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Preemption, Patchwork Immigration Laws, and the Potential For Brown Sundown Towns

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PREEMPTION, PATCHWORK IMMIGRATION LAWS, AND THE POTENTIAL FOR BROWN SUNDOWN TOWNS

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The raging debate about comprehensive immigration reform is ripe ground to overhaul federal exclusivity in the immigration context and move toward a cooperative federal and state-local model. The proliferation of immigration-related ordinances at the state and local level reflects "lawful" attempts to enforce immigration law to conserve limited resources for citizens and legal residents. Although the federal immigration statutes contemplate state and local involvement, the broad federal preemption model used to analyze immigration laws displaces many state-local ordinances, resulting in frustration at the inability to enforce the community's resolve that is manifested through violence against Latino immigrants. Broad federal preemption analyses alter the traditional scope of the states' police powers, and set the stage for "brown sundown towns"— where Latinos are not welcomed.

This Note evaluates the preemption analyses used in Lozano v. City of Hazleton *and* Chicanos Por La Causa, Inc. v. Napolitano, *and looks at the aftermath effects of the decisions at the communal level. It argues that the narrow preemption analysis in* Chicanos Por La Causa *strikes the correct balance between federal and state-local interests. A narrow approach better weighs state-local concerns and generates notoriety, which can incentivize action at the federal level. The Note then studies three scholarship models that balance differently the federal and state-local relationship in the immigration context. It posits that the narrow preemption approach can pave the way for the cooperative federalism model, and contain a new wave of sundown towns. As narrow preemption analysis considers state-local concerns, cooperative federalism addresses the reality that it is states and localities, rather than the federal government, which must incorporate immigrants into the communal fabric. Accordingly, this Note calls attention to the relationship between preemption analysis, practical reality at the state-local level, and how these two factors correlate with the creation of brown sundown towns.*

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INTRODUCTION

> "A Mass Meeting of the citizens of this place and vicinity will be held . . . to devise some lawful means of ridding Crescent City of Chinese."[1]

The idea that the federal government has plenary power over immigration law is beginning to erode.[2] Grounded on a tenuous foundation,[3] federal exclusivity over immigration should be revisited in light of increased state and local legislation seeking to fill in gaps in the complex and vague federal immigration policy.[4] Currently, the state-local legislation affecting immigrants reflects "lawful" attempts to enforce immigration law at the local level as states and localities attempt to conserve limited resources for their citizens and legal residents. Because of the broad federal preemption models generally applied to analyze immigration laws, the legislative text of these subnational laws seeks to mirror federal standards or evade categorization as immigration regulations, and seeks classification as permitted regulations within the state-local police powers—that is, the states' ability to regulate health, welfare, and crime.[5] This technical maneuvering approach is setting the stage for a new iteration of "sundown towns"—brown sundown towns, where Latinos are not welcomed.

The current immigration landscape is ripe ground to reexamine federal exclusivity and move toward a cooperative federal and state-local model.[6] This new model, cooperative federalism, better addresses the reality that it is states and localities, rather than the federal government, that must be tasked with incorporating immigrants into the communal fabric.[7] Allowing state and local laws to determine how best to deal with immigrant influxes may result, in the interim, in national confusion as to the correct preemption

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1. JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM 310–311 (2006) (reprinting newspaper articles that document the Chinese expulsion from California).

2. *See* Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571–76 (2008); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1566, 1581–83 (2008).

3. States regulated immigration until U.S. Supreme Court decisions established congressional plenary power in the immigration context. *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (referring to Congress's plenary power over immigration law as a "constitutional oddity")*; see also* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 115–23 (5th ed. 2009) (suggesting that federal exclusivity in immigration policy is not explicitly grounded in the Constitution's text).

4. *See* Pratheepan Gulasekaram, *Sub-national Immigration Regulation and the Pursuit of Cultural Cohesion*, 77 U. CIN. L. REV. 1441, 1443–46 & nn.8–9 (2009); Peter Baker, *Obama Exhorts Congress To Back Immigration Overhaul*, N.Y. TIMES, July 2, 2010, at A12; *see also* 8 U.S.C. § 1324a (2006) (employment); *id.* § 1324 (harboring). However, neither statutory provision is specific or clear enough for uniform judicial agreement regarding congressional intent whether to partially or entirely preempt state and local legislation in these areas.

5. *See* Stumpf, *supra* note 2, at 1566–67.

6. Rodríguez, *supra* note 2, at 570–73, 641.

7. *Id.* It is important to make the reality on the ground reflect the law on the books. *Id.*

approach.[8] This effect likely will be short lived.[9] The diversity of approaches will incentivize the federal government to set clearer standards or take a stance in the current debate,[10] which will foster federal-state cooperation and increase control and enforcement of immigration law.[11] Piecemeal state-local attempts within the current immigration framework only redirect immigrant flows elsewhere without finding practical solutions on how to integrate, manage, and stabilize immigrant influxes. The cooperative federalism model will result in a greater degree of collaboration between the federal and state-local governments. Combined with a narrow preemption analysis, this model will tackle the immigration problem head on and prevent the proliferation of brown sundown towns.[12]

This Note evaluates the broad and narrow preemption analyses used in *Lozano v. City of Hazleton*[13] and *Chicanos Por La Causa, Inc. v. Napolitano*.[14] It looks at the aftermath of the decisions at the communal level and posits that *Chicanos Por La Causa* strikes the correct balance between federal and state-local interests. A narrow approach better weighs state-local concerns and generates notoriety, which can incentivize action at the federal level. The Note also studies three scholarship models that balance differently the federal and state-local relationship in the immigration context and proposes that the narrow preemption approach can pave the way for the cooperative federalism model. By better addressing the reality that states and localities—rather than the federal government—must incorporate immigrants into the communal fabric, cooperative federalism can contain a new wave of sundown towns. Accordingly, this Note calls attention to the relationship between preemption analysis,

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8. *Id.* at 616–36; *see also* Gulasekaram, *supra* note 4, at 1496 ("Currently, the federal polity and several states and localities are construction zones.").

9. Rodríguez, *supra* note 2, at 616–36. This approach will lead to some initial discrimination, but in the long run, competition at the subnational level is healthy in developing a coherent immigration approach. *Id.*

10. *See id.*; Randal C. Archibold, *Arizona Law Is the Focus of a Debate in U.S. Court*, N.Y. TIMES, July 16, 2010, at A18; Julia Preston, *Justice Dept. Sues Arizona Over Its Immigration Law*, N.Y. TIMES, July 7, 2010, at A3.

11. Rodríguez, *supra* note 2, at 616–36.

12. *See generally* Tom I. Romero, II, *No Brown Towns: Anti–Immigrant Ordinances and Equality of Educational Opportunity for Latina/os*, 12 J. GENDER RACE & JUST. 13 (2008). This article explores the impact of anti-immigration ordinances in the educational context, but it contains statistics on how the measures have affected the movement of Latinos. *Id.* at 15–16 (discussing how about "25,000 Latinos left northeastern Oklahoma alone in response to the Oklahoma Taxpayer and Citizen Protection Act of 2007, 'billed by its backers as the toughest U.S. legislation against illegal immigration'" (quoting *Oklahoma Law Blamed For Hispanic Exodus*, MSNBC (Jan. 25, 2008), http://www.msnbc.msn.com/id/22845808/from/ET/)). Professor Tom I. Romero argues that the state-local educational measures are about race—"about who is and who is not part of the community"—and not about the need for immigration control at the state-local level. *Id.* at 15–17.

13. 496 F. Supp. 2d 477 (M.D. Pa. 2007), *aff'd in part, rev'd in part*, No. 07-3531, slip op. at 146 (3d Cir. Sept. 9, 2010).

14. 544 F.3d 976 (9th Cir. 2008), *amended by* 558 F.3d 856 (9th Cir. 2009), *cert. granted sub nom.* Chamber of Commerce v. Candelaria, ___ S. Ct. ___, 78 U.S.L.W. 3762 (U.S. June 28, 2010) (No. 09-115).

practical reality at the state-local level, and how these two factors can combine to develop brown sundown towns.

In Part I, this Note explores the case law, constitutional, statutory, and social foundations underlying the current immigration regulatory framework. Part II of this Note lays out the two types of federal preemption analyses used to examine state-local laws of which immigrants are the subjects. It then addresses three scholarship models proposing different balances to the federal and state-local relationship in the realm of immigration law. In Part III, this Note argues that the narrow preemption analysis in *Chicanos Por La Causa* strikes the correct balance between federal and state-local interests. It proposes that the narrow preemption approach will pave the way for the cooperative federalism model, and prevent a new wave of sundown towns.

I. UNDERSTANDING SUNDOWN TOWNS, FEDERAL EXCLUSIVITY IN IMMIGRATION, AND THEIR RELATIONSHIP

This part explains the legal history that shaped the current federal immigration regulatory scheme. Part I.A defines "sundown towns" and describes why the concept is relevant to the current national debate over immigration regulation. Then, Part I.B. traces the constitutional and case history that established federal exclusivity over immigration laws. Part I.C concentrates on how the constitutional and case-law developments resulted in vast federal statutes governing immigration. It then explains how subsequent statutes and case law have eroded the doctrine of federal exclusivity in the immigration context.

A. Sundown Towns

Sundown towns are an obscure part of American history.[15] A sundown town refers to a jurisdiction that excluded minority groups from living there—it was "all-white" on purpose.[16] Because such a classification was inappropriate for U.S. Census purposes,[17] the towns usually allowed one black family or other racial minorities to reside within the jurisdictional boundaries.[18]

Sundown towns emerged during the 1800s and reflected the growing anti-Chinese sentiment in response to increased immigration from China to the United States.[19] Capitalists encouraged Chinese immigration as a cheap

15. LOEWEN, *supra* note 1, at 5.

16. *Id.* at 4.

17. Race has been asked about in the Census since 1790. Race: Why Ask About It?, U.S. Census Bureau Question & Answer Center, https://ask.census.gov/ (last visited Sept. 23, 2010) (insert "Race: Why Ask About It?" into "Search by Keyword" and select first result). The government uses the data to assess disparities in health, access to social services, and education, among other government benefits. *Id.* The information also is important to determine funding for federal programs. *Id.*

18. LOEWEN, *supra* note 1, at 4.

19. *Id.* at 12, 31, 47.

source of farm, domestic, and industrial labor.[20] Although Chinese immigrants were a vital part of building the American West,[21] white workers suffered due to increased competition with the Chinese for the same sources of employment.[22] As a result, state and local government efforts forced Chinese immigrants to migrate to large metropolitan cities, away from small towns and suburbs, thereby creating sundown towns.[23]

Accordingly, many towns and counties in the West drove out their Chinese populations through a combination of legal and extra-legal methods usually characterized by violence.[24] For example, armed white miners in Wyoming gave Chinese workers one hour to evacuate the town, after which they opened fire.[25] Because some Chinese hid in their homes, the rioters set fire to their houses, killing those remaining inside.[26] Those who escaped were not spared; without shelter, many died from exposure to low temperatures, leading to the expression "He doesn't have a Chinaman's chance."[27] This series of events was repeated throughout Western towns.[28]

The sundown town concept grew to characterize not only the exclusion of the Chinese, but also African Americans and Mexicans.[29] "In town after town in the United States, especially between 1890 and the 1930s, whites forced out their African American neighbors violently, as they had the Chinese in the West."[30] After African Americans gained their freedom, many American cities with black populations devised ways to exclude the new citizens.[31] Through ordinances or other governmental action,[32] buyout,[33] freeze-out,[34] or violence,[35] many cities became places where blacks and other ethnic minorities were not welcome.[36] By the early 1900s, these towns explicitly forbade blacks and other ethnic minorities from

20. *See id.* at 50.
21. *Id.*
22. *See id.*
23. *Id.* at 18, 47, 50–54.
24. *Id.* at 50–53.
25. *Id.* at 50.
26. *Id.*
27. *Id.* at 51.
28. *Id.* at 50–53.
29. *Id.* at 4.
30. *Id.* at 92.
31. *See id.* at 90–114.
32. *See id.* at 99–105. An ordinance is an authoritative law, decree, or regulation. BLACK'S LAW DICTIONARY 1132 (8th ed. 2004). "Municipal governments can pass ordinances on matters that the state government allows to be regulated at the local level." *Id.* Although the ordinances were eventually found to be illegal, their enforcement continued through the formal policy or unwritten laws of police departments. LOEWEN, *supra* note 1, at 103–05.
33. LOEWEN, *supra* note 1, at 108–09. Buyout refers to communal efforts in which towns bought out the homes of African Americans or prevented African Americans from completing purchases. *Id.* at 108.
34. *Id.* at 105–07. Freeze-out refers to the practice employed by some towns in which white residents made African Americans feel unwelcome and barred African Americans from activities in which they had previously participated. *Id.* at 105–06. This was achieved through collective but private discrimination. *Id.* at 107.
35. *Id.* at 92–99. "Sometimes just the threat of violence sufficed . . . ." *Id.* at 96.
36. *Id.* at 90–114.

residing within their limits.[37] If allowed at all, blacks and minorities had to leave town before sundown, and signs reading "Nigger, Don't Let the Sun Go Down on You in _____[town name]" proliferated.[38]

Cultural fears and violence played a powerful role in the creation of sundown towns.[39] For example, Vienna, Illinois, became a sundown town in the 1950s after racial tensions erupted when two black men assaulted two white women.[40] The entire black community became a proxy for the town's outrage and many African Americans' houses were set on fire.[41] Vienna's black inhabitants ran for their lives, and as of the 2000 Census, there is only one African American resident.[42] Similarly, when a black family tried to move into Cicero, Illinois, the police forcefully stopped them.[43] The National Association for the Advancement of Colored People (NAACP) obtained an injunction to bar police interference, but this action resulted in communal anger directed at the black family, who decided not to move to the town.[44] Whatever the method used, cities that resolved to exclude racial and ethnic minorities used the tools at their disposal—that is, their police powers to regulate property, zoning, and land use.[45] Instances of violence reflected the communities' frustration at being unable to determine which people became a part of the community and how they were integrated.[46] The violence was a manifestation of extra-legal means to enforce the community's resolve.[47]

The state and local legislation that resulted in sundown towns was grounded on the states' and localities' police powers, and a tradition of uneven enforcement and intimidation schemes.[48] The sundown town phenomenon spread due to the federal government's protracted inability to produce a national housing law to curtail the existence and tolerance of sundown towns.[49] It was not until the federal Fair Housing Act of 1968 (FHA) that states and localities were forced to rein in the use of their police powers to keep out or drive out ethnic minorities.[50] The FHA prohibits

37. *See id.* at 3.
38. *Id.*
39. *See id.* at 10–12.
40. *Id.* at 10.
41. *Id.*
42. *Id.*
43. *Id.* at 10–11.
44. *Id.* at 11.
45. *See id.* at 106–07. This Note does not espouse the methods adopted by sundown towns or those being implemented by state and local governments in the current immigration debate. It only emphasizes that the methods likely fall within the state and local governments' police powers or, at the very least, illustrate the exploration of non-violent methods to implement the community's legislative priorities.
46. *See id.*; Romero, *supra* note 12, at 15, 29–30.
47. *See* LOEWEN, *supra* note 1, at 107; *cf.* Romero, *supra* note 12, at 33.
48. *See* Romero, *supra* note 12, at 30–32 (discussing how anti-immigration legislation stems from factors that parallel the proliferation of sundown towns in the early 1900s).
49. *Cf.* LOEWEN, *supra* note 1, at 14–15.
50. *See id.* at 130–32, 395–96 (detailing the federal government's and other governmental bodies' actions—or inaction—which contributed to the sundown town phenomenon).

public and private discrimination in the housing market on the basis of race, color, national origin, sex, religion, disability, and familial status.[51]

However, despite the breadth of the federal intervention, the damage to race relations had been done. States and localities searched for alternative ways to continue to exclude ethnic and racial minorities.[52] Federal inaction resulted in the severe segregation of many American towns, a persisting socio-cultural effect.[53]

The federal government's current inaction and its inability to effectively control immigration are increasing the possibility that the sundown town concept may soon expand to include all Latino immigrants.[54] Therefore, it is important to understand the history of federal activity and its correlation to the sundown town phenomenon.

