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*CHAMBER OF COMMERCE v. WHITING: A LAW STUDENT'S
FREEWHEELING INQUIRY*

LAURA E. PLOEG*

I. INTRODUCTION

“Illegal immigration” is a phrase that elicits strong opinions from many people.¹ Debate on the topic ranges from the blatantly racist to sympathy for the plight of immigrants, and less emotionally based arguments that fall in between.² It is estimated that there are over ten million undocumented aliens in the United States.³ Most people agree that something must be done about illegal immigration; the question becomes what.⁴ In an attempt to stem the tide

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1. Cf. *Anti-Immigration Groups*, SOUTHERN POVERTY LAW CENTER (Spring 2001) [hereinafter SPLC], <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2001/spring/blood-on-the-border/anti-immigration-#> (listing and briefly describing several anti-immigration groups).

2. See *id.* (describing anti-immigration groups); *Racist Music, Neo-Paganism and Nationalism Drive Growth of Hate Movement*, SPLC (Spring 2001), <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2001/spring/the-year-in-hate> (describing existence of racist and ethnic hate including ethnic nationalism); *National Pro-Immigrant Groups*, POLITICAL RESEARCH ASSOCS., http://www.publiceye.org/research/directories/immig_grp_defend.html (last visited Oct. 10, 2011) (listing various pro-immigrant groups).

3. See MICHAEL HOFER, NANCY RYTINA & BRYAN C. BAKER, OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2010 1 (2011). It is difficult to know how many undocumented aliens are residing in the United States, thus estimates are made by subtracting the number of documented aliens from the number of foreign-born residents based on information collected by the Census Bureau. See *id.* at 1–2. For years between census collections, estimates are made by extrapolation based on recent immigration patterns. See *id.* at 6–7. Undocumented aliens who do not complete a Census form are not included in the estimate.

4. Cf. DREAM ACT PORTAL, <http://dreamact.info/> (last visited Nov. 23, 2012) (discussing one proposed reform to immigration law). The Dream Act (“Act”) would have given legal immigration status to children who were brought into the country by their parents, so long as they completed certain education or military service requirements because the children were theoretically incapable of making the choice for themselves. See *id.* The Act, to the frustration of many, did not make it past the Senate. See Elise Foley, *DREAM Act Vote Fails in Senate*, HUFFINGTON POST (Dec. 18, 2010, 11:31 AM), <http://www.huffingtonpost.com/2010/12/18/dream-act-vote-senaten798631.html>. In the summer of 2013, President Obama initiated an administrative substitute for the Dream Act, generally referred to as “DACA” (Deferred Action for Childhood Arrivals) which provides certain young undocumented aliens with temporary deferred action and work authorization. See *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGR. SERVICES, [available at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD](http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD).

of illegal immigration, some states have enacted their own immigration laws.⁵ Additionally, many state laws that purport to regulate areas such as housing or employment are effectively immigration regulations.⁶ Arizona passed laws of this sort, one of which addresses employment of unauthorized aliens, thus targeting a primary incentive for immigration.⁷ This law was recently the subject of litigation in the United States Supreme Court.⁸

This Note argues that the Supreme Court, in *Chamber of Commerce v. Whiting*,⁹ should have found that federal law pre-empts the Arizona law, and that the Court's holding will have serious consequences.¹⁰ Section II of this Note provides an overview of *Whiting*, and the relevant state and federal statutes considered therein.¹¹ Section III discusses principles of the pre-emption doctrine relevant to *Whiting*.¹² This discussion begins with an overview of the federal power to legislate in the area of immigration, and an introduction to the germane principles of pre-emption.¹³ The discussion then examines the progression of the pre-emption doctrine, including its application in the specific areas of immigration law and employment authorization.¹⁴ Finally, Section IV addresses the practical concerns resulting from *Whiting*.

II. OVERVIEW OF *CHAMBER OF COMMERCE v. WHITING*

In *Whiting*, the United States Supreme Court analyzed potential pre-emption of Arizona law by two federal statutes, the Immigration Reform and Control Act (IRCA) and the Illegal Immigration Reform and Immigrant

5. See generally NAT'L IMMIGRATION FORUM, DEFICITS, LAWSUITS, DIMINISHED PUBLIC SAFETY: YOUR STATE CAN'T AFFORD S.B. 1070 (2010), available at <http://www.immigrationforum.org/images/uploads/2010/SB1070Report.pdf> (highlighting proposed or discussed state laws).

6. See, e.g., *Department of Justice Challenges Alabama Immigration Law*, U.S. DEP'T OF JUSTICE (Aug. 1, 2011), <http://www.justice.gov/opa/pr/2011/August/11-ag-993.html> (noting Alabama law is "designed to affect virtually every aspect of an unauthorized immigrant's daily life"). The Alabama law regulates things such as housing, transportation, right to contract, schooling, and other areas. See *id.* Alabama and other states are regulating these areas with the specific aim of targeting undocumented aliens. See *id.*

7. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1975–76 (2011) (discussing Arizona law that affects employment of unauthorized aliens).

8. See *id.* at 1977 (deciding whether federal law pre-empts Arizona law).

9. 131 S. Ct. 1968 (2011).

10. Cf. 16A AM. JUR. 2D *Constitutional Law* § 234 (2d ed. 2011) (discussing pre-emption principles). Implied pre-emption principles, applied traditionally, provide strong support for invalidation of the Arizona law. See *id.*

11. For a discussion of statutes considered in *Whiting* and the court's rationale for its holding, see *infra* notes 17–46 and accompanying text.

12. For a discussion of the pre-emption doctrine, see *infra* notes 47–173 and accompanying text.

13. For a discussion of the federal government's power to legislate immigration and an introduction of pre-emption principles, see *infra* notes 47–73 and accompanying text.

14. For a discussion of the progression of pre-emption case law, including the application of pre-emption principles in immigration law and employment authorization, see *infra* notes 74–173 and accompanying text.

Responsibility Act (IIRIRA).¹⁵ This section summarizes the relevant state and federal laws, the Court's reasoning, and its ultimate holdings on the pre-emption issue.¹⁶

IRCA requires all employers to verify employment authorization for all new hires.¹⁷ Specifically, the law outlines the required verification procedure and imposes sanctions for knowingly hiring an unauthorized alien.¹⁸ IRCA also contains a pre-emption provision which states that, "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."¹⁹ The language allowing state licensing laws—a saving clause—carves out a small class of state law from pre-emption.²⁰

IIRIRA authorized the creation of E-Verify as an "experimental complement[] to the I-9 process" of document review.²¹ E-verify is an electronic system for employers to verify employment authorization of workers.²² IIRIRA announces that use of E-Verify is voluntary and prohibits the Secretary of Homeland Security from mandating its use for anyone outside of the federal government.²³ Use of E-Verify for employment authorization verification, however, creates a rebuttable presumption of compliance with IRCA.²⁴

Arizona law requires that all employers use E-Verify.²⁵ The attorney general or county attorney is required to request information from the federal government regarding the immigration status of a worker upon complaint, by

15. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1974–75 (2011) (discussing and outlining relevant portions of IRCA and IIRIRA).

16. For further discussion of the applicable statutes and pre-emption case law, see *infra* notes 17–46 and accompanying text.

17. See 8 U.S.C. § 1324a(a), (b), (e)–(f) (2006) (explaining required procedure for employment authorization verification and sanctions for non-compliance).

18. See *id.* (describing compliance procedures and stating civil and criminal penalties). The employer is required to review documents of employment applicants that establish their work authorization and identification. See § 1324(b). Also, it states that it is a crime to "hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." § 1324(a)(1)(A). Civil sanctions for knowingly hiring, recruiting, or referring unauthorized aliens for employment range from a minimum \$250 fine for a first offense to a maximum \$10,000 fine in the case of multiple previous violations. See § 1324a(e)(4)(A). Criminal sanctions include a maximum \$3,000 fine and six months imprisonment for a pattern of violations. See § 1324a(f)(1).

19. § 1324a(h)(2).

20. See *Whiting*, 131 S. Ct. at 1977–78 (discussing saving clause and Arizona law).

21. See *id.* at 1975 (discussing E-Verify and other programs created by IIRIRA).

22. See Naomi Barrowclough, Note, *E-Verify: Long-Awaited "Magic Bullet" or Weak Attempt to Substitute Technology for Comprehensive Reform?*, 62 RUTGERS L. REV. 791, 793 (2010) (explaining E-Verify).

23. See *Whiting*, 131 S. Ct. at 1975 (explaining limitation on Secretary's authority to require use of E-Verify). The Secretary of Homeland Security is only permitted to require the use of E-Verify by individuals or entities within the federal government. See *id.*

24. See *id.* (explaining rebuttable presumption created by use of E-Verify).

25. See *id.* at 1976–77 (laying out Arizona law's requirements).

any person, that a worker is unauthorized.²⁶ Upon a determination that an employer has knowingly hired an unauthorized alien, the law imposes various sanctions ranging from mandatory termination of the employee, mandatory filing of quarterly reports for all new hires, and a ten-day suspension of the employer's business license for a first time offense, to permanent revocation of all business licenses for a second offense.²⁷

Several business groups and civil rights organizations, led by the Chamber of Commerce ("Chamber"), challenged the Arizona law on several grounds.²⁸ First, the Chamber argued that the Arizona law is explicitly pre-empted because it is not a legitimate licensing law; it does not serve to grant licenses, but only to suspend or revoke them.²⁹ The Court rejected this argument as having "no basis in law, fact, or logic."³⁰ The Court also refused to consider the

26. *See id.* at 1976 (explaining relevant portions of Arizona law). Interestingly, the Arizona law prohibits state and local officials from making final determinations about work authorization on their own, yet there is no mechanism whereby they can obtain information regarding the work authorization of noncitizens. *See id.* The Arizona law directs state and local officials to obtain information regarding immigration status pursuant to Section 1373(c). *See id.* Immigration status, however, is not the same thing as work authorization; many categories of noncitizens legally residing within the country are not authorized to work. *See generally* Classes of Aliens Authorized to Accept Employment, 8 C.F.R. § 274a.12 (2011). Thus, the Arizona law explicitly prohibits, yet implicitly requires, state and local officers to make final determinations. *See Whiting*, 131 S. Ct. at 1976 ("The Arizona law expressly prohibits state, county, or local officials from attempting to 'independently make a final determination on whether an alien is authorized to work in the United States.'" (quoting ARIZ. REV. STAT. ANN. § 23-212 (2010))). The Arizona law also directs state courts to only consider the federal government's determination of, presumably, immigration status. *See id.* Thus, state judges, like state and local officers, are left to navigate federal immigration law. *See id.*

27. *See id.* (explaining sanctions imposed by Arizona law). It should be noted that, because state courts will be hearing charges brought for alleged violations of Arizona law, the state courts will also be determining whether the employment of an unauthorized alien was done "knowingly," which is a different determination than under federal law due to the mandatory use of E-Verify. *See id.* at 1976-77 (acknowledging that state courts hear complaints for violations of Arizona law). If an employer fails to use E-Verify, yet followed the I-9 procedure required by federal law, it would still not be able to effectively challenge a charge of knowingly hiring an unauthorized alien. *See id.* It could be argued that any lack of knowledge that a worker is unauthorized was due to the employer's failure to use E-Verify as required by Arizona law. *See id.* This also means that actions taken which would provide a defense under federal law would be insufficient under Arizona law. *See id.* (ignoring heightened standards under state law).

28. *See* Julie Myers Wood, *Supreme Court Affirms a State Immigration Law—What it Means*, 2011 EMERGING ISSUES 5686, 5687 (2011) (noting identity of plaintiffs in *Whiting*).

