is used throughout this paper to define someone who is not lawfully admitted to the United States of America as defined by the Federal Immigration Statutes. See Immigration and Nationality Act, 8 U.S.C. § 1101 (2006) (providing definitions). Although generally termed “illegal alien,” other commonly used terminology include “illegal immigrant” and “unauthorized alien.” The term is not used in this paper to show any racist stereotypes and is only used to denote someone who is in the United States in violation of the Federal Immigration Statutes.

Additionally, the term “unlawful worker” is used as a term of art by the city of Hazleton, and is identical to the federally defined “unauthorized alien.” It only applies to whether a person is considered unauthorized to work within the United States.

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little to control immigrants who remain illegally. Currently, the population of illegal aliens is between nine and twelve million. Yet, as the num-

3. See Sheila Jackson Lee, Why Immigration Reform Requires a Comprehensive Approach That Includes Both Legalization Programs and Provisions to Secure the Border, 43 HARV. J. ON LEGIS. 267, 272-73 (2006) (concluding that current federal immigration laws are not effectively limiting rate of migration or having intended effects of limiting employment of unauthorized aliens). "While IRCA has been anecdotally effective in curtailing the employment of some undocumented workers, its overall effect during the past twenty years has been insignificant." Id. Additionally, the number of illegal aliens in the United States has grown such that deportation proceedings would be inadequate. See id. at 273 (noting lack of resources available for deportation proceedings and that "[a]ll of the eight to eleven million undocumented immigrants currently living in the United States would be entitled to removal hearings before an immigration judge as well as the right to appeal adverse decisions to the Board of Immigration Appeals"); see also Clear Law Enforcement for Criminal Alien Removal Act of 2005, H.R. 3137, 109th Cong. (2005) (stating purpose of proposed legislation is: "To provide for enhanced Federal, State, and local assistance in the enforcement of the immigration laws, to amend the Immigration and Nationality Act, to authorize appropriations to carry out the State Criminal Alien Assistance Program, and for other purposes."). Recognizing that the federal government was not effectively regulating illegal immigrants, the bill would have provided additional funding and training to local enforcement officers who aid in enforcing federal immigration laws. See id. § 7 ("The Secretary of Homeland Security shall make grants to States and political subdivisions of States for procurement of equipment, technology, facilities, and other products that facilitate and are directly related to investigating, apprehending, arresting, detaining, or transporting immigration law violators, including additional administrative costs incurred under this Act."). The bill also required the distribution of training manuals to aid in the detection and apprehension of illegal aliens. See id. § 10 (providing funding for training of local officials to enforce federal immigration laws).

While this bill remains in the House, another bill is currently in the Senate. See generally Homeland Security Enhancement Act of 2005, S. 1362, 109th Cong. (2005) (stating purpose of proposed legislation is "[t]o provide for enhanced Federal enforcement of, and State and local assistance in the enforcement of, the immigration laws of the United States, and for other purposes"). Both bills would allow state and local law enforcement officers to enforce civil immigration law. See Tiffany Walters Kleinert, Note & Comment, Local and State Enforcement of Immigration Law: An Equal Protection Analysis, 55 DEPAUL L. REV. 1103, 1104 (2006) (asserting that both bills would increase enforcement efficiency of federal immigration law but would also create other problems, including illegal aliens avoiding all police contact for fear of deportation).

ber of illegal aliens increases, the federal government is neither providing
enough support to slow down the rate of immigration nor policing those
currently in the United States.\footnote{See Daniel Booth, Note, Federalism on Ice: State and Local Enforcement of Federal Immigration Law, 29 HARV. J.L. & PUB. POL’Y 1063, 1065 (2006) (examining lack of federal agents, roughly 2000, required to enforce immigration policies and regulations).} Meanwhile, some of the communities that illegal immigration affects significantly are small towns and cities.\footnote{See Gaiutra Bahadur, Riverside Warned of Second Lawsuit, PHILA. INQUIRER, Sept. 21, 2006, at B1 (reporting that Riverside, New Jersey enacted its Illegal Immigration Ordinance in response to 1500 illegal aliens from Brazil and Central America draining town resources); Michael Powell & Michelle Garcia, Pa. City Puts Illegal Immigrants on Notice, WASH. POST, Aug. 22, 2006, at A3 (“But the big change came half a decade back when Latinos—Puerto Ricans, who are citizens of the United States, and Dominicans—began driving west on Interstate 80, fleeing the high housing prices and cacophony of inner-city New York, Philadelphia and Providence.”).} As Congress continued its never-ending debate over immigration reform, on May 10, 2006, two men shot and killed Derek Kichline on a street in Hazleton, Pennsylvania, a small mining town eighty miles northwest of Philadelphia.\footnote{See Milan Simonich, Hazleton Draws a Hard Line: Ordinance Aimed at Illegal Immigrants Puts Mayor Center Stage, PITTSBURGH POST-GAZETTE, Aug. 27, 2006, at A1 (noting criminal acts that led to passing of Illegal Immigration Relief Act).} Both suspects were illegal aliens from the Dominican Republic.\footnote{See id. (asserting two suspects who killed Derek Kichline were illegal immigrants).} The following day, a fourteen-year-old boy, who was also an illegal alien, fired gunshots into a city playground.\footnote{See id. (providing details of crime committed by illegal alien that led Hazleton to seek to regulate illegal aliens within community).} As a result of these two high-profile crimes, on July 13, 2006, the city of Hazleton, Pennsylvania passed the Illegal Immigration Relief Act Ordinance \textit{(the “Original Ordi-}

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\textit{Border Security, and Claims of the Comm. on the Judiciary, 108th Cong. 27-29 (2003) [hereinafter Griswold Statement] \textit{(testimony of Daniel T. Griswold, Cato Institute) (providing statistics on rate of immigration). In 1986, the United States government gave amnesty to nearly 2.8 million people who had been in the country illegally but had been employed in specific industries for certain time periods; thus, the number of illegal aliens could be even higher. See Kleinert, supra note 3, at 1108 (estimating illegal alien population to be nearly ten million even after Congress granted amnesty in 1986).}}
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nance”). Soon after the Original Ordinance was passed, several other locales throughout the country passed similar legislation.

10. See Hazleton, Pa., Ordinance 2006-10 (July 13, 2006), http://www.prldef.org/Civil/Hazleton/hazleton%20legal%20documents/Hazleton%20Ordinance.pdf [hereinafter Original Ordinance]. The Original Ordinance provides:

Any entity or any parent, affiliate, subsidiary or agent of any entity . . . that employs, retains, aids or abets illegal aliens or illegal immigration into the United States, whether directly or by or through any agent, ruse, guise, device or means, no matter how indirect, and even if the agent or entity might otherwise be exempted from this section, or violates any provision of this Ordinance, shall from the date of the violation or its discovery, whichever shall be later, be denied and barred from approval of a business permit, renewal of a business permit, any city contract or grant as follows . . . .

Id. § 4. Further, “[i]llegal aliens are prohibited from leasing or renting property [in the city of Hazleton].” Id. § 5(A); see also City Council Speech, supra note 1 (providing basis for enactment of Original Ordinance); Leti Volpp, Impossible Subjects: Illegal Aliens and Alien Citizens, 103 Mich. L. Rev. 1595, 1601 (2005) (developing theory of some that illegal aliens have tendency to commit criminal acts because they were willing to violate, knowingly, laws of United States by entering country without authorization). “Because the ‘wetback’ starts out by violating a law, . . . it is easier and sometimes appears even more necessary for him to break other laws since he considers himself to be an outcast, even an outlaw.” Id. (quoting MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 149 (Princeton Univ. Press 2004) (quoting INS official); Steve Mocarsky, Hazleton Area Sees Steady Crime Hike: Review of Stats Shows Cops There Are Clearing Cases Better Than Rest of County, Wilkes-Barre Times Leader, Oct. 1, 2006, at A3 (providing evidence that Hazleton crime rate has increased over last five years and “number of crimes investigated by state police in Hazleton has nearly doubled”).

There have been other occurrences nationally of illegal aliens, some of whom federal authorities have at one time detained, committing serious crimes. See Brian Blomquist et al., INS Lunacy Forces City to Keep Thugs, N.Y. Post, Feb. 28, 2003, at 2 (elaborating on brutal gang-rape and murder of woman in New York by five men on December 18, 2002, four of whom were illegal aliens and three of whom had criminal records yet were not deported); Blaine Harden & Tim Golden, The Hunt for a Sniper: The Suspects; Suspects Spent Year Traveling, Nearly Destitute, N.Y. Times, Oct. 25, 2002, at A1 (noting that Lee Malvo, who participated in deadly Washington D.C. shooting spree, was illegal alien from Jamaica); Marisa Taylor, Backlogs at INS Generate Criticism, Fort Worth Star-Telegram, Dec. 5, 1999, at 1 (detailing how illegal alien, Angel Resendiz, “Railway Killer,” was released by Immigration and Nationality Service after being suspect in series of gruesome murders); Armando Villafranca, Immigrants Fear Shooting Will Cause a Backlash, Some Say, Houston Chron., Sept. 26, 2006 at B5 (reporting that “Juan Leonardo Quintero, a 32-year-old Mexican national [and illegal alien], was charged with capital murder in the death of Houston police officer Rodney Johnson following a routine traffic stop”).

11. See Powell & Garcia, supra note 6, at A03 (stating “four neighboring municipalities in Pennsylvania and Riverside, N.J., already have passed identical ordinances” and “[s]even more cities, from Allentown, Pa., to Palm Beach, Fla., are debating similar legislation”); Joyce Howard Price, Towns Take a Local Approach to Blocking Illegal Aliens, Wash. Times, Sept. 20, 2006, at A03 (discussing legislation passed in Suffolk County, N.Y., that “bars contracts with employers who hire illegal aliens”). But see George Brennan, Sandwich Won’t Act on Illegals, Cape Cod Times, Sept. 26, 2006, http://www.capecodonline.com/ctimes/sandwichwonxt26.htm (last visited Oct. 12, 2006) (stating voters in Sandwich, Massachusetts chose not to enact legislation that would “target businesses known to have hired illegal aliens”);
On August 15, 2006, the American Civil Liberties Union (the “ACLU”) and the Puerto Rican Legal Defense and Education Fund (the “PRLDEF”) filed a lawsuit in the United States District Court for the Middle District of Pennsylvania challenging the constitutionality of the Original Ordinance and seeking an injunction preventing its enforcement, that was set to take effect on September 11, 2006.12 Hazleton, believing it had the right to protect its citizens from burdens caused by illegal aliens, enacted an amended version of the Illegal Immigration Relief Act Ordinance13 (the “Revised Ordinance”) in an effort to withstand the legal challenge.14 The court stipulated that Hazleton must provide the ACLU and PRLDEF twenty days notice prior to enforcement of the Revised Ordinance to renew their challenge.15 The Mayor of Hazleton stated that the Revised Ordinance would be enforced on November 1, 2006.16 In re-

response, the ACLU filed a second lawsuit days before the Revised Ordinance was to go into effect, seeking an injunction preventing enforcement of the ordinance. Judge James Munley issued a temporary restraining order, valid until November 14, which he extended further to provide both sides time to prepare for trial set to begin on March 12, 2007.

