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Chamber of Commerce v. Whiting and the Future of State Immigration Laws

Gregory DeLassus
gdelassu@slu.edu

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CHAMBER OF COMMERCE v. WHITING AND THE FUTURE OF STATE IMMIGRATION LAWS

INTRODUCTION

The 1986 Immigration Reform and Control Act (“IRCA”) requires employers to verify the legal status of all newly hired employees.¹ To facilitate compliance with this requirement, the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) created a federal database (“E-verify”) that employers could use as a means of verification, although the IIRIRA provided that “the Attorney General may not require any person or other entity to participate” in E-verify.² In 2007, Arizona enacted legislation that required employers to use E-verify to check the immigration status of all new-hires.³ When a coalition of employers and immigrant-rights activists sued in federal court to block the implementation of the new law, titled the Legal Arizona Workers Act (“LAWA”), the U.S. District Court for the District of Arizona ruled that the federal statutory language making E-verify voluntary did not preempt Arizona from requiring the database’s use.⁴ The Ninth Circuit Court of Appeals upheld the district court’s decision.⁵

By contrast, subsequent decisions in the Third and Tenth Circuits concluded that federal law preempted similar laws in Pennsylvania and Oklahoma.⁶ These courts reached their conclusions partly on the grounds that requiring the use of E-verify upsets the balance of interests that Congress hoped to achieve by making E-verify’s use voluntary.⁷

1. Immigration Reform and Control Act of 1986 § 274A(b)(1)(A), 8 U.S.C. § 1324a(b)(1)(A) (2006).

2. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 402(a), 403(a), 110 Stat. 3009, 3009-656, 3009-659 to -662. The IIRIRA provided for several pilot programs. *Id.* One of them, called the Basic Pilot in the Act, became known as E-verify. *Ariz. Contractors Ass’n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036, 1042 (D. Ariz. 2008).

3. ARIZ. REV. STAT. ANN. § 23-214 (Supp. 2010).

4. *Ariz. Contractors Ass’n*, 534 F. Supp. 2d at 1057.

5. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 861 (9th Cir. 2009), *aff’d sub nom.* *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).

6. *Lozano v. City of Hazleton*, 620 F.3d 170, 219 (3d Cir. 2010); *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 769 (10th Cir. 2010).

7. *Lozano*, 620 F.3d at 210–11; *Edmondson*, 594 F.3d at 767–68.

On June 28, 2010, the Supreme Court granted certiorari in the Ninth Circuit case under the caption *Chamber of Commerce v. Candelaria*.⁸ On December 8, 2010, the Court heard arguments to determine whether the voluntary nature of the federal law preempts the obligations imposed by the Arizona law.⁹ On May 26, 2011, the Court affirmed the Ninth Circuit's ruling.¹⁰

This Note will explain why, although the Ninth Circuit correctly applied existing law in this case, the Supreme Court should have reversed existing precedents and secured control of immigration law at the Federal level. Such an outcome would have prevented further impractical immigration restrictions, created a more uniform and predictable frame of reference for employers' immigration questions, and enhanced compliance with the law.

I. HISTORY

A. *History of the IRCA & IIRIRA*

The impetus for the IRCA stemmed from the enactment of the Immigration and Nationality Act Amendments of 1965 ("INA").¹¹ Before 1965, strict controls governed the number of persons allowed to enter the United States from Europe and Asia, but few limitations applied to entry from the Americas.¹² This lack of limits allowed farmers in the western states to organize "*bracero*"¹³ programs starting in 1917 to bring Latino farm workers back and forth across the Mexican border as needed to work in the fields.¹⁴ The 1965 INA imposed a cap of 120,000 persons per annum on migration from the Western Hemisphere¹⁵ and specified that only ten percent of visas given each year should be apportioned to "immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States."¹⁶

The *bracero* programs terminated around the time of the INA's enactment, but the programs' end did not change the fundamental supply-and-demand

8. 130 S. Ct. 3498 (2010), *decided sub nom.* *Chamber of Commerce v. Whiting* 131 S. Ct. 1968, 1981 (2011).

9. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1968 (2011).

10. *Id.* at 1987.

11. *See* Immigration and Nationality (Hart-Cellar) Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

12. HELENE HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED 16 (2001).

13. *Bracero* is Spanish for "one who works with his arms." *Id.* at 18.

14. *Id.*

15. *Id.* at 16.