29. *See Whiting*, 131 S. Ct. at 1979 (explaining and rejecting Chamber's argument regarding licensing laws). The Chamber's argument seemingly asserted that a licensing law is more comprehensive than a law that merely prescribes licensing sanctions. *See id.* This may also indicate that Arizona's law is different in substance and purpose than the ordinary state function of licensing and is actually an immigration regulation in disguise. *Cf. id.* (finding Arizona law within scope of savings clause). This raises the question of why a state may act in a way that is normally prohibited simply by calling its actions by a different name. *Cf. id.* (finding Chamber's argument without merit).

30. *See id.* at 1977-79 (considering whether Arizona statute is licensing law). The Court noted that Arizona's definition of "license" is nearly identical to the definition of that

Chamber's argument that the saving clause should be read narrowly in light of the history of its enactment, stating that the plain text of IRCA does not compel the suggested reading.³¹

The Chamber next argued that the Arizona licensing law is impliedly pre-empted on field pre-emption grounds.³² In other words, state law is ousted from the field of law because federal legislation comprehensively occupies the same field.³³ The Court rejected the Chamber's argument, asserting that because the Arizona law falls within the saving clause, it cannot offend any congressional intention to oust state law.³⁴

The Chamber also argued that the Arizona law is pre-empted because it upsets the balance struck by Congress among competing goals of "detering unauthorized alien employment, avoiding burdens on employers, protecting employee privacy, and guarding against employment discrimination."³⁵ The Court asserted that licensing is not a traditionally federal area of regulation, and

term within the Administrative Procedure Act. *See id.* at 1978. It also found Arizona's inclusion of "documents such as articles of incorporation, certificates of partnership, and grants of authority to foreign companies," was acceptable. *Id.* Thus, the Court concluded that, "Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted." *Id.* at 1981.

31. *See id.* at 1979 (explaining and rejecting Chamber's argument for narrow reading of saving clause). The Chamber argued that Congress's concurrent repeal of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) and enactment of IRCA support a narrow reading. *See id.* Specifically, the Chamber argued that state licensing sanctions should only be available after a federal adjudication. *See id.* Prior to IRCA, AWPA prohibited hiring unauthorized workers and outlined adjudicatory procedures for violations. *See id.* When Congress enacted IRCA and repealed AWPA, adjudications of employment of unauthorized workers for agricultural work, which can result in suspension or revocation of labor certification, rested on a prior finding of an IRCA violation for the first time. *See id.*

The Court, however, found this to be merely evidence that Congress "eliminated that potential redundancy." *Id.* Although the Chamber argued that the elimination of a redundancy is further evidence that Congress intended uniformity in the law, rather than separate laws for each state, the Court again reverted to the plain text of the statute and the fact that the Arizona law claims to rely on federal determinations. *See id.* at 1979-80. ("[I]t is worth recalling that the Arizona licensing law is based exclusively on the federal prohibition—a court reviewing a complaint under the Arizona law may 'consider only the federal government's determination' with respect to 'whether an employee is an unauthorized alien.'" (quoting ARIZ. REV. STAT. ANN. § 23-212(H) (2010))). The only federal determinations provided to the state, however, are those regarding immigration status as opposed to work authorization. *See id.* at 1992 (Breyer, J., dissenting).

32. *See id.* at 1981 (majority opinion) (noting Chamber's field pre-emption argument). The Chamber argued that the Arizona law necessarily conflicted with federal law because Congress had intended its legislation to be exclusive. *See id.* (citing Reply Brief for Petitioners at *1, Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011) (No. 09-115), 2010 WL 4803135, at *1).

33. *See Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (explaining field pre-emption).

34. *See Whiting*, 131 S. Ct. at 1981 ("Arizona's procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws.").

35. *Id.* at 1983.

denied that state law would impede federal programs.³⁶ The Court also downplayed the pressure placed on employers and the corresponding potential for discrimination.³⁷ Finally, the Court stated that, “[i]mplied preemption analysis does not justify a ‘freewheeling judicial inquiry into whether a state statute is in tension with federal objectives,’” because “‘it is Congress rather than the courts that preempts state law.’”³⁸

Finally, the Court rejected the Chamber’s argument that IIRIRA impliedly pre-empts the Arizona law’s E-Verify mandate.³⁹ The Court concluded that federal law “limits what the Secretary of Homeland Security may do—nothing more.”⁴⁰ Sidestepping congressional intent, the Court instead pointed to President George W. Bush’s expression of support for the Arizona law.⁴¹ The Court did reference Congress’s objectives in developing E-Verify, but failed to

36. *See id.* (distinguishing from prior cases). The Court distinguished all of the cases cited by the Chamber regarding state laws that upset the balance struck by federal law. *See id.* The Court argued that all of these cases involved legislation of matters that are “uniquely federal.” *See id.* In this case, the Court explained, licensing laws are not a traditionally federal concern. *See id.* However, the Court failed to discuss that the Arizona law is a licensing sanction for immigration law violations and is intended to have clear effects on immigration and employment of noncitizens. *See generally id.*

37. *See id.* at 1984 (rejecting argument that discrimination will increase from Arizona law). Justice Breyer and the Chamber argued that businesses are likely to discriminate in their hiring practices rather than risk license suspension or revocation under the Arizona law. *See id.* The Court argued that such a result is unlikely because license suspension and revocation are sanctions only for knowing violations, and proclaimed that “[a]n employer acting in good faith need have no fear of the sanctions.” *Id.* The Court also asserted that the Arizona law will not displace IRCA’s anti-discrimination provisions. *See id.* However, Congress foresaw the potential for discrimination with the I-9 process alone, and thus contemporaneously prohibited discrimination in hiring practices based on national origin or citizenship status. *See* Andrew P. Karabetsos, *Immigration-Related Employment Discrimination Under IRCA*, 82 ILL. B.J. 32, 32 (1994) (explaining Congress’s purpose for prohibition of discrimination in IRCA). Adding further verification requirements and further sanctions under state law can only increase the potential for discrimination. *See generally id.*

38. *Id.* at 1985 (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).

39. *See id.* at 1985–86 (rejecting Chamber’s argument that Arizona law requiring E-Verify use is pre-empted by federal law). The Chamber did not challenge Arizona’s E-Verify mandate on express pre-emption grounds because IIRIRA does not contain a pre-emption provision. *See id.* at 1985 (noting that IIRIRA “contains no language circumscribing state action”).

40. *Id.*

41. *See id.* (discussing Executive Order 13465). President George W. Bush, in a 2008 Executive Order, required all federal contractors to use E-Verify and cited the Arizona law as support for the legitimacy of the Order. *See id.* He explained, when attacked on the grounds that E-Verify could not be made mandatory for anyone outside of the federal government, that he was acting in the same permissible way as Arizona by requiring E-Verify use because IIRIRA only limits the authority of the Secretary of DHS to mandate E-Verify. *See id.* The Court did not discuss the significance of the fact that the Executive Order was also challenged, and that it was in this setting that the President spoke supportively of the Arizona law. *See generally id.* (ignoring that Executive Order was challenged).

address its specific objectives for making use voluntary.⁴² Thus, focusing on the broader objectives of E-Verify, the Court found state law did not undermine legislative purposes.⁴³

In rejecting the Chamber's argument that state E-Verify mandates would result in an unsustainable drain on federal resources, the Court relied on a statement by the Department of Homeland Security (DHS).⁴⁴ DHS expressed confidence that the E-Verify system could handle increased use resulting from Arizona's mandate in addition to similar existing mandates, but did not address the specific issue of federal resources or the consequences of additional state mandates.⁴⁵ In sum, the Court rejected all express and implied pre-emption arguments by the Chamber without undertaking a sincere analysis of implied pre-emption.⁴⁶

III. PRE-EMPTION DOCTRINE AND IMPLIED PRE-EMPTION: ITS HISTORY, CURRENT CONTOURS, AND APPLICATION TO IMMIGRATION LAW

This section provides an overview of the pre-emption doctrine; specifically principles of implied pre-emption.⁴⁷ First is a discussion of the federal power to regulate immigration, followed by an overview of general pre-emption principles.⁴⁸ Next is a glance at both the early and recent application of implied pre-emption principles in immigration law, particularly in the area of alien

42. *See id.* at 1986 (explaining objectives of creating E-Verify). The Court stated that, "Congress's objective in authorizing the development of E-Verify was to ensure reliability in employment authorization verification, combat counterfeiting of identity documents, and protect employee privacy." *Id.*

43. *See id.* (finding that Arizona law does not conflict with congressional objectives). The Court, after noting the purposes of creating E-Verify, proclaimed that "Arizona's requirement that employers operating within its borders use E-Verify in no way obstructs achieving those aims." *Id.*

44. *See id.* (rejecting Chamber's argument that nationwide E-Verify use would result in federal resource drains). Also, the Court cited DHS for the opinion that "the E-Verify system can accommodate the increased use that the Arizona statute and *existing* similar laws would create." *Id.* (emphasis added) (quoting Brief for the United States as Amicus Curiae Supporting Petitioners at *34, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (No. 09-115), 2010 WL 3501180). This says nothing about federal resources, nor does it predict potential results of state E-Verify mandates beyond those existing. *See generally id.*

45. *See id.* (discussing statement made by DHS).

46. *See id.* at 1981-85 (acknowledging and rejecting Chamber's implied pre-emption arguments). The Court briefly considered the Chamber's implied pre-emption arguments, citing sources such as the President and DHS as support for its conclusion. *See id.* The Court ended by stating that its analysis cannot be a "freewheeling judicial inquiry." *Id.* (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1995)).

47. For a discussion of the pre-emption doctrine, including implied pre-emption, see *infra* notes 63-73 and accompanying text.

48. For a discussion of federal power to regulate immigration, see *infra* notes 51-62 and accompanying text. Additionally, for a discussion of general pre-emption principles, see *infra* notes 63-73 and accompanying text.

employment.⁴⁹ Finally, this section attempts to show that implied pre-emption principles dictate pre-emption of Arizona law.⁵⁰

A. *Basis for Federal Power to Legislate in the Area of Immigration Law*

Under the Supremacy Clause of the Constitution, federal law pre-empts conflicting state law so long as it is made pursuant to the Constitution.⁵¹ The Supreme Court has long recognized that Congress holds plenary power to regulate immigration.⁵² Although the Supreme Court has found different bases for the federal exercise of this power over time, the Court has most recently attributed this power to the Naturalization Clause of the Constitution.⁵³ The Naturalization Clause states that Congress has the power to “establish an uniform Rule of Naturalization.”⁵⁴

As early as 1875, the Supreme Court recognized Congress’s power to legislate in the area of immigration, initially citing the Commerce Clause as the basis for such power.⁵⁵ In several other cases, the Court has stated that the

49. For a discussion of implied pre-emption over time and the application of implied pre-emption principles to immigration law, including immigration law concerning employment of aliens, see *infra* notes 74–131 and accompanying text.

50. For a discussion of implied pre-emption principles dictating pre-emption of Arizona law, see *infra* notes 150–73 and accompanying text.

51. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”)

52. See Gary Endelman & Cynthia Juarez Lange, *State Immigration Legislation and the Preemption Doctrine*, in 41st ANNUAL IMMIGRATION & NATURALIZATION INST. 123, 127 (Austin T. Fragomen, Jr. & Cynthia Juarez Lange eds., 2008) (noting that Supreme Court has long recognized federal power to regulate immigration); see also Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 795 (2008) (recognizing that for over 100 years, immigration law governing admission and removal has been accepted as virtually exclusive federal power).