B. History of Federal Exclusivity: How Did We Get Here?

Until the mid-nineteenth century there was virtually no immigration law in the United States.[55] The movement of people across borders was perceived to fall within each state's police powers,[56] which refer to a state's ability to legislate on health, welfare, and crime.[57] During this still nascent stage in the country's history, states were primarily concerned with excluding criminals and other "undesirables."[58]

In 1875, the U.S. Supreme Court began to curb the era of state control of immigration to address more effectively the large immigrant influx[59] and the disparate state laws regulating immigrants.[60] The Court's decision in

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51. 42 U.S.C. § 3604 (2006).

52. *See* Romero, *supra* note 12, at 32 (describing systematic enforcement of local land use laws to harass, discriminate against, and keep out racial minorities, while avoiding constitutional or FHA violations).

53. *See* LOEWEN, *supra* note 1, at 16.

54. *See* Romero, *supra* note 12, at 33 ("[A]nti-immigration ordinances and other similarly toned anti-immigrant legislation in many ways are the latest manifestation of the Sundown Town phenomenon. Many of the catalysts driving anti-immigration hysteria are little different from those factors contributing to Sundown Town sentiment in the early twentieth century . . . .").

55. LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 115–20. Except for the Alien and Sedition Act of 1798, Congress had not regulated immigration before 1875. *Id.* at 117 n.3.; Stumpf, *supra* note 2, at 1566–67.

56. Stumpf, *supra* note 2, at 1566–67.

57. *Id.*

58. *Id.* at 1567–69. Due to a variety of "pull factors" in the United States, such as the need for labor to build railroads, and "push factors" in China, such as war and political turmoil, there was a large influx of Chinese immigrants into the United States during the 1850s. *See id.*; *see also* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993) (discussing the one hundred years of state forays into immigration regulation); *cf.* 1 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 2.02 (rev. ed. 1966); LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 14–15. Accordingly, many of the early state forays into immigration regulation were racist in nature, directed at the large Asian immigrant influx. *See* Stumpf, *supra* note 2, at 1569–73.

59. *See* 1 GORDON ET AL., *supra* note 58, § 2.02; LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 14–15. Even so, the immigration rate remained high and from 1901 to 1910, more than 8.5 million people came to the United States. LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 23.

60. Stumpf, *supra* note 2, at 1571.

Chy Lung v. Freeman[61] started to establish federal plenary power in immigration law.[62] Soon thereafter, in a string of cases dealing with congressional statutes regulating Chinese immigration to the United States, the Court developed and declared federal plenary power in the immigration context, and attempted to ground it in the constitutional text.[63] The Court used various constitutional clauses to expand the federal government's power over immigration.[64]

Based on enumerated powers, the Court cited the Commerce Clause, which allows Congress to "regulate Commerce with foreign Nations."[65] It also tried to ground plenary power over immigration in the Migration or Importation Clause, which authorized Congress to prohibit migration and importation after 1808.[66] The Naturalization Clause also was explored because it authorizes Congress to create "an uniform Rule of Naturalization" and thus implied that admission of noncitizens could be enveloped under the clause.[67] The War Clause was considered as well, since it allowed Congress to regulate "alien enemies" and perhaps extended to regulation of noncitizens already in the country.[68]

Ultimately, the Court relied on implied constitutional powers to shape the federal exclusivity doctrine in the immigration field.[69] In *Chae Chan Ping v. United States* (*The Chinese Exclusion Case*),[70] the Court determined that Congress had an absolute authority to exclude noncitizens, derived from its sovereign powers.[71] Finally, in *Fong Yue Ting v. United States*,[72] the Supreme Court solidified its jurisprudence on congressional supremacy in the field of immigration. The Court held that the federal government's inherent sovereign powers extended to admission, exclusion, and

61. 92 U.S. 275 (1875).

62. *Id.* at 279–80 (implying that the Foreign Affairs and Commerce Clauses did not permit states to make immigration-related determinations because the states could embroil the United States in wars with other countries).

63. *See* Stumpf, *supra* note 2, at 1572.

64. *See* Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 603–04 (1889) (holding that the government's ability to exclude noncitizens derived from its sovereign powers); LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 115–23 (reviewing the various constitutional clauses and other powers the Supreme Court used to ground immigration regulation solely in the federal government).

65. U.S. CONST. art. I; § 8, cl. 3; *see* Henderson v. Mayor of New York, 92 U.S. 259, 270–71 (1875) (using the Commerce Clause to strike down a state law requiring arriving vessels to pay taxes on arriving noncitizen passengers).

66. U.S. CONST. art. I, § 9, cl. 1; *see also* LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 118.

67. U.S. CONST. art. I, § 8, cl. 4; *see also* LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 118–19.

68. U.S. CONST. art. I, § 8, cl. 11; *see also* LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 119.

69. LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 119–25.

70. 130 U.S. 581 (1889).

71. *Id.* at 604 ("'The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty . . . .'" (quoting The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812))).

72. 149 U.S. 698 (1893); *see also* LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 147–55; Stumpf, *supra* note 2, at 1572.

deportation decisions, and that this power reposed only in the political branches and not the courts.[73] With this decision, the Court stopped trying to link the constitutional text to the federal government's absolute power over immigration. Instead, it justified the federal exclusivity doctrine on the extra-constitutional concept of powers, which are "an inherent . . . right of every sovereign."[74] Framed as political decisions, Congress's admission and exclusion policies became largely immune from judicial review.[75] Despite the judiciary's application of the federal exclusivity doctrine in immigration, within the last thirty years, congressional action and case law have increasingly eroded the principle.

C. Dismantling Federal Exclusivity: Legislative and Judicial History

Over a twenty-five year period, the Supreme Court pushed the states out of immigration regulation.[76] The decisions led to myriad legislation regulating immigration into the United States,[77] culminating with the Immigration and Nationality Act of 1952 (INA).[78] Congress regularly amends the INA to reflect the most current immigration law.[79] Accordingly, throughout the twentieth century, the doctrine of federal exclusivity—plenary power—over immigration legislation was ingrained in American jurisprudence.

In 1976, the Supreme Court decided *De Canas v. Bica*.[80] The decision was crucial because it weakened the vast but vague federal exclusivity

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73. *Fong Yue Ting*, 149 U.S. at 704–05, 731. *See generally* Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (arguing that federal immigration authority cannot be devolved to the states). This Note proffers that immigration regulation can be shared between the states and the federal government.

74. *Fong Yue Ting*, 149 U.S. at 711–13; *see* LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 149–50; Stumpf, *supra* note 2, at 1572–73.

75. *See Fong Yue Ting*, 149 U.S. at 731; LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 149–50; Stumpf, *supra* note 2, at 1572–73.

76. In later cases, the Court further refined the field for the federal government by prohibiting the states from trying to regulate immigration through the criminal law. *See* Stumpf, *supra* note 2, at 1573–78.

77. LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 14–22. In 1917, Congress tried to control the quality of immigrants by looking at physical and moral characteristics and literacy levels. 1 GORDON ET AL., *supra* note 58, § 2.02–2.04; LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 14–22. Then in 1921, Congress instituted a quota system based on the percentage of the white population in 1920 that could trace its ancestry to that country. LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 14–22. Three years later, the Immigration Act of 1924 established another quota system based on two percent of the foreign-born individuals of each nationality in the United States in 1890, and limited annual arrivals into the country to 150,000. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 558 (M.D. Pa. 2007), *aff'd in part, rev'd in part*, No. 07-3531, slip op. at 146 (3d Cir. Sept. 9, 2010). In 1942, a shortage of American men, due to World War II deployments, led to the "bracero" program. LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 377, 1141. This program was established to bring Mexican workers to harvest fields; it ended in 1964. *Id.*

78. Immigration and Nationality Act of 1952 §§ 101–507, 8 U.S.C. §§ 1101–1537 (2006).

79. 1 GORDON ET AL., *supra* note 58, §§ 2.03–2.04; LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 17.

80. 424 U.S. 351 (1976).

doctrine in the immigration context. In determining the constitutionality of a California statute that imposed penalties on employers who hired unauthorized immigrants, the Court stated that not all "state enactment[s] which in any way deal[] with aliens [are] regulation[s] of immigration."[81] This statement indicates that there is room for the states to pass legislation that affects immigrants without encroaching on the federal government's power to determine which immigrants to admit, exclude, or deport.[82] In reaching its decision, the *De Canas* Court took a narrow preemption analysis, which contrasts with the more prevalent and broad preemption analysis performed in the immigration context.[83] The broad preemption approach "leads courts to define conflict between state and federal laws broadly and to put a thumb on the scale in favor of preemption."[84] Scholars on both sides of the divide over immigration rely on *De Canas* to advance their propositions.[85] Part I.D discusses the preemption doctrine and its application in the immigration context.

After *De Canas*, Congress also began to cut away at the federal exclusivity doctrine. The first legislation to do so was the Immigration Reform and Control Act of 1986 (IRCA).[86] The Act established an unprecedented system of document verification for immigrant employment in conjunction with criminal and civil penalties for violations of the Act.[87] IRCA introduced employment regulation of aliens into the immigration

81. *Id.* at 355. Although the *De Canas* decision was before the Immigration Reform and Control Act of 1986 (IRCA), which marked the beginning of federal presence in the regulation of immigrant employment, the case continues to be used for its preemption analysis in the immigration context. *See* Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579, 592–96 (2009); Rodríguez, *supra* note 2, at 620–21; Stumpf, *supra* note 2.

82. *See* Rodríguez, *supra* note 2, at 620–21.

83. *Id.* at 621.

84. *Id.* State and federal laws discriminating on the basis of alienage are subject to different levels of scrutiny. *See* Mathews v. Diaz, 426 U.S. 67, 86-87 (1976); Gulasekaram, *supra* note 4, at 1478-81; Rodríguez, *supra* note 2, at 628–29. This Note only focuses on the preemption analysis approach to the current immigration situation; whether a state law ultimately survives judicial review for compliance with constitutional and federal rights is beyond the scope of this inquiry.

85. *See infra* Part II.C (discussing three scholarship models, their connection to *De Canas*, and their utility in understanding the immigration regulatory scheme); *see also* Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do To Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 462–66 (2008) (advancing that *De Canas* allows states to pass immigration legislation because it is within the states' police powers). *But see* McKanders, *supra* note 81, at 590–92, 594 (positing that because *De Canas* was a pre–IRCA decision, IRCA displaces state involvement in employment legislation that affects immigrants).

86. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.). This act is mostly known for its mass legalization scheme, which allowed eligible undocumented aliens to obtain legal status. 8 U.S.C § 1255a (2006); *see* Aristide R. Zolberg, *Reforming the Back Door: The Immigration Reform and Control Act of 1986 in Historical Perspective*, *in* IMMIGRATION RECONSIDERED: HISTORY, SOCIOLOGY, AND POLITICS 334–35 (Yans-McLaughlin ed., 1990).

87. Zolberg, *supra* note 86, at 334. The Act authorizes civil penalties of $250 to $2000 for each worker violation and criminal penalties, including steep fines and terms of imprisonment, for a continued pattern of hiring unauthorized workers. *Id.*

area, further widening Congress's role in this context. IRCA prohibits employers from hiring unauthorized aliens,[88] defined as aliens not "lawfully admitted for permanent residence" or "authorized to be so employed by [IRCA] or by the Attorney General."[89] The Act establishes procedures to enable employers to comply with IRCA's requirements. For example, to ensure that employers can determine a person's immigration status, the statute lists the document types employers may accept to verify an employee's eligibility to work in the United States.[90] The Act requires employers to inspect and attest to the veracity of the employee's documentation, and comply in good faith with the statute's instructions.[91] It also details procedures employers must follow when they unknowingly hire unauthorized aliens or when employees become unauthorized subsequent to hiring.[92] Both employers and employees are subject to civil fines or criminal penalties for document fraud during the employment process.[93]

IRCA's preemption and savings clauses are crucial to the current raging debate regarding state and local involvement in the context of the employment of aliens. The clauses read: "The 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."[94] The section "other than through licensing and similar laws" is known as the savings clause.[95] Accordingly, the savings clause contemplates state or local involvement in regulating the employment of aliens through legislative mechanisms within their police powers. This brief statutory provision is the center of the current debate.

Further immigration reforms were introduced in 1996 to refine the already vast and complex immigration scheme. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[96] sought to tighten the federal immigration system.[97] IIRIRA covers issues such as border patrol, document fraud, and public benefits eligibility.[98] The Act's

88. 8 U.S.C. § 1324a(a)(1)(A).

89. *Id.* § 1324a(h)(3).

90. *See id.* § 1324a(b); Rachel Feller, *Preempting 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, 297–98 (2009).

91. *See* 8 U.S.C. § 1324a(b)(1)–(2), (6).

92. *See id.* § 1324a(a)(2). In both instances, the employer must discharge the employee. *See id.*; Jason P. Luther, *A Tale of Two Cities: Is* Lozano v. City of Hazleton *the Judicial Epilogue to the Story of Local Immigration Regulation in Beaufort County, South Carolina?*, 59 S.C. L. REV. 573, 579–80 (2008).

93. 8 U.S.C. §§ 1324a(e), 1324c.

94. *Id.* § 1324a(h)(2).

95. *See id.*

96. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009–546 (1996) (codified in various sections of 8 U.S.C. and 18 U.S.C.).

97. *See* Feller, *supra* note 90, at 297.

98. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat., at 3009–546 (increasing restrictions on immigration and reviewability of removal

provisions allow states to implement programs to filter out and deny undocumented aliens access to a driver's license.[99] The Act also allows the Attorney General "to deputize state and local authorities to enforce federal immigration law."[100] Importantly, the Act explicitly states that a written agreement with the Attorney General is not required for state or local officers to communicate with the Attorney General or otherwise cooperate with the enforcement of federal immigration laws.[101] Thus, the Act contemplates state-local partnerships with the federal government in immigration control and enforcement.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)[102] also increased the opportunity for state involvement in the administration of laws affecting immigration. The PRWORA permits states to make public benefits determinations based on immigration status[103] and to "make independent determinations on the eligibility of legal resident aliens."[104] With the PRWORA, Congress sought to close gaps in the federal immigration scheme by ensuring that unauthorized aliens, usually the undocumented, could not benefit from public benefits at either the national or subnational level.[105] In the Act, Congress explicitly includes numerous provisions to ensure that unauthorized aliens do not receive public benefits at the federal, state, or local level.[106] The benefits denied to unauthorized aliens range from government contracts and licenses to retirement and other public assistance.[107] However, exceptions are made

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decisions, expanding deportability grounds, and limiting discretionary relief for immigration law violations); *see also* Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1633 (1997).

99. Illegal Immigration Reform and Immigrant Responsibility Act § 502; Spiro, *supra* note 98, at 1637.

100. Spiro, *supra* note 98, at 1637; *see* 8 U.S.C. § 1357(g)(1) (2006) (authorizing agreements with the Attorney General to allow state or local officers to investigate, apprehend, and detain aliens); *see also id.* § 1103(a)(10) (allowing the Attorney General to delegate enforcement of immigration law to the states in situations of "an actual or imminent mass influx of aliens").

101. 8 U.S.C. § 1357(g)(10).

102. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sessions of 8, 25, and 42 U.S.C. (2000)).

103. Kobach, *supra* note 85, at 466.

104. Spiro, *supra* note 98, at 1637.

105. 8 U.S.C. §§ 1611, 1621; Kobach, *supra* note 85, at 466.

106. 8 U.S.C. §§ 1601, 1611, 1621. The provisions that deny public benefits to unqualified aliens state that ineligible aliens cannot receive "any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government." *Id.* § 1621(c)(1)(A). Another section further disqualifies unauthorized aliens from most public benefits funded by state or local government agencies, such as "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit[s]." *Id.* § 1621(c)(1)(B). The language disqualifying ineligible aliens from the same federal benefits is nearly identical, but replaces "by an agency of a State or local government or by appropriated funds of a State or local government" with "by an agency of the United States or by appropriated funds of the United States." *Id.*; *compare id.*, *with id.* § 1611(c)(1).