This Note analyzes whether Hazleton's Revised Ordinance is preempted by federal immigration laws. Part II of the Note summarizes the history of illegal immigration and immigration regulation in the United...
States. Additionally, Part II analyzes the current status of illegal immigration, focusing particularly on the effects that illegal immigration has had on smaller cities. Further, it explains how the lack of action by the federal government has led Hazleton, and other cities like it, to enact immigration legislation.

Part III provides the analytical framework that a court should apply when determining whether an ordinance prohibiting the renting of property to, and the hiring of, illegal aliens would be preempted under the Supremacy Clause of the United States Constitution. By applying the foregoing analytical framework, Part IV examines the Hazleton Revised Ordinance, focusing especially on whether particular provisions of the Revised Ordinance are preempted by federal immigration laws, and concludes that the employment and harboring provisions should not be preempted. Hoping to highlight key concerns with either finding or not finding preemption of the Revised Ordinance, Part V explores the effects that the Revised Ordinance may have on illegal and legal aliens.

II. BACKGROUND

A. History of Illegal Immigration in the United States

Immigration has long been an integral part of the United States history; yet, contrary to popular belief, it was not initially considered exclusively a federal power. One law professor writes: "[F]or almost a hundred years, it was unclear whether the federal government was even
intended by the Constitution to have power to regulate immigration." 27 Congress had the power to regulate foreign commerce, but it was debatable whether the power to regulate immigration was included within that regulatory power. 28 Following the Civil War, some states enacted their own immigration laws, but the United States Supreme Court held them to be unconstitutional, ruling that the regulation of immigration is an exclusive power of Congress. 29

Following the Court's decision, immigration continued unrestricted and conditions in certain areas began to deteriorate, forcing Congress to enact the Immigration Act of 1882 30 in an effort to restrict immigration. 31

27. See David Weissbrodt, Immigration Law & Procedure in a Nutshell 3 (West Publishing Co. 4th ed. 1998) (considering whether immigration regulation was power given to Congress under Constitution, or whether States retained power).

28. See id. at 4 (analyzing whether framers intended to give Congress exclusive power to regulate immigration); see also Chirac v. Lessee of Chirac, 15 U.S. 259, 269 (1817) (holding that naturalization was exclusively federal power). "Congress shall have [the] [p]ower . . . [t]o establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4 (delineating "Naturalization Clause"): "It shall be lawful for the President of the United States at any time during the continuance of this act, to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States . . . ."

The Alien and Sedition Act, ch. 58, 1 Stat. 570 (1798). During the time that Congress was unsure whether it had the power to regulate immigration, it is estimated that ten million immigrants came to the United States. See Weissbrodt, supra note 27, at 5 (noting large number of immigrants came to United States during 1800s); see also Jasper, supra note 26, at 2 (describing immigration policy of United States as "open door policy" for first 100 years after independence from Great Britain); Diana Vellos, Dedication, Immigrant Latina Domestic Workers and Sexual Harassment, 5 Am. U. J. Gender & L. 407, 415 (1997) ("Between 1820 and 1880, political and economic conditions brought over 2.8 million Irish immigrants to the United States. German Catholic immigrants also came during the 1840s.").

29. See Henderson v. Mayor of City of N.Y., 92 U.S. 259, 274 (1875) (holding that states are not permitted to restrict immigration because regulation of immigration "has been confided to Congress by the Constitution" and "that Congress can more appropriately and with more acceptance exercise it than any other body known to our law, state or national"); see also Smith, supra note 26 (noting states passed own laws restricting immigration following Civil War). Although the Constitution "did not specifically address the issue of immigration . . . it did provide Congress with some authority concerning aliens within the enumerated powers." See Jasper, supra note 26, at 1 (explaining that Congress has authority to regulate immigration under Commerce Clause, Naturalization Clause, War Power Act and Migration and Important Clause).


31. See Jasper, supra note 26, at 2 (noting immigration laws enacted in 1882 "contained provisions which excluded criminals, certain mentally disabled persons, prostitutes, and persons who were likely to need public assistance" and imposed fifty cent head tax on each immigrant); Smith, supra note 26 (discussing history of Immigration and Nationality Service).
Throughout the next hundred years, Congress enacted several immigration laws that put numerical limits on immigration through quota systems and created grounds for deportation of immigrants who were not authorized to remain in the United States. Although Congress continued to legislate immigration during the 1970s and 1980s, public concern over illegal immigration began to grow, "reaching a fever pitch in the 1990s." In an effort to improve public sentiment, Congress enacted the Immigration Reform and Control Act of 1986, that prohibited the employment of illegal immigrants and provided methods for illegal aliens to "legalize their residence." Additionally, because it was unsure how to


Congress also passed the Johnson-Reed Immigration Act of 1924, which imposed quotas on immigration from countries in Europe for the first time, provided for grounds for deportation and made unauthorized entry in the United States a criminal act. See Volpp, supra note 10, at 1598-1601 (providing history of Congressional acts regulating immigration). The Johnson-Reed Act also excluded "aliens ineligible for citizenship," which meant that although China was allotted a one-hundred person quota, no Chinese persons were permitted to enter the United States because they were not eligible for citizenship. See id. at 1599-1600. It also completely removed the statute of limitations on deportation, that was expanded from one year to five years from time of arrival with the Immigration Act of 1917. See id. at 1601. In 1968, Congress enacted a quota of 120,000 persons for the entire Western Hemisphere. See id. at 1607. Further, in 1976, the number of immigrants from Mexico was capped at 20,000. See id.

33. See Kevin R. Johnson & Bill Ong Hing, National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants, 103 Mich. L. Rev. 1347, 1374-75 (2005) (describing reported animosity towards Mexican immigrants on theory that they failed to assimilate to American culture). "Mexican immigrants were attacked for sapping public benefits, taking jobs, committing crime, speaking Spanish, living in separate communities, and similar alleged misconduct." Id. at 1375 (discussing sentiment of voters in California that led to passing of California's Proposition 187, that attempted to prevent immigration from Mexico by disallowing illegal aliens access to public school and public benefits).


35. See Smith, supra note 26 (detailing services Immigration and Nationality Service was expected to provide following Immigration Reform and Control Act of 1986, including "enforcing sanctions against United States employers who hired undocumented aliens" and "[c]arrying out employer sanction duties involving investigating, prosecuting, and levying fines against corporate and individual employers, as well as deportation of those found to be working illegally"). Congress stated its goals in enacting the Immigration Reform and Control Act:

The purposes of the bill are to control illegal immigration to the U.S., make limited changes in the system for legal immigration, and provide a controlled legalization program for certain undocumented aliens who have entered this country prior to 1982.

The bill establishes penalties for employers who knowingly hire undocumented aliens, thereby ending the magnet that lures them to this country. It also revises the procedures for the temporary entry of foreign
handle illegal immigrants currently in the United States, Congress granted “permanent legal status . . . to 2.8 million unauthorized immigrants who had been in the country continuously since January 1, 1982.” Concerns about illegal aliens rose to new heights following the September 11, 2001 attacks on the World Trade Center in New York City, and the Washington, D.C. sniper attacks. Even as citizens clamor for immigration reform, Congress has attempted but failed to enact any substantial reform that would effectively cure the problems that the Mayor of Hazleton claims are plaguing his city.

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agricultural workers under the H-2 program and provides permanent residence to certain aliens performing field work with respect to perishable crops. 


37. See Johnson & Hing, supra note 33, at 1357 (noting that fears over immigration rose after attacks on September 11, 2001 committed by illegal aliens, and how immigration became focal point of war on terror); see also 151 CONG. REC. S7822, 7854 (daily ed. June 30, 2005) (statement of Sen. Sessions) (detailing need to improve enforcement of immigration statutes in response to September 11, 2001 attacks, Washington, D.C. sniper and attack and gang-rape of New York woman by five illegal aliens). Senator Sessions and others have proposed that local police and officials should be permitted to enforce federal immigration law because:

   When it comes to immigration enforcement in America, the rule of law is not prevailing. If we are serious about securing the homeland, we simply must get serious about immigration enforcement.

   It is time to talk about the big picture—time to be honest about what it will really take to fix our broken immigration system.

   Id. at 7855.


For a further discussion of recent House and Senate immigration reform bills, see infra notes 164-65 and accompanying text.
B. Effects of Illegal Aliens on Cities and States

The costs of illegal aliens tend to fall on states and local governments, that are required by law to provide some services, such as emergency services, to all members of the community, including illegal aliens. In 1994, this burden was the catalyst for Proposition 187, California legislation that attempted to prohibit illegal aliens from receiving many social services. The District Court for the Central District of California held that a state statute denying primary and secondary education to illegal aliens was unconstitutional because the statute conflicted with precedent for alienage classification established by the Supreme Court.

Some analysts believe that illegal aliens burden cities by overcrowding classrooms, thereby reducing the quality of public services for legal residents. One report estimates that in 2006 the "cost[] of educating the children of illegal aliens born in the United States would be about $1.62 billion." Further, in New York, the same report estimated that in public schools the "educational costs per pupil have risen to a current level of about $12,408 in 2004." It can be inferred that illegal alien students in

39. See Georgie Anne Geyer, Pennsylvania Mayor Leads a Growing Crackdown on Illegals, Oct. 10, 2006, http://www.smalltowndefenders.com/public/node/55 (discussing what illegal aliens cost cities and towns). "Suddenly it was not uncommon to wait four to five hours in the emergency rooms, schools became miserably overcrowded, and one imaginative illegal was apprehended with five different Social Security cards." Id.; see Revised Ordinance, supra note 13, § 2(G) ("The City shall not construe this ordinance to prohibit the rendering of emergency medical care, emergency assistance, or legal assistance to any person.").

40. See League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1249 (C.D. Cal. 1997) ("The stated purpose of Proposition 187 is . . . to establish a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in State of California."); see also JASPER, supra note 26, at 7 (acknowledging "concern over the impact of illegal immigration" on California's economy led to passing of Proposition 187, excluding illegal aliens from public elementary and secondary schools).


42. See, e.g., Open Letter, supra note 9 ("Illegal immigration . . . contributes to overcrowded classrooms and failing schools."); see also Welcome to Hazleton, CBS NEWS, Nov. 19, 2006, http://www.cbsnews.com/stories/2006/11/17/60minutes/main2195789.shtml?CMP=ILC-SearchStories (discussing effects of immigration on Hazleton and reporting public school enrollments up twenty-five percent, budget for teaching English as second language up from $500 per year to $875,000, "un-reimbursed medical expenses for things like emergency room visits are up by 60 percent").