53. See *INS v. Chadha*, 462 U.S. 919, 940 (1983) (finding federal power to regulate immigration based upon Naturalization Clause). The primary issue in *Chadha* involved the constitutionality of legislative vetoes. See *id.* at 923. In contrast to the way legislative vetoes were usually exercised—to override administrative regulations—the veto in this case would have overturned an administrative adjudication. See *id.*

The issue of federal power to regulate immigration was only raised as part of the Court’s response to the government’s assertion that *Chadha*’s claim was a non-justiciable political question. See *id.* at 940. In the course of rejecting that assertion, the Court stated that, “[t]he plenary authority of Congress over aliens under Art. I, §8, cl. 4 is not open to question.” *Id.* Thus, because the basis of the federal power to regulate immigration was not a primary issue of the case, it is arguable that the Court did not thoroughly consider whether such power is in fact derived from the Naturalization Clause. *Cf. id.*

54. U.S. CONST. art. I, § 8, cl. 4.

55. See *Edey v. Robertson (Head Money Cases)*, 112 U.S. 580, 600 (1884) (declaring Congress has “the power to pass a law regulating immigration as a part of the commerce of this country with foreign nations . . .”); *Henderson v. Mayor of New York*, 92 U.S. 259, 270 (1875) (finding federal power to regulate immigration as derivative of Commerce Clause powers). In *Henderson*, the Court struck down a New York statute requiring a tax to be paid for each immigrant arriving in any New York port. See *Henderson*, 92 U.S. at 260–61. The

power is grounded in authority inherent in independence and sovereignty.⁵⁶ It has also specifically linked the authority to inherent foreign affairs powers.⁵⁷

Court explained that regulation of navigation is included in the power to regulate foreign commerce because navigation is “the principal means by which foreign intercourse is effected.” *Id.* at 270. The Court further asserted that the power to regulate navigation and, more specifically, the “admission of vessels” included the power to regulate “admission of their cargo or their passengers.” *Id.* (quoting *Gibbons v. Ogden*, 22 U.S. 1, 190 (1824)). The Court also emphasized the influence on commerce by immigrants due to their labor and the wealth they bring with them. *See id.* Thus, the Court concluded that the state law was invalid for its encroachment upon the federal legislature’s power to regulate commerce. *See id.* The Court summed up its conclusion by stating: “As already indicated, the provisions of the Constitution of the United States, on which the principal reliance is placed to make void the statute of New York, is that which gives to Congress the power ‘to regulate commerce with foreign nations.’” *Id.* (quoting U.S. CONST. art. I, § 8, cl. 3). Prior to 1875—the year *Henderson* was decided—the federal government had mostly left the area of immigration law alone, thus states were able to pass their own legislation. *See generally* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993) (describing status of immigration law before 1875). It makes sense that 1875 marked the beginning of the Court’s recognition of federal power to regulate immigration because that year also signaled the beginning of the federal government’s exercise of its power to regulate immigration. *See id.* at 1896–99.

56. *See Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 603–04 (1889) (finding federal power to regulate immigration grounded in inherent powers of sovereignty); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (finding power to regulate immigration as part of inherent power to conduct foreign relations). The Court has concluded in various cases that power to regulate immigration is based on inherent powers of sovereignty or foreign affairs. *See, e.g., Chinese Exclusion Case*, 130 U.S. at 603–04. In the *Chinese Exclusion Case*, the Court relied on and explained inherent powers of sovereignty: “Jurisdiction over its own territory to that extent is an incident of every independent nation. It is part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.” *Id.* The Court further listed inherent powers of sovereignty, which included “[t]he powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republic governments to the states, and admit subjects of other nations to citizenship.” *Id.* at 604.

In *Chy Lung*, the Court emphasized specifically the inherent sovereignty power to conduct foreign affairs, asserting that regulation of immigration is included within that power. *See Chy Lung*, 92 U.S. at 280. To illustrate the risks of removing this power from the exclusive exercise of the federal government, the Court asserted that “[i]f it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.” *Id.* at 280. Thus, in order to effectively manage foreign affairs, the federal government must also have exclusive control over immigration law. *Cf. id.* (asserting that federal government has inherent power over all foreign affairs).

57. *See Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941) (finding federal power to regulate immigration as derivative of foreign affairs powers as evidenced by precedent and original intent); *Chinese Exclusion Case*, 130 U.S. at 604 (emphasizing and describing inherent powers of sovereignty); *Chy Lung*, 92 U.S. at 279–80 (finding federal power to regulate immigration as part of inherent foreign affairs powers). In one of many such holdings throughout the *Chinese Exclusion Case*, the Court noted that “the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.” *Chinese Exclusion Case*, 130 U.S. at 604. Thus, for concerns that traditionally belong to the sovereign, especially in those matters necessary to the independence and safety of the entire country, the federal government necessarily has control. *Cf. id.* (asserting that federal

Most recently, in *INS v. Chadha*,⁵⁸ the Court stated that federal power to regulate immigration is grounded in the Naturalization Clause.⁵⁹ In that case, noncitizen Chadha overstayed his visa and was subsequently subject to removal proceedings.⁶⁰ Because he never sought naturalization, the Supreme Court arguably extended the Naturalization Clause beyond its plain text to matters of

government has inherent foreign affairs power). In *Chy Lung*, a California statute gave the state's Commissioner of Immigration authority to determine if an arriving immigrant was:

[L]unatic, idiotic, deaf, dumb, blind, crippled, or infirm, and is not accompanied by relatives who are able and willing to support him, or is likely to become a public charge, or has been a pauper in any other country, or is from sickness or disease (existing either at the time of sailing from the port of departure or at the time of his arrival in the State) a public charge, or likely soon to become so, or is a convicted criminal, or a lewd or debauched woman.

Chy Lung, 92 U.S. at 277. If an arriving immigrant fell into one of these categories as determined by the Commissioner, the immigrant would not be permitted to leave the vessel on which she arrived unless the master, owner, or consignee gave a bond to ensure the immigrant would not create costs for the state. *See id.* Additionally, the Commissioner was allowed to charge the master, owner, or consignee of the vessel various other fees. *See id.* at 277–78. The Court described the possible dangers of allowing states to regulate a subject, which has great potential for creating controversy with other nations, especially when a foreign nation's citizens are found to fall into categories of “lunatic, idiotic, deaf, dumb, blind, crippled, or infirm,” or other undesirable categorizations. *See id.* at 277. In considering such a possibility, the Court posed the question:

[H]as the Constitution . . . done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?

Id. at 280. The Court concluded that “[t]he Constitution of the United States is no such instrument.” *Id.* The Court also determined that the federal government must have the power to regulate immigration for “[i]f it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.” *Id.* In *Hines*, the Court found that a *Pennsylvania* alien registration law was pre-empted by a *federal* alien registration law. *Hines*, 312 U.S. at 62–63. The Court relied on precedent and the Federalist papers:

That the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution was pointed out by the authors of *The Federalist* in 1787, and has since been given continuous recognition by this Court. When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute . . .

Id. (footnotes omitted). Thus, the Court concluded that state law must be pre-empted because of “the supremacy of the national power in the general field of foreign affairs, including . . . immigration.” *Id.* at 62.

58. 462 U.S. 919 (1983).

59. *See id.* at 940 (“The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question . . .”)

60. *See id.* at 923–24 (explaining background facts leading up to review by Supreme Court). Chadha came to the United States in 1966 with a nonimmigrant student visa, which expired in 1972. *See id.* at 923. In 1973, the INS commenced removal proceedings against Chadha. *See id.*

immigration law in general.⁶¹ Regardless of the foundation attributed to federal power over immigration law, the Court has consistently recognized that Congress possesses such power.⁶²

B. *General Principles of Pre-emption*

Federal legislation may pre-empt state legislation either expressly or impliedly.⁶³ Implied pre-emption is further divided into two categories: field pre-emption and implied conflict pre-emption.⁶⁴ These pre-emption principles apply to conflicts between state and federal law in all areas where federal power is legitimately exercised, including immigration law.⁶⁵

Express pre-emption occurs when Congress chooses to “pre-empt state law by so stating in express terms.”⁶⁶ All other forms of pre-emption fall within the ambit of implied pre-emption.⁶⁷ Field pre-emption occurs when congressional intent to pre-empt all state law in a particular area is “inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation.”⁶⁸

Implied conflict pre-emption can occur in two different ways.⁶⁹ First, it can occur when “compliance with both federal and state regulations is a physical impossibility.”⁷⁰ Second, implied conflict pre-emption can occur when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁷¹

61. *See id.* at 923–24 (explaining Chadha’s immigration status leading up to review by Supreme Court). The facts of the case do not indicate that Chadha ever sought to adjust his status to that of a lawful permanent resident, nor did he seek to extend the duration of his visa. *See id.* During removal proceedings, Chadha sought to suspend deportation on grounds of extreme hardship that would result from removal, but there was no indication in the record that Chadha had any intention of applying for naturalization. *See id.*

62. *See Chinese Exclusion Case*, 130 U.S. at 603–04 (asserting federal government has control over immigration matters); *Head Money Cases*, 112 U.S. 580, 600 (1884) (same); *Henderson v. Mayor of New York*, 92 U.S. 259, 270 (1875) (same); *Chy Lung*, 92 U.S. at 279–80 (same).

63. *See* 16A AM.JUR. 2D *Constitutional Law* § 234 (2d ed. (2011) (discussing pre-emption principles).

64. *See id.* (discussing pre-emption principles).

65. *See* U.S. CONST. art. VI, cl. 2 (announcing supremacy of federal law over state law); *see also Chadha*, 462 U.S. at 940 (“The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question . . .”).

66. *Hillsborough Cnty. v. Automated Med. Labs.*, 471 U.S. 707, 713 (1985).

67. *See generally* Gregory M. Dickinson, *An Empirical Study of Obstacle Preemption in the Supreme Court*, 89 NEB. L. REV. 682, 684–85 (2011) (outlining various types of pre-emption).

68. *Automated Med.*, 471 U.S. at 713 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

69. *See id.* (explaining both physical impossibility and obstacle versions of implied conflict pre-emption).

70. *Id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)).

71. *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Any argument that the Arizona law is expressly pre-empted would likely result in a battle over different definitions of the word "license."⁷² Thus, because the strongest argument that the Arizona law is pre-empted by IRCA and IIRIRA is grounded in implied pre-emption, the following discussion will focus on this type of pre-emption.⁷³

C. *Implied Pre-emption Cases in General*

The Supreme Court has developed and applied the pre-emption doctrine for over 150 years.⁷⁴ Accordingly, a wealth of case law exists regarding the doctrine, within which implied conflict pre-emption plays a major role, despite the *Whiting* Court's quick dismissal of any serious inquiry of this type.⁷⁵ This

72. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1977–79 (2011) (considering intended meaning of "license" in IRCA's saving clause in relation to scope of Arizona law). The express pre-emption issue results in a battle of definitions, each of which provide varying levels of support for the Arizona law. Compare *id.*, with *Whiting*, 131 S. Ct. at 1987–88 (Breyer, J., dissenting) (arguing for two different interpretations of word "license"). The Court determined that Arizona's law is a licensing law because it fits within the meaning of that term as defined by various sources. See *id.* at 1977–78 (majority opinion).

73. See *id.* (considering intended meaning of "license"). The Chamber's express pre-emption argument essentially asserts that Congress was only referring to a narrow class of licenses, as reflected by historical context. See *id.* at 1979. This argument, however, fails to explain why, if Congress had intended this narrow meaning of a word with many legal connotations, it did not make that clear in the text of the statute. Cf. *id.* at 1988 (Breyer, J., dissenting) ("But neither dictionary definitions nor the use of the word 'license' in an unrelated statute can demonstrate what scope Congress intended the word 'licensing' to have as it used that word in this federal statute.").