107. *Id.* §§ 1601, 1611, 1621.

for emergency situations[108] and K–12 education, which the Supreme Court mandated in *Plyler v. Doe*.[109] After the PRWORA, state and local governments that wish to provide public benefits to ineligible aliens must enact legislation that "affirmatively provides" for such aliens' eligibility.[110]

Through the PRWORA, the federal government further enlisted state and local governments by explicitly authorizing them "to require an applicant for State and local public benefits . . . to provide proof of eligibility."[111] While empowering state and local governments, Congress also sought to improve the effectiveness of the expanded regulatory scheme by barring state and local governments from "prohibit[ing], or in any way restrict[ing] [any state or local government entities], from sending to or receiving from the [federal immigration officials] information regarding the immigration status, lawful or unlawful, of an alien in the United States."[112] The PRWORA clearly manifests the federal government's intent to work concurrently with and to require the state and local governments to ensure compliance and tighten the federal statutory scheme.[113]

Most recently, various iterations of the Clear Law Enforcement for Criminal Alien Removal Act (CLEAR Act or the Act) have been introduced in Congress since 2005.[114] The Act was introduced again in 2007[115] and in 2009.[116] The Act's purpose is to reaffirm states' and localities' inherent police powers to investigate, apprehend, detain, transport, and remove noncitizens from the United States.[117] The three versions all proclaim that state and local sovereign authority "to investigate, identify, apprehend, arrest, detain, or transfer to Federal custody aliens in the United States . . . has never been displaced or preempted by Congress."[118]

The development of the federal exclusivity doctrine illustrates the historical concerns that triggered the Court to curb the original practice of state regulation of immigration.[119] History shows that the federal exclusivity doctrine in immigration is not in the constitutional text, but that it was judicially created in response to increased state regulation at a time when a uniform national approach best reflected the country's interests.[120]

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108. *Id.* §§ 1611(b), 1621(b).

109. 457 U.S. 202, 230 (1982) (holding that public schools cannot refuse to provide education to undocumented children); *see also* Kobach, *supra* note 85, at 466–67.

110. 8 U.S.C. § 1621(d); *see also* Kobach, *supra* note 85, at 467 & n.40.

111. 8 U.S.C. § 1625.

112. *Id.* § 1644; Kobach, *supra* note 85, at 468.

113. Kobach, *supra* note 85, at 467–68. *But see* Archibold, *supra* note 10, at A18.

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

115. CLEAR Act, H.R. 3494, 110th Cong. (2007).

116. CLEAR Act, H.R. 2406, 111th Cong. (2009).

117. *Id.*

118. *Id.* § 2.

119. Rodríguez, *supra* note 2, at 610; *see supra* notes 48–75 and accompanying text.

120. Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 72–73 (2007) ("[J]udicial justifications for national exclusivity based on constitutional mandates are court-made doctrines to mediate federalist problems."); Rodríguez, *supra* note 2, at 610–11.

However, the last thirty years of Supreme Court jurisprudence, congressional statutes, and scholarly debate indicate that the façade of federal exclusivity in the immigration context has eroded or is beginning to crumble.[121]

The current immigration debate regarding state-local legislation affecting immigrants demonstrates that there may be room for state-local presence in the immigration context.[122] The presumption of federal exclusivity may have expired as the current debate implicates important state and local concerns with public health, safety, and welfare of their constituents.[123] The landscape that shaped congressional plenary power over immigration law in the late 1800s is now moving towards a power sharing theory,[124] which can move comprehensive immigration reform forward, but also highlights the potential creation of brown sundown towns in the absence of such reform. Thus, it is important to understand the interaction among federal exclusivity in immigration, sundown towns, and the preemption doctrine.

D. The Preemption Doctrine

The Constitution and laws made in pursuance of it are "the supreme law of the land . . . anything in the Constitution or laws of any state to the contrary notwithstanding."[125] When the Constitution gives Congress the exclusive power to regulate a policy area, the states may not legislate in that area because "the Constitution of its own force requires preemption of such state regulation."[126] However, when the Constitution does not explicitly grant federal exclusivity over a subject matter, then both state governments and the federal government can legislate within the same area, compelling courts to engage in in-depth preemption analyses.[127] Any state law that interferes or conflicts with the Constitution or an act of Congress succumbs, and is not enforceable.[128] Federal law can preempt state law in three ways: through express preemption, implied conflict preemption, and implied field preemption.[129]

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121. Rodríguez, *supra* note 2, at 613–20; *see supra* notes 76–118 and accompanying text.
122. Rodríguez, *supra* note 2, at 616.
123. *Id.*
124. *Id.* at 617–638.
125. U.S. CONST. art. VI, cl. 2.
126. De Canas v. Bica, 424 U.S. 351, 355 (1976).
127. *Cf. id.* (stating that the issue of whether federal regulation of immigration displaces a state's regulation of aliens would be irrelevant if the Constitution granted the federal government power over all regulations affecting aliens). The Court in *De Canas* continued:

> [T]here would have been no need, in [previous cases examining state statutes affecting aliens] . . . even to discuss the relevant congressional enactments in finding pre-emption of state regulation if all state regulation of aliens was *ipso facto* regulation of immigration, for the existence *vel non* of federal regulation is wholly irrelevant if the Constitution of its own force requires pre-emption of such state regulation.

Id.
128. NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2 SUTHERLAND STATUTORY CONSTRUCTION § 36:9 (7th ed. 2009).
129. *Id.*

1. Generally

The clearest expression of congressional preemption of state law is through explicit statutory language, or express preemption.[130] Generally, Congress can achieve express preemption in statutes by including a preemption clause, which explains the type of state laws or actions that are displaced.[131]

However, express preemptive language is not always included in federal laws. In such cases, the courts can imply preemption by examining legislative intent and history.[132] This approach is known as implied preemption, and it breaks down into two sub-approaches: field and conflict preemption.[133] Implied field preemption occurs when the federal legislative scheme is so comprehensive "that no room remains for supplemental state legislation."[134] Field preemption also occurs when national uniformity is important to achieve dominant federal interests.[135] The second type of implied preemption is conflict preemption.[136] It happens when a federal law's goals show a direct, actual, and irreconcilable conflict, so that the federal and state acts cannot coexist.[137]

Courts should presume that Congress does not intend to displace state law.[138] As such, preemption should only be "found if the federal law clearly evinces a legislative intent to preempt the state law, or there is such direct and positive conflict that the two acts cannot be reconciled or consistently stand together."[139] Furthermore, there is a presumption against federal preemption of state law in traditional areas of state power, like their historic police powers over public health, safety, welfare, and domestic relations.[140] The presumption does not apply when the state legislation regulates an area "where there has been a history of significant federal presence."[141]

Accordingly, topics not addressed in "a comprehensive and detailed federal statutory scheme are presumably left subject to disposition by state law."[142] The presumption against federal preemption of state law is particularly strong when a federal law touches areas traditionally regulated

130. *Id.*
131. *Id.*; *supra* text accompanying notes 128–30.
132. SINGER & SINGER, *supra* note 128, § 36:9.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 518 n.41 (M.D. Pa. 2007), *aff'd in part, rev'd in part*, No. 07-3531, slip op. at 146 (3d Cir. Sept. 9, 2010); SINGER & SINGER, *supra* note 128, § 36:9.
139. SINGER & SINGER, *supra* note 128, § 36:9.
140. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); SINGER & SINGER, *supra* note 128, § 36:9.
141. *Lozano*, 496 F. Supp. 2d at 518 n.41 (quoting United States v. Locke, 529 U.S. 89, 108 (2000)).
142. SINGER & SINGER, *supra* note 128, § 36:9.

by the states.[143] In such cases, courts impose a higher standard and "the state law must do major damage to the clear and substantial federal interests in order for the preemption doctrine to apply."[144] Court review of immigration-related laws at the state-local level falls on both sides of the spectrum.[145]

2. Preemption As Applied in the Immigration Context

As the Supreme Court stated in *De Canas*, not every state or local regulation affecting immigrants is a regulation of immigration.[146] Nevertheless, as will be discussed in Part II, courts take divergent approaches regarding the breadth of federal activity in the immigration field, specifically as it relates to employment and housing provisions enacted at the state-local level.[147] The recent explosion of state and local legislative activity seeking to address state and local concerns by enforcing immigration law illustrates the divergent approaches.[148] One camp, exemplified by *Lozano v. City of Hazleton*,[149] adopted a wide preemption analysis, which favors federal preemption of state laws that address the employment of aliens.[150] The other camp, epitomized by *Chicanos Por La Causa, Inc. v. Napolitano*,[151] employed a presumption against preemption, by searching for actual conflict between the federal and state laws, because the employment and housing fields have predominantly been occupied by the states.[152]

The divergent approaches can be traced to how the particular court defines "immigration."[153] Black's Law Dictionary defines immigration as "the act of entering a country with the intention of settling there permanently."[154] This definition is in line with the *De Canas* Court's determination that a regulation of immigration "is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[155] In *De Canas*, the Court further explained that even when a federal and a state law are

143. *Id.*
144. *Id.*
145. *See infra* Part II.A.
146. 424 U.S. 351, 355 (1976); *see supra* notes 80–84 and accompanying text.
147. *See* Susan M. Bartlett, Comment, *Grass Roots Immigration Reform*, 69 LA. L. REV. 989, 994–1005 (2009). *See generally* McKanders, *supra* note 81; Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1 (2007) (arguing that immigration-related legislation at the subnational level is unconstitutional).
148. *See* Gulasekaram, *supra* note 4, at 1480–81; Archibold, *supra* note 10, at A18.
149. 496 F. Supp. 2d 477 (M.D. Pa. 2007), *aff'd in part, rev'd in part*, No. 07-3531, slip op. at 146 (3d Cir. Sept. 9, 2010).
150. *Id.*; *see also* McKanders, *supra* note 81, at 593–96.
151. 544 F.3d 976 (9th Cir. 2008), *amended by* 558 F.3d 856 (9th Cir. 2009), *cert. granted sub nom.* Chamber of Commerce v. Candelaria, ____ S. Ct. ____, 78 U.S.L.W. 3762 (U.S. June 28, 2010) (No. 09-115).
152. *Infra* Part II.A.2; *see also* Kobach, *supra* note 85, at 470–82.
153. McKanders, *supra* note 81, at 595–96.
154. BLACK'S LAW DICTIONARY 765 (8th ed. 2004).
155. De Canas v. Bica, 424 U.S. 351, 355 (1976).

within the same policy area, the state law should not be preempted unless there are persuasive reasons to conclude that both governmental systems cannot simultaneously regulate the subject matter or Congress has unmistakably so preempted state-local participation in the field.[156] The decision stated that courts should not presume a federal intention to oust state authority within their traditional police powers to regulate consistently with federal laws.[157] The Court found that a "clear and manifest" demonstration that Congress intended complete ouster of state power, including the power to promulgate laws harmonious with and not in conflict with federal laws, was necessary to justify federal preemption of a state law falling within the state's police powers.[158]

A broader definition of immigration, on the other hand, emphasizes federal authority to overturn state and local laws of which aliens are the subject, deeming the laws to be regulations of immigration. Courts adopting a broader definition of immigration reason that the "[p]ower to regulate immigration is unquestionably exclusively a federal power,"[159] because national uniformity in immigration is required to avoid foreign relations problems with other nations.[160] The argument is that the definition of immigration is broader than determining who gets to come in and who has to go.[161] To proponents of this approach, a definition of immigration must be expansive enough to encompass all areas in which the federal government has regulated with respect to immigration, even when the federal law does not explicitly oust the states from the federal scheme.[162] The range of permissible state-local action within the immigration scheme is guided by statutory and case law on the issue.

E. Scope of the States' Police Powers Within the Immigration Context

When the Supreme Court declared federal exclusivity over immigration, states used their police powers to pass statutes that discriminated against immigrants.[163] In the initial stages of this type of state legislation, the Court "did not perceive any reason why the state[s] could not discriminate against non-citizens."[164] However, in 1948, the Court began to constrict the

156. *Id.* at 355–56 (citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)).

157. *Id.* at 357–58.

158. *Id.* (citing *Fla. Lime*, 373 U.S. at 146).

159. *Id.* at 354.

160. McKanders, *supra* note 147, at 37–39; *see also* Jason Englund, Note, *Small Town Defenders or Constitutional Foes: Does the Hazleton, PA Anti-Illegal-Immigration Ordinance Encroach on Federal Power?*, 87 B.U. L. REV. 883, 904 (2007).

161. McKanders, *supra* note 147, at 27–29.

162. *Id.*; *see also* Englund, *supra* note 160, at 898–900.

163. *Cf.* Valerie L. Barth, Comment, *Anti-Immigrant Backlash and the Role of the Judiciary: A Proposal for Heightened Review of Federal Laws Affecting Immigrants*, 29 ST. MARY'S L.J. 105, 121 & n.56 (1997) (describing the use of the public interest doctrine against immigrants). States also relied on their police powers to regulate public safety to discriminate against immigrants. *Id.* at 121–22 nn.57–59 (citing various Supreme Court cases that weighed states' police powers more heavily than other constitutional rights).

164. *Id.* at 123.

states' use of this type of legislation.[165] In a departure from its recent jurisprudence on the issue, the Court determined that a state statute that discriminated equally among immigrants was unconstitutional.[166] The case further decreased the states' ability to respond to immigrant influxes. Finally, in 1971, the Court's decision in *Graham v. Richardson*[167] rejected a state's interest in conserving welfare benefits for its citizens as a valid reason for discriminating against immigrants.[168] Thus, the Court severely curtailed the states' ability to pass legislation that affected immigrants.[169] Despite the Court's decisions, subsequent federal legislation contemplates a role for the states to pass laws of which aliens are the subject.[170]

As such, the states' ability to conserve limited resources for their citizens and those authorized to reside or work in the United States requires a delicate balance to avoid the ambiguous boundaries of federal exclusivity and permissible subnational action in the immigration context.[171] States cannot define admission, exclusion, deportability criteria, or create new immigration statuses.[172] States also may not enact laws in a policy area in which Congress has expressed or implied an intention to preempt state laws.[173]

De Canas provides important guidance regarding the type of legislation states may enact.[174] In its decision, the Court determined that "states possess considerable authority to act in ways that affect immigration

165. *Id.* at 123–24.

166. Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419–20 (1948); *see also* Barth, *supra* note 163, at 123–24 (describing the Court's decision in *Takahashi* as "unlike past decisions in which the Court found the state's special public interest more important than an immigrant's constitutional rights," so that the state's interest in its resources "was inadequate to justify its discriminatory behavior against immigrants").

167. 403 U.S. 365 (1971).

168. *Id.* at 374.

169. *See* Barth, *supra* note 163, at 125. The Court's rejection of the states' interest in preserving and allocating limited resources, and labeling classifications based on alienage at the state level as "suspect," set the stage for the strict-scrutiny standard now applied to state laws that discriminate against immigrants. *Id.* at 125–26. The contrary is true for federal laws that treat immigrants differently. *Id.* at 127, 134. The Court is extremely deferential based on Congress's plenary power over immigration, which has been expanded to "laws that implicate no foreign policy interest." *Id.* at 133 ("For example, the Supreme Court in *Mathews v. Diaz* cautioned against judicial review of immigration laws by stating the 'reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.'" *Id.* at 133–34 (quoting Mathews v. Diaz, 426 U.S. 67, 81–82 (1976))).

170. *See supra* notes 97–113 and accompanying text.

171. Kobach, *supra* note 85, at 463–64; John Schwartz & Randal C. Archibold, *A Law Facing a Tough Road Through the Courts*, N.Y. TIMES, Apr. 28, 2010, at A17.

172. Kobach, *supra* note 85, at 464.

173. *Id.* at 464 & n.26 (describing some types of immigration-related laws that are preempted by federal law).

174. *Id.* at 464 ("As the Supreme Court declared in the landmark immigration preemption case of *De Canas v. Bica*, 'standing alone, the fact that aliens are the subject of a state statute does not render it a [prohibited] regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.'" (alteration in original) (quoting De Canas v. Bica, 424 U.S. 351, 355 (1976))).

without being preempted by the [relevant federal immigration law]."[175] In other words, states may continue to legislate in the field of immigration by enacting laws that: deny public benefits, driver's licenses, or resident tuition rates to unauthorized aliens; prohibit the employment of unauthorized aliens; "mirror federal immigration crimes"; and provide "state and local law enforcement assistance to [Immigration and Customs Enforcement (ICE)]."[176] As recognized by another federal district court,[177] as long as the state or local legislation uses federal statutory classifications or determinations, it is not preempted.[178]

The erosion of the judicially created federal exclusivity doctrine—plenary power—in the immigration context through case law and congressional statutes set the stage for the current immigration debate.[179] Part II of this Note focuses on two divergent preemption approaches to the state-local immigration legislation debate. Additionally, Part II explores three scholarship models to the immigration regulatory scheme. Part II also looks at the background and aftermath of each case to find a correlation between the preemption approaches, the scholarship models, and the prevention of a new wave of sundown towns.