44. See id. at 9-10 (discussing National Education Association's estimate of educational outlays per student in New York and reporting that these outlays could be costing taxpayers $29-38 million per year).
Pennsylvania generate similar costs for education in public elementary and secondary schools.\footnote{45} Additionally, it is estimated that nearly thirty-five percent of all immigrants who arrived in the United States within the last five years lack a high school diploma.\footnote{46} This influx of unskilled labor has caused the wage rate to decrease for unskilled native workers.\footnote{47} One commentator theorizes that "by not letting wages rise and also productivity rise in response and instead continually adding immigrant labor, we are making our economy less productive," with estimates of the economic loss exceeding over $70 billion a year.\footnote{48}

45. See, e.g., Open Letter, supra note 9 ("Illegal immigration leads to higher crime rates, contributes to overcrowded classrooms and failing schools, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, and destroys our neighborhoods and diminishes our overall quality of life."); see also Federation for American Immigration Reform, Immigration Impact: Pennsylvania, http://www.fairus.org/site/PageServer?pagename=research_research4e21 (last visited Jan. 29, 2007) ("31,000 Pennsylvania households are defined as severely crowded by housing authorities, a 40 percent increase since 1990. Studies show that a rise in crowded housing often correlates with an increase in the number of foreign-born.").


47. See Camarota Statement, supra note 46, at 8 (providing testimony that immigration results in higher supply of labor, thereby reducing wages for natives). It is estimated that a ten percent increase in the supply of labor by immigration can cause a decrease in the wage rate of native workers by three to four percent. See id. (discussing effects of immigration on American work force). Some believe the wage increase is due to a willingness of immigrants to work for less pay; however, studies have shown that the reduction may be due more to the overabundance in supply of unskilled labor. See id. (noting decrease in wage rate caused by number of people entering work force). Additionally, in 1997, the National Research Council found that the average immigrant, without a high school degree, will use $89,000 more in public services than he or she pays in taxes. See id. at 13 (providing statistics showing immigrants could be draining economy more than supporting it).

48. See id. at 8 (discussing paper published by National Bureau of Economic Research regarding effects of immigrant labor on United States's economy); see also Martin, supra note 43, at 1 (concluding that analysis of "current estimates of the illegal alien population residing in New York indicates that population is costing the state's taxpayers more than $5.1 billion per year for education, medical care and incarceration. That annual tax burden amounts to about $874 per New York household headed by a native-born resident"); Yu, supra note 4, at 917-18 (citing surveys stating that "up to one half of employers do not even deduct taxes from the pay of undocumented workers," but also noting that illegal aliens some-
Alternatively, some analysts believe that illegal aliens contribute significantly to the nation’s economy.\textsuperscript{49} In fact, one report states that during some periods of “robust immigration,” national unemployment and poverty rates have fallen.\textsuperscript{50} Moreover, a growing need exists for unskilled labor and “immigrants provide a ready and willing source of labor to fill that growing gap on the lower rungs of the labor ladder.”\textsuperscript{51} Consistent with this reasoning, one analyst comments that “[b]arring low-skilled immigrants from the U.S. workforce would not reverse the underlying economic trends arrayed against the least-skilled workers in American society” because low-skilled legal residents are unwilling to accept the jobs that low-skilled immigrants accept.\textsuperscript{52} The Mayor of Hazleton, however, believes that the costs of illegal aliens in Hazleton outweigh the benefits, and in June 2006, as a result, proposed the Original Ordinance.\textsuperscript{53}

\textsuperscript{49} See Griswold Statement, supra note 4, at 27 (asserting that immigration “has been a blessing to the United States” because immigrants fill “niches in the labor market,” amounting to “significant positive gain . . . of up to $10 billion a year to native Americans”); Victor Morales, \textit{Illegal Workers Subsidize U.S. Economy}, Voice of America, July 19, 2006 (on file with author) (arguing that illegal aliens support American economy and estimating that illegal aliens “generate[ ] hundreds-of-billions of dollars in untaxed wages, goods and services each year”). One analyst provided additional statistics about the lifestyle of illegal immigrants in the United States:

It is estimated that illegal aliens in the U.S. make, on average, less than half of what legal immigrants or American citizens earn. And nearly 60 percent of illegal families live at or below the poverty line. Nonetheless, they are crucial to several sectors of the economy.

In construction, for example, it is estimated that some 15 percent of the labor force consists of undocumented workers. Many others are farm laborers. And many personal services occupations such as maid services, building cleaning and gardening are dominated by illegal immigrants.

\textit{Id.}

\textsuperscript{50} See Griswold Statement, supra note 4, at 27 (explaining that during economic boom of 1990s, immigration rate was high yet “unemployment fell to below 4 percent” and “poverty rate fell by 3 percentage points” and “by 10 percentage points for black Americans”).

\textsuperscript{51} See id. at 27-28 (claiming that “demand for less-skilled labor will continue to grow in the years ahead” and reporting that “[a]ccording to the Department of Labor, the largest growth in absolute numbers over the next decade is going to be in occupations that don’t require large amounts of skill”).

\textsuperscript{52} See id. at 28 (concluding that although “[i]mmigration does lower the wages of high school dropouts,” wage rate will not be increased by restricting immigration but by providing more skills and education to Americans, and asserting that competition from immigrants “actually increases the likelihood that native-born Americans will stay in school . . . because immigration increases the wage premium for workers who complete their high school education”). Additionally, in the early 1900s “a wave of low-skilled immigration” led to the “high school movement, [a] dramatic increase in Americans with high school degrees.” \textit{Id.}

\textsuperscript{53} See Open Letter, supra note 9 (“The City of Hazleton is empowered and mandated by the people of Hazleton to abate the nuisance of illegal immigration by aggressively prohibiting and punishing the acts, policies, people and businesses that aid and abet illegal aliens. That is why I proposed the Illegal Immigration...
III. FRAMEWORK FOR FEDERAL PREEMPTION ANALYSIS OF STATE OR LOCAL IMMIGRATION ORDINANCE

Under the Supremacy Clause, federal law is the "supreme [l]aw of the [l]and" and preempts state law.\textsuperscript{54} The Supreme Court has expressly held that even though immigration is exclusively within the purview of the federal government, not every state enactment is necessarily preempted because it deals with immigration.\textsuperscript{55} Pursuant to De Canas v. Bica,\textsuperscript{56} a court

\begin{quote}

Illegal immigrants already account for billions of dollars in costs to hospitals, local schools, and a full range of other state, local, and federal government entities. Relying on data compiled by the National Research Council and the Center for Immigration Studies, it is conceivable that over their lifetimes, the 12 million illegal immigrants residing in the U.S. today will cost American taxpayers over one-half trillion dollars.

\textit{Id.} Immigration can also cause a drain on the country's healthcare system because patients who do have health insurance are often forced to cover for the costs uncompensated health care through taxes and higher premiums. See Alison Green \& Jack Martin, \textit{The Sinking Lifeboat: Uncontrolled Immigration \& the U.S. Health Care System}, at 3 (2004), http://www.fairus.org/site/DocServer/healthcare.pdf?docID=424 (asserting taxpayers forced to fund costs associated with providing medical services to illegal aliens). Moreover, hospitals must treat anyone in an emergency situation, yet no one provides reimbursement for the governmentally mandated services provided to illegal aliens. \textit{See id.} at 4. Furthermore, emergency services are the most expensive aspect of healthcare, causing an even greater burden on the insured. \textit{See id.} at 6. In 1997, Congress approved $25 million in funding for the twelve states with the most illegal aliens, in order to offset emergency medical bills; however, this program has since been terminated and although Congress has discussed creating a similar program, it has not yet done so. \textit{See id.} at 4.

\textsuperscript{54} U.S. Const. art. VI, cl. 2. Article VI provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

\textit{Id.}

\textsuperscript{55} \textit{See De Canas v. Bica}, 424 U.S. 351, 355 (1976) (discussing whether every state enactment that deals with aliens is preempted by Supremacy Clause of Constitution and concluding that although immigration is exclusively federal power, not all state laws dealing with aliens are necessarily preempted). The "statute at issue [in \textit{De Canas}] was not a regulation of immigration because it did not amount to a state 'determination of who should or should not be admitted into the country . . . .'" Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 602 (E.D. Va. 2004) (discussing reasoning for Court's holding in \textit{De Canas}). Opponents of the Hazleton ordinance allege that "the Federal government has established a comprehensive system of laws, regulations, procedures, and administrative agencies that determine, subject to judicial review, whether and under what conditions a given individual may enter, stay in, and work in the United States." \textit{See Complaint, supra note 12, at 21 (providing arguments for preemption of Original Ordinance).}

\textsuperscript{56} 424 U.S. 351 (1976)
must engage in a three-pronged test to determine if a state or local law regulating immigration is preempted.\textsuperscript{57}

In \textit{De Canas}, migrant farm workers brought an action against farm labor contractors, alleging that the contractors had refused to continue employing the workers because of a surplus in labor caused by the "knowing employment . . . of aliens not lawfully admitted to residence in the United States."\textsuperscript{58} The Superior Court of California held "'[the statute] is unconstitutional . . . [because it] encroaches upon, and interferes with, a comprehensive regulatory scheme enacted by Congress in the exercise of its exclusive power over immigration.'"\textsuperscript{59} The California Court of Appeals affirmed the decision.\textsuperscript{60} In a unanimous decision, the United States Supreme Court reversed the Court of Appeals decision, holding federal immigration law does not necessarily preempt every state statute pertaining to immigration regulation.\textsuperscript{61}

The Court held that federal law did not preempt the state statute, reasoning that the presumption is against federal preemption.\textsuperscript{62} The Court developed a three-part test to determine whether federal law preempts a state statute or local ordinance.\textsuperscript{63} A state law is preempted if: (1) Congress has manifested an express intent to preempt any state law; (2) Congress has intended completely to occupy the field in which the law attempts to regulate; or (3) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Con-
progress." If any of the foregoing apply, a court must find that federal law preempts state law.

The first step of the De Canas preemption test requires the court to analyze the plain language of the statute. If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's pre-emptive intent. Thus, the court should first look to the preemption provision to determine whether Congress has specifically indicated that federal law preempts the state law.

If there is no evidence that Congress expressly intended to preempt local law, a court should determine whether Congress intended to occupy the field of regulation completely. Field preemption exists "where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it ....'" The De Canas Court held that the "central concern of the [Immi-

64. See De Canas, 424 U.S. at 356-64 (outlining three-step analysis to determine whether state or local law is preempted by federal law); see also Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 601 (E.D. Va. 2004) (using De Canas three-step analysis to determine whether Virginia post-secondary educational institutions violate Supremacy Clause by denying admission to illegal aliens); League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1252-53 (C.D. Cal. 1997) (applying De Canas to determine whether sections of Proposition 187 are preempted); Balbuena, 845 N.E.2d at 1255-56 (applying De Canas to determine if Immigration Reform and Control Act preempts state labor laws).


66. See Balbuena, 845 N.E.2d at 1255 (developing first prong of preemption test—determining if Congress expressly intended to preempt state or local law). The court analyzed the statutory language of the Immigration Reform and Control Act to determine whether Congress intended to preempt state and local laws regulating the payment of lost wages to illegal aliens injured on worksite. See id. at 1253.


68. See De Canas, 424 U.S. at 357 (stating that state law must "give way to paramount federal legislation" if Congress intended such).

69. See Jorgensen, supra note 62, at 917 (stating if Congress intended to occupy field, even harmonious state regulations are preempted).

is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country."  

Although the Immigration and Nationality Act is comprehensive, the Court held that the matter of regulating immigrants lawfully or unlawfully admitted into the country is so complex that it cannot be said Congress intended to occupy the entire field.  