74. See, e.g., *Tarble's Case*, 80 U.S. 397, 406–07 (1871) (explaining relation between state and federal law and supremacy of federal law in cases of conflict); see also *Prigg v. Pennsylvania*, 41 U.S. 539, 617–18 (1842) (asserting that state laws cannot intrude into area of law controlled by federal law). In *Tarble's Case*, the Court explained the relation between state and federal law, and the way pre-emption occurs:

The two governments in each State stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments.

Tarble's Case, 80 U.S. at 406.

75. Compare *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (undertaking implied pre-emption analysis), with *Whiting*, 131 S. Ct. at 1985 (expressing reluctance to inquire into congressional intent). Referencing its longstanding practice of undertaking an analysis of conflicting state and federal laws to determine whether the state law is impliedly pre-empted, the *Lohr* Court, concluded that "our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment . . . that '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." *Lohr*, 518 U.S. at 485 (alteration in original) (quoting *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963)). In *Whiting*, by contrast, the Court refused to conduct what it called a "'freewheeling judicial inquiry'" into the congressional intent or legislative purpose. *Whiting*, 131 S. Ct. at 1985. Instead, the *Whiting* Court said it is Congress's job to pre-empt state law. See *id.* The Court, however, did not explain how Congress could pre-empt state laws that it may not even be able to anticipate, especially decades into the future, if courts hesitate to examine legislative purpose. See generally *id.*

section will discuss relevant case law to demonstrate that the Court has frequently been willing to employ a much more rigorous inquiry into implied pre-emption than that used by the *Whiting* Court.⁷⁶

1. *Early Use of Implied Pre-emption*

The Supreme Court has long recognized implied pre-emption, developing and applying the doctrine over many years.⁷⁷ One early case, *Houston v. Moore*⁷⁸, clearly establishes pre-emption as a mechanism by which federal law trumps state law.⁷⁹ *Houston* dealt with a Pennsylvania law that imposed penalties for failing to report when called for active military duty, and laid out a procedure for state adjudication.⁸⁰ The state enacted this statutory scheme despite concurrent penalties and procedures prescribed by federal law.⁸¹ The Court found that the power to govern the militia, once it has been called forth, is an exclusively federal power.⁸² Moreover, the Court noted that—in areas where federal and state governments both have power to legislate—once Congress has spoken, state law must give way.⁸³ Finally, the Court recognized that even if state legislation is not ousted from the area of law, if it is “practically inconsistent” with federal law, it “must yield to the supremacy of the laws of the United States.”⁸⁴

76. For a further discussion of the Supreme Court’s application of implied pre-emption, see *infra* notes 77–123 and accompanying text.

77. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (applying implied pre-emption principles); *United States v. Locke*, 529 U.S. 89 (2000); *Lohr*, 518 U.S. 470; *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504 (1992); *Hillsborough Cnty. v. Automated Med. Labs.*, 471 U.S. 707 (1985); *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141 (1982); *DeCanas v. Bica*, 424 U.S. 351 (1976), *superseded by statute*, 8 U.S.C. § 1324a (2006), *as recognized in Whiting*, 131 S. Ct. 1968 (2011); *Retail Clerks*, 375 U.S. 96; *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597 (1915); *S. Ry. Co. v. R.R. Comm’n of Indiana*, 236 U.S. 439 (1915); *Houston v. Moore*, 18 U.S. 1 (1820).

78. 18 U.S. 1 (1820).

79. See *id.* at 33 (opinion of Johnson, J.) (“This Court can relieve him only upon the supposition that the State law under which he has been fined is inconsistent with some right secured to him, or secured to the United States, under the Constitution.”).

80. See *id.* at 2–3 (explaining Pennsylvania law).

81. See *id.* (explaining provisions of state law). The Pennsylvania law imposed its own sanctions and procedure for adjudication of violations, on top of federal law governing the same issue. See *id.*

82. See *id.* at 5 (explaining exclusively federal power to govern militia once called forth by national government).

83. See *id.* (explaining that exclusion of state law is necessary once federal legislation is passed). This type of pre-emption is essentially field pre-emption, in that state law is ousted from an area that federal law dominates, even though state law could exist in that area absent federal legislation. See *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (explaining various types of pre-emption).

84. See *Houston*, 18 U.S. at 5–6 (explaining that state law must give way where inconsistent with federal law). Although the Court did not identify the type of pre-emption considered, the description is consistent with implied conflict pre-emption. See *Automated*

2. *Persisting Use of Implied Pre-emption in More Recent Years*

The Supreme Court has continued to rely on implied pre-emption, affirming that its validity has not faded over time.⁸⁵ As recently as 1996, in *Medtronic, Inc. v. Lohr*,⁸⁶ the Court expressed strong support for implied pre-emption principles and analysis of legislative purpose.⁸⁷ The Court explained, “our analysis of the scope of the statute’s pre-emption is guided by our oft-repeated comment . . . that ‘[t]he purpose of Congress is the ultimate touchstone’ in every pre-emption case.”⁸⁸ Elaborating further, the Court explained that, “any understanding of the scope of a pre-emption statute must rest primarily on ‘a fair understanding of congressional purpose.’”⁸⁹

Even more recently, in *Geier v. American Honda Motor Co.*,⁹⁰ the Court discussed pre-emption principles as they applied to a federal law similar in relevant respects to the federal laws considered in *Whiting*—IRCA and IIRIRA.⁹¹ First, the federal law in *Geier* resembled IRCA in that both

Med., 471 U.S. at 713 (explaining various types of pre-emption). Although the Court does not explain the meaning of “practically inconsistent,” it arguably encompasses the Supreme Court’s modern categories of “impossibility” and “obstacle” pre-emption, both of which create inconsistencies between state and federal law as a practical matter. For a further discussion of implied pre-emption, see notes 79–125.

85. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (undertaking rigorous implied pre-emption analysis).

86. 518 U.S. 470 (1996).

87. See *id.* at 485–86 (expressing support for investigation of Congress’s purpose for legislation as part of pre-emption analysis). The Court explained that legislative purpose can be discerned from the text of the statute, the “statutory framework,” the “structure and purpose of the statute as a whole,” and a “reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.” *Id.* at 486. The *Whiting* Court arguably referred to such an analysis when it expressed disapproval of “freewheeling judicial inquir[ies],” into Congress’s objectives. See *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968, 1985 (2011).

88. *Lohr*, 418 U.S. at 485 (quoting *Retail Clerks v. Shermerhorn*, 375 U.S. 96, 103 (1963) (alteration in original)). The *Lohr* Court considered whether a federal statute regarding safety requirements for medical devices pre-empted state negligence law. See *id.* at 474. After analyzing the legislative purpose and congressional intent, the Court’s findings led it to conclude that the state common law was not pre-empted. See *id.* at 503. This case also demonstrates that implied pre-emption analyses will not always lead to invalidation of state law. See *id.* (finding state law not pre-empted).

89. *Id.* at 485–86 (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 530 (1992)).

90. 529 U.S. 861 (2000).

91. See *id.* at 867–68 (discussing federal regulation and pre-emption provision). The pre-emption provision stated:

“Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

contained pre-emption provisions.⁹² Second, each contained a saving clause encompassing the state law at issue.⁹³

After finding that the state law fell within the saving clause of the federal law—meaning that the state law was not expressly pre-empted—the *Geier* Court continued its analysis to determine whether the state law conflicted with the federal law in a way that would implicate implied pre-emption.⁹⁴ The Court concluded that, “the saving clause (like the express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.”⁹⁵ Similarly, later in the opinion, the Court again stressed that neither the existence of the pre-emption provision nor the saving clause “create[d] some kind of ‘special burden’ beyond that inherent in ordinary pre-emption principles—which ‘special burden’ would specially disfavor pre-emption here.”⁹⁶

Throughout its analysis, the *Geier* Court expressed strong support for pre-emption of state law where it conflicts with the operation or objectives of federal law, despite the existence of a saving clause.⁹⁷ In one such statement of support, the Court declared that it “has repeatedly ‘decline[d] to give broad effect to saving clauses,’” if doing so would upset the balance struck by federal law.⁹⁸ Later, the Court queried why Congress would have expected bypass of ordinary pre-emption principles despite actual conflict between federal objectives and state law.⁹⁹ The Court concluded that Congress would not have intended that result.¹⁰⁰

Id. (alteration in original) (quoting 15 U.S.C. § 1392(d) (1988)). A separate provision contained a saving clause, which stated, “[c]ompliance with a federal safety standard ‘does not exempt any person from any liability under common law.’” *Id.* at 868 (alteration in original) (quoting 15 U.S.C. § 1397(k) (1988) (repealed 1994)).

92. *See id.* at 865 (noting pre-emption provision of federal statute).

93. *See id.* at 868 (finding that state law fell within saving clause). The Court determined that the combination of the text of the pre-emption provision, which allowed for a “narrow reading that excludes common-law actions,” combined with the existence of the saving clause, supported the inference that common law tort actions were not explicitly pre-empted. *See id.* The Court concluded that, “the pre-emption clause must be so read.” *Id.*

94. *See id.* at 869 (discussing whether saving clause affects implied pre-emption inquiry). The Court considered the possibility that, although the pre-emption provision sought to ensure that state law was not automatically pre-empted, it was not intended to foreclose the possibility that a state law that actually conflicts with federal law will be upheld. *See id.*

95. *Id.*

96. *Id.* at 870.

97. *See id.* at 869–72 (discussing congressional intent as limitation on effect of saving clause). The Court argued that it would not make sense for the saving clause to preserve all state law tort actions despite their potential to undermine federal objectives. *See id.* at 870. For example, the Court explained that the pre-emption provision itself was meant to “subject the industry to a single, uniform set of federal safety standards,” which would be undermined if conflicting state law was upheld. *See id.* at 871.

98. *Id.* at 870 (alteration in original) (quoting *United States v. Locke*, 529 U.S. 89, 106–07 (2000)).

99. *See id.* at 871 (“Why, in any event, would Congress not have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake?”).

100. *See id.* at 872 (noting that disposal of ordinary pre-emption analysis due to existence of saving clause “would take from those who would enforce a federal law the very

The Court asserted that there is not a legal, but merely a terminological, difference “between ‘conflicts’ that prevent or frustrate the accomplishment of a federal objective and ‘conflicts’ that make it ‘impossible’ for private parties to comply with both state and federal law.”¹⁰¹ Thus, the Court concluded that state laws creating either type of conflict are invalid.¹⁰² The *Geier* Court asserted that this has been the Court’s practice and that it “has thus refused to read general ‘saving’ provisions to tolerate actual conflict *both* in cases involving impossibility and in ‘frustration-of-purpose’ cases.”¹⁰³

The *Geier* dissent attacked the majority with language similar to that used by the *Whiting* majority, claiming that analysis of “frustration-of-purpose” pre-emption involved an unacceptable “freewheeling judicial inquiry.”¹⁰⁴ The *Geier* dissent—like the *Whiting* majority—based its unwillingness to undertake such an inquiry on the idea that “it is Congress rather than the courts that preempts state law.”¹⁰⁵ The *Geier* majority responded to the dissent’s attack by commenting that pre-emption principles are difficult enough to apply without further complicating them by drawing new distinctions, as the dissent would have done.¹⁰⁶ Specifically, it voiced concern that such an approach would create “legal uncertainty” and associated issues.¹⁰⁷

The federal law in *Geier*, which applied to airbag installation, is also useful

ability to achieve the law’s congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect”).

101. *Id.* at 873.

102. *See id.* (concluding both types of implied pre-emption are equally relevant). The Court explained that state laws either creating impossibility or undermining federal objectives “are ‘nullified’ by the Supremacy Clause and it has [been] assumed that Congress would not want either kind of conflict.” *Id.* (citations omitted).