II. DIVERGENT PREEMPTION APPROACHES IN THE IMMIGRATION CONTEXT AND THEIR CONSEQUENCES

This Part describes two preemption approaches used to review state-local legislation that affects immigrants or immigration. It also lays out three scholarship models to evaluate the federal and state-local roles with respect to immigration regulation. Part II.A illustrates two courts' divergent approaches to preemption analysis with respect to state-local legislation affecting the employment and housing of immigrants. Part II.B discusses

175. *Id.* at 464. The *De Canas* Court stated explicitly that Congress did not occupy the entire field of immigration. *See De Canas*, 424 U.S. at 357 ("Of course, even state regulation designed to protect vital state interests must give way to paramount federal legislation. But we will not presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship . . . in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was 'the clear and manifest purpose of Congress' would justify that conclusion." (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963))). The Court indicated that a state statute is not preempted absent "any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general." *Id.* at 358.

176. Kobach, *supra* note 85, at 465 (listing eight areas in which states or localities can act without being preempted).

177. *Id.* at 468 (discussing similar provisions upheld in Friendly House v. Napolitano, D.C. No. CV-04-00649-DCB (D. Ariz. Dec. 22, 2004), *vacated on other grounds*, 419 F.3d 930 (9th Cir. 2005)).

178. *Id.* ("These judicial decisions confirmed what was already clear: states are on solid legal ground if they follow the requirements of federal law and deny public benefits to illegal aliens, using the [federal] program to verify with the federal government the legal status of any alien applicant. . . . This is perhaps the easiest step that can be taken to remove an incentive for continued unlawful presence and further illegal immigration.").

179. Rodríguez, *supra* note 2, at 611–20; *see supra* Part I.C.

current state legislation. Part II.C then reviews each scholarship model—federal exclusivity, state and local regulation, and cooperative federalism.

A. Preemption as Applied by the Middle District of Pennsylvania and the Ninth Circuit

Lozano v. City of Hazleton[180] and *Chicanos Por La Causa, Inc. v. Napolitano*[181] illustrate the divergent approaches used to conduct a preemption analysis in the immigration context.[182] The *Lozano* model reflects a broad approach to preemption and relies on the vague federal exclusivity boundaries in the immigration area.[183] The *Chicanos Por La Causa* model illustrates a narrow and "normalized" preemption analysis.[184] Thus, if the court determines that the INA occupies the entire immigration field, then the state or local law affecting immigrants will be preempted.[185] However, if the court follows the narrow *De Canas* approach,[186] a law that affects immigrants is not a per se immigration regulation and consequently not preempted if the state acts within its police powers in enacting the law.[187]

1. *Lozano v. City of Hazleton*

Hazleton, Pennsylvania, is a small town located in Luzerne County, approximately eighty miles from Philadelphia.[188] The 2000 Census indicated Hazleton's population was about 23,000; however, by 2005 the City's population had increased to over 30,000.[189] The demographic explosion came after the terrorist attacks of September 11, when many immigrants from the New York metropolitan area, both legal and undocumented, headed to Hazleton, Pennsylvania for more jobs and opportunities.[190] The population increase led to additional costs in social and educational services in the small town.[191] For example, a school built

180. 496 F. Supp. 2d 477 (M.D. Pa. 2007), *aff'd in part, rev'd in part*, No. 07-3531, slip op. at 146 (3d Cir. Sept. 9, 2010).

181. 544 F.3d 976 (9th Cir. 2008), *amended by* 558 F.3d 856 (9th Cir. 2009), *cert. granted sub nom.* Chamber of Commerce v. Candelaria, ____ S. Ct. ____, 78 U.S.L.W. 3762 (U.S. June 28, 2010) (No. 09-115).

182. McKanders, *supra* note 81, at 592–96.

183. *Id.* at 596 (Professor Karla Mari McKanders believes the correct approach to preemption analysis is one that "broadly interpret[s] Congress's power to regulate immigration").

184. Rodríguez, *supra* note 2, at 620.

185. McKanders, *supra* note 81, at 596.

186. *See supra* notes 80–84 and accompanying text.

187. McKanders, *supra* note 81, at 592.

188. *See* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 484 (M.D. Pa. 2007), *aff'd in part, rev'd in part*, No. 07-3531, slip op. at 146 (3d Cir. Sept. 9, 2010); Englund, *supra* note 160, at 884.

189. *Lozano*, 496 F. Supp. 2d at 484; *see also* Kris W. Kobach, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 36 HOFSTRA L. REV. 1323, 1327 (2008); Englund, *supra* note 160, at 887.

190. Rachel E. Morse, *Following* Lozano v. Hazleton*: Keep State and Cities Out of the Immigration Business*, 28 B.C. THIRD WORLD L.J. 513, 529 (2008) (book review).

191. Englund, *supra* note 160, at 887.

for only 1800 students had to accommodate about 2500 students, the town's budget for teaching English as a second language grew from $500 per year to $875,000, and "unreimbursed health care costs increased 60%" over a two year period.[192] Additionally, the criminal arrests of undocumented immigrants created a communal perception of increased criminal activity.[193] This combination of factors led the City of Hazleton to pass its Illegal Immigration Relief Act (IIRA) in 2006.[194]

Hazleton's IIRA consisted of various ordinances to combat the employment and harboring of undocumented aliens, as well as the Official English Ordinance, which declared English as the City's official language.[195] The legislature acted on the community's desire to curtail the increased fiscal burdens and criminal activity allegedly resulting from Hazleton's undocumented alien population.[196] The version that became the law of the City of Hazleton was Ordinance 2007-6, which amended specific sections of Ordinance 2006-18, but enveloped the rest of 2006-18.[197] The *Lozano* decision of the U.S. District Court for the Middle District of Pennsylvania was based on 2007-6 and determined that the previous versions were similar enough and were encompassed in the review of 2007-6.[198]

The ordinance used the term "illegal alien" and defined it as "an alien who is not lawfully present in the United States, according to the terms of United States Code Title 8, section 1101 et seq."[199] It stated that the City and its officials could only determine immigration status by verifying a person's information with the federal government.[200] The City of Hazleton could not make independent determinations about a person's immigration status, but had to await federal verification. Thus, the federal government

192. *Id.* (citing Julia Vitullo-Martin, Editorial, *Save Our Cities*, WALL ST. J., Mar. 30, 2007, at W13, *available at* http://www.manhattan-institute.org/html/_wsj-save_our_cities.htm).

193. *See* Michael Powell & Michelle García, *Pa. City Puts Illegal Immigrants on Notice*, WASH. POST, Aug. 22, 2006, at A3. Allegedly, in 2006, four Dominican immigrants were arrested in connection with a fatal shooting, and a fourteen-year-old undocumented immigrant opened fire at a playground. Englund, *supra* note 160, at 887. There is no evidence linking undocumented immigrants with Hazleton's increase in crime. *Id.* However, the fact that undocumented aliens were involved sufficed to create the communal belief that an increased presence of undocumented aliens correlated to the increase in crime. *Id.*

194. *Lozano*, 496 F. Supp. 2d at 484.

195. *See id.*; Powell & García, *supra* note 193, at A3. The IIRA was amended various times, the last version was Ordinance 2007-6. *Lozano*, 496 F. Supp. 2d at 515. The amendments were most likely in response to litigation. *See id.* However, this discussion will treat all amendments as one and equivalent to Ordinance 2007-6, which became the law of the City and was the version on which the district court ruled. *Id.* at 515–16.

196. Englund, *supra* note 160, at 888–89 (quoting Hazleton, Pa., Ordinance 2006-10, § 2(A) (July 13, 2006), *available at* http://www.aclupa.org/downloads/Originalordinance.pdf).

197. Hazleton, Pa., Ordinance 2007-6 (Mar. 21, 2007), *available at* http://www.aclupa.org/downloads/hazletonord607.pdf. Ordinance 2006-18 was the original law, but was later amended in response to the litigation.

198. *Lozano*, 496 F. Supp. 2d at 516.

199. Hazleton, Pa., Ordinance 2006-18, § 3(D) (Sept. 8, 2006), *available at* http://www.aclupa.org/downloads/hazletonsecondordinance.pdf.

200. *Id.*

would have made the immigration status determination and then transmitted that information to Hazleton officials.

The ordinance's employment provisions stated that it was unlawful to hire, recruit, continue to employ, permit, dispatch, or instruct "unlawful worker[s] to perform work in whole or part within the City."[201] Accordingly, the law established enforcement and administrative procedures to ensure and facilitate compliance.[202] Employers that adhered to the law's verification procedures were protected from license suspension.[203] In contrast, an employer's business license could be suspended for failure to comply or correct violations.[204] The suspensions varied depending on the severity and length of the violation.[205]

Similarly, the law's housing provisions attempted to mimic federal standards. The "Harboring Illegal Aliens" section of the IIRA made it unlawful "to let, lease, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard" of a person's unauthorized status.[206] It defined a person with unauthorized status as a person in the United States in violation of the immigration law.[207] As with the employment section, the harboring provision also set enforcement and administrative procedures.[208] Landlords' rental licenses were subject to fines of $250 per day or to suspension for a violation or failing to correct violations, respectively.[209] As a companion to the IIRA, the City's registration ordinance required landlords to register current tenants by providing certain identifying information and to obtain rental licenses before leasing to new or renewing tenants.[210] Prospective and renewing tenants also had to obtain occupancy permits.[211] The occupancy permit application required the applicants to supply personal information, including "[p]roper identification showing proof of legal citizenship and/or residency."[212] Property owners who adhered to the ordinance's administrative procedures by verifying a tenant's immigration status were safe from the penalty provision.[213]

Both the employment and harboring sections contained the same language regarding the potential for discriminatory application.[214] The IIRA's relevant sections invalidated and made unenforceable any complaints primarily based on "national origin, ethnicity, or race."[215] The

201. *Id.* § 4(A).
202. *Id.* § 4(B)–(E).
203. *Id.* § 4(B)(5).
204. *Id.* § 4(B)(3)–(7).
205. *Id.*
206. *Id.* § 5(A)(1).
207. *Id.* § 5(A).
208. *Id.* § 5(A)(2)–(B).
209. *Id.* § 5(B)(3)–(8).
210. Hazleton, Pa., Ordinance 2006-13, § 6(a)–(c) (Aug. 15, 2006), *available at* http://www.aclupa.org/downloads/hazletonfirstordinance.pdf.
211. *Id.* § 7(b).
212. *Id.* § 7(b)(1).
213. Hazleton, Pa., Ordinance 2006-18, § 5(B)(9).
214. *Id.* § 4(B)(2), § 5(B)(2).
215. *Id.*

employment provisions also created a private cause of action to protect unfairly discharged employees,[216] which was not replicated in the harboring or registration provisions.

On August 15, 2006, Pedro Lozano and other Hazleton residents,[217] along with the American Civil Liberties Union (ACLU) and the Puerto Rican Legal Defense and Education Fund (PRLDEF), sued to challenge the validity of the Hazleton ordinance and to enjoin its enforcement.[218] The plaintiffs included lawful permanent residents of the United States, undocumented persons, and local groups, such as ethnic business organizations.[219] The plaintiffs alleged constitutional violations pursuant to 42 U.S.C. § 1983, which creates a private cause of action for any citizen or other person who is deprived of "any rights, privileges, or immunities secured by the Constitution and laws" by a person acting under the color of state law.[220] The plaintiffs claimed the ordinances could ensnare legal residents[221] and created a climate of fear, causing people to avoid association with groups that expressed interest in the rights of Latino immigrants.[222] Latino political activity became associated with undocumented status.[223] The plaintiffs also alleged that in passing the ordinances, the City of Hazleton violated the "United States Constitution's Supremacy Clause, Due Process Clause, Equal Protection Clause and privacy guarantees."[224]

In analyzing the claims, the *Lozano* court subscribed to a broad preemption inquiry. The district court struck down the Hazleton laws prohibiting employment and housing of undocumented immigrants.[225] With respect to the employment ordinance, the court determined that IRCA's provision regulating the employment of immigrants was broad enough to preempt the law in question.[226] The court found that the local

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216. *Id.* § 4(E).

217. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 487–507 (M.D. Pa. 2007), *aff'd in part, rev'd in part*, No. 07-3531, slip op. at 146 (3d Cir. Sept. 9, 2010) (discussing standing for all named, anonymous, and organizational plaintiffs).

218. *Id.* at 485; Powell & García, *supra* note 193, at A3.

219. *Lozano*, 496 F. Supp. 2d at 485–86.

220. 42 U.S.C. § 1983 (2006); *Lozano*, 496 F. Supp. 2d at 517.

221. *See* Powell & García, *supra* note 193, at A3. This is possible because many undocumented immigrants are parts of "mixed families." *Lozano*, 496 F. Supp. 2d at 496–97 (detailing the story of John Doe 1, an undocumented immigrant, asked to vacate an apartment by a landlord, who was a family member, because the ordinance frightened the landlord); *see* Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 53, 98 (2009) (noting that "mixed families" refers to family structures "in which some members are citizens or have legal status and some lack legal status"). Housing provisions targeting unauthorized aliens penalize mixed families and make it impossible for them to live together. *Id.* at 98–99.

222. *Lozano*, 496 F. Supp. 2d at 491 n.12.

223. *Id.*

224. *Id.* at 517.

225. *Id.* at 517, 530–33, 554–55.

226. *Id.* at 518–29, 554–55; *see* 8 U.S.C. § 1324a (2006).

ordinance was outside IRCA's savings clause,[227] ignoring the statutory language that contemplates the states' ability to further the federal regulatory scheme through their licensing laws.[228] The court determined that before the states could exercise their power within the savings clause, federal officials must have found an IRCA violation.[229] The court held that another reading would conflict with the federal government's comprehensive scheme and result in state or local determinations as to which immigrants are authorized to work.[230] Thus, the court determined the IIRA's sanctioning scheme was not within IRCA's savings provision.[231]

The court next reviewed Hazleton's housing ordinance, which instituted a sanctions scheme against landlords and tenants.[232] The law prohibited landlords from renting to undocumented immigrants and sanctioned violators.[233] The scheme required both landlords and tenants to obtain occupancy certificates issued by local authorities upon a determination that the tenants were authorized to reside in the United States.[234] The ordinance targeted undocumented persons and prohibited them from renting housing in Hazleton.[235] Using a broad preemption analysis, the court determined that the ordinance conflicted with federal immigration law.[236] The court reasoned that the federal immigration laws and removability decisions were too complex to be implemented at the local level.[237] The court also stated that since the federal government does not deport all unauthorized immigrants, the Hazleton law conflicted with federal policy.[238] As such, the local scheme was expressly and impliedly preempted because it conflicted with Congress's goals in the immigration area.[239] On appeal, the

227. *Lozano*, 496 F. Supp. 2d at 518–29, 554–55; *see* 8 U.S.C. § 1324a(h)(2) ("The 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.").

228. *Lozano*, 496 F. Supp. 2d at 520–21 & n.42.

229. *Id.* at 520–21.

230. *Id.* at 521; *see also* McKanders, *supra* note 81, at 593.

231. The law would have been preempted under a conflict preemption analysis because it gave local officials the ability to determine immigration status. *Lozano*, 496 F. Supp. 2d at 517–29. However, this Note focuses on the court's express preemption analysis, which is different from a "normalized" approach, contradicts the statutory language, and ultimately prohibited the City of Hazleton from fixing its immigration status determination process to match the federal standard established in IRCA. *See* McKanders, *supra* note 81, at 593–94.

232. *Lozano*, 496 F. Supp. 2d at 529–33.

233. *Id.* at 530.

234. *See supra* notes 178, 231 and accompanying text. While such a scheme could also be challenged as violative of other federal statutes and constitutional protections, this Note does not explore those options. *See generally* Oliveri, *supra* note 221 (arguing the various housing ordinances are preempted because of federal exclusivity in the immigration area and possible Federal Housing Act violations); Kai Bartolomeo, Note, *Immigration and the Constitutionality of Local Self Help: Escondido's Undocumented Immigrant Rental Ban*, 17 S. CAL. REV. L. & SOC. JUST. 855 (2008).

235. *Lozano*, 496 F. Supp. 2d at 530–33.

236. *Id.* at 533.

237. *Id.* at 532.

238. *Id.* at 533; *see supra* notes 125–62 and accompanying text.