Finally, the court must determine whether the state law conflicts with the federal law. A state law conflicts with federal law if compliance with both the state law and federal law is impossible. The De Canas Court declined to determine whether the state legislation conflicted with the federal scheme; however, the Court stated that if the "statute prevent[ed] federal law); De Canas, 424 U.S. at 356 (quoting Fla. Lime & Avocado Growers, 373 U.S. at 142) ("Federal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.").  

71. De Canas, 424 U.S. at 359 (holding federal immigration legislation, preceding current legislation, and corresponding legislative history did not show Congressional intent to occupy field).  

72. See id. at 359-60 (finding that Congress did not intend to occupy field of regulating employment of immigrants and that, although Congress must occupy some field with each legislation, there must be boundaries to field of regulation); see also Balbuena, 845 N.E.2d at 1256 ("Certainly [Immigration Reform and Control Act] and related statutes thoroughly occupy the spectrum of immigration laws. But there is nothing in those provisions indicating that Congress meant to affect state regulation of occupational health and safety . . . .").  

73. See Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (asserting that state legislation is unconstitutional if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").  


State Dep't. of Revenue v. Andrade, 23 P.3d 58, 76 (Alaska 2001) (quoting Toll v. Moreno, 458 U.S. 1, 13 (1982)) (asserting that local law is unenforceable, even if not preempted, if it discriminates against legal aliens).  

Because the Revised Ordinance defines "unauthorized worker" identically to the federal scheme and requires city officials to confirm the status of potential violators with the federal government, it will not be found to discriminate against those lawfully admitted to the country. See Complaint, supra note 12, at 23 (alleging Original Ordinance would discriminate against those lawfully admitted to country and only federal officials can determine immigration status). But see Revised Ordinance, supra note 13, § 3 (providing definitions consistent with federal scheme, that sets parameters for who is lawfully admitted into, or can remain in, United States). Moreover, the Revised Ordinance requires that the Hazleton Code Enforcement Office confirm any suspicions regarding the immigration status of an employee with the federal government before any sanctions can be enforced against the employer. See id. § 4(B)(3) (requiring submission of "identity data required by the federal government to verify, pursuant to United States Code Title 8, section 1373"). Therefore, it will not be discussed further in this Note.
employment of aliens who . . . [were] under federal law . . . permitted to work here,” this would be in conflict with the federal scheme.\footnote{75. See De Canas, 424 U.S. at 364-65 (providing issue for lower court to determine on remand and explaining what constitutes conflict with federal law).}

IV. APPLICATION OF THE THREE-STEP PREEMPTION ANALYSIS TO HAZLETON ILLEGAL IMMIGRATION RELIEF ACT ORDINANCE

The purpose of the Original Ordinance was to “stem the flow of illegal immigrants into Hazleton.”\footnote{76. See Open Letter, supra note 9 (discussing reasons behind enacting Hazleton’s immigration legislation).} The Original Ordinance prohibited hiring an illegal alien or renting property to an illegal alien.\footnote{77. See Original Ordinance, supra note 10 (providing regulations against illegal aliens, and making English official language of Hazleton). The ordinance prevents any entity from employing an illegal alien, as defined in Section 3 of the ordinance, and if such an illegal alien is employed the employer will be “denied and barred from approval of a business permit, renewal of a business permit, and any city contract or grant.” \textit{Id.} § 4. A first violation withholds a permit for a period of five years, and any subsequent violation carries a suspension of ten years. See id. (describing varying degrees of penalties). The Revised Ordinance only penalizes an employer who “knowingly” employs an illegal alien. See Revised Ordinance, supra note 13 (noting additional safeguard included within Revised Ordinance in effort to withstand legal challenge).} In response to the lawsuit and at the advice of its lawyers, the City of Hazleton agreed to delay enforcement of the ordinance; however, the Mayor of Hazleton stated that he would not discard the ordinance, and shortly thereafter amended it in an effort to make it legally enforceable.\footnote{78. See Preston, supra note 15, at A11 (discussing intent of Hazleton to amend its Original Ordinance and to fight any legal challenges). Judge James M. Mulney issued an order confirming that Hazleton had agreed not to enforce the Original Ordinance in exchange for the challengers agreeing not to seek a formal injunction. See id. (same). Mayor Barletta announced that he would seek to write a new ordinance, and hoped to submit a new version of the ordinance in time for the vote in the September 12, 2006 City Council meeting. See id. (reporting that Mayor Barletta had plans to revise Original Ordinance immediately). The goal of the amended ordinance is to achieve the same results but to have a better chance to stand up in court. See id. (acknowledging that Ordinance could be revised quickly to better stand up to legal challenge).} The question still remains whether the provisions of the Revised Ordinance will survive a constitutional challenge.\footnote{79. This Note will separately analyze the two major sections of the Revised Ordinance—employment of unlawful workers and renting of property to illegal aliens—because the statute expressly provides that each section is severable and can be separately enforced if the other is found to be unconstitutional. See Revised Ordinance, supra note 13, § 6 (stating parts of ordinance are severable). The Revised Ordinance provides:

If any part or provision of this Chapter is in conflict or inconsistent with applicable provisions of federal or state statutes, or is otherwise held to be invalid or unenforceable by any court of competent jurisdiction, such part of provision shall be suspended and superseded by such applicable laws or regulations, and the remainder of this Chapter shall not be affected thereby.}
A. Definition of Illegal Alien and Unlawful Worker

The Original Ordinance defined an illegal alien as "any person whose initial entry into the United States was illegal and whose current status is also illegal as well as any person who, after entering legally, has failed to leave the United States upon expiration of his or her visa." \(^{80}\) This definition was incompatible with federal law because the federal immigration scheme does not classify any immigrants or their status as illegal. \(^{81}\) After the ACLU and PRLDEF filed the lawsuit alleging this incompatibility with the federal definition, Hazleton revised the Original Ordinance to be consistent with the federal definition. \(^{82}\)

Further, the Revised Ordinance also provides that the Hazleton Code Enforcement Office must confirm that a person is an "illegal alien" or "unlawful worker" with the federal government prior to imposing any sanctions or penalties. \(^{83}\) By requiring the confirmation of the citizenship status of any individual thought to be "illegal" or "unauthorized," the city may avoid improper enforcement of the legislation that the Complaint

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\(^{80}\) Original Ordinance, supra note 10, § 3 (providing definitions for statute). The federal legislation regarding harboring and hiring of an unauthorized alien defines an "unauthorized alien" as one who is not "lawfully admitted for permanent residence, or . . . authorized to be so employed by this chapter or by the Attorney General." Immigration Reform and Control Act, 8 U.S.C. § 1324a(h)(3) (2005).

\(^{81}\) See Complaint, supra note 12, at 23 ("The definition of 'illegal alien' in the Ordinance is incompatible with and contrary to Federal law, and "the term 'illegal status' does not appear in the INA and has no meaning in the Federal immigration scheme."). See supra note 80 for the federal definition of an "unauthorized alien."

\(^{82}\) See Revised Ordinance, supra note 13, § 3(D) (defining for purposes of statute "illegal alien" as "an alien who is not lawfully present in the United States, according to the terms of [8 U.S.C. § 1101 et seq.]"). The Revised Ordinance provides that an unlawful worker is defined within the bounds of the federal definition of an "unauthorized alien." See id. § 3(E) (interpreting federal definition).

\(^{83}\) See id. §§ 3(D)-(E) (providing definitions of illegal alien and unlawful worker for purposes of Revised Ordinance). The Revised Ordinance explains the procedure for determining whether a person is an illegal alien:

The City shall not conclude that a person is an illegal alien unless and until an authorized representative of the City has verified with the federal government, pursuant to United States Code Title 8, subsection 1373(c), that the person is an alien who is not lawfully present in the United States.

Id. § 3(D). Additionally, Congress has provided a method for state agencies to obtain verification of a person's citizenship. See 8 U.S.C. § 1373(c) (2006) (providing ability for local government to seek verification of citizenship of individual from INS). The statute provides:

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

Id.
alleged would occur. Thus, it appears that the Revised Ordinance is consistent with the federal immigration scheme because it defines “illegal alien” and “unlawful worker” in the same manner as the federal statute. 85

B. Prohibition on Employment of Unlawful Workers 86

The Revised Ordinance prohibits any employer within the City from employing “unlawful workers,” as defined in the federal immigration statute governing the “unlawful employment of aliens.” 87 Further, the Revised Ordinance requires that any “business entity that applies for a business permit to engage in any type of work in the City shall sign an affidavit . . . affirming that they do not knowingly utilize the services or hire any person who is an unlawful worker.” 88 If the Hazleton Code Enforcement Office confirms a business has employed an unlawful worker, the business entity’s business permit will be suspended until “one business day after a legal representative of the business entity submits . . . a sworn affidavit stating that the violation has ended.” 89 The Revised Ordinance

84. See Complaint, supra note 12, at 23-24 (stating that Hazleton officials do not have expertise necessary to determine who is “illegal alien” and that “some Individual Plaintiffs . . . who are permitted by the Federal government to live and/or work in the United States will nevertheless be barred from doing so in Hazleton”).

85. See Revised Ordinance, supra note 13, §§ 3(D)-(E) (defining illegal alien and unlawful worker according to terms of federal immigration scheme); see also Equal Access Educ. v. Merten, 305 F. Supp. 2d 585, 602 (E.D. Va. 2004) (stating De Canas adopted federal standards of defining illegal alien, thus it was not preempted).

86. See Revised Ordinance, supra note 13, § 3(E) (defining “unlawful worker” as someone “who does not have the legal right or authorization to work due to an impediment in any provision of federal, state or local law, including but not limited to a minor disqualified by nonage, or an unauthorized alien as defined by [8 U.S.C. § 1324a(h)(3)”).

The Immigration Reform and Control Act defines 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 chapter or by the Attorney General.” 8 U.S.C. § 1324a(h)(3) (2005) (defining unauthorized alien).

For clarification in this Note, I will attempt to use “unlawful worker” whenever possible because that is the terminology used in the Revised Ordinance; however, “unauthorized alien” is used in the federal immigration law and will appear within the Note at times.

87. See Revised Ordinance, supra note 13, § 4(A) (“It is unlawful for any business entity to recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the city.”).

88. Id. § 4(A) (detailing requirements that business entities must comply with so as not to violate Revised Ordinance, and only imposing penalties if employer “knowingly” employs unlawful worker, consistent with federal immigration law); see also H.R. REP. No. 99-682, pt. 1, at 57 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5661 (providing that federal statute only penalizes “knowingly” hiring an unauthorized alien, and if person checks proper documentation prior to hiring person, rebuttable presumption of good faith is established).