16. Immigration and Nationality Act Amendments of 1965, sec. 3, § 203(a)(6), 79 Stat. at 913.

considerations that motivated their initial formation.¹⁷ Consequently, large numbers of workers who had once participated in the *bracero* programs began to travel in and out of the United States in a covert, undocumented fashion.¹⁸ By 1980, officials estimated the number of undocumented Latino immigrants to be somewhere between three and six million, even as the country suffered a surge in unemployment during a difficult recession.¹⁹ Moreover, those immigrants in the United States suffered stereotyping as “welfare cheats” and “free-loaders,”²⁰ sparking an increase in anti-immigrant sentiments that culminated in Attorney General William French Smith’s 1981 declaration that “[w]e have lost control of our borders.”²¹

To regain control, the IRCA attempted to turn off the “job magnet” that drew migrants in the first place.²² Interest groups from both ends of the political spectrum mounted a bipartisan effort to address the immigration issue,²³ joining groups as disparate as the Daughters of the American Revolution and the American Civil Liberties Union to forge what has been characterized as “a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected.”²⁴ For instance, while early drafts of the IRCA provided permanent residency to any undocumented worker “who could prove that he had been working in perishable agriculture for at least 20 full days” in 1985, the final version that was actually passed required ninety days.²⁵ Likewise, the Democratic-controlled House included a provision in an early draft ending the employer sanctions after six and one half years only to have the measure axed by Republicans in the Senate.²⁶

The earliest draft of the bill imposed a one thousand dollar fine per illegal worker if the employer had at least four illegal workers on the payroll.²⁷ When

17. HAYES, *supra* note 12, at 18.

18. *Id.*

19. *Id.* at 19.

20. *Id.* at 21. It should be noted that this popular perception was not well grounded in data. *Id.* at 38.

21. *Administration’s Proposals on Immigration and Refugee Policy: Joint Hearing Before the Subcomm. on Immigration, Refugees, and Int’l Law of the H. Comm. on the Judiciary and Subcomm. on Immigration and Refugee Policy of the S. Comm. on the Judiciary*, 97th Cong. 6 (1982) (statement of William French Smith, Att’y Gen. of the United States).

22. HAYES, *supra* note 12, at 47.

23. *Id.* at 41–46.

24. *Nat’l Ctr. for Immigrants’ Rights, Inc. v. INS*, 913 F.2d 1350, 1366 (9th Cir. 1990); *see also* *Lozano v. City of Hazleton*, 620 F.3d 170, 212 (3d Cir. 2010); Romano L. Mazzoli, *Immigration Reform: The Path to Passage and Beyond*, 14 J. LEGIS. 41, 41 (1987).

25. HAYES, *supra* note 12, at 60.

26. *Id.* at 62.

27. *Id.* at 53.

anti-immigration lobbying groups objected that these sanctions were too weak, a subsequent draft of the bill called for three thousand dollar fines against repeat offenders per illegal worker for even one illegal worker on the payroll.²⁸ With business interests alarmed that xenophobia might cut into profits and Hispanic organizations alarmed that employer sanctions would lead to discrimination,²⁹ Congress reached a compromise of two thousand dollars per illegal worker for the first offense.³⁰ No fewer than seven failed attempts to reach an acceptable balance were required, as various interest groups demanded adjustments to this or that provision, before the final IRCA was achieved.³¹ The later IIRIRA required a similar series of congressional compromises, illustrating the complex politics of immigration reform.³²

B. *History of the LAWA*

While the impetus behind the LAWA included the IRCA and the IIRIRA, other demographic and financial trends unique to Arizona influenced the debate. Although economists disagree about the fiscal impact of illegal immigration on various levels of government,³³ many think that illegal immigration's fiscal impact falls more heavily on border states like Arizona.³⁴

28. *See id.* at 54, 55.

29. *See id.* at 56–64 (describing the differing reactions to the employer sanctions provisions in the proposed legislation).

30. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 274A(e)(4), 100 Stat. 3359, 3366.

31. HAYES, *supra* note 12, at 53–55.

32. *See, e.g.,* Appiah v. INS, 202 F.3d 704, 710 (4th Cir. 2000) (noting the compromise involved in the IIRIRA); LARRY EIG & WILLIAM KROUSE, CONG. RESEARCH SERV., 97–946 A, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENCE STATUS UNDER SECTION 245(i) 5 (1998), available at <http://www.policyarchive.org/handle/10207/bitstreams/487.pdf>.