239. *Lozano*, 496 F. Supp. 2d at 533. The court emphasized Justice Blackmun's concurrence in *Plyler v. Doe*, declaring that "'the structure of the immigration statuses

U.S. Court of Appeals for the Third Circuit affirmed the District Court's determination that the employment and housing provisions were both pre-empted by the INA.[240]

In the midst of the IIRA litigation, Hazleton Mayor, Louis J. Barletta, remarked: "I see illegal immigrants picking up and leaving—some Mexican restaurants say business is off 75 percent."[241] Hazleton's immigrant families started moving away after the IIRA's passage in 2006.[242] Despite the federal district court's ruling that the ordinances were unconstitutional, the outward flows of people did not stop.[243] Rudy Espinal, head of the Hazleton Hispanic Business Association, observed that people continued to leave because "they [did not] want their kids to grow up in an environment like this."[244]

Hazleton's ordinances reverberated throughout the Pennsylvania Anthracite and Appalachian regions. Places like Shenandoah and Altoona, with even smaller immigrant populations than Hazleton, considered similar legislation and fueled anti-immigrant sentiment.[245] Approximately one year later, Luis Ramirez, a twenty-five-year-old Mexican and father of two, was murdered in Shenandoah, Pennsylvania, a town twenty miles from Hazleton, in an ethnically motivated crime.[246] The attack on Ramirez was brutal. He was knocked to the ground and kicked multiple times in the head, resulting in loss of consciousness, convulsions, and foaming at the mouth.[247] The attackers, identified as local teenagers, were apprehended and tried; their charges ranged from simple assault to civil rights violations.[248] The murder took place as Shenandoah considered a law similar to Hazleton's IIRA but held off after observing Hazleton's litigation

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makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported.'" *Id.* at 532 (quoting Plyler v. Doe, 457 U.S. 202, 236 (1982) (Blackmun, J., concurring)).

240. Lozano v. City of Hazleton, No. 07-3531, slip op. at 146 (3d Cir. Sept. 9, 2010).

241. Powell & García, *supra* note 193, at A3.

242. Emily Bazar, *Illegal Immigrants Moving Out*, USA TODAY, Sept. 27, 2007, at 3A.

243. *Id.*

244. *Id.*

245. Sean D. Hamill, *Altoona, With No Immigrant Problem, Decides To Solve It*, N.Y TIMES, Dec. 7, 2006, at A34 [hereinafter Hamill, *Altoona*]; Sean D. Hamill, *Mexican's Death Bares a Town's Ethnic Tension*, N.Y TIMES, Aug. 5, 2008, at A12 [hereinafter Hamill, *Mexican's Death*].

246. LEADERSHIP CONF. ON C.R. EDUC. FUND, CONFRONTING THE NEW FACES OF HATE: HATE CRIMES IN AMERICA 17 (2009), *available at* http://www.civilrights.org/publications/hatecrimes/lccref_hate_crimes_report.pdf. The attackers allegedly yelled, "This is Shenandoah, this is America, go back to Mexico," and "Tell your fucking Mexican friends to get the fuck out of Shenandoah or you'll be fucking laying next to them." *Id.*

247. *Id.*

248. In May 2009, two of the teens were convicted of simple assault, a misdemeanor, and were acquitted of murder, aggravated assault, and ethnic intimidation. *Id.* Another teenager pleaded guilty in federal court to a civil rights violation in exchange for having the third-degree murder, aggravated assault, and other counts against him dropped. *Id.* The two teenagers who had been acquitted of murder were indicted on federal hate crime charges. Wendy Sefsaf, *Shenandoah is a Cautionary Tale for how to Debate Immigration Reform*, IMMIGRATION IMPACT, (Dec. 16, 2009), http://immigrationimpact.com/2009/12/16/shenandoah–is–a–cautionary–tale–for–how–to–debate–immigration–reform/.

troubles.[249] Nevertheless, Hazleton's IIRA provoked discussion in Shenandoah, which created tensions between the town's Latino and White communities despite formerly peaceful relations.[250] "Many people believe[d] the debate fueled by Hazleton's actions helped create the environment that led to Mr. Ramirez's death."[251] The failed attempt at legislative action combined with "inflammatory rhetoric in the immigration debate . . . correlat[es] with increased violence against Latinos."[252] Therefore, *Lozano* shows that broad preemption analyses displace communal legislative attempts to allocate resources, which are replaced with ethnically motivated violence or harassment—setting the stage for a brown sundown town.

2. *Chicanos Por La Causa, Inc. v. Napolitano*

The state of Arizona passed a law similar to Hazleton's IIRA to address resource allocation and criminality concerns. During the 1990s, increased border patrol presence across the California and Texas borders with Mexico diverted flows of undocumented immigrants to the Arizona border.[253] Deaths on the Arizona border "account for half of all border deaths."[254] In addition to increased border crossings into Arizona, drug cartel-related violence accentuated the sense of danger.[255] Arizona border residents reported an increase in burglaries and other violent property crimes.[256] For example, during the 2000 Presidential campaign, Pat Buchanan told Theresa Murray's story.[257] Murray is an elderly woman who lives near Douglas, Arizona.[258] Her house is surrounded by chain-link fence and "[s]he sleeps with a gun on her bed table because she has been burglarized 30 times."[259] In response to the porous border and dangerous activity, Arizona passed a law in 2005 that extended felony immigrant-smuggling charges to state jurisdiction.[260]

A border state, Arizona constantly struggles with how to reduce the number of undocumented immigrants, who are part of the state's

249. LEADERSHIP CONF. ON C.R. EDUC. FUND, *supra* note 246, at 8, 17.
250. *Id.*
251. Hamill, *Mexican's Death*, *supra* note 245.
252. *Id.* (quoting Gladys Limón, staff lawyer for the Mexican American Legal Defense and Educational Fund).
253. Gordon H. Hanson, Raymond Robertson & Antonio Spilimbergo, *Does Border Enforcement Protect U.S. Workers from Illegal Immigration?*, 84 REV. OF ECON. & STAT. 73, 76 (2002).
254. George Ciccariello-Maher, *Arizona: Ground Zero in Immigration's New Race Wars*, COUNTERPUNCH (Dec. 26, 2008), http://www.alternet.org/story/115032/.
255. R. Cort Kirkwood, *Border Town Violence: As Illegal Immigrants Flood the United States, A Wave of Crimes Committed by Illegals Is Crashing into Border Towns and Threatening To Engulf Our Entire Nation*, NEW AM., Aug. 7, 2006, at 25-28.
256. *Id.*
257. *Id.* at 25.
258. *Id.*
259. *Id.*
260. Ciccariello-Maher, *supra* note 254.

workforce.[261] Undocumented workers account for approximately ten percent of Arizona's workforce.[262] Furthermore, various organizational surveys indicate that Arizona's undocumented population increased dramatically from the mid-1990s through 2006.[263] In October 1996, the unauthorized population was estimated at around 115,000.[264] By 2006, the estimate had ballooned to a range from 400,000 to 500,000.[265] The state's answer to the problem came in the Legal Arizona Workers Act (LAWA).[266] The statute was enacted on July 2, 2007 and became effective on January 1, 2008.[267] It reflects Arizona's response to the hiring of undocumented aliens by its businesses.[268] This conflation of factors likely catalyzed the enactment of LAWA.

LAWA prohibits employers from "knowingly" hiring undocumented workers.[269] LAWA defers to federal law to define "unauthorized alien."[270] It creates a comprehensive administrative and enforcement structure providing for investigation, adjudication, and sanctions.[271] The sanctions range from a probationary period to suspension and revocation of employers' business licenses, depending on the number of previous violations and other factors.[272] To help employers comply with the federal and state laws, the law mandates the use of E-Verify, the federal online verification program, to confirm that all new employees are authorized to work in the United States.[273] LAWA also creates a voluntary program through which employers agree to perform additional checks using federal databases to ensure compliance.[274] Voluntary enrollment in the program protects employers from findings of violations if they adhere to the program's guidelines.[275]

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261. Feller, *supra* note 90, at 302.

262. *Id.* (citing PEW HISPANIC CTR., ARIZONA: POPULATION AND LABOR FORCE CHARACTERISTICS, 2000–2006, at 1 (2008), *available at* http:// pewhispanic.org/ files/factsheets/37.pdf.).

263. *See* PEW HISPANIC CTR., *supra* note 262, at 1; Federation for American Immigration Reform (FAIR), Arizona: Illegal Aliens, http://www.fairus.org/site/ PageServer?pagename=research_research82b2 (last visited Sept. 23, 2010).

264. Federation for American Immigration Reform (FAIR), *supra* note 263.

265. PEW HISPANIC CTR., *supra* note 262, at 3–4; Federation for American Immigration Reform (FAIR), *supra* note 263.

266. ARIZ. REV. STAT. ANN. §§ 23-211 to 23-216 (2009).

267. Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976, 981 (9th Cir. 2008), *amended by* 558 F.3d 856 (9th Cir. 2009), *cert. granted sub nom.* Chamber of Commerce v. Candelaria, ____ S. Ct. ____, 78 U.S.L.W. 3762 (U.S. June 28, 2010) (No. 09-115).

268. *Id.* at 979.

269. ARIZ. REV. STAT. ANN. § 23-212.

270. *Id.* § 23-211(8). The statute adopts 8 U.S.C § 1324a to define "[k]nowingly employ an unauthorized alien," and further clarifies that the "term shall be interpreted consistently with 8 United States Code § 1324a and any applicable federal rules and regulations." *Id.*

271. *Id.* § 23-212(C)–(F).

272. *Id.* § 23-212(F).

273. *Id.* § 23-214.

274. *Id.* § 23-215(C)–(H).

275. *Id.* § 23-215(D).

In July 2007, a month after the law's enactment, businesses and civil rights organizations brought a facial challenge against the Act.[276] The initial action was dismissed because none of the county attorneys responsible for enforcing the Act were named as defendants.[277] In December 2007, a second action was instituted, naming appropriate defendants: fifteen Arizona state county attorneys, the governor, and the attorney general, among others.[278] The suit alleged that the Arizona law was preempted by federal law.[279] The district court determined that LAWA was within IRCA's savings clause and thus was not expressly preempted by federal law.[280] The court also found that LAWA's sanctions provisions and mandatory use of E-Verify were not inconsistent with federal policy and therefore were not impliedly preempted.[281] The plaintiffs appealed the decision to the Ninth Circuit Court of Appeals.[282]

In contrast to the *Lozano* court, in *Chicanos Por La Causa, Inc. v. Napolitano*,[283] the Ninth Circuit performed a narrow preemption analysis to approach the Arizona statute.[284] The Ninth Circuit determined that the statute fell within IRCA's saving clause[285] because a state's business licensing requirements were part of the state's power to regulate employment.[286] To reach this conclusion, the court focused on established case law, stating that "[w]hen Congress legislates 'in a field which the States have traditionally occupied . . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[287] The court also invoked the Supreme Court's language in *De Canas*.[288]

The court also found that Arizona's requirement that all employers participate in the E-Verify program did not conflict with or impede the federal government's goals in the immigration area.[289] Even though E-

276. Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976, 979 (9th Cir. 2008), *amended by* 558 F.3d 856 (9th Cir. 2009), *cert. granted sub nom.* Chamber of Commerce v. Candelaria, ____ S. Ct. ____, 78 U.S.L.W. 3762 (U.S. June 28, 2010) (No. 09-115). It was a facial challenge because the law had yet to be enforced against any employer. *Id.*

277. *Id.* at 981.

278. *Id.* at 979.

279. *Id.* at 981–82. The plaintiffs also alleged due process violations because LAWA did not give employers "an adequate opportunity to dispute the federal government's response that an employee was not authorized to work." *Id.* at 982. The court held that the employer's due process rights were adequately protected. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. 544 F.3d 976 (9th Cir. 2008).

284. *Id.* at 982–86.

285. *See id. But see supra* note 227 and accompanying text.

286. *Chicanos Por La Causa*, 544 F.3d at 983–84.

287. *Id.* at 983 (alteration in original) (quoting United States v. Locke, 529 U.S. 89, 108 (2000)).

288. *Id.*; *see also supra* note 81 and accompanying text.

289. *Chicanos Por La Causa*, 544 F.3d at 985–86. The electronic-based system is an alternative to the I-9 paper verification system. *Id.* at 981.

Verify is voluntary under the federal scheme, the court determined that Arizona's statute actually advanced Congress's goal to expand and encourage participation in the program.[290] The court reached its conclusion not only because of its narrow express and implied preemption analysis, but also because LAWA language adopted federal definitions and processes to determine employment eligibility.[291]

Even though LAWA survived the legal challenge, the law has been difficult to enforce.[292] The county attorneys charged with prosecuting violations do not have subpoena power to obtain personnel records from employers, which is crucial to prove the employers knowingly hired undocumented workers.[293] Thus, most investigations do not yield enough evidence to proceed with an employer sanctions case.[294] In November 2009, the first case under the Act was filed in Maricopa County against an employer for knowingly hiring an unauthorized worker.[295] In December 2009, Waterworld became the first Arizona business to experience the punitive impact of the law.[296] The employer's business license was suspended for ten days under a settlement with the Maricopa County Attorney's Office.[297]

Despite enforcement difficulties, LAWA has had a deterrent effect, as illustrated by the exodus of mostly Latino immigrants since the law's passage.[298] It is reported that about 100 Latinos per day move to Texas as a result of the "immigration crackdowns in Oklahoma and Arizona."[299] The exodus is visible in the decreased availability of workers in industries that rely heavily on Latino labor, such as the restaurant[300] and construction industries.[301] Employers also are reporting a decrease in both legal and undocumented workers.[302] The outward flow of Arizona's undocumented

290. *Id.* at 986.
291. *Id.* at 985.
292. Jim Small, *Employer Sanctions Coming Up Short*, ARIZ. CAPITOL TIMES, Oct. 9, 2009, at 3.
293. *Id.* at 3, 63.
294. *Id.*
295. JJ Hensley & Michael Kiefer, *Employer Sanctions Law Finally Yields First Case*, ARIZ. REPUBLIC, Nov. 19, 2009, at A1.
296. JJ Hensley & Michael Kiefer, *First Firm Punished Under Ariz. Hiring Law*, ARIZ. REPUBLIC, Dec. 18, 2009, at B1.
297. Hensley & Kiefer, *supra* note 296. Whether this sanction's instance is a success story is questioned by some since the company was already out of business. *Id.* The parent company, Golfland Entertainment Centers, did not lose any license privileges, but agreed to use the E–Verify system and provide proof, if requested, that all employees are legal. *Id.*
298. Small, *supra* note 292. "[The Arizona law] is a strong deterrent . . . . [but] [a]s an actual weapon, it falls short." *Id.*
299. Dan McFeely, *Immigration Laws Send Hispanics Elsewhere: 2 States that Approved Crackdowns Have Seen an Exodus of Illegals*, INDIANAPOLIS STAR, Feb. 24, 2008, at A1, *available at* 2008 WLNR 26580674.
300. Small, *supra* note 292.
301. McFeely, *supra* note 299.
302. Small, *supra* note 293 ("We're . . . driving out a lot of people who are legal, too." (quoting Jason LaVecke, owner of restaurant franchises in Arizona)); *see also* McFeely, supra note 299 (describing outflow in Oklahoma and Indiana).

population was also reflected in housing trends.[303] As early as January 2008, Arizona landlords reported that "thousands of alien tenants had vacated their apartments."[304] LAWA's effect also was noticed at the federal level by then-Secretary of Homeland Security, Michael Chertoff.[305] He observed that since Arizona's law was upheld, the federal government was "beginning to see that illegal workers are picking up and leaving, because they recognize this system is an impediment to their continued illegal activities and illegal employment in this country."[306]

Along with a decrease in the Latino labor force in Arizona, there has been an increase in race-motivated hate crimes.[307] The national trend indicates that hate crimes against Latinos and others perceived to be immigrants has steadily increased.[308] According to a report by the U.S. Federal Bureau of Investigation (FBI), Arizona police departments reported 185 hate crimes during 2008, compared with 161 in 2007.[309] Finally, the renewal of Maricopa County's agreement with the federal government under 8 U.S.C. § 1357(g),[310] led by Sheriff Joe Arpaio, along with Arpaio's targeted and aggressive law enforcement techniques to enforce Arizona's human smuggling law, [311] may be increasing resentment against Arizona's immigrants, both authorized and undocumented.[312]

B. The Ninth Circuit's Chicanos Por La Causa *Provides New Impetus for Arizona's Continued Involvement with Immigration-Related Laws at the State Level*

On April 23, 2010, Arizona's governor, Jan Brewer, signed into law Senate Bill 1070 (S.B. 1070).[313] The law goes beyond LAWA and is the country's toughest and broadest effort to control undocumented

303. Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155, 157–60 (2008).