89. See Revised Ordinance, supra note 13, § 4(B)(6) (indicating penalties imposed for violation of employment provision and method to cure). The Revised Ordinance also provides that a business entity will not have its business permit
does not impose any monetary penalties on any business entity that employs an unlawful worker.\textsuperscript{90} Because federal legislation covers the employment of unlawful workers, a court must apply the \textit{De Canas}\textsuperscript{91} three-step preemption test to determine whether the employment provision of the Revised Ordinance is preempted.\textsuperscript{92}

1. \textit{Did Congress Expressly Preempt Local Legislation Regarding the Employment of Unauthorized Aliens?}

No. The first step of the \textit{De Canas} analysis is to determine whether Congress expressly preempted state and local legislation regarding the employment of unauthorized aliens.\textsuperscript{93} Current federal legislation states that it is unlawful “to hire, or to recruit for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.”\textsuperscript{94} Congress also implemented the employment verification system, that requires suspended if “prior to the date of the violation, the business entity had verified the work authorization of the alleged unlawful worker(s) using the Basic Pilot Program.” \textit{Id.} § 4(B)\textsuperscript{(5)}.

\textsuperscript{90} See \textit{id.} § 4 (providing for no monetary penalties if business entity violates Revised Ordinance by employing unauthorized worker).

\textsuperscript{91} For a further discussion of \textit{De Canas}, see \textit{supra} notes 54-75 and accompanying text.

\textsuperscript{92} See \textit{Complaint}, \textit{supra} note 12, at 28 (“The Ordinance is preempted because it attempts to legislate in fields occupied by the Federal Government and because it conflicts with Federal laws, regulations, policies, and objectives.”). The federal law prohibits the employment of an unauthorized alien. \textit{See} \textit{Immigration Reform and Control Act, 8 U.S.C. § 1324a(a)(1)(A) (2005)} (“It is unlawful for a person . . . to hire . . . in the United States an alien knowing the alien is an unauthorized alien.”). An unauthorized alien, for the purpose of 8 U.S.C. § 1324a, “means, 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 chapter or by the Attorney General.” \textit{Id.} § 1324a(h)(3). Prior to the Immigration Reform and Control Act (IRCA), the number of aliens entering the United States to obtain employment, although not verified, was increasing. \textit{See Balbuena v. IDR Realty LLC}, 845 N.E.2d 1246, 1252-53 (N.Y. 2006) (asserting although federal immigration laws in place, Congress enacted Immigration Reform and Control Act to combat increasing “waves of aliens entering the United States illegally”). The purpose of the IRCA was to eliminate the job opportunities that enticed immigrants to enter the United States illegally. \textit{See H.R. REP. No. 99-682, pt. 1, at 46 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5650} (advocating purpose of federal law). The Report states:

Other countries with similar illegal migration problems have enacted employer sanctions and some of these countries recently indicated to the General Accounting Office (GAO) that “employer sanction laws helped to deter illegal alien employment” (GAO Report on Illegal Aliens: Information on Selected Countries’ Employment Prohibitions Laws, October 1985, p. 2).


\textsuperscript{93} For a discussion of the first prong of the \textit{De Canas} preemption analysis, see \textit{supra} notes 64-68 and accompanying text.

\textsuperscript{94} See 8 U.S.C. § 1324a(a)(1)(A) (prohibiting employers from hiring unauthorized aliens).
that employers check whether a potential employee is authorized to work within the United States. 

In the Immigration Reform and Control Act, Congress expressly preempted many state and local laws dealing with the employment of unauthorized aliens by stating "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions . . . upon those who employ . . . unauthorized aliens." Congress, however, explicitly allowed for state and local laws to regulate the employment of unlawful workers through "licensing and similar laws." Therefore, although one can argue that Congress expressly preempted any local laws that sought to penalize an employer for hiring an unlawful worker, it would seem more likely that Congress intentionally left a loophole for local governments to supplement the federal laws. The Revised Ordinance seeks to prevent the employment of unauthorized workers by withholding or suspending business permits from employers who violate the Revised Ordinance. Presumably, then, a court would find that Congress did not expressly preempt the employment provision of the Revised Ordinance because Congress intentionally allowed for state and local governments to enforce their own laws through "licensing and similar laws."

2. Did Congress Intend to Occupy the Field of Legislation Regarding the Employment of Unauthorized Aliens?

Probably not. It seems unlikely that Congress intended to occupy the field, because it intentionally allowed local governments the ability to reg-
ulate employment of unlawful workers through licensing and similar laws.\textsuperscript{100} Congress drafted the legislation to address circumstances where local governments may need the ability to withhold licenses from businesses that employ unauthorized workers.\textsuperscript{101} Furthermore, in \textit{Balbuena v. IDR Realty LLC},\textsuperscript{102} the New York Court of Appeals held that state labor laws providing lost wages to illegal aliens who sustain injuries on the worksite were not preempted by the Immigration Reform and Control Act.\textsuperscript{103} The court explicitly stated that, although the Immigration Reform and Control Act "occup[ied] the spectrum of immigration laws," the court was "unpersuaded by . . . [the] field preemption argument."\textsuperscript{104}

\textsuperscript{100} See Rebecca Smith, \textit{Immigrants' Right to Workers' Comp: Undocumented Foreign-born Workers Are Often Hired for the Most Dangerous and Lowest Paid Jobs. They Deserve Workers' Compensation Protections — But Don't Always Get Them}, 40 \textit{TRIAL} 48, 50 (2004) ("[A] state law is preempted where Congress has demonstrated an intent for federal law to 'occupy a field' exclusively."). The author argues that:

This type of congressional intent may be inferred under two circumstances: when a "scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it," or "where an act of Congress '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.'"


The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens.

They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation. Further, the Committee does not intend to preempt licensing or 'fitness to do business laws,' such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

\textit{Id.}

\textsuperscript{102} 845 N.E.2d 1246 (N.Y. 2006).

\textsuperscript{103} See \textit{id.} at 1250 (stating holding of case). Plaintiff was a native of Mexico who was not authorized by the Immigration and Nationality Service to be or work in the United States. See \textit{id.} (describing facts of case). Mr. Balbuena fell from a ramp while pushing a wheelbarrow and suffered severe head trauma and other injuries, rendering him incapacitated and unable to work. See \textit{id.} (same). He and his wife sued the defendant, manager of the construction company, for common law negligence and violating New York labor laws. See \textit{id.} (same).

\textsuperscript{104} See \textit{id.} at 1256 (determining that Immigration Reform and Control Act did not meet field preemption test from \textit{De Canas}). "To the contrary, the legislative history of IRCA shows that the Act was not intended to undermine or diminish in any way labor protections in existing law." \textit{Id.} (internal quotations omitted); see also \textit{English}, 496 U.S. at 84-85 (holding that state-law cause of action for intentional infliction of emotional distress not preempted by field preemption of federal laws covering nuclear safety); \textit{Cal. Coastal Comm'n v. Granite Rock Co.}, 480 U.S. 572, 594 (1987) (holding that Congress did not occupy field of legislation regarding
Opponents of the Revised Ordinance, however, will argue that the Immigration Reform and Control Act is a complete ouster of state power because it expressly prohibits the hiring of unauthorized aliens. This argument fails to consider that every federal regulation occupies some field, and there must be boundaries to what is preempted. The Complaint also fails to consider that Congress included a preemption clause in the statute, which the Supreme Court has held expressly sets the boundary for field preemption.

3. Does the Hazleton Ordinance Conflict with Federal Regulation of Employment of Unauthorized Aliens?

No. The final test for whether the Revised Ordinance is preempted by federal law is to determine whether the Revised Ordinance conflicts with the federal scheme. A local law is preempted if it conflicts with the purpose of the federal statute. In *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) (holding that illegal alien who obtained work by falsifying documents was not permitted to receive back pay for being impermissibly terminated); *Tarango v. State Indus. Ins. Sys.* (2001) (holding that IRCA preempts Coastal Commission permit requirements); Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987) (affirming that Congress only set floor for employment discrimination and did not preempt state legislation that "guarantees pregnant women a certain number of pregnancy disability leave days").

105. See Complaint, supra note 12, at 28 (claiming that Ordinance is preempted by federal immigration law).


Little aid can be derived from the vague and illusory but often repeated formula that Congress "by occupying the field" has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution.

To discover the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history.

107. See *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (stating that if Congress includes preemption clause within statute, there is no need to look any further to determine Congressional intent with respect to preemption). The Court, quoting from a previous case, stated:

When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

108. See *De Canas*, 424 U.S. at 356-64 (outlining three-step analysis to determine whether state or local law is preempted by federal law). For a further discussion of the final step of the *De Canas* preemption analysis, see supra notes 55-75 and accompanying text.

The Revised Ordinance is consistent with the purpose of the federal scheme because it prevents the employment of unlawful workers in an attempt to decrease the number of unauthorized aliens working in the United States.114 Therefore, a court would likely not find that the Revised Ordinance conflicts with the federal scheme because it is attempting to

Nevada's worker's compensation scheme insofar as it deals with employment of undocumented aliens because state law conflicts with federal scheme). The court did not want to allow the insurance company to provide vocational rehabilitation benefits to undocumented aliens because it did not want to entice undocumented aliens to seek employment in the United States. See id. at 179 (finding federal immigration law designed to prevent employment of unauthorized aliens). Furthermore, in Tarango, the defendant was not the employer so there was no benefit conferred on the employer of an undocumented alien by preventing the procurement of benefits. See id. (noting that holding unauthorized alien does not receive benefits does not provide incentive for employer to hire future unauthorized aliens). The court attempted to achieve bifurcated goals: (1) to avoid giving employers the incentive to seek undocumented aliens as employees, and (2) to prevent undocumented aliens from seeking employment within the United States. See id. (detailing reasons for Court's holding).

111. See id. at 151 (stating holding of case).
112. See id. (discussing Court's fear of more unauthorized workers coming to United States if permitted to seek back pay).
113. See id. at 147-49 (discussing legislation Congress enacted to limit employment of unauthorized aliens and decrease incentives for immigrants to come to United States illegally).
114. See id. (discussing purpose of Immigration Reform and Control Act and defining IRCA as "comprehensive scheme prohibiting the employment of illegal aliens in the United States"); Revised Ordinance, supra note 13, § 2(C) (stating in findings and declaration of purpose "[t]hat unlawful employment [of unlawful workers] . . . harm[s] the health, safety and welfare of authorized US workers and legal residents in the City of Hazleton"). But see Memorandum from Jody Feder & Michael Garcia, Legislative Attorneys, Am. L. Div. to Paul E. Kanjorski, U.S. Congressman (June 29, 2006) (on file with author) at 4, available at http://www.pr1def.org/Civl/Hazleton/hazleton%20legal%20documents/Hazleton%20Memo.pdf ("As an overarching matter, the [first draft of the] proposed ordinance would impose new regulations upon immigration matters wholly separate from those enacted by the federal government."). In an attempt to avoid discriminatory actions against legal immigrants, the Revised Ordinance also provides a private cause of action for a wrongfully discharged worker "against the business entity for unfair business practice." See Revised Ordinance, supra note 13, § 4(E)(2) (providing addi-
achieve the same goal, limiting the number of unauthorized workers within the United States, as the federal statute.\textsuperscript{115}

Thus, Hazleton, and other cities that have enacted similar legislation, should not be prohibited from enforcing the employment section of the Revised Ordinance based on federal preemption because the \textit{De Canas} preemption analysis does not demonstrate congressional intent to preempt all state and local laws dealing with the employment of unauthorized workers.\textsuperscript{116} Congress expressly allowed for state and local laws to prohibit the employment of illegal aliens through "licensing and similar laws," and, thus, Congress did not intend to occupy the field of employment regulation of unauthorized aliens.\textsuperscript{117}