33. *See, e.g.,* *The Budgetary Impact of Current and Proposed Border Security and Immigration Policies: Hearing on S. 2611 Before the S. Comm. on the Budget*, 109th Cong. 7 (2006) (statement of Paul R. Cullinan, Chief, Human Resources Cost Estimates Unit of the Congressional Budget Office) [hereinafter “Cullinan”] (“[W]hen increases in immigration are simulated in the [Social Security Administration’s computer] models, the program’s finances generally show improvement”); GORDON H. HANSON, COUNCIL ON FOREIGN RELATIONS, *THE ECONOMIC LOGIC OF ILLEGAL IMMIGRATION* 23 (2007) (“[W]e cannot say with much conviction whether the aggregate impact of immigration on the U.S. economy is positive or negative. What available evidence does suggest is that the total impact is small.”); PANEL ON THE DEMOGRAPHIC AND ECONOMIC IMPACTS OF IMMIGRATION, NAT’L RESEARCH COUNCIL, *THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION* 9 (James P. Smith & Barry Edmonston eds., 1997) (“[T]he net fiscal impact of all U.S. immigrant-headed households . . . averaged across all native households in the United States . . . [is a burden] on the order of \$166 to \$226 per native household.”).

34. *See, e.g.,* Cullinan, *supra* note 33, at 4 (“CBO’s review of the research on immigration found that over the long term, immigration tends to affect federal finances positively and state and local finances negatively.”); COUNCIL OF ECON. ADVISERS, *ECONOMIC REPORT OF THE*

While this last point is not clearly established,³⁵ popular perceptions that the nation suffered from an excess of undocumented immigrants grew throughout the 1990s, especially in the border states.³⁶ Meanwhile the federal government struck some commentators as being complicit in the entry of undocumented immigrants, even though it retained the power to create and enforce immigration laws.³⁷ Such perceptions engendered anti-federal resentment in Arizona.³⁸

To counter popular outrage, Arizona legislators invited Professor Kris Kobach to help draft legislation that became the LAWA.³⁹ These legislators were inspired by Professor Kobach's writings on the subject of state immigration laws.⁴⁰ Just like the IRCA at the federal level, the LAWA sought to reduce illegal immigration to Arizona by preventing undocumented workers from obtaining jobs.⁴¹ As Governor Napolitano's LAWA signing statement

PRESIDENT 106-07 (2005) (“[W]hile immigrants do not impose a net higher tax burden at the Federal level, natives in states with a heavy concentration of immigrants from Latin America do realize an increased overall tax burden.”).

35. See, e.g., JUDITH GANS, UDALL CTR. FOR STUDIES IN PUB. POLICY, IMMIGRANTS IN ARIZONA: FISCAL AND ECONOMIC IMPACTS 3 (2008) (“[I]mmigrants in Arizona generated a net 2004 fiscal contribution of about \$940 million toward services such as public safety, libraries, road maintenance, and other areas.”).

36. See, e.g., MORRISON INST. FOR PUB. POLICY, ILLEGAL IMMIGRATION: PERCEPTIONS AND REALITIES (2010); Johanna Dunaway et al., *Agenda Setting, Public Opinion, and the Issue of Immigration Reform*, 91 SOC. SCI. Q. 359, 359 (2010); Rita J. Simon & James P. Lynch, *A Comparative Assessment of Public Opinion Towards Immigrants and Immigration Policy*, 33 INT'L MIGRATION REV. 455, 458-59 (1999).

37. See, e.g., Cullinan, *supra* note 33, at 8 (noting the large flow of illegal immigrants despite increases in the number of border control agents); COUNCIL OF ECON. ADVISERS, *supra* note 34, at 93, 114 (suggesting that the federal government needs to do a better job enforcing immigration laws and that the IRCA failed to stop illegal immigration, in part, due to the burdensome nature of the labor certification checks).

38. See, e.g., MORRISON INST. FOR PUB. POLICY, *supra* note 36.

39. Alia Beard Rau, *Activist's Strategy Spurred Ariz. Law*, ARIZ. REPUBLIC, May 31, 2010, at A1.

40. Professor Kobach is known for scholarly writings encouraging states to take a more active role in immigration enforcement and more particularly for his “mirror-image theory,” which holds that states are broadly free to enact immigration-related laws so long as they mirror exactly the wording of federal immigration laws. See, e.g., Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 465 (2008) (suggesting that a state immigration law must use terms consistent with federal law if it is to avoid preemption); see also Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 60 DUKE L.J. 251, 255-56 (2011).