304. *Id.* at 158.

305. *Id.* at 158–60.

306. *Id.*

307. *Hate Crimes Increase 15 Percent in Arizona*, PHOENIX BUS. J. (Nov. 24, 2009), http://phoenix.bizjournals.com/phoenix/stories/2009/11/23/daily34.html [hereinafter *Hate Crimes*].

308. LEADERSHIP CONF. ON C.R. EDUC. FUND, *supra* note 246, at 14–15.

309. *Hate Crimes*, *supra* note 307.

310. *See supra* notes 96–101 and accompanying text; *see also* Audrey Hudson, *Law Agencies Make New Pact on Illegal Deportation*, WASH. TIMES (Oct. 17, 2009), http://www.washingtontimes.com/news/2009/oct/17/law-agencies-make-new-pact-on-illegals-sheriff-sti/?page=1.

311. Sheriff Joe Arpaio, known as "America's Toughest Sheriff," gained national notoriety with his "controversial immigration and other law enforcement policies—such as forcing detainees to wear pink underwear and engaging in racial profiling—that regularly draw the ire of the civil rights and immigrant rights communities." Keith Aoki & Kevin R. Johnson, *Latinos and the Law: Cases and Materials: The Need for Focus in Critical Analysis*, 12 HARV. LATINO L. REV. 73, 97 (2009).

312. McFeely, *supra* note 299; *see also infra* note 419.

313. S.B. 1070, 2010 Leg., 2d Reg. Sess. (Ariz. 2010), *available at* http://www.azleg.gov/alispdfs/council/SB1070-HB2162.pdf.

immigration at the subnational level.[314] It amends various Arizona statutes, including LAWA, such that in its entirety, the bill is a concerted effort to facilitate the prosecution and deportation of undocumented immigrants and discourage their presence in Arizona.[315] As such, the law is hailed as a much needed tool for the state "to solve a crisis . . . [that] the federal government has refused to fix."[316]

The law's broad scope aims to reduce undocumented immigrants' ability to stay under the radar in Arizona.[317] Most prominently, the law criminalized as a misdemeanor the failure to carry immigration documents.[318] It also empowered the local police to detain people, where "reasonable suspicion exist[ed] that the person" was an unlawful undocumented alien,[319] or there was "probable cause to believe" that the person had committed an offense that made that person "removable" from the United States.[320] It also created a cause of action allowing "people to sue local government or agencies if they believe[d] federal or state immigration law [was] not being enforced."[321] Finally, the law carefully delineates that immigration status is defined and verified using federal standards.[322]

The law was supposed to become effective on July, 29, 2010, but it occasioned immediate international, popular, legislative, and legal backlash.[323] Among the most vocal critics were Latino groups and legislators, who were concerned about the law's use as an ethnic or racial

314. Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1.

315. S.B. 1070, 2010 Leg., 2d Reg. Sess., § 1 ("The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.").

316. Archibold, *supra* note 314; *see also supra* note 315.

317. *See generally* S.B. 1070, 2010 Leg., 2d Reg. Sess., §§ 1–3 (targeting employers, imposing fines on and requiring undocumented persons to reimburse the state for jail costs, stopping and blocking the road to hire day laborers, and making illegal the transporting and harboring of a person suspected of having entered the state in violation of U.S. immigration laws, etc.).

318. *Id.* § 3.

319. *Id.* § 2.

320. *Id.* § 6.

321. Archibold, *supra* note 314; *see also* S.B. 1070, 2010 Leg., 2d Reg. Sess., § 2.

322. S.B. 1070, 2010 Leg., 2d Reg. Sess., §§ 2–3.

323. *See e.g.*, Randal C. Archibold, *Arizona Law Is Stoking Unease Among Latinos*, N.Y. TIMES, May 28, 2010, at A11; Archibold, *supra* note 10; Randal C. Archibold & Ana Facio Contreras, *First Legal Challenges to New Arizona Law*, N.Y. TIMES, Apr. 30, 2010, at A15; Peter Baker, *supra* note 4, at A12; Rebecca Cathcart, *California: Los Angeles Approves a Boycott of Arizona*, N.Y. TIMES, May 13, 2010, at A17; Carl Hulse & David M. Herszenhorn, *Democrats Outline Plans for Immigration*, N.Y. TIMES, Apr. 30, 2010, at A12; Marc Lacey, *For Migrants, New Law is Just Another Challenge*, N.Y. TIMES, Apr. 29, 2010, at A6; Preston, *supra* note 10, at A3; Julia Preston, *Latino Groups Urge Boycott of Arizona Over New Law*, N.Y. TIMES, May 7, 2010, at A16; John Schwartz & Randal C. Archibold, *A Law Facing a Tough Road Through the Courts*, N.Y. TIMES, Apr. 28, 2010, at A17; Billy Witz, *"Los Suns" Join Protest, Then Stop the Spurs*, N.Y. TIMES, May 6, 2010, at B13. *But see* Kris W. Kobach, *Why Arizona Drew a Line*, N.Y. TIMES, Apr. 29, 2010, at A31.

profiling tool.[324] Although the law stated that its implementation had to be consistent with federal immigration and civil rights laws,[325] critics were concerned that the law would create fear and distrust of Latinos in Arizona, as well as have "nationwide repercussions."[326] Overall, S.B. 1070's comprehensive scope unnerved various constituencies and caused Arizona both economic and reputational harm.[327]

Importantly, S.B. 1070 was so controversial that it put pressure on the federal government and reinvigorated the immigration debate at the federal level.[328] On July 6, 2010, the Justice Department filed suit against the State of Arizona, challenging S.B. 1070's constitutionality.[329] Despite the controversy, Arizona refused to capitulate to the increasing pressure to revoke the law and defended it.[330] The Justice Department presented its position on July 22, 2010, argued that the Arizona law was preempted by federal law, and urged Judge Susan R. Bolton to grant a preliminary injunction before the law became effective on July 29, 2010.[331] Judge Bolton expressed skepticism about the federal government's constitutional challenge and continually asked the federal government to explain how the Arizona law infringed federal authority to remove immigrants.[332]

On July 28, 2010, the day before S.B. 1070 was to become effective, Judge Bolton handed down her decision, which struck the most controversial provisions and let the remaining provisions go into effect.[333] Accordingly, the provision empowering the police to detain people where a reasonable suspicion existed that they were in Arizona in violation of U.S immigration laws was enjoined.[334] Also enjoined were the provisions requiring police officers to check a person's immigration status during routine stops for traffic violations and foreigners to carry identification documents proving they were legally present in the country.[335] However,

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324. Archibold, *supra* note 314.

325. *See, e.g.*, S.B. 1070, 2010 Leg., 2d Reg. Sess., § 2.

326. Archibold, *supra* note 314. Opponents were particularly concerned with the potential to abuse the reasonable suspicion standard to profile Latinos. Archibold, *supra* note 323, at A11. *But see* Kobach, *supra* note 323, at A31 (arguing that S.B. 1070 contains adequate safeguards and since reasonable suspicion is not a new standard to courts or law enforcement, the potential for abuse is exaggerated).

327. Cathcart, *supra* note 323, at A17; Preston, *supra* note 323, at A16; Witz, *supra* note 323, at B14.

328. Baker, *supra* note 4, at A12; Hulse & Herszenhorn, *supra* note 323, at A12, A15; Preston, *supra* note 10, at A3.

329. Complaint at 1, United States v. Arizona, No. 2:10-cv-01413-NVW (D. Ariz. July 6, 2010); Preston, *supra* note 10, at A3.

330. *See, e.g.*, Preston, *supra* note 323, at A6 (discussing legislative attempts to convince the governor of Arizona to delay enforcement).

331. James C. McKinley, Jr., *Taking to Streets and Court on Immigration*, N.Y. TIMES, July 23, 2010, at A11; *see also* Preston, *supra* note 10, at A3.

332. McKinley, *supra* note 331, at A11.

333. United States v. Arizona, 703 F. Supp. 2d 980, 985-87 (D. Ariz. 2010); *see also* Miriam Jordan, *Judge Blocks Arizona Law*, WALL ST. J., July 29, 2010, at A1. For a complete list of all the provisions that were enjoined and those that were allowed to go into effect, see *Arizona*, 703 F. Supp. 2d at 985-87.

334. *Arizona*, 703 F. Supp. 2d at 993–98; *see also* Jordan, *supra* note 335, at A6.

335. *Arizona*, 703 F. Supp. 2d at 998–1000; *see also* Jordan, *supra* note 333, at A6.

the provisions criminalizing the harboring and transporting of undocumented persons, and allowing people to sue local governments where they believe federal immigration law is not being enforced survived the district court's review.[336]

Judge Bolton's decision was welcomed by immigrant rights' groups, which were particularly concerned with the potential for racial profiling abuse.[337] However, supporters of the Arizona law and the state's right to enact such legislation expressed anger and dismay at the decision and its implications for states' ability to allocate limited resources.[338] The governor of Arizona vowed to appeal the decision and observers cautioned that the delicately carved decision was just a preliminary injunction and could be overturned.[339] By the time of the ruling, the uncertainty and controversy around S.B. 1070 had already forced many immigrant families to self-deport or move to other states.[340]

C. Scholarship Models to Federal Preemption in the Immigration Context

There are three scholarship models to analyze the relationship between the state and local government vis-à-vis the federal government. These three models are useful to study *Lozano* and *Chicanos Por La Causa*, and to understand the balance struck by the courts through a preemption lens. The models are federal exclusivity, state and local regulation of immigration, and cooperative federalism.[341] Part II.C will analyze each scholarship model to determine how each fits under or would alter the current immigration scheme.

1. Federal Exclusivity

The federal exclusivity model reflects the foundational cases' approach. It deposits plenary power over immigration regulation exclusively in the federal government.[342] It prevents both states and localities from passing laws that affect immigration in its broad definition.[343] Accordingly, subfederal governments cannot enact negative or positive laws regulating noncitizens. The *Lozano* decision illustrates this approach.

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336. *Arizona*, 703 F. Supp. 2d at 986–87, 1000-04, 1008; *see also* Jordan, *supra* note 333, at A6.

337. *See* Jordan, *supra* note 333, at A6; Evan Perez, *States Deal Blow in Battle for Power*, WALL ST. J., July 29, 2010, at A6.

338. *See* Jordan, *supra* note 333, at A6; Perez, *supra* note 337, at A6; *cf.* Jonathan Weisman & Stephanie Simon, *Ruling Is New Hot-Button Issue in Election Year*, WALL ST. J., July 29, 2010, at A6 (quoting various politicians' criticisms of Judge Bolton's decision).

339. *See* Jordan, *supra* note 333, at A1, A6; Perez, *supra* note 337, at A6.

340. *See* Jordan, *supra* note 333, at A6.

341. McKanders, *supra* note 81, at 599. *See generally* Kobach, *supra* note 85 (stating that state and local governments have authority under the current scheme); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 54 (2007) (arguing against "sub-federal assumption of immigration powers"); Wishnie, *supra* note 73 (positing that federal power over immigration is not devolvable).

342. *See supra* Part I.B.

343. *See generally* Wishnie, *supra* note 73.

The Supreme Court has continuously determined that when the federal government has plenary power in any particular area, Congress cannot divest itself of this authority.[344] The delegation of plenary power violates the constitutional text and structure.[345] When congressional plenary power is grounded in the constitutional text, the states and localities do not have a role to play and Congress cannot grant them power to act in the area—the power is non-devolvable.[346] The basis for the non-devolution principle in the immigration context is grounded in other areas of law.[347]

Advocates of this approach prefer it because of the inextricability of immigration and foreign relations in an increasingly interconnected world.[348] The reasoning is that if states are permitted to regulate in this area, even if based on their police powers, the disparate state policies could potentially embroil the country in problems with other nations.[349] Even though foreign nations recognize that the states are not distinct entities from the United States, the fact is that states have increased their interactions with other countries.[350] Although this theory is strongest when dealing with "serious international players like California, Texas, and New York,"[351] it remains an attractive rationale.[352]

Additionally, the federal government does not remove every undocumented alien who is in the country in violation of the immigration laws.[353] The state and local laws about employment or housing of undocumented aliens redistribute immigrant flows to other states and localities[354] or precipitate self-deportation.[355] Federal exclusivity advocates argue that the subnational laws also conflict with the federal policy of nonenforcement with respect to the removal of unauthorized aliens.[356]

Proponents of this approach argue that states and localities should stay out of the immigration scheme.[357] They contend that states and localities are incapable of considering the effects of their law beyond their

344. *Id.* at 527–59.
345. *Id.* at 529–30.
346. *Id.* at 549–59.
347. *Id.* at 501–04, 527–58 (stating that court decisions concluding that congressional plenary power is not devolvable are based on maritime law, contact law, and taxation law).
348. Englund, *supra* note 160, at 904.
349. *Id.* at 904–05; *cf.* Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 161 (1994).
350. Englund, *supra* note 160, at 904–05; *see* Spiro, *supra* note 349, at 161.
351. *See* Englund, *supra* note 160, at 905.
352. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 527–28 (M.D. Pa. 2007), *aff'd in part, rev'd in part*, No. 07-3531, slip op. at 146 (3d Cir. Sept. 9, 2010).
353. Englund, *supra* note 160, at 906.
354. Morse, *supra* note 190, at 535–36.
355. *Cf.* Englund, *supra* note 160, at 904–06 (self-deportation refers to immigrants' return to their countries of origin, usually in reaction to anti-immigrant sentiment or stringent immigration laws).
356. Englund, *supra* note 160, at 904.
357. *See generally* Morse, *supra* note 190 (stating that allowing subnational actors to participate in the immigration field can cause negative social, economic, and political effects).

jurisdictional limits.[358] As such, "[a] sudden extirpation of some twelve million foreign nationals would not go unnoticed by our neighbors."[359] Allowing state and local governments to continue passing immigration-related laws could lead to incongruent policies, which in turn could lead to massive self-deportations or relocations of immigrants to other states and cause tension with other countries or sister states.[360]

Federal exclusivity advocates also point to existing federal immigration law and argue it reflects a "comprehensive scheme,"[361] which ousts the states from the field. They point to the federal government's regulation of the immigration area through criminal, employment, and welfare provisions to support the existence of an all-encompassing federal immigration system that displaces state and local involvement.[362] Within this approach, any role the state or local governments may play can occur only at the behest of the federal government.[363]

2. State and Local Regulation of Immigration

A true state-local approach to immigration is not possible due to the Supreme Court's declaration of federal plenary power in the field.[364] Accordingly, in discussing this scholarship model, the current immigration scheme will serve as the example. Despite the Supreme Court's declaration of federal plenary power in immigration policy, legislative developments in the last thirty years established a role for subfederal governments within the current regulatory scheme.[365] The current immigration scheme encourages states and localities to fill in the gaps where the federal government has failed to act and where the states have not been explicitly displaced.[366] Nevertheless, for states and localities to pass immigration-related legislation based on their police powers[367] requires manipulative technical skill to avoid federal preemption.[368]

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358. Englund, *supra* note 160, at 904.

359. *Id.* (citing Patrik Jonsson, *Immigration Crackdown Debated*, CHRISTIAN SCI. MONITOR, Nov. 3, 2006, at 2).

360. *See id.* at 905–06. "If a substantial number of Mexican nationals were affected by the ordinances, Mexico would look to Washington for answers." *Id.* at 905.

361. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 518 (M.D. Pa. 2007), *aff'd in part*, *rev'd in part*, No. 07-3531, slip op. at 146 (3d Cir. Sept. 9, 2010) (citing Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 147 (2002)); McKanders, *supra* note 81, at 596.

362. McKanders, *supra* note 81, at 596 ("[T]he *Lozano* court correctly and broadly interpreted Congress's power to regulate immigration. [It] found that Congress, under [the] IRCA, had created a comprehensive scheme . . . .").

363. *Cf.* Englund, *supra* note 160, at 903–10.

364. *See supra* notes 55–74 and accompanying text.

365. Bartlett, *supra* note 147, at 1021–22 (discussing the introduction of CLEAR Act, which "reaffirms states and cities inherent police powers to enforce immigration laws and protect its citizens"); Kobach, *supra* note 189, at 1327–28; McKanders, *supra* note 147, at 14–20. "[M]ost interesting about the Clear Act of 2007 is that the bill clearly states that the inherent police powers of states and municipalities has never been displaced or preempted by Congress in the field of immigration enforcement." Bartlett, *supra* note 147, at 1022.