\textbf{C. Prohibition on Renting or Leasing Property to Illegal Aliens}

The second major provision of the Revised Ordinance prohibits property owners from knowingly harboring an illegal alien.\textsuperscript{118} In the Revised Ordinance "to let, lease, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact" that the person is an illegal alien as defined by federal law "shall be deemed to constitute harboring."\textsuperscript{119} If a

\begin{itemize}
  \item \textsuperscript{115} \textit{Compare Revised Ordinance, supra note 13, § 4 (prohibiting knowing employment of unlawful workers within city), with Immigration Reform and Control Act, 8 U.S.C. § 1324a(a) (2005) (prohibiting knowing employment of unauthorized alien in United States).}
  \item \textsuperscript{116} \textit{See Feder & Garcia, supra note 114, at 5 (analyzing draft of Original Ordinance prior to enactment and deciding "INA expressly provides that it does not preempt states and localities from independently regulating the employment of illegal aliens through licensing and similar laws").}
  \item \textsuperscript{117} \textit{See 8 U.S.C. § 1324a(h)(2) (stating under what circumstances state law is preempted); Malcolm, supra note 14 (reporting that Congressional Research Service study of ordinance similar to Revised Ordinance found that Revised Ordinance has much better chance of surviving Constitutional challenge).}
  \item \textsuperscript{118} \textit{See Revised Ordinance, supra note 13, § 5(A) (prohibiting property owners from harboring illegal aliens). The Revised Ordinance provides: A separate violation of this section shall be deemed to have been committed for each business day on which the owner fails to provide the Hazleton Code Enforcement Office with identity data needed to obtain a federal verification of immigration status, beginning three days after the owner receives written notice from the Hazleton Code Enforcement Officer. Id. § 5(A)(3).}
  \item \textsuperscript{119} \textit{See id. § 5(A)(1) (defining harboring for purposes of Revised Ordinance). The Revised Ordinance states: For the purposes of this section, 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. To suffer or permit the occupancy of the dwelling unit by 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 also be deemed to constitute harboring. Id.}
\end{itemize}
"written signed complaint" alleging harboring of an illegal alien is pro-
vided to the Hazleton Code Enforcement Office, and the federal govern-
ment verifies the person's immigration status as illegal, the owner of the
dwelling unit will be given five business days to remedy the situation.120 A
property owner is able to cure a violation of the Revised Ordinance by
having a "legal representative of the dwelling unit owner submit[] to the
Hazleton Code Enforcement Office a sworn affidavit stating that each and
every violation has ended."121

Failure to correct the violation will result in a denial or suspension of
the owner’s "rental license for the dwelling unit."122 A second or subse-
quent violation by the dwelling owner will result in a fine of $250 for each
day of each separate violation, and a suspension of the landlord’s rental
license.123 On the other hand, a property owner can avoid a violation of
the Revised Ordinance by making a request, prior to renting the property,
to the Hazleton Code Enforcement Office, that will "verify with the federal
government the lawful immigration status of a person seeking to use, oc-
cupy, lease, or rent a dwelling unit in the City."124

120. See id. §§ 5(B)(1)-(5) (explaining procedure for enforcement of Revised
Ordinance provisions prohibiting harboring of illegal aliens). The Revised Ordi-
nance provides that:
Upon receipt of a valid written complaint, the Hazleton Code Enforce-
ment Office shall, pursuant to United States Code Title 8, section
1373(c), verify with the federal government the immigration status of a
person seeking to use, occupy, lease, or rent a dwelling unit in the City.
The Hazleton Code Enforcement Office shall submit identity data re-
quired by the federal government to verify immigration status. The City
shall forward identity data provided by the owner to the federal govern-
ment, and shall provide the property owner with written confirmation of
that verification.
Id. § 5(B)(3).
121. See id. § 5(B)(6) (providing procedure for property owner to remedy vio-
lation of Harboring provision of Revised Ordinance). "The affidavit shall include
a description of the specific measures and actions taken by the business entity to
end the violation, and shall include the name, address and other adequate identi-
fying information for the illegal aliens who were the subject of the complaint." Id.
122. See id. § 5(B)(5) (stating that in addition to suspension of rental license, owner "shall not be permitted to collect any rent, payment fee, or any other form
of compensation from, or on behalf of, any tenant or occupant in the dwelling
unit").
123. See id. § 5(B)(8) (stating penalty for second violation of Harboring Provi-
sion). The Original Ordinance imposed one thousand dollar minimum fines
against dwelling owners who "knowingly allow[ed] an illegal alien to use, rent or
lease their property." See Original Ordinance, supra note 10, §§ 5(A)-(B) (providing
penalties imposed against landlord for renting property to illegal alien). Addition-
ally, the Original Ordinance did not provide, as the Revised Ordinance does, for a
grace period for dwelling owners to correct any violations. Compare Revised Ordi-
nance, supra note 13, § 5(B)(4) (allowing dwelling unit owner "five business days
following receipt of written notice . . . to correct a violation"), with Original Ordi-
nance, supra note 10, § 5(B) (imposing monetary penalty upon violation of Ordin-
ance with no "grace period").
124. See Revised Ordinance, supra note 13, § 5(B)(9) (stating that Hazleton
Code Enforcement Office will verify status, pursuant to 8 U.S.C. § 1373(c), of
Federal immigration law prohibits harboring an illegal alien.\textsuperscript{125} Federal courts have interpreted that the harboring provision is violated when a person provides shelter to an alien who is known to be in the United States without authorization, even if the violating party was not involved in smuggling the illegal alien into the country.\textsuperscript{126} A person who violates the potential tenants for landlords; and, penalties shall not be enforced against dwelling unit owners whose occupants’ statuses as “alien[s] lawfully present in the United States has been verified”); \textit{see also} H.R. Rep. No. 99-682, pt. 1, at 61 (1986), \textit{reprinted in} 1986 U.S.C.C.A.N. 5649, 5665 (“The Committee directs that INS fully cooperate with employers who desire to understand their verification obligations” and “should employers seek to check on the authenticity of any alien identification document, INS officials are expected to assist them in a timely manner.”).

Critics of the Original Ordinance noted that it would be nearly impossible for landlords to determine if a person was an illegal alien given the myriad of possible immigration documentation. \textit{See Complaint, supra note 12, at 4 (“It is difficult if not impossible for Plaintiffs Lozano and Hernandez to determine whether each of their tenants is or is not an ‘illegal alien’ as defined by the Ordinance.”).} In response, Hazleton enacted separate legislation that will allow landlords merely to determine if a potential renter has an occupancy permit, which the renter must obtain from the Town Clerk prior to renting or leasing property in the city. \textit{See Hazleton, Pa., Ordinance 2006-13, § 7(b) (Aug. 15, 2006) [hereinafter Rental Ordinance] (“There shall be a one-time occupancy permit fee of $10.00 for every new Occupant, which is payable by the Occupant.”); City Council Speech, supra note 1 (discussing how potential tenants must get occupancy permit from town clerk before renting or leasing property).}

Under the Rental Ordinance, an owner must refuse occupancy unless the “[o]ccupant first obtains an occupancy permit.” \textit{See Rental Ordinance, supra, § 7(b).} And, in a further regulation of immigration, an occupancy permit cannot be issued unless the Occupant can provide “proper identification showing proof of legal citizenship and/or residency.” \textit{See id. § 7(b)(1)(g) (listing minimum requirements for occupancy permit, including name, address and name of landlord).} An owner who fails to require an occupancy permit “shall, upon conviction thereof after notice and a hearing before the Magisterial District Judge, be sentenced to pay a fine of $1,000 for each occupant.” \textit{See id. § 10(b) (describing penalties for violations of Rental Ordinance).} Thus, the determination of who is an illegal alien will not be placed on landlords, so there should be no fear of potentially renting to an illegal alien in violation of the Revised Ordinance. \textit{See City Council Speech, supra note 1 (discussing Rental Ordinance and alleviating concern that landlords would be required to understand federal immigration law, because only required to ask for “occupancy permit”).}

\textsuperscript{125} \textit{See generally} Immigration Reform and Control Act, 8 U.S.C. § 1324a (2005). The Immigration Reform and Control Act provides:

Any person who 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, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation; . . . shall be punished as provided in subparagraph (B).

\textit{Id. § 1324(a)(1)(A)(iii).}

\textsuperscript{126} \textit{See United States v. Lopez, 521 F.2d 437, 440 (2d Cir. 1975) (affirming defendant’s conviction for harboring illegal aliens in violation of 8 U.S.C. § 1324(a) (3)).} Defendant provided housing to aliens, whom he knew to be illegal, for a fee. \textit{See id. at 439 (noting defendant provided housing to illegal aliens).} The illegal aliens used the defendant’s property as refuge and received additional services by the defendant, such as job applications and transportation. \textit{See id. (noting}
federal harboring provision is subject to criminal sanctions, including fines and imprisonment, but is not subject to any civil sanctions. The purpose of the federal harboring statute is to limit the number of illegal aliens entering the United States by penalizing people who aid illegal aliens in remaining in the United States.

Unlike the federal legislation prohibiting the employment of unauthorized aliens, Congress did not include an express preemption provision within the harboring legislation, which prevents a court from easily determining the boundaries of preemption. Therefore, a court will need to look at the plain language of the statute and the legislative intent to determine whether Congress intended to preempt state and local laws.

1. Did Congress Intend to Occupy the Field of Legislation Regarding the Renting of Property to Illegal Aliens?

Maybe. Congress explicitly chose only to enforce the harboring provision through criminal sanctions. Moreover, Congress chose not to include civil sanctions or an express preemption provision within the federal

illegal aliens' benefits). Harboring is defined as "[t]he act of affording lodging, shelter, or refuge to a person, esp. a criminal or illegal alien." BLACK'S LAW DICTIONARY 733 (8th ed. 2004). Harboring an Illegal Alien is defined as "the act of providing concealment from detection by law-enforcement authorities or shelter, employment, or transportation to help a noncitizen remain in the United States unlawfully, while knowing about or recklessly disregarding noncitizen's illegal immigration status." Id.

127. See 8 U.S.C. § 1324(a)(1)(B) (imposing criminal sanctions upon any person who harbors illegal alien). A person who [harbors an alien], "for the purpose of commercial advantage or private financial gain, [shall] be fined under Title 18, imprisoned not more than 10 years, or both." See id. § 1324(a)(1)(B) (describing penalties for harboring aliens). "An alien described in this subparagraph is an alien who . . . is an unauthorized alien (as defined in Section 1324a(h) (3) of this title)." Id. § 1324(a)(3)(B).

128. See H.R. REP. No. 99-682, pt. 1, at 45 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5649-50 ("The purposes of the bill are to control illegal immigration to the U.S., make limited changes in the system for legal immigration, and provide a controlled legalization program for certain undocumented aliens who have entered this country prior to 1982.").


130. For a discussion of the three-pronged test, established under De Canas, used to determine if federal law preempts a state and local law, see supra notes 55-75 and accompanying text.