41. See, e.g., JUDITH GANS, UDALL CTR. FOR STUDIES IN PUB. POLICY, ARIZONA'S ECONOMY AND THE LEGAL ARIZONA WORKERS ACT 1 (2008).

explained, federal foot-dragging left the state feeling obliged to secure its own borders.⁴²

Professor Kobach intentionally drafted the new law to survive a preemption challenge. It deliberately defers to federal law on the question of who is legally allowed to work in the United States.⁴³ It obliges employers to verify the legal work eligibility of all new hires using the federal E-verify database.⁴⁴ Finally, its enforcement sanctions are limited to the revocation of business licenses⁴⁵ so as to come within the scope of the IRCA's own savings clause, which explicitly "preempt[s] any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*)."⁴⁶

C. Federal Preemption Jurisprudence

The leading modern case on the intersection of preemption and immigration, *De Canas v. Bica*, involved American farm workers who sued farm labor contractors under a California statute that provided a right of recovery for those displaced by undocumented immigrant workers.⁴⁷ The California Superior Court dismissed the case, holding that the statute in question was an unconstitutional intrusion on the federal power to regulate immigration.⁴⁸ The United States Supreme Court reversed, holding that when a state enacts a regulation governing the employment of immigrants, it is an *employment* law (an area within the states' historic police powers)⁴⁹ and not an *immigration* law (an exclusively federal prerogative).⁵⁰

At the time that *De Canas* was decided, Congress had yet to address the employment of undocumented workers in anything more than a cursory fashion.⁵¹ Consequently, the Court hinted that *De Canas* might have been decided differently if Congress had addressed such matters more directly.⁵² Of course, in the years since *De Canas* was decided, Congress *has* crafted

42. Letter from Janet Napolitano, Governor of Ariz., to Jim Weiers, Speaker of the Ariz. House of Representatives (July 2, 2007) [hereinafter Napolitano Letter], *available at* http://www.azsos.gov/public_services/Chapter_Laws/2007/48th_Legislature_1st_Regular_Session/CH_279.pdf.

43. ARIZ. REV. STAT. ANN. § 23-211(11) (Supp. 2010).

44. *Id.* § 23-214.

45. *Id.* § 23-212(F)(1)(d), (F)(2).

46. 8 U.S.C. § 1324a(h)(2) (2006) (emphasis added).

47. *De Canas v. Bica*, 424 U.S. 351, 353 (1976).

48. *Id.*

49. *Id.* at 356–57.

50. *Id.* at 355–56. *De Canas* defines immigration law per se as "a determination of who should or should not be admitted into the country." *Id.* at 355.

51. *Id.* at 360.

52. *De Canas*, 424 U.S. at 361 n.9 ("Congress' failure to enact such general sanctions reinforces the inference that . . . Congress believes this problem does not yet require uniform national rules . . .").

legislation specifically regulating the employment of immigrants, namely, the IRCA,⁵³ so the remaining applicability of *De Canas* was unclear⁵⁴ until the Court recently reaffirmed *De Canas*'s presumption against preemption of state laws regulating matters historically within the states' police powers—such as the employment of immigrants.⁵⁵

The Court had clarified the law concerning *explicit* preemption in *Medtronic, Inc. v. Lohr*, which involved a plaintiff who sued a medical device manufacturer for defective product design when her pacemaker failed.⁵⁶ The defendant manufacturer argued that the Florida common law liability principles that the plaintiffs asserted were preempted by the federal Medical Device Amendments of 1976 (“MDA”).⁵⁷ The Supreme Court disagreed, reaffirming that “[t]he purpose of Congress is the ultimate touch-stone in every preemption case. As a result, any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of congressional purpose.”⁵⁸

The Court reasoned that when a law touches on an area within the scope of the states' historic police powers, federal law does not supersede unless Congress manifests a clear intention to do so.⁵⁹ Because there was nothing in either the statutory text of the MDA⁶⁰ or its legislative history⁶¹ that rebutted the presumption against preemption, the Court ruled that the Florida cause of action was not preempted by the MDA.⁶²

In contrast to the *explicit* federal preemption of state law described above, state laws can also be *implicitly* preempted by either “field” or “conflict” preemption.⁶³ “Field preemption” occurs when Congress intends to occupy an

53. See *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 147 (2002) (“IRCA forcefully made combating the employment of illegal aliens central to the policy of immigration law.” (internal quotation marks omitted)).

54. See *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 864–65 (9th Cir. 2009); Hajra I. Malik, *Raiding the American Workplace: Federal Preemption and States' Rights in Curbing Unlawful Alien Employment*, 39 N.M. L. REV. 577, 580 (2009).

55. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1981 (2011).

56. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 481 (1996).

57. *Id.*

58. *Id.* at 485–86 (citations omitted) (internal quotation marks omitted).

59. *Id.* at 485 (“In all pre-emption cases . . . 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.” (internal quotation marks omitted)); see also *United States v. Locke*, 529 U.S. 89, 108 (2000) (“[A]n ‘assumption’ of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence.”).

60. *Medtronic*, 518 U.S. at 487.

61. *Id.* at 490–91.

62. *Id.* at 494.