366. Kobach, *supra* note 85, at 483; McKanders, *supra* note 147, at 14–20.

367. McKanders, *supra* note 147, at 22 ("States have traditionally used their Tenth Amendment police powers to exercise control over immigrants within their communities."

Different states and cities are exposed to varying levels of immigration and thus to varying costs of absorbing immigrants, both legal and undocumented, into their fabrics.[369] As such, some states and localities become "sanctuaries,"[370] while others use "attrition by enforcement" strategies and become synonymous with anti-immigrant legislation.[371]

It is the attrition by enforcement method that is at the fore of the debate.[372] States and localities that have succeeded in upholding laws that punish the hiring and harboring of undocumented aliens by deferring to federal standards claim the laws were necessary to conserve finite resources.[373] Commentators urge that the laws are not prohibited regulations of immigration, but rather are about state and local governments' decisions on how to allocate limited resources to address the increased costs or obligations of immigration influxes.[374]

3. Cooperative Federalism

Various scholars have criticized the courts' applications of preemption analyses.[375] These scholars argue that the application of broad preemption analyses limits "federalism's iterative opportunities"[376] and expands presidential and congressional power at the expense of local democratic forces.[377] They posit that the lens through which the courts analyze preemption and federalism has not kept up with the changed federal

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(citing Laurel R. Boatright, *"Clear Eye for the State Guy": Clarifying Authority and Trusting Federalism To Increase Nonfederal Assistance with Immigration Enforcement*, 84 TEX. L. REV. 1633, 1666 (2006))).

368. The City of Hazleton implied that because it had followed federal standards with "exacting precision," its ordinance eschewed federal preemption because it only took actions permitted by Congress. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 519 (M.D. Pa. 2007), *aff'd in part, rev'd in part*, No. 07-3531, slip op. at 146 (3d Cir. Sept. 9, 2010) (quoting Memorandum of Law in Support of Defendant's Motion To Dismiss at 37, Lozano v. City of Hazleton, 496 F.Supp.2d 477 (2007) (No. 3:06–cv–01586–JMM)); Kobach, *supra* note 85, at 464 ("[S]tate statutes must be carefully drafted to avoid federal preemption.").

369. Rodríguez, *supra* note 2, at 586 n.72, 637.

370. *Id.* at 600–05.

371. *See generally* Kobach, *supra* note 303 (explaining how this enforcement strategy has yielded results in driving out the undocumented in Arizona and Missouri).

372. *See supra* note 315.

373. Kobach, *supra* note 189, at 1324–25; Kobach, *supra* note 85, at 459–62. "In city after city, and state after state, governments have acted for one overriding reason: they can't afford not to." Kobach, *supra* note 189, at 1324.

374. Kobach, *supra* note 189, at 1324–25; Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1624–25, 1632–41 (2008) ("[L]ocal involvement in immigration regulations is not always solely or even primarily concerned about immigration per se, but [is] an attempt to circumvent or negotiate obligations and constraints that have been imposed by state law.").

375. Gulasekaram, *supra* note 4, at 1481; Resnik, *supra* note 120, at 41–42; Rodríguez, *supra* note 2, at 609–30.

376. Resnik, *supra* note 120, at 41.

377. *Id.* at 73.

landscape and stifles local legislative innovation.[378] For example, state and local governments and their officials are increasingly interrelated in the twentieth century.[379] This increased interconnection is illustrated by governmental interest groups, which lobby for subnational actors' interests and to protect them from national encroachments.[380] States and localities also are more international and, through interest group memberships, adopt foreign issues into domestic law—usually, where the federal government has failed to act.[381]

The cooperative federalism model proposed by Professor Cristina M. Rodríguez suggests that a "reformulation of existing federalism presumptions in the immigration context" is needed to better address federal and subfederal concerns.[382] The model calls for courts to limit their preemption analyses to that applied in all other contexts.[383] Accordingly, courts should abandon "strong field and obstacle preemption theories in immigration cases."[384] Professor Rodríguez's proposed framework improves the status quo and offers subfederal governments meaningful participation within the immigration regulatory scheme.[385] Real participation and empowerment of subfederal entities can "restrain [court] impulses to preempt legislation . . . [and] create incentives for cooperative ventures in immigration regulation."[386]

Considering congressional inability to enact lasting and effective comprehensive immigration reform, cooperative federalism becomes an important model to reinforce, revamp, and implement durable immigration laws.[387] Because states and localities absorb immigrants and must cope with increased resource consumption and other immigration-related effects, it is important to give them a voice in immigration regulation as "agents of integration."[388] Thus, Rodríguez suggests, reassessing the foundational basis for the current ambiguous federal exclusivity system, without overemphasizing the national interest in immigration regulation, can foster

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378. *See id.* at 42–43, 65; *see also* Gulasekaram, *supra* note 4, at 1450 ("[T]he Supreme Court's thick notion of national sovereign power is anachronistic.").

379. Resnik, *supra* note 120, at 45.

380. *Id.*

381. *Id.* at 46–47. For example, because many local officials disagreed with the federal government's failure to adopt the Kyoto Protocol, some cities enacted ordinances to conform to the Protocol's targets. *Id.* at 62.

382. Rodríguez, *supra* note 2, at 567.

383. *Id.* at 567–68.

384. *Id.*

385. *Id.* at 568, 572.

386. *Id.* at 568.

387. *See id.*

388. *Id.* at 571, 581.

> States and localities must determine how to integrate immigrants, legal and illegal alike, into the body politic. . . . [Therefore,] immigration regulation should be included in the list of quintessentially state interests, such as education, crime control, and the regulation of health, safety, and welfare, not just because immigration affects each of those interests, but also because managing immigrant movement is itself a state interest.

Id. at 571.

federal-state-local cooperation and strengthen the federal and subfederal relationship to manage migration efficiently.[389]

Under this model, both the courts and Congress would have to modify their conduct with regards to immigration regulation. Courts would adhere to the default rule under preemption doctrine, which is one of concurrent subject matter jurisdiction.[390] In the absence of an actual conflict and not just "on general assertions of the risk of potential harms," the courts should not displace state legislation that relates to federal legislation.[391] Because the Constitution does not explicitly delegate immigration authority to the federal or state governments, the proper allocation of immigration authority between levels of government is a political judgment for which the courts are not the best proxies to strike the proper balance.[392] The courts' current approach to this area—through broad preemption analysis—is unlikely to provide a permanent fix that addresses both the states' and the federal concerns in the immigration field.[393] "[E]ven if the courts find some particular measures unconstitutional," the need for both state and federal action in the area is unlikely to go away.[394] Accordingly, along with a strong presumption against preemption, part of the proposal for cooperative federalism calls for courts to consider whether a state or local law is a regulation or a selection rule.[395] Although the difference between regulation and selection rules is not clear cut, the distinction is helpful to advance the national discussion and balance national and subnational interests.[396]

States could provide meaningful involvement in selection rules by serving as laboratories of innovation to tighten the immigration regulation scheme.[397] Therefore, when the courts and Congress are determining what state and local actions to preempt in the immigration context, they should consider the conceptual difference between regulation and selection.[398]

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389. *Id.* at 573. Professor Cristina M. Rodríguez believes cooperative federalism will "reshape our conceptual and doctrinal understandings of immigration regulation" by "restraining Congress from explicitly preempting much [subfederal] legislation that may seem counter to federal objectives at first glance." *Id*. at 571, 573. Through the integration of both federal and state-local concerns into the immigration regulatory scheme, Congress would be restrained from "over-regulating with respect to integration issues, such as the rights and benefits states can accord immigrants within their jurisdictions." *Id.* at 573.

390. Resnik, *supra* note 120, at 75; *see supra* notes 127–44.

391. Resnik, *supra* note 120, at 75–76.

392. Clare Huntington, *A House Still Divided*, 157 U. PA. L. REV. PENNUMBRA 227, 231–32 (2009), http://www.pennumbra.com/responses/response.php?rid=63.

393. *Id.* at 232.

394. *Id.*

395. *See generally id.*

396. *Id.* at 232–33.

397. *See id.* at 233.

398. *Id.*; Resnik, *supra* note 120, at 85–86 (using the Sudan context to illustrate how local efforts eventually affect national political postures). The history of California's Proposition 187, which prohibited most types of public benefits for undocumented immigrants, stands as an early state effort to curb undocumented immigration to California. LEGOMSKY & RODRÍGUEZ, *supra* note 3, at 1283. The passage of Proposition 187 led to immediate lawsuits to enjoin its enforcement. *Id.* at 1284. Nevertheless, the national controversy and inflamed passions engendered by the California law may have added clarity to the

Under this system, "subnational governments cannot choose which noncitizens can come into the state, but a state can choose the conditions under which noncitizens live. This balance preserves the idea that the federal government chooses its members and state and local governments make decisions about their resources."[399] Because each state and locality experiences the costs of undocumented immigrants to varying degrees, the regulation and selection distinction can allay fears and empower subnational governments' resource allocation decisions.

Finally, this model would require modification of current congressional practices. For a proper and clear preemption analysis, Congress would need to make explicit how or if state and local action is displaced by specific federal legislation in the immigration context.[400] For this preemption clarity to exist, the courts would have to apply a "normalized" preemption analysis and presume against the displacement of subnational laws that overlap with the federal immigration scheme. Insisting on clear congressional directives before finding preemption can push Congress to balance the allocation of authority among federal-state-local governments, so that both state-local and national interests are reflected.[401] Some courts' current approaches not only expand presidential and congressional power,[402] but also broaden the courts' own roles to determine "when national interests require preemption of state and local legislation."[403] The current divergent approaches to preemption analysis illustrate that courts have become de facto policy makers in the immigration context. Thus, judicial restraint is required to incentivize prompt congressional action and avoid the solidification of the ground for or the proliferation of brown sundown towns.

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immigration debate, when Congress responded with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) and IIRIRA in 1996. *Cf. id.* The relevant provisions that solved the issue stated that unauthorized aliens were not eligible for any "[s]tate or local public benefit," except for certain emergency relief programs. 8 U.S.C. § 1621(a)–(c) (2006). As such, the federal government enacted the legislation that California sought to implement and unauthorized aliens were excluded from "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit," grants, contracts, and licenses provided by an agency of a state or local government. *Id.* § 1621 (c)(1)(B).

399. Huntington, *supra* note 392, at 233. For example, LAWA can be explained as both a regulation and selection rule because it sanctions employers who hire undocumented immigrants. *Id.* at 232–33 ("It operates as a regulation rule by making it more difficult for unauthorized migrants in Arizona to find employment. But it also operates as a selection rule because it likely influences the decision whether to come to the United States, or at least to Arizona."). However, by applying the conceptual distinction, such a law should not be preempted because the selection distinction does not create an actual conflict and Arizona is not making the selection determination.

400. *See* Resnik, *supra* note 120, at 76.

401. *See* Huntington, *supra* note 392, at 232–34; Resnik, *supra* note 120, at 75–76.

402. *See* Resnik, *supra* note 120, at 76–77.

403. *Id.* at 84; *cf.* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 523–24 (M.D. Pa. 2007), *aff'd in part*, *rev'd in part*, No. 07-3531, slip op. at 146 (3d Cir. Sept. 9, 2010); *supra* notes 230–39 and accompanying text.

III. PAVING THE WAY FOR COOPERATIVE FEDERALISM AND AVOIDING BROWN SUNDOWN TOWNS

This part proposes that the cooperative federalism model is the most effective model to balance federal and state-local concerns and tighten the immigration regulatory scheme. It also posits that the Ninth Circuit's preemption analysis is the best approach to move the current federal regulatory system towards cooperative federalism. The Ninth Circuit's preemption analysis approach and the cooperative federalism model represent the most adequate and efficient methods to provide a meaningfully functional and lasting immigration regulatory scheme. Part III.C considers how the Ninth Circuit's approach is important to galvanize the federal government towards the cooperative federalism model and help to curtail the emergence of or the expansion of brown sundown towns.

A. The Ninth Circuit's Chicanos Por La Causa *Decision Illustrates the Appropriate Approach to Preemption Analysis in the Immigration Context*

The Ninth Circuit Court of Appeals decision adhered to *De Canas*' regulation and selection distinction to balance Arizona's interests within the current federally-oriented system.[404] In analyzing LAWA for federal preemption, the court applied a normalized examination for express, field, and conflict preemption.[405] LAWA mirrored federal standards to determine immigration status and fell within IRCA's savings clause, thus express preemption was not applicable.[406] LAWA is a licensing law through which Arizona regulates employment in the state—a function that falls under its police powers.[407]

With regard to implied field preemption, similar reasoning for the express preemption argument is applicable.[408] If Congress had intended to fully occupy the entire field of employment immigration regulations, the savings clause would have been omitted. Conflict preemption also was inappropriate to invalidate the law because although Arizona struck a different balance from the federal government, the case arose as a facial challenge.[409] The law had yet to be enforced, so any conflicts or problems

404. *See supra* notes 80–84, 146–58, 187 and accompanying text; *see also supra* notes 395–400 and accompanying text.

405. *See supra* notes 125–58, 180–87, 280–91 and accompanying text.

406. *See supra* text accompanying notes 94–95; *supra* notes 171–78, 280–88 and accompanying text.

407. *See supra* text accompanying notes 56–58, 140, 157–59, 269–75, 285–88; *supra* Part I.E.

408. *See supra* text accompanying notes 280–91.

409. Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976, 986–87 (9th Cir. 2008), *amended by* 558 F.3d 856 (9th Cir. 2009), *cert. granted sub nom.* Chamber of Commerce v. Candelaria, ____ S. Ct. ____, 78 U.S.L.W. 3762 (U.S. June 28, 2010) (No. 09-115); *see supra* text accompanying notes 283–288. The federal government does not deport all unauthorized immigrants, not because it has chosen not to enforce the law, but because it lacks human and financial resources, and must prioritize its focus to deport dangerous aliens, both documented and undocumented. *Cf.* Kobach, *supra* note 303, at 157-58, 162-63.

were unsubstantiated. The court warned that, should similar litigation arise in an enforcement context, the fact-finding may lead to a different result.[410]

It is precisely this sort of nuanced and restrained preemption analysis that courts should adhere to in the context of state and local regulations that affect immigrants.[411] This approach allows the legislative process and immigration dialogue to take hold at the state and local level.[412] It reflects the reality on the ground that it is states and localities that must accommodate immigrants, both legal and undocumented, into their fabrics.[413] Thus, subnational governments should be able to make legislative decisions on how to allocate finite resources. The federal government is less sensitive to these concerns because it benefits from the taxes paid by undocumented persons.[414] Burdened states and localities may have behaved differently if the federal government had shared some of those revenues with them.

Independent of other motives precipitating the state of Arizona to enact LAWA and S.B. 1070, *Chicanos Por La Causa*'s aftermath demonstrates that allowing the polity to determine its priorities may have beneficial, albeit limited, effects.[415] The immigrant exodus in the months leading up to and subsequent to the passage of the legislation indicates that it provided enough of a deterrent to lessen the influx and presence of unauthorized immigrants in Arizona.[416] While hate crimes against Latinos have risen in the state, the trend mirrors a national increase that is likely attributable to the heated immigration debate at the national level.[417] Even though the anti-immigrant and inflammatory language continues to plague LAWA, 287(g) enforcement, and the S.B. 1070 controversy in the state,[418] no increase in or egregious occurrences of violent crime by locals against immigrants has been widely reported.[419] It is too soon to determine

410. *See Chicanos Por La Causa*, 544 F.3d at 981.

411. *See supra* text accompanying notes 376–78, 383–86.

412. Legomsky, *supra* note 3, at 259 ("In the immigration cases . . . the Court has relied on the plenary power doctrine to avoid performing *any* balancing of the relevant countervailing interests."); *cf. id.* at 263–68 (stating that courts should apply normal standards of review, except when foreign policy or other important aliens' rights are realistically threatened).

413. *See supra* notes 7–11, 388–89 and accompanying text; *supra* text accompanying note 369; *cf.* Morse, *supra* note 190, at 519–20 ("[I]t is the system that needs to change to reflect reality, as opposed to the issue being the need to better enforce the existing laws.").

414. Gulasekaram, *supra* note 4, at 1472, 1481.

415. Rodríguez, *supra* note 2, at 595–97, 635–37.

416. *See supra* notes 298–306 and accompanying text; *see also* Jordan, *supra* note 333, at A6 (stating that S.B. 1070 prompted many undocumented immigrants to move to other states or back to their countries) .