131. See 8 U.S.C. § 1324(a) (emphasis added) (providing only for criminal sanctions if person violates statute). There is no mention of civil sanctions or licensing provisions within the Immigration Reform and Control Act. See id. (including section (a), entitled "Criminal Penalties," but including no other penalties in statute); see also William G. Phelps, Annotation, Validity, Construction, and Application of § 274(a)(1)(A)(iii) of Immigration and Nationality Act (8 U.S.C.S. § 1324(a)(1)(A)(iii)), Making It Unlawful to Harbor or Conceal Illegal Alien, 137 A.L.R. FED. 255, 266 (1997) (asserting that "[section 1324(a) is a criminal statute").
harboring statute, even though it did in the employment provisions. The apparent deliberate decision not to include civil sanctions could mean that Congress is permitting state and local governments to enforce similar laws through civil sanctions and licensing, while still preempting criminal sanctions. Further, the legislative history provides that Congress felt the best means of enforcing the harboring provision was through criminal sanctions.

The Revised Ordinance does not expressly impose any criminal sanctions. In fact, the Revised Ordinance does not even impose a monetary fine until a second offense. Given that the De Canas Court stated the presumption is against preempting state law and Congress did not expressly preempt state and local laws dealing with the harboring of illegal aliens, a court could find that the Revised Ordinance is not preempted by federal harboring legislation.

Contrarily, however, opponents of the Revised Ordinance argue that Congress intended to occupy the entire field by prohibiting the harboring of illegal aliens. Courts have interpreted harboring for the purposes of the federal harboring statute to include the "mere sheltering" of an illegal alien. Because the courts have interpreted harboring not to require the

132. Compare 8 U.S.C. § 1324(a) (providing for criminal sanctions if person violates federal harboring statute, but not including any civil sanctions or including express preemption provision), with Immigration Reform and Control Act, 8 U.S.C. § 1324a(h)(2) (2005) (expressing that state and local laws dealing with employment of unauthorized workers are preempted if they impose civil or criminal sanctions).

133. See Ronald Benton Brown & Sharon Jacobs Brown, Statutory Interpretation: The Search for Legislative Intent 81 (NITA 2002) ("When the legislature provided a specific term or a list of terms, the implication is that the legislature intended to exclude others."); 16 Am. Jur. 2d Constitutional Law § 69 (2006) ("[W]here a qualifying word or phrase is found in one provision and not in some other provision, the presumption is that the other provision was not intended to have such qualification."); see also Drake v. Lab. Corp. of Am. Holdings, 458 F.3d 48, 62 (2d Cir. 2006) (finding that "FAA's decision to save only certain state criminal laws" did not provide for conclusion "that the saving clause of the . . . regulations carries a negative pregnant that other state [civil] law is preempted") (internal quotations omitted).


135. See Revised Ordinance, supra note 13, § 5 (providing for fines if landlord violates provision twice, however not classifying fines as criminal or civil).

136. See id. §§ 4(B)(5)-(8) (discussing penalties for violations of harboring provision).

137. See, e.g., De Canas v. Bica, 424 U.S. 351, 362-63 (1976) (finding state law not preempted in part because "there [was] no indication that Congress intended to preclude state law [and there was] . . . affirmative evidence . . . that Congress sanctioned concurrent state legislation on the subject covered by the challenged state law").


139. See United States v. Acosta De Evans, 531 F.2d 428, 430 (9th Cir. 1976) (interpreting harbor to mean merely to "afford shelter" and not requiring, for
intent to conceal, it is arguable that a court would find Congress did intend to occupy the field of regulating property rental to illegal aliens.\textsuperscript{140}

2. \textit{Does the Hazleton Ordinance Conflict with the Federal Regulation of Renting Property to Illegal Aliens?}

No. If the court does find that Congress did not intend to preempt, or occupy the field of, harboring illegal aliens, the court must analyze whether the Harboring Illegal Aliens provision is in conflict with the federal scheme.\textsuperscript{141} The Supreme Court has held a local law is in conflict with federal law when the purpose of the state law is contrary to the purpose of the federal law.\textsuperscript{142} The purpose of the harboring provision is to decrease the flow of illegal aliens into the United States by criminalizing the act of "conceal[ing], harbor[ing], or shield[ing] from detection" unauthorized aliens.\textsuperscript{143} The Revised Ordinance is not inconsistent with the federal purposes of federal harboring statute, that there be "clandestine sheltering"); see also United States v. Balderas, 91 F. App'x 354, 354-55 (5th Cir. 2004) (per curiam) ("Because affording shelter to an illegal alien is conduct which by its nature tends to substantially facilitate the alien's remaining in the United States illegally, providing shelter to illegal aliens constitutes harboring illegal aliens under 8 U.S.C. § 1324(a)(1)(A)(iii).") United States v. Mount Fuji Japanese Steak House, Inc., 435 F. Supp. 1194, 1202 (E.D.N.Y. 1977) (citing \textit{Acosta De Evans} and holding, for purposes of harboring, shelter not required to be provided in clandestine manner).

\textsuperscript{140.} See English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (asserting "in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively"). In attempting to provide guidance for determining field preemption the Court stated:

Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "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."

\textit{Id.} (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). \textit{But see} Malcolm, supra note 14 (reporting that Congressional Research Service study of ordinance similar to Revised Ordinance found that Revised Ordinance provision aimed at prohibiting landlords from renting property to illegal aliens was more likely to be found unenforceable than employment provision).

\textsuperscript{141.} For a discussion of the third prong of the \textit{De Canas} preemption analysis, whether the local law conflicts with the federal scheme, see supra notes 73-75 and accompanying text.


\textsuperscript{143.} See Sarah M. Kendall, Comment, \textit{America’s Minorities Shown the “Back Door” . . . Again: The Discriminatory Impact of the Immigration Reform and Control Act}, 18 \textit{Hous. J. INT’L L.} 899, 924 (1996) (analyzing how Immigration Reform and Control Act was not living up to its goal of decreasing rate of illegal immigration into United States, but noting purpose of federal law was to decrease rate of illegal immigration).
scheme because it does not encourage, in any way, illegal aliens to remain in the United States.\textsuperscript{144}

On one hand, Congress seems to have occupied the field of legislation because the federal harboring provision has been held to include knowingly providing shelter to aliens whose entrance into the United States is illegal,\textsuperscript{145} and to aliens whose entry was legal but continued presence in the United States became illegal.\textsuperscript{146} Yet, on the other hand, Congress elected to make the federal harboring provision strictly a criminal statute and did not include any preemption provision, even though it did include one in the employment provision; therefore the court must construe the language of a statute as conclusive unless there is legislative intent to the contrary.\textsuperscript{147} Nevertheless, in the employment provision, Congress intentionally excepted licensing, while in the Harboring provision Congress did not permit any state power.\textsuperscript{148} Thus, a court could find that Congress did not intend to preempt state and local laws that are consistent with the federal scheme, and regulate the harboring of illegal aliens through civil, licensing and similar laws.\textsuperscript{149}

\textsuperscript{144.} See Revised Ordinance, supra note 13, \S 2(E) ("The provision of housing to illegal aliens is a fundamental component of harboring" that is prohibited by Immigration Reform and Control Act). In addition, a goal of the Revised Ordinance was to "abate the nuisance of illegal immigration by diligently prohibiting the acts and policies that facilitate illegal immigration in a manner consistent with federal law and the objectives of Congress." See id. \S 2(D) (discussing findings and declaration of purpose).

\textsuperscript{145.} See United States v. Lopez, 521 F.2d 437, 440 (2d Cir. 1975) (holding defendant violated predecessor to current harboring provision by providing shelter to aliens who entered country illegally).

\textsuperscript{146.} See United States v. One 1984 Chevrolet Trans Star, 623 F. Supp 625, 628 (D. Conn. 1985) (finding that predecessor to current harboring provision "must be read to encompass the transportation and harboring of aliens who entered the United States legally but whose continued presence in the United States later became unlawful").

\textsuperscript{147.} See FBI v. Abramson, 456 U.S. 615, 635 (1982) (O'Connor, J., dissenting) (quoting Bread Political Action Comm. v. FEC, 455 U.S. 577, 580 (1982)) (stating that, "[a]bsent a clearly expressed legislative intention to the contrary, that language [of the statute] must ordinarily be regarded as conclusive"). "In approaching a statute, moreover, a judge must presume that Congress chose its words with as much care as the judge himself brings to bear on the task of statutory interpretation." Id. (noting statutes should be interpreted as though Congress intentionally chose each word).

\textsuperscript{148.} Compare 8 U.S.C. \S 1324(a) (failing to provide preemption provision, and thus not expressly allowing states to enforce similar laws through licensing), with Immigration Reform and Control Act, 8 U.S.C. \S 1324a(h)(2) (2005) (expressing that state and local laws permitted to prohibit employment of unauthorized workers through "licensing and similar laws").

V. IMPACT AND EFFECTS OF HAZLETON’S IMMIGRATION ORDINANCE

Many cities and towns are awaiting the court decision on the Hazleton ordinance. If the Revised Ordinance is overturned, it is unlikely that other cities will enforce their own immigration ordinances. Additionally, Congress may be forced to legislate an area of the law that some believe it has been trying to avoid. On the other hand, if Hazleton is successful, towns around the country will proceed to enact their own versions of the Revised Ordinance.

If a court finds that the Revised Ordinance is not preempted by federal laws, the effects could be chaotic and catastrophic. There are a federal issue than a local issue, it's not exclusively a federal issue. In each case, one would have to ask whether Congress has spoken on the issue.

150. See Tien-Shun Lee, Newton Defers Illegal-Immigration Fines: Town Weighs Penalizing Businesses, Landlords That Hire, House Them, DAILY RECORD (Morristown, N.J.), Sept. 29, 2006, at 54 (stating that town is waiting to see result of challenge to Hazleton ordinance before determining whether to enact its own immigration legislation); Wade Malcolm, Wilkes-Barre Taking a Wait-And-See Approach to an Illegal Immigration Ordinance, CITIZENS’ VOICE (Wilkes-Barre, Pa.), Oct. 7, 2006, http://www.citizensvoice.com/site/news.cfm?newsid=17297007&BRD=2259&PAG=461&dept_id=455154&rfi=6 (same); Laura Parker, Court Tests Await Cities’ Laws on Immigrants, USA TODAY, Oct. 9, 2006, at 3A (“At the state level, lawmakers in 33 states have passed 78 bills, most of them imposing restrictions similar to the city measures, the National Conference of State Legislatures says.”); Powell & Garcia, supra note 6, at A03 (listing cities considering enacting similar legislation); see also Editorial: Hazleton Ordinance Exacerbates Problem, READING EAGLE (Reading, Pa.), July 23, 2006, http://www.readingeagle.com/blog/editorials/archives/2006/07/hazleton_ordina.html (“In fact, there are communities all over the country who are on the verge of passing similar ordinances.”).

151. See Lee, supra note 150 (“Due to the pre-emption in federal law, and as a cost-saving measure to Newton taxpayers, the town council has made an economically wise decision to table this issue until resolution of the existing litigation in Hazleton, Pa., a statement posted on the town’s Web site read.”).