63. See *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (“[A] federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law.” (citation omitted)).

area of law without explicitly claiming as much in any particular statute.⁶⁴ “Conflict preemption” occurs when the requirements of federal and state laws are such that an individual cannot comply completely with both.⁶⁵ The law on implicit preemption had also developed in the years since *De Canas*. In particular, the Court has noted that “saving clauses” (like the one in the IRCA)⁶⁶ serve only to prevent explicit preemption, but do not save state statutes from implicit preemption where either field or conflict preemption is implicated.⁶⁷

II. STATEMENT OF THE CASE IN THE NINTH CIRCUIT: *CHICANOS POR LA CAUSA, INC. V. NAPOLITANO*

A. *The IRCA Does Not Explicitly Preempt the LAWA*

Governor Janet Napolitano signed the LAWA into law on July 2, 2007.⁶⁸ On December 9, 2007, a coalition of Arizona business and immigrants’ rights activists filed suit in the U.S. District Court for the District of Arizona alleging that the LAWA violated the plaintiff’s Due Process rights, violated the Separation of Powers doctrine of the Arizona Constitution, and was preempted by federal law.⁶⁹ The district court ruled for the defendants and the same coalition of business and immigration interest groups appealed.⁷⁰

When confronted with a facial challenge to the LAWA, the Ninth Circuit’s first task was to determine whether the LAWA was expressly preempted by the IRCA’s preemption provisions.⁷¹ The IRCA excludes “licensing and similar laws”⁷² from its preemption scope, so the argument on this point centered on whether the LAWA fit within this exception.⁷³ The appellants argued that the savings clause should be read narrowly as applying only to particular professional licenses (e.g., license to practice law), not business licenses;

64. See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (“When Congress intends federal law to ‘occupy the field,’ state law in that area is preempted.”).

65. See *id.* (“[E]ven if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute. We will find preemption where it is impossible for a private party to comply with both state and federal law” (citations omitted)).

66. 8 U.S.C. § 1324a(h)(2) (2006).

67. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) (“[S]aving clause[s] [do] not bar the ordinary working of conflict pre-emption principles.”).

68. Napolitano Letter, *supra* note 42, at 1.

69. Complaint at 3, *Ariz. Contractors Ass’n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz. 2008) (No. CV07-02496-PHX-NVW).

70. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009).

71. “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.” 8 U.S.C. § 1324a(h)(2) (2006).

72. *Id.*

73. *Chicanos Por La Causa*, 558 F.3d at 864.

otherwise, the exception could easily swallow the rule.⁷⁴ The question, therefore, became whether the exception should be read broadly (in which case the LAWA would fit within the exception and be sustained) or narrowly (in which case the LAWA would not fit within the exception and would be struck down by the IRCA preemption provisions).⁷⁵

1. Under *De Canas* the LAWA Is an Employment Law

Does the LAWA regulate a matter within the states' traditional police powers or within the historic federal prerogatives? If the LAWA governs a state matter, then per *Medtronic*, there would be a presumption against preemption and the exception should be applied broadly.⁷⁶ If the LAWA governs a federal matter, however, then there would be no presumption⁷⁷ and the exception should be applied narrowly.⁷⁸ The Ninth Circuit held that, under *De Canas*, the LAWA is an employment law within the scope of the states' police powers, so a presumption against preemption should apply and the IRCA exception should be applied broadly.⁷⁹

2. *De Canas* Still Controls, Even in Light of the IRCA

At this point the court paused to address the argument that *De Canas* was no longer applicable in light of the IRCA.⁸⁰ The appellants, relying on language in *Hoffman Plastic Compounds, Inc. v. NLRB*,⁸¹ had argued that the IRCA made the regulation of undocumented workers "central to the policy of immigration law," thus bringing the issue within a federal domain in which a presumption against preemption no longer applied.⁸² The court, however, distinguished *Hoffman* from the instant case on the grounds that *Hoffman* involved a federal administrative agency rule, not a state law, so *Hoffman* did not really speak to issues of preemption and *De Canas* still controlled.⁸³

B. *The IIRIRA Does Not Conflict with the LAWA*

Having established that the LAWA was not expressly preempted, the court proceeded to conclude that the LAWA was not implicitly preempted under a

74. *Id.* at 865.

75. *Id.*

76. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996).

77. *United States v. Locke*, 529 U.S. 89, 108 (2000).

78. *Chicanos Por La Causa*, 558 F.3d at 864.

79. *Id.* at 865.

80. *Id.* at 864–65.

81. 535 U.S. 137, 147 (2002).

82. *Chicanos Por La Causa*, 558 F.3d at 864 (quoting *Hoffman Plastic Compounds*, 535 U.S. at 147) (internal quotation marks omitted).