103. *Id.* at 874 (citations omitted).

104. *Compare id.* at 906 (Stevens, J., dissenting) (advocating narrower test for conflict pre-emption), with *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (requiring high threshold to be met for frustration-of-purpose pre-emption).

105. *Compare Whiting*, 131 S.Ct. at 1985 (2011) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992)), with *Geier*, 529 U.S. at 906 (Stevens, J., dissenting) (“[I]t is Congress [and federal agencies,] rather than the courts[,] that pre-emp[t] state law.”).

106. *See Geier*, 529 U.S. at 873 (responding to dissent’s call for imposition of special burden on party claiming conflict pre-emption where federal statute contains both pre-emption and saving clauses). The Court argued that the dissent’s approach of imposing a strong presumption against pre-emption—as opposed to applying ordinary pre-emption principles—where a state law is found to be within the saving clause of a federal law, is undesirable. *See id.* at 873–74. The Court argued that “[a] ‘special burden’ would also promise practical difficulty by further complicating well-established pre-emption principles that are already difficult to apply.” *Id.* at 873. The Court noted the various types of pre-emption to further illustrate how a “special burden” would complicate an already confusing doctrine. *Id.* The Court also noted that there are not clear lines between the two categories of implied pre-emption, but rather that they “often shade, one into the other.” *Id.* at 874.

107. *See id.* at 874 (expressing additional concerns about dissent’s approach). The Court asserted that the dissent’s “special burden” approach would result in legal uncertainty and “its inevitable systemwide costs (e.g., conflicts, delay, and expense).” *Id.* Further, it speculated that the dissent’s approach stemmed more from its dislike of implied pre-emption analysis than sound reasoning. *See id.*

for considering IIRIRA, the other federal law at issue in *Whiting*.¹⁰⁸ In *Geier*, federal law required auto manufacturers to equip their cars with “passive restraints,” which included airbags.¹⁰⁹ But the law did not specifically mandate airbags for several reasons, including safety concerns.¹¹⁰ It also did not prohibit installation of airbags on all cars, but left the choice to the manufacturer and provided them incentives for airbag installation.¹¹¹ The federal law also sought to gradually phase-in passive restraints, largely to allow for technological development and increased safety of airbags.¹¹² The Court held that state negligence law, which created liability for failure to install airbags, was pre-empted by federal law.¹¹³ It rested its conclusion on implied conflict pre-emption, asserting that state law upset the balance struck by federal law.¹¹⁴

108. Compare *Whiting*, 131 S. Ct. at 1975 (describing IIRIRA), with *Geier*, 529 U.S. at 877–79 (detailing federal law regarding airbag installation and phase-in scheme).

109. See *Geier*, 529 U.S. at 878 (describing passive restraint mechanisms as including “airbags, automatic belts, or other passive restraint technologies”).

110. See *id.* at 877–79 (explaining balance struck by federal law). The Court explained that the Department of Transportation (DOT) considered much evidence when making decisions about regulations. *Id.* at 877. For example, it was shown that airbags alone could not make up for the safety benefits of a buckled seatbelt, and that airbags posed their own dangers. See *id.* Also, airbags were much more expensive than seatbelts and other passive restraints, which would increase the price of vehicles by \$320, not including replacement costs after airbags are deployed. See *id.* at 878.

111. See *id.* at 879 (explaining lack of ceiling for any particular safety device and detailing DOT’s incentive program for airbag installation). The federal law gave car manufacturers credit for 1.5 cars with passive restraints for each 1 car installed with airbags. *Id.* The DOT did not worry that this would result in over-reliance on airbags and, in turn, neglect of other passive restraints it sought because of the “likelihood that manufacturers would install, not too many airbags too quickly, but too few or none at all[.]” *Id.* at 880.

112. See *id.* at 879 (describing phase-in process and need for development). The phase-in process began with a requirement that ten percent of cars be equipped with passive restraints, increasing over time until passive restraints would be required for all cars. See *id.* The Court determined that the phase-in system was meant to “allow more time for manufacturers to develop airbags or other, better, safer passive restraint systems. It would help develop information about the comparative effectiveness of different systems . . .” *Id.*

113. See *id.* at 881 (holding that state law is pre-empted as obstacle to federal objectives).

114. See *id.* at 864–65 (explaining grounds for holding). The Court summed up the reasoning leading to its holding:

In effect, petitioners’ tort action depends upon its claim that manufacturers had a duty to install an airbag when they manufactured the 1987 Honda Accord. Such a state law—i.e., a rule of state tort law imposing such a duty—by its terms would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors. It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought. . . . It thereby also would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed. . . . Because the rule of law for which petitioners contend would have stood “as an obstacle to the accomplishment and execution of” the important means-related federal objectives that we have just discussed, it is pre-empted.

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

IIRIRA is similar to the federal law in *Geier* in that it does not mandate an employer's use of E-Verify.¹¹⁵ Furthermore, like the federal law incentive in *Geier* for the installation of airbags, IIRIRA provides employers who use E-Verify with a rebuttable presumption of compliance with IRCA.¹¹⁶ The federal law in *Geier* mandated installation of safety devices, but left open the choice of installing seatbelts or going a step further by installing airbags.¹¹⁷ Similarly, federal immigration law mandates employment verification, but leaves open the decision of whether to use E-Verify in addition to I-9s (document inspection).¹¹⁸ Furthermore, the state law in each case sought to mandate the use of something voluntary under federal law that required further development to ensure it functioned properly.¹¹⁹ Finally, similar to the phasing-in of passive restraints in *Geier*, E-Verify is a pilot program.¹²⁰

Although the federal law in *Geier* contained an express pre-emption provision and IIRIRA does not, the *Geier* Court found that these portions of the law did not answer the pre-emption question and, thus, employed ordinary pre-emption principles.¹²¹ Hence, there should have been no difference between the principles used to assess potential pre-emption in *Whiting* and *Geier*.¹²²

115. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1975 (2011) (explaining relevant portions of IIRIRA); see also *id.* at 1996 (Breyer, J., dissenting) (highlighting various provisions of IIRIRA related to E-Verify bearing titles which include word "voluntary"). The federal statute prohibited the Secretary of Homeland Security from requiring anyone outside of the federal government to use E-Verify. See *id.* at 1975 (majority opinion). Nevertheless, it created a rebuttable presumption of compliance with IRCA for anyone who used E-Verify to verify the employment authorization of an employee. *Id.*

116. Compare *id.* at 1975 (explaining that employer who uses E-Verify may use that as rebuttable presumption against violation of IRCA), with *Geier*, 529 U.S. at 879 (noting that voluntary installation of airbags resulted in extra credit given to manufacturer under federal law).

117. See *Geier*, 529 U.S. at 878 (explaining that federal law set "performance requirement for passive restraint devices and allow[ed] manufacturers to choose among different passive restraint mechanisms . . .").

118. See *Barrowclough*, *supra* note 22, at 796–97 (explaining that use of E-Verify is voluntary and does not relieve employer of also completing I-9 forms, but creates rebuttable presumption of compliance with federal law).

119. Compare *Geier*, 529 U.S. at 879 (discussing DOT's decision not to require airbags due to concerns about their safety), with Rachel Feller, Comment, *Pre-empting State E-Verify Regulations: A Case Study of Arizona's Improper Legislation in the Field of "Immigration-Related Employment Practices"*, 84 WASH. L. REV. 289, 300–01 (2009) (discussing various flaws of E-Verify leading to inaccurate results).

120. See *Whiting*, 131 S. Ct. at 1996 (Breyer, J., dissenting) (explaining that E-Verify is pilot program and voluntary in nature).

121. See *Geier*, 529 U.S. at 869 (noting that state law fell within saving clause but finding that ordinary pre-emption principles still applied).

122. Compare *Whiting*, 131 S. Ct. at 1985 (finding federal law does not prevent states from mandating E-Verify), with *Geier*, 529 U.S. at 881 (discussing conflict between state law and federal law). The Court in *Geier* found that state law requiring across the board installation of airbags conflicted with federal law requiring only ten percent of cars to have passive restraints, among which airbags were just one choice. See *Geier*, 529 U.S. at 881. The *Geier* Court also found that the state law would undermine the phasing-in scheme created by federal law. See *id.* In *Whiting*, the Court concluded that federal law only limited the

Application of the implied pre-emption principles employed in *Geier* dictates that Arizona law is pre-empted.¹²³

D. *Implied Conflict Pre-emption Cases in the
Specific Area of Immigration Law*

The Supreme Court has made no exception for the application of pre-emption principles in the specific area of immigration law.¹²⁴ In *Hines v. Davidowitz*,¹²⁵ a Pennsylvania law imposed certain registration requirements and corresponding sanctions on immigrants for violations that did not parallel co-existing federal law.¹²⁶ In undertaking an implied pre-emption analysis, the Court explained that, “states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.”¹²⁷ Additionally, the Court explained that its task involved determining whether state law stood as an obstacle to the purposes and objectives of federal law.¹²⁸

Rather than limit its application of implied pre-emption principles due to the subject matter, the Court emphasized the exigency of such an analysis in the area of immigration law.¹²⁹ Specifically, the Court asserted that, in making a determination, “it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.”¹³⁰ Thus, ordinary pre-emption principles are fully applicable to

Secretary of Homeland Security’s ability to mandate E-Verify. *See Whiting*, 131 S. Ct. at 1985. The Court reached this conclusion despite numerous sections and subsections of IIRIRA regarding E-Verify containing the word “voluntary,” its requirement that the Secretary widely publicize the voluntary nature of E-Verify, E-Verify’s pilot program status, and reliability concerns with E-Verify. *See id.* at 1996 (Breyer, J., dissenting).

123. *Cf. Whiting*, 131 S. Ct. at 1990–92 (asserting majority’s holding is incorrect and that Congress intended to forbid activity allowed by Arizona act).

124. *See, e.g., Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941) (evaluating whether state alien registration law is impliedly pre-empted by federal alien registration law imposing different requirements and sanctions). The Court specifically endorsed field pre-emption and various types of conflict pre-emption as appropriate grounds for invalidating state laws regulating immigration. *See id.*

125. 312 U.S. 52 (1941).

126. *See id.* at 59–61 (explaining relevant details of state and federal laws). The Pennsylvania law at issue required all aliens eighteen and older to register with the Department of Labor and Industry, while the federal act required a single registration of aliens fourteen and older. *See id.*

127. *Id.* at 66–67.

128. *See id.* (discussing implied conflict pre-emption). The Court specifically stated that its task was to “determine whether, under the circumstances of this particular case, Pennsylvania’s law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *See id.*

129. *See id.* at 67–68 (emphasizing significance of issue and its potential impact on foreign relations).

130. *Id.* at 68.

immigration law.¹³¹

E. *Pre-emption of State Laws Regulating Employment of Noncitizens—From DeCanas v. Bica to Chamber of Commerce v. Whiting*

Analysis of *Whiting* is not complete without mentioning *DeCanas v. Bica*,¹³² the Supreme Court case most analogous to *Whiting* because it also dealt with the specific issue of pre-emption in the context of a state law addressing the employment of noncitizens.¹³³ This section gives a brief overview of *DeCanas*, and explains the differences between *DeCanas* and *Whiting*.¹³⁴

1. *DeCanas v. Bica and INA: A Brief Explanation*

The federal law addressed in *DeCanas* was the Immigration and Nationality Act (INA).¹³⁵ IRCA was passed ten years after *DeCanas*, thus replacing INA as the relevant federal statute in *Whiting*.¹³⁶ IRCA developed a comprehensive legislative scheme for employment authorization verification.¹³⁷ INA, by contrast, did not explicitly deal with employment of noncitizens.¹³⁸ The *DeCanas* Court found that California law was not

131. *See id.* at 66–67 (“And where the federal government . . . has enacted a complete scheme of regulation and has therein provided a standard for registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict with or interfere with, curtail or complement, the federal law . . .”).