152. See Allison Brophy Champion, The Federal Government Has Failed, CULPEPER STAR EXPONENT (Culpepper, Va.), Oct. 10, 2006, http://www.starexponent.com/servlet/Satellite?pagename=CSE/MGArticle/CSE_MGArticle&c=MGArticle&id=1149191066501 (quoting Mayor of Culpepper, Virginia saying “[t]he Town believes the federal government has failed to secure its borders, adequately track visa recipients or enforce work site laws, allowing illegal immigration to thrive, with record numbers of persons entering the United States illegally and allowing others who entered legally to overstay their visas”); Julia Malone, Immigration, ATLANTA JOURNAL-CONSTITUTION, Aug. 6, 2006, at D1 (announcing Congress put immigration reform on hold for August recess even though “local officials and residents are losing patience with the federal government’s failure to resolve the issue”).

153. See id. (noting Newton, New Jersey “keeping an eye” on Hazleton and may enact its immigration bill if Hazleton successful in court).

154. See Elizabeth Llorente, Closing Its Borders N.J. Town Has Illegal Immigrants Feeling Unwelcome, THE RECORD (Bergen County, N.J.), Oct. 8, 2006, at A01 (quoting one immigrant of Riverside, New Jersey as saying, “Many of my friends have left to Delaware, Pennsylvania, Florida. Immigrants who are still here just stay indoors. They’re afraid they’ll be arrested or attacked if they go outside.”); L.A. Tarone, Suit Challenges Illegals Crackdown, STANDARD SPEAKER (HAZLETON, Pa.), Oct. 31, 2006, http://www.smalltowndefenders.com/public/node/77 (“Immigration reform is an important issue but if every little town like Hazleton across the 50 states
nearly 12 million illegal aliens in the United States, many of whom do not have high school degrees, and none of whom will be able to remain in any city that enacts a copycat ordinance.\textsuperscript{155} Illegal aliens will be forced to move to cities without immigration ordinances, and those new cities will have to incur the additional costs to handle the increased population.\textsuperscript{156}

Further, if Congress amends the federal immigration laws to preempt the Revised Ordinance but does reform federal immigration law, many of the problems Hazleton was concerned about will still exist.\textsuperscript{157} The federal immigration laws will still not be enforced effectively, and the incentive of employment will still attract immigrants.\textsuperscript{158} Hazleton and cities considering similar ordinances will likely clamor for federal immigration reform,

makes up their own rules about immigration, we’re going to be left with an even bigger mess,’ ACLU Legal Director Witold J. Walczak told Associated Press Monday evening.”); Editorial, supra note 150 (reporting that some legal Latino residents in Hazleton believe ordinance directed at them). Additionally, some believe that local immigration ordinances may “embolden individuals to openly discriminate against foreigners and treat them all as illegal immigrants.” See Llorente, supra (discussing possible effects of immigration ordinances).

155. See Parker, supra note 150 (reporting number of cities and states considering adopting ordinances similar to Hazleton, prohibiting illegal from remaining in city). But see Malone, supra note 152 (reporting that one Illinois County considering welcoming illegal aliens who are forced to leave their towns because of Hazleton-like ordinances). “County Commissioner Roberto Maldonado wants to create a ‘sanctuary county’ to shield undocumented workers from deportation until immigration reform makes its way through Congress.” Id. (noting example of welcoming illegal aliens who are forced to leave their towns because of Hazleton-like ordinances).

156. See Stacy Brown, Scranton Officials Believe Illegal Immigrants Heading Their Direction City’s Council President: People Are Moving Because of Hazleton’s Restrictive Ordinance, CITIZENS’ VOICE (Wilkes-Barre, Pa.), Oct. 7, 2006, http://www.citizenvoice.com/site/news.cfm?newsid=17297006&BRD=2259&PAG=461&deptid=455134&rfid-6 (“We’ve watched people pick up in the middle of the night and move away and, from what I understand, they’ve moved to Scranton,” said Hazleton Mayor Lou Barletta .... If they were legal, they wouldn’t pick up like that and move.”); Powell & Garcia, supra note 6, at A03 (“I see illegal immigrants picking up and some Mexican restaurants say business is off 75 percent,” [Mayor] Barletta says. “The message is out there.”); see also Price, supra note 11 (stating in Valley Park, MO, where immigration legislation recently passed, that immigrants fled high-crime apartment complex shortly after passage of immigration bill). Pennsylvania City Council President Judy Gatelli recently said, “I have asked that we get a copy of Hazleton’s ordinance and review it because the illegal immigrants are coming here from Hazleton ...[and] ((that) is wrong and it must be stopped.” See Brown, supra (noting comment by Pennsylvania City Council President Judy Gatelli regarding Hazleton’s ordinance and desire to effectively regulate illegal immigrants).


158. See id. (noting that job opportunities and inexpensive housing have led illegal aliens to arrive in small towns like Hazleton).
but their collective voice may not be enough to convince Congress to focus less on border patrol and to address local issues.159

On the other hand, if the Revised Ordinance is overturned, Hazleton's efforts may not be for naught.160 First, Hazleton was able to amend the Original Ordinance quickly once the faults were pointed out in the Complaint, so it is feasible that Hazleton will be able to amend again to strengthen the Revised Ordinance even more.161 Second, the mere threat of enforcing the Revised Ordinance has lessened the number of reported crimes and caused many people, who are believed to be illegal aliens, to leave the city.162 Finally, the Original and Revised Ordinances, by highlighting some of the weaknesses in the current immigration scheme, may

The Intelligence Reform and Terrorism Prevention Act of 2004 called for at least 2,000 more Border Patrol agents per year along our border with Mexico to stop the unrelenting flow of people and illegal drugs into this country. But the Bush administration provided funding for only around 200 additional agents. President Bush then promised to deploy by August 6,000 National Guard troops to support the U.S. Border Patrol on the border with Mexico. Now, in mid-July, having already missed a June deadline, fewer than 900 have moved into place along the border.


161. See, e.g., Revised Ordinance, supra note 13 (revising Original Ordinance for second time in two months); Hazleton, Pa., Ordinance 2006-17 (revising Original Ordinance for first time); Original Ordinance, supra note 10 (initially prohibiting renting of property to, and hiring of, illegal aliens).

162. See Michael Rubinkam, Bidding Adios to Hazleton: This Week, City's Illegal Immigration Law Takes Effect. Hispanic Exodus is Under Way, Many Say, MORNING CALL, Oct. 30, 2006, at A1 (reporting many Hispanics, both illegal and legal, have left Hazleton in fear of enforcement of Revised Ordinance, and noting that police chief said "officers . . . are not responding to as many calls" as before). On the other hand, if Hispanics, who are legal immigrants, are leaving Hazleton, the Revised Ordinance is causing unintended consequences. See id. (noting unintended consequences of Hazleton ordinance). A Dominican reported that he felt "pressure" from other residents prior to enforcement of Revised Ordinance. See id. (same).
persuade Congress to enact legislation that will remedy local problems, including the employment of illegal aliens. Immigration reform has been on the floor of the House and Senate several times, but Congress has not enacted any substantial changes in nearly a decade.

Nevertheless, necessitating Congressional action may not solve Hazleton's problems, because some believe Congress should legalize the illegal aliens currently in the United States. Alternatively, however, there has been a strong movement to allow local officials to enforce immigration laws because of the recognition that the federal immigration scheme does not solve the problem.

163. See Milan Simonich, Hazleton Draws a Hard Line: Ordinance Aimed at Illegal Immigrants Puts Mayor Center Stage, PITTSBURGH POST-GAZETTE, Aug. 27, 2006, at A1 (reporting the views of local resident who stated that “[t]he federal government has not been doing enough to stop illegal immigration. When Mayor Barletta advanced his initiative, it brought him national attention. I hope that will force the federal government to take some more direct action”); see also David M. Brown, Pa. Poll Finds Support for Local Immigration Laws, PITTSBURGH TRIBUNE-REV., Oct. 23, 2006, http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s_476252.html (reporting about recent statewide poll in Pennsylvania in which sixty-five percent support Revised Ordinance, and would “back similar laws in their communities”).

164. For a discussion of recent attempts by Congress to reform immigration, see supra note 38 and accompanying text. One recent bill provided:

Notwithstanding any other provision of law and reaffirming the existing inherent authority of States, law enforcement personnel of a State or a political subdivision of a State have the inherent authority of a sovereign entity to investigate, identify, apprehend, arrest, detain, or transfer to Federal custody aliens in the United States (including the transportation of such aliens across State lines to detention centers), for the purpose of assisting in the enforcement of the immigration laws of the United States in the normal course of carrying out the law enforcement duties of such personnel. This State authority has never been displaced or preempted by a Federal law.


165. See Ron Smith, For Immigration Reform—Keys Are Guest Worker, Amnesty, SOUTHWEST FARM PRESS (Houston, Tex.), Sept. 7, 2006, at 1 (discussing provisions of proposed Senate bill that “would allow those undocumented workers to come forward, pay back taxes, a fine and leave the country for a short period and then come back legally”); see also Joel Pfeffer, Editorial, Work They Must: Congress Must Finally Create Incentives for Aliens to Play By the Rules, PITTSBURGH POST-GAZETTE, Mar. 31, 2006, at B7 (commenting undocumented aliens “clamoring” for Congress to grant amnesty like it did in 1986, but better course would be to create incentives for migrant workers to comply with law); Griswold Statement, supra note 4, at 29 (asserting that “legalized system would, in one stroke, bring a huge underground market into the open”).

Part of the reason many support legalizing illegal aliens present in the United States is that there is a strong belief that the country cannot do anything about them. See Lee, supra note 3, at 273 (predicting that Immigration Board could not handle sheer volume of removal proceedings to remove millions of illegal aliens in United States). One report states that the Immigration Board can only handle 3000 appeals per month, meaning it would take centuries to handle claims of illegal aliens currently in the country. See id. (noting capacity of Immigration Board to handle appeals).
not protect smaller cities and towns efficiently, which may allow Hazleton to regulate illegal immigrants without the Revised Ordinance. No matter what the outcome of the Revised Ordinance, Hazleton has exposed a significant preemption loophole in the federal immigration scheme; and, as illegal immigrants move out of Hazleton following the passing of the Revised Ordinance, Mayor Barletta has so far succeeded in his goal of making illegal aliens unwelcome in Hazleton.

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166. See Wishnie, supra note 46, at 1093 (noting in 1996 Congress amended federal immigration law to allow state and local officials to “arrest and detain an individual who (1) is an alien illegally present in the United States, and (2) has previously been convicted of a felony and ordered deported”). Congress also established procedures to allow local authorities to enforce federal immigration law if trained and “written agreement with, and supervision by the Attorney General.” See id. at 1094 (establishing procedures to allow local authorities to enforce federal immigration law). In addition, in 2002, a media report stated the Department of Justice “had abandoned its long-standing view that Congress has preempted state and local police from enforcing civil immigration laws” however, when questioned, the Department would not confirm this new policy. See id. at 1085-86 (abandoning long-standing view that Congress has preempted state and local police from enforcing civil immigration laws).

167. See City Council Speech, supra note 1 (promoting purpose of Hazleton Immigration ordinance).