417. *See supra* text accompanying notes 307–09.

418. *See supra* text accompanying notes 310–12.

419. Zachary Roth, *More Far-Right Violence? Anti-Immigrant Suspects in Arizona Killing Have Ties To White Supremacists*, TPMMUCKRAKER (June 16, 2009 12:48 EST), http://tpmmuckraker.talkingpointsmemo.com/2009/06/more_rightwing_violence_anti–immigrant_suspects_in_1.php. Although the violent murder of a Mexican immigrant and his young daughter in an Arizona border town were reported, the homicide was the product of white supremacist group leader with no particular links to Arizona. *Id.* One of the suspects, Shawna Forde, is linked to various murders throughout the country associated with white

whether the S.B. 1070 mixed decision will increase violence against immigrants in Arizona, but certain political commentators warned of growing anger and resentment. [420]

The Supreme Court asked President Barack Obama's administration to weigh in on the Arizona law challenge pending before the Court before it decided to grant or deny certiorari.[421] On June 28, 2010, the Court granted certiorari.[422] The Supreme Court should follow the Ninth Circuit's narrow preemption analysis.

The narrow approach gives the statutory language in IRCA's savings clause its natural meaning, respects the states' police powers in the employment context, and demonstrates judicial restraint in making policy judgments. Significantly, the narrow approach signals to Congress that immigration reform is overdue and that the states should be integral parts of the new regulatory scheme. For durable immigration reform, states must play meaningful roles in enforcement to help control unauthorized immigration and reduce the incentives and opportunities for unauthorized immigrants to live in the shadows.[423] The states and localities are the ones that must accommodate immigrants, both legal and undocumented, and the federal government does not have the resources to deport all unauthorized immigrants. This is precisely why the subnational governments must be involved in the immigration enforcement scheme. Otherwise, the stop-valve approach exemplified in the previous waves of legalization programs will continue to attract unauthorized immigrants hoping to go undetected long enough to benefit from the next mass legalization scheme.

Additionally, the fact that Congress has not acted to overturn the Ninth Circuit decision is key.[424] Rather, as exemplified recently in CLEAR Act,[425] it appears that Congress has embraced the erosion of federal exclusivity.[426] IRCA, IIRIRA, PRWORA, and CLEAR Act, all contemplate or carve out spaces to allow states and localities a role to play within the immigration context.[427] Because CLEAR Act is the most recent

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supremacist causes. *Id.* Reportedly, the murder victim was a known drug dealer and the suspects expected to find weapons and money to fund their cause. *Id.* Despite being motivated by animus towards immigrants, there were other motivating factors. *Id.* Thus, this murder is distinguishable from violent crime committed by locals of cities or states where immigrant-related laws were found to be preempted. However, the S.B. 1070's potential for racial and ethnic profiling was a different but still concerning issue. *See* Archibold, *supra* note 323.

420. *See* Weisman & Simon, *supra* note 338, at A6.

421. Daniel González & Dan Nowicki, *Justices May Hear Disputed Ariz. Law*, ARIZ. REPUBLIC, Nov. 3, 2009, at A1.

422. Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976 (9th Cir. 2008), *amended by* 558 F.3d 856 (9th Cir. 2009), *cert. granted sub nom.* Chamber of Commerce v. Candelaria, ____ S. Ct. ____, 78 U.S.L.W. 3762 (U.S. June 28, 2010) (No. 09-115).

423. *Cf.* Lacey, *supra* note 323 (discussing how migrants perceive Arizona's laws and how migrants will continue to come to Arizona or other states as long as there are jobs for them across the border).

424. *See supra* text accompanying notes 114–18, 305–06.

425. *See supra* text accompanying notes 114–18.

426. *See supra* Part I.C.

427. *See supra* Part I.C.

development in the immigration debate, its language should inform courts' preemption analyses. The proposed statutory language explicitly states that concurrent subfederal authority in the enforcement of immigration law is neither expressly nor impliedly displaced.[428] It indicates that "the *Lozano* court's field preemption analysis is flawed"[429] and that the Ninth Circuit's approach is better aligned with congressional intent.

B. Cooperative Federalism Is the Most Effective Model for the Federal and State-Local Relationship as Reflected in Chicanos Por La Causa

The cooperative federalism model attempts to move the immigration regulation scheme "[t]oward a [n]ew [p]ower-[s]haring [t]heory."[430] The evolution from federal legislation, as exhibited in IRCA, IIRIRA, the PRWORA, and CLEAR Act, to increased state and local participation, demonstrates that federal exclusivity is no longer a viable theory in the immigration context.[431]

The status quo reflects deference to the federal exclusivity doctrine, which is exhibited in the broad preemption analyses used to evaluate state-local legislation affecting immigrants.[432] Such broad analyses emphasize federal concerns and increase anti-immigrant sentiment as state-local governments are disempowered and their resource allocation concerns, whether real or not, are disregarded.[433] The brewing hostility against and suspicion of immigrants will result in their exodus and create a breeding ground of resentment similar to the one that produced the first sundown towns.[434] The events in Hazleton and nearby cities demonstrate that the path towards brown sundown towns may have been paved already.[435] The murder of Luis Ramirez by local teenagers, the increased proliferation of similar ordinances, and the inflammatory rhetoric have bred fear and resulted in an exodus of both legal and undocumented immigrants.[436]

The current state and local attrition by enforcement approaches likely fall within the states' and localities' police powers.[437] However, they require legal technical maneuvers to avoid federal preemption.[438] The legality of the measures does not negate the inappropriate motives against immigrants

428. *See supra* text accompanying notes 114–18.
429. Bartlett, *supra* note 147, at 1022.
430. Rodríguez, *supra* note 2, at 617.
431. *See supra* text accompanying note 427; *supra* notes 119–24, 378–89 and accompanying text.
432. *See supra* notes 83, 84, 159–62, 225–39, 390–96 and accompanying text.
433. *See supra* text accompanying notes 386–89; *see also* Rodríguez, *supra* note 2, at 595–96, 639. "[P]reempting local laws that aim to exclude immigrants will not make for a better integration environment, because the sentiments behind the preempted ordinances are likely to remain and fester." *Id.* at 639.
434. *Compare* Rodríguez, *supra* note 2, at 595–96, 639 (discussing the importance of narrow preemption analyses and tolerance for disharmony and short-term backlash), *with* Part I.A (illustrating the history of sundown towns and the exodus of various ethnic groups).
435. *See supra* notes 241–52 and accompanying text.
436. *See supra* notes 245–52 and accompanying text.
437. *See* Kobach, *supra* note 85; *see also supra* notes 373–74 and accompanying text.
438. *See supra* notes 366–68 and accompanying text.

that may have driven such campaigns. Although the approach can move the immigration debate to the forefront through increased media and judicial scrutiny,[439] it is not a permanent solution. Attrition through enforcement is a springboard to rethink and evolve the status quo—embodied in broad preemption analyses—towards cooperative federalism, which best balances the concerns driving the two divergent approaches.

The cooperative federalism model empowers state and local governments to determine how to manage immigrant influxes within their resource allocation and police powers.[440] Because the model envisions a role for both the national and subnational governments, it can better protect immigrants' rights from improper legislative motives.[441] It can also help to quell the inflamed passions that the immigration debate provokes at both the federal and subnational levels.[442] State and local legislation that affects immigrants probably will adversely affect undocumented immigrants by forcing them into other states and localities.[443] However, with respect to those immigrants that remain, the cast of suspicion and communal hostility will dissipate because the presumption will be that they are lawfully in the United States.

The move towards a cooperative federalism model may result in a patchwork of immigration legislation. Different states can take sanctuary-like or enforcement-focused approaches as they determine the allocation of limited resources.[444] Nevertheless, the interim patchy immigration picture probably will catalyze the re-creation of the immigration scheme.[445] The divergent approaches can create competition and innovation to incentivize or force the federal government either to: (1) adopt the cooperative federalism model, or (2) set out clearer policies and standards to allow the courts to determine what actually constitutes immigration regulation.[446]

California's Proposition 187 is an example of what the transition to cooperative federalism could look like.[447] The state's attempt to exclude undocumented aliens from most public benefits, even constitutionally protected ones,[448] produced immediate lawsuits to enjoin its enforcement.[449] While animus towards Latinos may have been a driving

439. *See supra* notes 299–306 and accompanying text; *see also supra* text accompanying notes 403–25.

440. *See supra* Part I.E; *supra* notes 388, 399 and accompanying text; *see also* Rodríguez, *supra* note 2, at 571, 581–82.

441. *See supra* note 412 and accompanying text.

442. *See* Rodríguez, *supra* note 2, at 639.

443. *Id.*; *see also* McFeely, *supra* note 299 ("'What was Oklahoma's problem is now some other state's problem.'" (quoting Oklahoma Representative Randy Terrill on the success of the Oklahoma law that makes it illegal to harbor an undocumented person)).

444. *See* Rodríguez, *supra* note 2, at 581–609; *supra* Parts II.A.1–2.

445. *See* Rodríguez, *supra* note 2, at 638–40; *supra* note 9; *infra* text accompanying note 449.

446. *See supra* text accompanying note 158; *supra* notes 390–403 and accompanying text.

447. *See supra* note 398; *see also* Rodríguez, *supra* note 2, at 595–96.

448. *See supra* notes 109, 398 and accompanying text.

449. *See supra* note 398 and accompanying text.

force behind the passage of the legislation, it propelled the legislation to the national stage.[450] The controversy likely precipitated congressional action in the form of PRWORA and IIRIRA.[451] This legislative exchange between the subnational and national levels demonstrates that partnership creates a legislative dialogue, which, in turn, moves the federal government to act—to clarify its policies and to address the subnational concerns.

Two years elapsed from Proposition 187's passage at the state level in 1994 to the federal overhaul embodied in PRWORA and IIRIRA in 1996.[452] Two years can be a long time to tolerate anti-immigrant rhetoric and animus, and the conditions for brown sundown towns may be solidified in the meantime. However, because sanctuary states and cities will continue to exist in the interim, at a minimum, undocumented aliens have some options. Given that the Supreme Court granted certiorari and comprehensive immigration reform is back on the legislative horizon, the answer to the proper relationship between the federal and state-local level with respect to the immigration regulatory scheme may emerge in less than two years. Courts should let the issue percolate instead of stepping in as policy makers in overlapping areas where, historically, they have been reluctant to supplant their political judgment for that of the political branches—be that Congress in the immigration context or the states and localities in resource allocation and traditional police powers.

C. Avoiding Brown Sundown Towns

The *Lozano* court's decision, while admirable for emphasizing immigrants' substantive rights,[453] was a disservice to the immigration reform debate. While the Hazleton ordinance was overly broad and some of its language was problematic, certain provisions mirrored LAWA and should have survived.[454] The court's broad preemption approach allowed it to engage in an unusual, labored, and results-oriented reasoning process.[455] Such a broad approach set the Hazleton ordinance up to be preempted, so much so that the court's decision in the case prohibited the City from fixing the ordinance. Thus, even though the local ordinance had other problems, the court mistakenly determined that Hazleton's sanctioning scheme was not within IRCA's savings provision.[456]

Through its broad preemption analysis, the court quashed the debate at the local level. The subsequent events in Hazleton illustrate what can happen when the polity is blocked from employing legal means to address

450. *See supra* note 398 and accompanying text.
451. *See supra* text accompanying notes 96–113, 398.
452. *See supra* note 398.
453. *See supra* text accompanying note 394. *See generally* Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007), *aff'd in part, rev'd in part*, No. 07-3531, slip op. at 146 (3d Cir. Sept. 9, 2010).
454. *See supra* text accompanying notes 199–200, 406; *supra* notes 225–31 and accompanying text.
455. *See supra* notes 225–31 and accompanying text.
456. *See supra* text accompanying notes 94–95, 225–39.

what it perceives to be communal problems.[457] Sadly, the murder of Luis Ramirez, an undocumented immigrant, represents the extra-legal methods to excise the community of "problems."[458] The murder is likely to increase the outflow of immigrants from these cities.[459] Thus, new brown sundown towns may emerge throughout states and cities that are denied the legal opportunity to determine how to allocate limited resources or how to accommodate population increases and demographic changes. The broad preemption approach rewards the status quo and does not create a sense of urgency at the national level to address the reality that the immigration regulatory landscape has changed dramatically since 1893, when the Supreme Court announced federal exclusivity in the area.[460]

In contrast, the Ninth Circuit's narrow preemption approach to LAWA can move the immigration debate forward. The Arizona law was saved by the Ninth Circuit's nuanced inquiry about both the federal and the state level interests, actual conflicts, and recognition of the iterative opportunities in the Arizona law.[461] While the law still produced an exodus of undocumented immigrants and the rhetoric continues to be inflammatory, the incidence of violent communal crime towards undocumented aliens appears to be lower.[462] Additionally, by allowing the Arizona law to stand, LAWA has been propelled to the national level, attracting the attention of the Supreme Court, the Obama Administration, and the Department of Homeland Security.[463] LAWA also encouraged Arizona to pass S.B. 1070, which inflamed passions and catapulted the Department of Justice to act.[464]

Finally, employment and public benefits regulations at the state and local levels are appropriate within the current regulatory scheme when they mirror federal standards. However, they should also represent the outer limit of what is permissible at the subnational level during the transition from the status quo towards cooperative federalism. Housing and harboring regulations, however, may be beyond state and local authority within the current immigration scheme.[465] The lack of clarity in federal standards as to what constitutes harboring, as well as the invasiveness of the housing regulations, risk violating federal law and constitutional protections such as the Fair Housing Act and privacy rights, respectively.[466] In the meantime, the public benefits and employment regulations at the state and local levels

457. *See supra* notes 19–28, 39–47, 241–52 and accompanying text.
458. *See supra* notes 19–28, 39–47, 188–94, 245–52 and accompanying text.
459. *See supra* text accompanying notes 243–44.
460. *See supra* notes 59–74 and accompanying text; *supra* text accompanying note 124.
461. *See supra* notes 283–91 and accompanying text; *see also supra* text accompanying notes 376–78, 390–96.
462. *See supra* notes 307–12, 419 and accompanying text. More statistical and empirical research may prove otherwise; however, the goal of this Note is to bring attention to the relation among preemption analysis, federal activity, and anti-immigrant sentiment to set the stage for a new explosion of sundown towns.
463. *See supra* text accompanying notes 421–24.
464. *Supra* Part II.B.
465. *See supra* note 234 and accompanying text. *See generally* Oliveri, *supra* note 221.
466. *See supra* note 234 and accompanying text; *see also* Oliveri, *supra* note 221, at 81–97.

address the same concerns that the housing and harboring prohibitions intend to solve. Because there is more background, both in jurisprudence and statutes,[467] to add precision to the employment and public benefits legislation, legislative use of such provisions for inappropriate purposes is more visible and thus, presumably, preventable.

It is unclear whether S.B. 1070 or LAWA will survive Ninth Circuit and Supreme Court review. However, increased harassment and profiling threats are creating sundown towns. Nevertheless, the laws have also contributed to reopening the immigration debate and can pave the way for cooperative federalism. Although a narrow preemption analysis may not completely eliminate the formation of sundown towns, it may have a positive effect in reducing ethnically-motivated violence.[468]

State empowerment within a revamped immigration scheme is a key element to any comprehensive immigration reform. Clearly defined federal limits are required to prevent ethnic and racial backlash that will convert American cities into brown sundown towns. Recognition of the fiscal burdens that unfettered immigration can have on states and localities and the vital role these subnational entities play is crucial to tighten and create a durable federal immigration scheme.

CONCLUSION

The raging debate about comprehensive immigration reform is ripe ground to overhaul the current federally oriented scheme. The divergent preemption approaches and scholarship models provide important background to inform the legislative process. As exemplified by *Lozano v. City of Hazleton*, *Chicanos Por La Causa, Inc. v. Napolitano*, and their aftermath, a narrow preemption approach is preferable to evaluate immigrant-related state-local legislation. A narrow and complex approach better weighs state-local concerns and does not appear to increase anti-immigrant violence. It also generates notoriety at the federal level and incentivizes action. Accordingly, courts and legislators should recognize the correlation between preemption, analytical clarity, and the practical reality at the state-local level—a reality that is a brewing ground for a new wave of sundown towns—brown sundown towns.

467. *See supra* notes 80–118 and accompanying text.
468. *Compare supra* Part II.A.1, *with* Part II.A.2, II.B.