132. 424 U.S. 351 (1976), *superseded by statute*, 8 U.S.C. § 1324a (2006), *as recognized in* Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011).

133. *See id.* at 352–53 (explaining that issue is whether California law regulating employment of unauthorized aliens is pre-empted). The California statute stated that, “[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.” *Id.* at 352 (citing CAL. LAB. CODE § 2805(c) (1971) (repealed 1988)). The Court considered whether the statute was pre-empted under either field pre-emption or implied conflict pre-emption principles. *See id.* at 352–53.

134. *See infra* notes 135–49 for a further discussion of *DeCanas* and its comparison to the Court’s decision in *Whiting*.

135. *See DeCanas*, 424 U.S. at 353 (noting relevant federal statute is INA).

136. *See* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1973–74 (2011) (explaining history leading up to enactment of IRCA). The Court explained that IRCA explicitly dealt with employment of aliens, as opposed to the INA, which did not. *See id.* Thus, the enactment of IRCA rendered *DeCanas* moot by undermining much of its reasoning. *See id.* at 1975.

137. *See id.* at 1974–75 (explaining IRCA’s system for employment authorization verification). In short, IRCA made it a crime to knowingly hire an unauthorized alien, established I-9 form method of verification, imposed civil and criminal sanctions for violations, and created a system for judicial resolution of violations. *See id.*

138. *See DeCanas*, 424 U.S. at 357–58 (finding no indication that Congress intended to oust state law regulating employment of aliens). The Court noted that neither the federal statute’s language nor the legislative history indicated that Congress intended to oust state law. *See id.* It appeared as though the federal law simply left this area untouched, its central

impliedly pre-empted by INA under field pre-emption for three reasons.¹³⁹ First, states have traditionally held broad police powers to regulate employment in order to protect workers.¹⁴⁰ Second, an exercise of this police power “must give way to paramount federal legislation.”¹⁴¹ Third, no paramount federal legislation existed because Congress had shown no more than a “peripheral concern with employment of illegal entrants.”¹⁴²

Next, the *DeCanas* Court considered whether the state law was pre-empted on implied conflict pre-emption grounds.¹⁴³ The Court, however, found that the record provided by the lower court was insufficient to determine whether the California law created an obstacle to federal objectives.¹⁴⁴ Thus, the Court

concern being “the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.” *Id.* at 359.

139. *See id.* at 356 (finding state law not pre-empted). The Court announced its holding by explaining that it could not “conclude that pre-emption is required either because ‘the nature of the . . . subject matter (regulation of employment of illegal aliens) permits no other conclusion,’ or because ‘Congress has unmistakably so ordained’ that result.” *Id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)).

140. *See id.* at 356–57 (explaining traditional police power of states in area of employment). The Court provided examples of the states’ police power over employment: “[c]hild labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen’s compensation laws” *Id.* at 356. The Court concluded that regulation of an unauthorized aliens’ employment is “certainly within the mainstream of such police power regulation.” *Id.*

In opposition to the Court’s reasoning, a few important points deserve consideration. First, the federal government, under the Occupational Safety and Health Act (OSHA) regulates occupational health and safety. *See* 29 U.S.C. §§ 651–677 (1970). Also, under the Fair Labor Standards Act (FLSA) the federal government regulates the minimum wage for any employee who, in any workweek, “engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce,” which covers most employment nationwide. *See* 29 U.S.C. § 206(a) (2012). The federal government also regulates various other aspects of employment previously left to the states. *See, e.g.,* Employee Retirement Income Security Act, 29 U.S.C. § 1144(a) (2006) (stating that ERISA supersedes any State laws that relate to employee benefit plans as defined in statute).

141. *DeCanas*, 424 U.S. at 357.

142. *See id.* at 360–61 (noting Congress expressed limited concern regarding employment of unauthorized aliens). The Court explained that Congress had only expressed “peripheral concern” regarding employment of unauthorized aliens by explicitly excluding it from a provision criminalizing harboring of undocumented aliens. *See id.* at 360. In other words, Congress made certain not to unintentionally criminalize employment of unauthorized aliens resulting from misguided statutory interpretations that might consider employment to be harboring. *See id.* This, the Court argued, only displayed a “peripheral concern,” which is not sufficient to oust state legislation. *See id.* at 360–61.

143. *See id.* at 363 (introducing issue of obstacle pre-emption). The Court explained “[t]here remains the question whether, although the INA contemplates some room for state legislation, [the California law] is nevertheless unconstitutional because it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’ in enacting the INA.” *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

144. *See id.* (finding record from lower court insufficient on issue of obstacle pre-emption because lower court had not reached that question). The Court of Appeals found that the state law was pre-empted on field pre-emption grounds, and thus had not reached the question of obstacle pre-emption. *See id.* Thus, the information required to determine the

concluded that the state law was not pre-empted, based solely on its field pre-emption analysis.¹⁴⁵

2. *Differences Between Whiting and DeCanas*

Despite dealing with pre-emption of state law regarding employment of noncitizens, *DeCanas* is not controlling because of the subsequent enactment of IRCA.¹⁴⁶ Also, *DeCanas* differed from *Whiting* in that the INA contained no pre-emption provision or saving clause.¹⁴⁷ Finally, the *DeCanas* Court did not undertake an implied conflict pre-emption analysis because the record was insufficient.¹⁴⁸ Significantly, however, the *DeCanas* Court acknowledged implied pre-emption as a legitimate category of pre-emption.¹⁴⁹

F. *What Was Congress's Intent for IRCA and IIRIRA?*

The text of IRCA and IIRIRA necessitate pre-emption of Arizona law.¹⁵⁰ IRCA establishes a detailed scheme regarding admission of immigrants and nonimmigrants, and employment eligibility for each category of noncitizen.¹⁵¹ It also sets out a detailed scheme for enforcing its employment authorization requirements.¹⁵² Immigration and Customs Enforcement (ICE) is authorized to

issue of obstacle pre-emption was lacking in the record provided to the Supreme Court. *See id.*

145. *See id.* at 365 (reversing lower court decision). The Court based its decision solely on its field pre-emption analysis, explaining that “[i]t suffices that this Court decide at this time that the Court of Appeal erred in holding that Congress in the INA precluded any state authority to regulate the employment of illegal aliens.” *Id.*

146. *See* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1974–75 (2011) (summarizing *DeCanas* and noting subsequent enactment of IRCA).

147. *See DeCanas*, 424 U.S. at 358 (noting lack of intent to preclude state regulation either from wording of federal law or legislative history).

148. *See id.* at 363 (finding record from lower court inadequate on issue of obstacle pre-emption because appellate court had not reached that question).

149. *See id.* (noting remaining question of implied pre-emption). The Court acknowledged that implied pre-emption was a possibility, but was unable to undertake such an analysis due to an inadequate lower court record. *See id.*

150. For a discussion of why the Arizona law is necessarily pre-empted, see *infra* notes 151–73.

151. *See* 8 U.S.C. § 1101(a)(15) (2012) (listing nonimmigrant categories of admission and corresponding information); *see also* Classes of Aliens Authorized to Accept Employment, 8 C.F.R. § 274a.12 (2011) (outlining work authorization for various nonimmigrant categories). Nonimmigrant categories are admitted for varying lengths of time with varying eligibility for work. *See* § 274a.12 (a)(19)–(20). Employers of those in some of the eligible categories must receive certification from the Department of Labor before employing a noncitizen. *See* § 1182 (a)(5)(A). Some authorized workers are only permitted to work for the sponsoring employer. *See* § 274a.12 (b).

152. *See* 8 U.S.C. § 1324(a) (announcing mandatory employment authorization verification process and sanctions for non-compliance).

bring charges against employers who violate the requirements of federal law.¹⁵³ IRCA leaves to the states only the power to impose licensing sanctions.¹⁵⁴ Because ICE is given the power to bring charges for violations, the text allows states to impose licensing sanctions only in response to final determinations resulting from charges initially brought by ICE.¹⁵⁵

Mandating use of E-Verify directly conflicts with the text of IIRIRA.¹⁵⁶ IIRIRA makes use of E-Verify voluntary, as explicitly noted by several headings and subheadings of the relevant provisions.¹⁵⁷ IIRIRA also instructs the Secretary of Homeland Security to “widely publicize” the fact that participation is voluntary, and prohibits the Secretary from mandating its use for anyone outside of the federal government.¹⁵⁸

Aside from the textual difficulties with finding that the Arizona law is not pre-empted, the state law also creates an obstacle to federal legislative purposes.¹⁵⁹ Courts have discerned four primary purposes that Congress intended when it enacted the IRCA.¹⁶⁰ First, stemming illegal immigration;¹⁶¹

153. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1974 (2011) (noting ICE’s authority to bring charges against violators). Under Section 1324(a), the Attorney General is required to designate an entity that will bring charges against employers who violate the federal law’s employment authorization verification requirements. See 8 U.S.C. § 1324(a). ICE is the entity selected by the Attorney General to bring charges. See *Whiting*, 131 S. Ct. at 1974.

154. See § 1324a(h)(2) (announcing pre-emption of state and local law which would impose civil or criminal sanctions “other than through licensing and similar laws”).

155. See *Whiting*, 131 S. Ct. at 2004 (Sotomayor, J., dissenting) (asserting that state licensing sanctions were intended by Congress to follow final determination of charges brought by ICE). Justice Sotomayor argued the saving clause should not be read to allow states to determine whether employer violations of IRCA have occurred because Congress has established a “specialized federal procedure” for judicial resolution of such violations. See *id.* Justice Sotomayor also noted that states lack access to the necessary information to make such determinations, and considered that to be evidence that Congress did not intend for states to adjudicate IRCA violations. See *id.* at 2003.

156. For a further discussion on why mandating the use of E-Verify is in conflict with the IIRIRA, see *infra* notes 157–58 and accompanying text.

157. See *Whiting*, 131 S. Ct. at 1996 (Breyer, J., dissenting) (noting section and subsection titles using word “voluntary”).

158. See *id.* (noting statutory instructions for Secretary of Homeland Security).

159. For a further discussion on why the state law creates an obstacle to legislative purpose, see *infra* notes 160–73.

160. See, e.g., *Collins Foods Int’l, Inc. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991); *Etuk v. Slattery*, 936 F.2d 1433, 1437 (2d Cir. 1991); *Steiben v. INS*, 932 F.2d 1225, 1228 (8th Cir. 1991); *Nat’l Ctr. for Immigrants’ Rights, Inc. v. INS*, 913 F.2d 1350, 1367 (9th Cir. 1990); *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988); *United States v. Jackson*, 825 F.2d 853, 864 n.6 (5th Cir. 1987); *EEOC v. Tortilleria “La Mejor”*, 758 F. Supp. 585, 591 (E.D. Cal. 1991); *United States v. Moreno-Duque*, 718 F. Supp. 254, 259 (D. Vt. 1989).