83. *Id.* at 865.

conflict preemption theory.⁸⁴ The appellants had argued that requiring all Arizona employers to use E-verify frustrated the congressional intent to keep E-verify voluntary.⁸⁵ The Ninth Circuit reasoned that Congress had repeatedly expanded the availability of E-verify, suggesting that Congress wished to see E-verify used more widely, so a state law requiring its use was not really in conflict with congressional intent.⁸⁶ Moreover, the court reasoned that because Congress had explicitly preempted state laws “imposing civil or criminal sanctions . . . upon those who employ . . . unauthorized aliens,”⁸⁷ the fact that it had not explicitly preempted laws requiring E-verify’s use should be understood to imply that Congress had no objection to such laws.⁸⁸

The appellants had also attempted to argue that the revocation of violators’ business licenses was a harsher penalty than the monetary fines imposed by the IRCA, and that this increased sanction would encourage employers to avoid hiring Hispanics for fear of losing a business license for inadvertently hiring an undocumented worker.⁸⁹ Such an outcome would frustrate the delicate balance that Congress had intended to strike between immigration enforcement and civil rights protections.⁹⁰ The court rejected this argument as too speculative⁹¹ because a facial challenge to a law on conflict preemption grounds must rest on an actual conflict⁹² and not veer off into speculations about hypothetical outcomes.⁹³ The court suggested that if such discriminatory employment

84. *Id.* at 866–67.

85. *Id.* at 866.

86. *Id.* at 867 (citing Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944, 1944; Basic Pilot Extension Act of 2001, Pub. L. No. 107-128, § 2, 115 Stat. 2407, 2407 (2002)). It is, perhaps, worth noting that the *Lozano* court takes this exact argument and stands it on its head, arguing that “through various expansions of the program, Congress has continually required that E-Verify be strictly voluntary for the vast majority of employers.” *Lozano v. City of Hazleton*, 620 F.3d 170, 215 (3d Cir. 2010) (citing Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, § 547, 123 Stat. 2142, 2177; Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, § 143, 122 Stat. 3574, 3580 (2008); Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, §§ 2, 3, 117 Stat. 1944, 1944; Basic Pilot Extension Act of 2001, Pub. L. No. 107-128, § 2, 115 Stat. 2407, 2407 (2002)).

87. 8 U.S.C. § 1324a(h)(2) (2006).

88. *Chicanos Por La Causa*, 558 F.3d at 867.

89. *Id.*

90. *Id.*

91. *Id.*

92. *See Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (“The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute.”).

93. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–50 (2008) (“In determining whether a law is facially invalid, we must be careful not to go beyond the statute’s facial requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases.”).

outcomes were to emerge, an as-applied challenge could be brought then and would not be prejudiced by the holding of the instant case.⁹⁴

III. ANALYSIS OF THE SUPREME COURT'S DECISION:

CHAMBER OF COMMERCE V. WHITING

The Ninth Circuit rightly applied existing law in reaching its decision in *Chicanos Por La Causa*. After hearing arguments in the case, the Supreme Court affirmed the Ninth Circuit's judgment based on similar existing law.⁹⁵ Nevertheless, the Supreme Court should have taken this opportunity to change the law for the better by reversing *Chicanos Por La Causa* and overruling *De Canas*. Such an outcome would have achieved two important goals: (1) employers would have had a more uniform and predictable frame of reference for their immigration questions, which would enhance compliance with the law; and (2) the practical result of preventing state regulation of immigration would have been to prevent the economic shocks that will ensue when xenophobic state governments enact draconian immigration restrictions. Because such restrictions will curtail the necessary flow of immigrants that the modern American economy requires to avoid deleterious disruptions, both public policy and purely legal considerations militated in favor of the Supreme Court overturning *De Canas*. The remaining sections of this Note will first explain why the Supreme Court's ruling was the correct application of existing law, and then why stare decisis should not have been applied in this case, but rather why current precedents should have been overturned.

A. *The Supreme Court Correctly Concluded That the IRCA Does Not Expressly Preempt the LAWA*

There were two points at issue in the Supreme Court's analysis of express preemption: (1) whether there is any ambiguity in the IRCA's term "licensing law" such that a court could find the LAWA to be outside the term's scope,⁹⁶ and (2) whether there is support in the legislative intent and history for a narrower reading of "licensing law."⁹⁷ The Court was correct in its analysis on both points.

The IRCA's use of the term "licensing law" definitely includes laws like the LAWA. It is well established that when Congress does not define a statutory term, the term should be given its ordinary or "dictionary" meaning.⁹⁸ As the Ninth Circuit noted,⁹⁹ *Black's Law Dictionary* defines "licensing" as

94. *Chicanos Por La Causa*, 558 F.3d at 861.

95. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1987 (2011).

96. *Whiting*, 131 S. Ct. at 1977–79.

97. *Id.* at 1979–81.

98. *See* *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

99. *Chicanos Por La Causa*, 558 F.3d at 865.

“[a] governmental body’s process of issuing a license.”¹⁰⁰ Arizona law defines a “license” as “any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state.”¹⁰¹ As the Court noted, this definition tracks almost exactly the federal definition of a “license” in the Administrative Procedures Act.¹⁰² By enforcing the LAWA through suspension of a business license, Arizona brings the LAWA within the plain sense of the term “licensing law.” When a statutory term is not ambiguous, courts must give force to the plain meaning,¹⁰³ so the Court was correct when it held that the LAWA was within the scope of the IRCA’s savings clause.¹⁰⁴

Even if the term “licensing law” were ambiguous, the presumption against preemption in this case resolves the ambiguity in the LAWA’s favor. There is a presumption against preempting laws concerning the states’ historic police powers.¹⁰⁵ *De Canas* makes clear that laws like the LAWA, which regulate the employment of undocumented workers, lie within the states’ historic police powers.¹⁰⁶ The *Medtronic* presumption against preemption applies whenever the states’ *historic* police powers are implicated.¹⁰⁷ Even if federal laws *now* regulate immigrant employment, *historically* the field belonged to the states, so the *Medtronic* presumption still applies.¹⁰⁸ Therefore, any ambiguity in the term “licensing law” must be resolved in the LAWA’s favor. So the Ninth Circuit’s final conclusion that the IRCA does not expressly preempt the LAWA is certainly correct.

The appellants also argued that amendments to the Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”) contained in the IRCA indicate that Congress intended for the IRCA’s savings clause to allow state licensing sanctions only after a federal IRCA adjudication.¹⁰⁹ The Court quickly disposed of this argument, simply noting the lack of warrant for this conclusion in the IRCA text.¹¹⁰

100. BLACK’S LAW DICTIONARY 1005 (9th ed. 2009).

101. ARIZ. REV. STAT. ANN. § 23-211(9)(a) (Supp. 2010).

102. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1978 (2011).

103. *See Lozano v. City of Hazleton*, 620 F.3d 170, 209 (3d Cir. 2010) (citing *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004)).

104. *Whiting*, 131 S. Ct. at 1981.

105. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

106. *De Canas v. Bica*, 424 U.S. 351, 356–57 (1976).

107. *Medtronic*, 518 U.S. at 485.

108. *See, e.g., Lozano*, 620 F.3d at 206–07.

109. *Whiting*, 131 U.S. at 1979.

110. *Id.*

B. The Court Was Correct Not to Find the LAWA Preempted for Conflicts with Federal Law

There are two types of implicit preemption: “field” and “conflict.” The appellants did not offer a field preemption theory, so the Court dealt only with conflict preemption arguments. By trying to bring a facial challenge before the LAWA was ever implemented, the appellants argued conflict preemption from a weak position. Conflict preemption cannot arise from merely hypothetical conflicts.¹¹¹ Therefore the appellants set themselves up for defeat by bringing this case before any actual businesses could be sanctioned under the LAWA. The Court could arguably have dismissed this part of the case as not yet ripe, without ever reaching the conflict preemption argument.¹¹² Regardless, the Court considered two conflict preemption arguments and correctly rejected them both.

The appellants’ broadest conflict argument was that Congress intended the federal immigrant-employment scheme to be exclusive, so any state regulation of that subject matter would necessarily conflict with congressional intent.¹¹³ More specifically, the appellants contended that an additional layer of state penalties on top of the IRCA penalties would upset the congressional balance of incentives.¹¹⁴

The appellants were able to cite many authorities for the proposition that state laws conflict with federal law when they specify a penalty scheme that is harsher than the federal scheme.¹¹⁵ The Court distinguished all of these cases, however, on the grounds that they all concerned matters belonging to the federal sphere of regulation, while the regulation of in-state business through licensing laws was within the states’ historic police powers.¹¹⁶ Based on that distinction and the express provision that the IRCA savings clause made for state sanctions through licensing laws, the Court held that additional state

111. *See Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (“The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute.”).

112. *See, e.g., Nat’l Park Hospitality Ass’n v. Dep’t of the Interior*, 538 U.S. 803, 812 (2003) (enunciating the standard for dismissal on ripeness grounds, i.e., “that further factual development would significantly advance our ability to deal with the legal issues presented” (internal quotation marks omitted)).

113. *Whiting*, 131 S. Ct. at 1983.