161. See, e.g., *Etuk*, 936 F.2d at 1437 (concluding that purpose of IRCA’s employment provisions was to stem illegal immigration by making employment difficult to obtain); *Steiben*, 932 F.2d at 1228 (same); *Nat’l Ctr.*, 913 F.2d at 1367 (same); *Quality Inn*, 846 F.2d at 704 (same); *Jackson*, 825 F.2d at 864 n.6 (same); *Tortilleria*, 758 F. Supp. at 591 (same).

second, minimizing burdens on employers;¹⁶² third, preserving legal immigration by minimizing illegal immigration;¹⁶³ fourth, imposing misdemeanor criminal liability for employing unauthorized workers.¹⁶⁴

Former Arizona Governor Janet Napolitano (now Secretary of the Department of Homeland Security), who signed the Arizona law at issue in *Whiting*, stated that she viewed Congress as incapable of providing what she believed was necessary immigration reform, and because she hoped to reduce “the flow of illegal immigration into Arizona,” by reducing or eliminating the availability of employment.¹⁶⁵ Thus, the Arizona law was intended to further only the first IRCA goal—stemming illegal immigration—without protecting the other goals, because it was meant to supplant dissatisfactory federal legislation and enforcement.¹⁶⁶ Therefore, the Arizona law has the effect of altering the “delicate balance of statutory objectives” struck by IRCA.¹⁶⁷

The Arizona law also explicitly undermines congressional intent regarding E-Verify because it mandated that which Congress explicitly made voluntary.¹⁶⁸ The Court relied on an Executive Order by President George W.

162. *See, e.g., Collins Foods*, 948 F.2d at 554 (holding that legislative history shows congressional intent to minimize burden on employers). Part of the balance Congress struck was to achieve its goals in a way that was the least burdensome to employers. *See id.* In other words, Congress was not seeking to eliminate illegal immigration without consideration of such burdens. *See id.* In doing so, Congress chose the I-9 method of employment authorization verification. *See id.*

163. *See, e.g., Steiben*, 932 F.2d at 1228 (noting congressional intent to limit illegal immigration in order to preserve legal immigration). The idea is that the door to legal immigration cannot be kept open if illegal immigration cannot be minimized. *See id.*

164. *See, e.g., Moreno-Duque*, 718 F. Supp. at 259 (finding that Congress intended to create misdemeanor criminal liability for employers who knowingly hired unauthorized workers).

165. *See* Penny Starr, *Supreme Court Hears Challenge to Arizona Immigration Law—The One Signed by Gov. Janet Napolitano*, CNSNEWS (Dec. 9, 2010), <http://cnsnews.com/news/article/supreme-court-hears-challenge-arizona-immigration-law-one-signed-gov-janet-napolitano>. At the time the Court heard *Whiting*, Napolitano had become Secretary of DHS and, thus, was no longer Governor of Arizona. *See id.* Governor Jan Brewer, who attended the *Whiting* hearings, was Napolitano's successor. *See id.*

166. *See id.* (quoting Napolitano's explanation of reasons for Arizona law).

167. *Cf. Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001) (finding state law must be pre-empted to avoid skewing balance struck by federal law). The Arizona law in *Whiting* impaired several federal objectives because it targeted employment as a means to reduce illegal immigration. *See* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1988 (2011) (Breyer, J., dissenting). First, mandatory use of E-Verify and harsh licensing sanctions increase, rather than minimize, the burden on employers. *See id.* at 1992. Second, although illegal immigration is the Arizona law's primary target, it may have an impact on legal immigration, including the potential for racial discrimination and the inaccuracy of E-Verify results. *See id.* at 1990. Finally, although the Arizona law does not affect criminal liability, it does supplement the congressionally chosen consequences for IRCA violations. *See id.* at 2004 (Sotomayor, J., dissenting).

168. *See id.* at 1997 (Breyer, J., dissenting) (disagreeing with majority's conclusion that Arizona's E-Verify mandate is not in conflict with federal law). Justice Breyer declared that “[t]here is no reason to imply negatively from language telling the Secretary *not* to make

Bush mandating use of E-Verify for federal contractors, and the President's contemporaneous statement of belief in the Arizona law's validity, as evidence that the Arizona law did not undermine congressional intent.¹⁶⁹ The Court also relied on DHS's opinion that E-Verify could sustain existing state E-Verify mandates.¹⁷⁰

The weak probative value of considering the statutory interpretation of anyone other than Congress to establish congressional intent is further weakened by the strong negative reaction and legal challenges to the Executive Order, and the fact that the President's statement of support for the Arizona law was made in the context of these challenges.¹⁷¹ Additionally, the Court's reference to Congress's purposes for creating E-Verify does not shed much light on its decision to make it voluntary.¹⁷² Finally, the Court's reliance on DHS was misplaced because DHS is not a competent source for questions regarding the federal budget.¹⁷³

IV. AFTER WHITING

Whiting is unlikely to be an isolated case with limited impact.¹⁷⁴ The *Whiting* decision has spurred additional litigation and will undeniably impact

the program mandatory, permission for the States to do so. There is no presumption that a State may modify the operation of a uniquely federal program like E-Verify." *Id.*

169. *See id.* at 1985 (majority opinion) (relying on Executive Order 13465 and contemporaneous statements as support for constitutionality of Arizona law).

170. *See id.* at 1986 (discussing statement made by DHS).

171. *Cf. id.* at 1997 (Breyer, J., dissenting) (noting that legitimacy of Executive Order itself has not been determined).

172. *See id.* at 1986 (majority opinion) (noting Congress's purposes for "authorizing the development of E-Verify"). Regardless of Congress's motivation for creating E-Verify, those purposes did not address E-Verify's status as a voluntary pilot program and that Congress has never expanded the scope of the Secretary of Homeland Security's authority to mandate its use. *See id.* at 1996 (Breyer, J., dissenting). The Court did not address why Congress would limit the Secretary of Homeland Security's ability to mandate use of E-Verify, but leave the states the power to do so. Arguably, if Congress took no issue with mandatory nationwide use of E-Verify, it would not have limited the Secretary's authority to make E-Verify mandatory. *See id.* at 1996-97.

173. *See* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."); *see also Whiting*, 131 S. Ct. at 2006-07 (Sotomayor, J., dissenting) (asserting that opinion of DHS carries little weight because Congress essentially holds power to balance budget). As Justice Sotomayor points out in *Whiting* dissent, "[i]t matters not whether the Executive Branch believes that the Government is now capable of handling the burdens of a mandatory system. Congressional intent controls, and Congress has repeatedly decided to keep the E-Verify program voluntary." *Whiting*, 131 S. Ct. at 2007 (Sotomayor, J., dissenting) (footnote omitted).

174. *See generally* Daniel B. Wood, *After Arizona, Why Are 10 States Considering Immigration Bills?*, THE CHRISTIAN SCI. MONITOR (May 10, 2010), <http://www.csmonitor.com/USA/Society/2010/0510/After-Arizona-why-are-10-states-considering-immigration-bills> (noting significant increase in state immigration laws in recent years).

any pending litigation on similar issues.¹⁷⁵ This is especially true because the Supreme Court recently reaffirmed *Whiting*'s approach to analyzing state immigration laws.¹⁷⁶ Also, *Whiting* created several practical concerns about similar proposed or enacted state laws.¹⁷⁷

A. Other Cases Involving State Immigration Laws

1. United States v. Arizona¹⁷⁸

Arizona has enacted other state immigration laws in addition to the one considered in *Whiting*, most notably the Support Our Law Enforcement and Safe Neighborhoods Act ("S.B. 1070").¹⁷⁹ S.B. 1070 created state offenses for immigration law violations and required police officers who suspect that a person is in unlawful immigration status to stop, detain, or arrest them in order to verify their immigration status with the federal government.¹⁸⁰ The United States challenged the state law on pre-emption grounds in the District of Arizona, which granted a preliminary injunction to enjoin enforcement of several provisions of S.B. 1070.¹⁸¹ Both parties appealed and the Ninth Circuit affirmed.¹⁸²

Recently, the Supreme Court rendered a decision in *Arizona v. United States*.¹⁸³ Somewhat surprisingly, the Court found S.B. 1070 largely pre-empted.¹⁸⁴ It did so by largely ignoring *Whiting* and, to the extent that it did acknowledge *Whiting*, the Court distinguished that case by framing it as a case

175. See, e.g., *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (challenging Arizona state law as pre-empted by Immigration and Nationality Act); *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011) (challenging city ordinance that regulated rental of houses to certain aliens). For a further discussion of litigation impacted by *Whiting*, see *infra* notes 179–92 and accompanying text.

176. See *Hazleton v. Lozano*, 131 S. Ct. 2958, 2958 (2011) (vacating and remanding to Third Circuit for reconsideration in light of *Whiting*).

177. See generally Barrowclough, *supra* note 22, at 805–16 (discussing various shortcomings of E-Verify). Arizona has paved the way for other state laws that go even further. See Wood, *supra* note 174 (discussing other states that have proposed or enacted immigration laws after Arizona); see also NAT'L IMMIGRATION FORUM, *supra* note 5 (discussing adverse consequences of state immigration laws).

178. (*Arizona I*), 641 F.3d 339 (9th Cir. 2011), *rev'd in part, aff'd in part by Arizona v. United States*, (*Arizona II*), 132 S. Ct. 2492 (2012).

179. See *id.* at 343–44 (outlining Arizona law S.B. 1070); *Arizona II*, 132 S. Ct. at 2497–98 (outlining S.B. 1070).

180. See *Arizona I*, 641 F.3d at 343–44 ("S.B. 1070 establishes a variety of immigration-related state offenses and defines the immigration enforcement authority of Arizona's state and local law enforcement officers.").

181. See *id.* at 344 (explaining procedural history of case and noting grant of preliminary injunction).

182. See *id.* (stating grounds for appeal and affirmation of lower court's decision).

183. See *Arizona II*, 132 S. Ct. at 2492 (considering appeal from Ninth Circuit).

184. See *id.* at 2510 (holding sections 3, 5(C), and 6 of S.B. 1070 pre-empted).

about express pre-emption.¹⁸⁵ The Court upheld, on its face, but not as applied, the provision of S.B. 1070 requiring police officers to ascertain the immigration status of individuals whom they suspect to be in unlawful immigration status, which requires cooperation with the federal government pursuant to “the same verification provision utilized in the law upheld in *Whiting*.”¹⁸⁶

2. Lozano v. Hazleton

*Lozano v. Hazleton*¹⁸⁷ involved a challenge to local ordinances in Hazleton, Pennsylvania that criminalized the employment and housing of undocumented aliens and imposed various sanctions upon employers, landlords, and others who violated the ordinances.¹⁸⁸ The district court found the local ordinances pre-empted by federal law and issued a permanent injunction against their enforcement.¹⁸⁹ On appeal, the Third Circuit affirmed in large part.¹⁹⁰ The Supreme Court granted certiorari, vacated the judgment of the Third Circuit, and remanded for reconsideration based on its decision in *Whiting*.¹⁹¹ It is possible that the outcome of this case will be completely altered in light of *Whiting*.¹⁹²

B. Other Recently Passed or Proposed State Laws

The implications of *Whiting* are not confined to pre-existing litigation of the state immigration laws discussed here, rather other states are continuing to

185. *See id.* at 2500–01 (“There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision.” (citing *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1974–75 (2011))).

186. Petitioner’s Reply Brief at 11, *Arizona II*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 1332574, at *11; *see also Arizona II*, 132 S. Ct. at 2510 (“The Federal Government has brought suit against a sovereign State to challenge the provision even before the law has gone into effect. There is a basic uncertainty about what the law means and how it will be enforced. At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume § 2(B) will be construed in a way that creates a conflict with federal law.”).

187. 620 F.3d 170 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011).

188. *See id.* at 176–81 (explaining local ordinances and factual and historical background).

189. *See id.* at 181 (summarizing procedural background).

190. *See id.* at 183 (discussing standing and finding that no plaintiff had standing to challenge private cause of action). The Court of Appeals reversed only the portion of the lower court’s decision that invalidated the ordinance’s creation of a private cause of action. *See id.* The court reversed based on lack of standing, rather than on the merits. *See id.* at 183–92.

191. *See Hazleton v. Lozano*, 131 S. Ct. 2958, 2958 (2011) (vacating and remanding to Third Circuit).

192. *See id.* (vacating and remanding to Third Circuit). It is likely that “further consideration in light of *Chamber of Commerce of United States of America v. Whiting*” will yield a result similar to *Whiting*. *See id.*

enact similar laws and litigation is increasing.¹⁹³ These state laws touch on employment, housing, and other areas.¹⁹⁴ Despite the fact that the Supreme Court has now decided two federal pre-emption cases in the area of immigration law within the past two years, lower courts are still split on many related pre-emption issues.¹⁹⁵

C. Problems with State Enforcement of Immigration Law

1. Unqualified Officials

Immigration law is a complicated body of law that has profound significance for those whose lives it touches.¹⁹⁶ In order to properly enforce immigration law, state and local police need extensive training, which requires increased funding.¹⁹⁷ Additionally, the current method of adjudication designated by Congress provides that judges familiar with immigration law will

193. See, e.g., *United States v. Alabama*, 691 F.3d 1269, 1280–81 (11th Cir. 2012) (holding various Alabama law provisions relating to aliens were pre-empted because provision requiring police to investigate immigration status of detained aliens suspected of being in unlawful immigration status was not pre-empted); *Villas at Parkside Partners v. City of Farmers Branch*, 675 F.3d 802, 809 (5th Cir. 2012) (holding city ordinance requiring rental tenants to obtain a special permit contingent on lawful immigration status pre-empted by federal law), *reh'g en banc granted*, 688 F.3d 801 (5th Cir. 2012); *Keller v. City of Fremont*, 853 F. Supp. 2d 959 (D. Neb. 2012) (holding city ordinances requiring employer use of E-Verify, prohibiting leasing of housing to “illegal aliens,” and requiring tenants to obtain special license were not pre-empted by federal law); *Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1179 (M.D. Ala. 2011) (holding state law criminalizing business transactions between undocumented aliens and state pre-empted by federal law); see also Susan Guyett, *Judge Blocks Part of Indiana Immigration Law*, REUTERS (June 24, 2011, 11:13 PM), <http://www.reuters.com/article/2011/06/25/us-indiana-immigration-idUSTRE75009R20110625> (discussing injunction issued to enjoin part of Indiana law); NAT'L IMMIGRATION FORUM, *supra* note 5, at 17–30 (discussing potential state legislation and its possible implications); Wood, *supra* note 174 (discussing enjoinder of Alabama law).

194. For a further discussion of the various state immigration laws that have been recently enacted, see *supra* note 193 and accompanying text.

195. For a further discussion of state immigration laws and lower court decisions, see *supra* note 193 and accompanying text.

196. See LISA M. SEGHETTI ET AL., CONG. RESEARCH SERV., ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 26 (2009) (explaining arguments regarding necessary training of local police to enforce immigration law). The report neutrally explains that immigration law is a “complex body of law,” which “requires extensive training and expertise to adequately enforce.” *Id.* at 22. The report then explains two opposing views, one emphasizing the extensiveness of the necessary training, and the other which confidently asserts that state and local police are capable of learning the necessary information through currently available training programs. *Id.* at 22–23.

197. See *id.* (discussing arguments regarding resources required for state and local enforcement). Both opponents and proponents of state and local enforcement of immigration law acknowledge that it would require resources to fund, although they disagree about how those resources might be obtained. See *id.* There is, however, a possibility that significant state and local resources would need to be diverted for funding of such training. See NAT'L IMMIGRATION FORUM, *supra* note 5, at 12–13 (summarizing predictions of costs to enforce S.B. 1070 made by one Arizona county).

hear charges of IRCA violations.¹⁹⁸ State courts, by contrast, are generally inexperienced with federal issues such as immigration law.¹⁹⁹ Thus, state laws like the Arizona law in *Whiting*, will place some of the most important issues of noncitizens' lives in the control of those unknowledgeable about such issues.²⁰⁰

2. *Negative Effects for State and Local Police*

Several recently passed or proposed state laws, including Arizona legislation not at issue in *Whiting*, require noncitizens to carry immigration documentation with them at all times and give state and local police broad power to arrest and detain individuals suspected of being in the country illegally.²⁰¹ Many, including police officers, have voiced concern that these laws will undermine public safety.²⁰² Threats to public safety may result from noncitizens' reluctance to cooperate in police investigations or to report crimes, and from diverting resources away from public safety initiatives.²⁰³

3. *E-Verify's Limitations*

Recent state laws that mandate use of E-Verify, like the Arizona law in *Whiting*, raise other concerns.²⁰⁴ The program's reliability is highly

198. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 2001 (2011) (Sotomayor, J., dissenting) ("Congress ensured that administrative orders finding violations of IRCA would be reviewed by federal judges with experience adjudicating immigration-related matters.") Justice Sotomayor considered it significant that Congress established procedures for federal adjudication of violations of IRCA's employment authorization verification procedures. See *id.*

199. See *id.* at 2003 (noting state courts are "inexperienced in immigration matters").

200. See generally *id.* For a further discussion on the lack of qualified state officials that could potentially hear immigration matters, see *supra* notes 196–199 and accompanying text.

201. See, e.g., NAT'L IMMIGRATION FORUM, *supra* note 5, at 8 (discussing Arizona's "Support Our Law Enforcement and Safe Neighborhoods Act," also known as S.B. 1070).

202. See ANITA KHASHU, POLICE FOUND., THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES 23–24 (2009) (discussing potential for threat to public safety as result of local enforcement); see also NAT'L IMMIGRATION FORUM, *supra* note 5, at 15 (discussing threats to public safety from local police enforcement of immigration law); SEGHETTI ET AL., *supra* note 196, at 24 (summarizing debate about effects on public safety). "Further, law enforcement officials—charged with public safety—argue that the law diverts precious resources from their ability to protect against dangerous criminals and violent crime" NAT'L IMMIGRATION FORUM, *supra* note 5, at 15.

203. See NAT'L IMMIGRATION FORUM, *supra* note 5, at 15 (discussing source of threats to public safety). The article quotes the Tucson, Arizona Police Chief expressing concern that S.B. 1070 will make immigration enforcement a higher priority than other important police concerns, and further strain limited law enforcement budgets. See *id.* The article also discussed the potential for creating distrust of police within communities if police are viewed as immigration officers. See *id.*

204. For a further discussion on the limitations of E-Verify, see *infra* notes 205–07 and accompanying text.

contested.²⁰⁵ Also, mandatory use of E-Verify seriously burdens both employers and employees; for example, employers must maintain access to computers and the Internet and employees shoulder the burden of challenging tentative non-confirmations.²⁰⁶ Moreover, E-Verify's exclusive use of social security numbers for employment authorization verification could easily result in an increase in identity fraud.²⁰⁷

V. CONCLUSION

Whiting departs from the Supreme Court's traditional application of implied pre-emption and general pre-emption principles, which are well established and have been repeatedly applied over many years.²⁰⁸ The Court used implied pre-emption principles only a few years ago to strike down a state law with a similar relationship to federal law as the laws in *Whiting*.²⁰⁹ The *Whiting* Court should have found the Arizona law pre-empted by federal law

205. See Barrowclough, *supra* note 22, at 810–13 (discussing accuracy and due process difficulties presented by E-Verify). Despite the *Whiting* Court's confidence in E-Verify, several studies have shown significant rates of inaccuracy. See *id.* Justice Breyer, dissenting in *Whiting*, also cited studies showing high inaccuracy rates and expressed concern that noncitizens would have an even higher risk of inaccurate work authorization verification results because of name inconsistencies caused by misspellings of foreign names, as well as other factors. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1996 (2011) (Breyer, J., dissenting). For example, in Mexican and other Hispanic cultures, every person has two surnames. See Manuel A. Perez-Quinones, *Hispanic Last Names: Why Two of Them?*, <http://perez.cs.vt.edu/twolastnames> (last updated Mar. 2002) (explaining Hispanics' use of two last names). However, confusion frequently arises when people assume that one of the surnames is a middle name, or the first surname can be eliminated and Hispanic persons having two surnames can be listed only by their second surname. See *id.* However, if a Hispanic name must be shortened, it would make more sense to eliminate the second surname instead of the first, as the first surname is paternal and the second is maternal. See *id.* (explaining source of each last name and suggesting ways to minimize confusion and inconsistency).

206. See Barrowclough, *supra* note 22, at 809, 812–13 (discussing burdens on employers and employees created by mandating use of E-Verify). If E-Verify were mandated nationwide then all employers would have to maintain access to a computer and Internet connection, even if they had no other use or need for them. See *id.* Also, employees must shoulder the burden of challenging a tentative non-confirmation, which requires the noncitizen to read—or have translated—documents into English, and travel within eight days to a Social Security Administration or USCIS office during business hours. See *id.* This process describes only the minimum that employees must do in response to a tentative non-confirmation, assuming no other complications. See *id.*

207. See Barrowclough, *supra* note 22, at 813–14 (discussing potential for identity fraud with E-Verify). Ironically, the I-9 system is less likely to result in identity fraud because it requires employers to review documents that establish identity and work authorization. See 8 U.S.C. § 1324a(b)(1)(B)–(D) (2006).

208. For a discussion of the Supreme Court's application of general pre-emption and implied pre-emption principles, see *supra*, notes 74–131 and accompanying text.

209. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2000) (holding state tort law pre-empted).

because it undermines several federal objectives.²¹⁰ Moreover, *Whiting* could create serious practical problems and has already begun to do so, as more state immigration laws are proposed and passed.²¹¹ It is time to return an exclusively federal power to the federal government and tear down the façade of state laws purporting to regulate employment, housing, and the like, while essentially regulating immigration.²¹² Dissatisfaction with federal law must be addressed at the federal level.²¹³

210. See, e.g., *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991) (“[T]he legislative history of section 1324a indicates that Congress intended to minimize the burden and the risk placed on the employer in the verification process.”); *Etuk v. Slattery*, 936 F.2d 1433, 1437 (2d Cir. 1991) (noting Congress’s goal of precluding employment of aliens lacking either LPR status or special employment authorization from Attorney General); *Steiben v. INS*, 932 F.2d 1225, 1228 (8th Cir. 1991) (“This legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open.”); *Nat’l Ctr. for Immigrants’ Rights v. INS*, 913 F.2d 1350, 1368 (9th Cir. 1990) (noting Congress’s objective to control alien employment “through employer not employee sanctions”); *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988) (“[N]othing in the IRCA or its legislative history suggests that Congress intended to limit the rights of undocumented aliens under the FLSA.”); *United States v. Jackson*, 825 F.2d 853, 864 n.6 (5th Cir. 1987) (noting purpose of IRCA to “lessen the volume” of undocumented aliens in United States by “removing much of the economic benefit associated with coming to the United States illegally”); *EEOC v. Tortilleria “La Mejor”*, 758 F. Supp. 585, 591 (E.D. Cal. 1991) (“Congress enacted the IRCA to reduce illegal immigration by eliminating employers’ economic incentive to hire undocumented aliens.”); *United States v. Moreno-Duque*, 718 F. Supp. 254, 259 (D. Vt. 1989) (emphasizing Congress’s intent to criminalize employment of unauthorized aliens through employers rather than employees in transportation context).

211. See *Barrowclough*, *supra* note 22, at 805–14 (discussing negative effects of E-Verify mandates including potential employer abuse and inaccuracy); see also NAT’L IMMIGRATION FORUM, *supra* note 5 (discussing proposed or discussed state immigration laws and serious consequences).

212. For a further discussion on why the federal government and not state governments should regulate immigration, see *supra* notes 1–207 and accompanying text.

213. For a further discussion on why the federal government, and not state governments, should regulate immigration, see *supra* notes 1–207 and accompanying text.