114. *Id.*

115. *Id.* (citing *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 401, 405–06 (2003) (presidential conduct of foreign policy); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373–74 (2000) (foreign affairs power); *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 352 (2001) (fraud on a federal agency); *United States v. Locke*, 529 U.S. 89, 97, 99 (2000) (regulation of maritime vessels); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 143–44 (1989) (patent law)).

116. *Id.*

penalties did not frustrate the IRCA's intent.¹¹⁷ Moreover, the Court expressed skepticism that the state penalties, as actually applied, would distort congressional incentives to the extent that the appellants had predicted.¹¹⁸

The appellants' narrower conflict argument was more interesting. The IIRIRA made the use of E-verify optional and forbade the Secretary of Homeland Security to make its use generally obligatory.¹¹⁹ The appellants argued that, by obliging employers to use E-verify, the LAWA conflicted with federal intent to make E-verify optional.¹²⁰ The Court, cleaving strictly to the IIRIRA text, noted that only federal officials, not states, are prevented from mandating E-verify's use.¹²¹ The appellants also argued that state E-verify mandates conflicted with federal intent because increased demand on the E-verify system would overwhelm its capacity.¹²² The Court set little store by this argument because the federal government claimed that E-verify could handle the increased demand and because Congress has repeatedly expanded E-verify, indicating a desire to see it more widely used.¹²³

C. *The Law Would Be Clearer and More Consistent if De Canas Were Reversed*

Although the *Chicanos Por La Causa* court reached the correct conclusion under then-current law, public policy concerns dictated that the Supreme Court should have overturned *De Canas* by reversing the Ninth Circuit's decision. Restrictions on the employment of immigrants are really immigration restrictions, not employment restrictions, the holding of *De Canas* notwithstanding. To hold otherwise is simply to ignore the reality that the Supreme Court recognized in *Hoffman Plastics*—that the IRCA brought the regulation of immigrants' employment into the scope of a broader federal scheme to control immigration.¹²⁴ State immigration laws create unnecessary confusion about the scope of federal authority and the standards for multi-state business operations.

Arizona explicitly enacted the LAWA to discourage immigration,¹²⁵ and the employment regulations are just a mechanism to achieve this end. Arizona

117. *Id.* at 1984–85.

118. *Whiting*, 131 S. Ct. at 1984–85.

119. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 402(a), 110 Stat. 3009, 3009-656.

120. *Whiting*, 131 S. Ct. at 1985.

121. *Id.*

122. *Id.* at 1986.

123. *Id.*

124. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 147 (2002).

125. *See, e.g.*, Minutes of the S. Comm. on Appropriations, 48th Ariz. Leg., 1st Reg. Sess. (April 23, 2007) [hereinafter Minutes] (“Senator Huppenthal stated . . . ‘When I go to neighborhoods . . . the impact of illegal immigration has caused them to look like they have been

and other states are trying to make an end run around the Constitution's commitment of immigration to the federal authority, so it defeats the constitutional intent to regard these state laws as employment regulations within the historic police powers.

The United States' nationally integrated economy needs a single, national immigration regime, not fifty conflicting regimes.¹²⁶ A principal objection against the IRCA when it was first proposed was that it would impose awkward burdens on American businesses, and Congress responded to these objections by deliberately making that regulatory burden as light as practical.¹²⁷ Congress required the President to compile annual reports detailing, among other things, the IRCA's effects on the nation's economy.¹²⁸ Congress wanted to make the verification process easy for employers to encourage voluntary compliance.¹²⁹ The LAWA diminishes such ease of application by adding another layer of regulation to which businesses must attend.

Numerous federal courts have repeatedly declared the "paramount" importance of the immigration law's uniformity.¹³⁰ Congress directed that the IRCA's application be "uniform."¹³¹ This stress on uniformity reflects the fact that federal control of immigration benefits the economy by keeping the regulatory burden on American businesses to the minimum necessary to control illegal immigration. Arizona courts' applications of the LAWA are not reviewable by the federal courts to ensure that Arizona's approach to the LAWA's implementation remains in sync with the federal government's implementation of the IRCA.¹³² Therefore, the uniformity of immigration enforcement will be disrupted by the Court's decision to let the LAWA stand.

Moreover, the LAWA and laws like it rest in an uneasy tension with dormant commerce clause¹³³ jurisprudence. Arizona clearly regards

hit with a nuclear bomb [It is just too much.]); Napolitano Letter, *supra* note 42, at 3 ("Because of Congress' failure to act, states like Arizona have no choice but to take strong action to discourage the further flow of illegal immigration through our borders.").

126. Actually, there are municipalities enacting their own immigration-related housing and employment codes, so the number of applicable laws could be well more than fifty. *See, e.g.,* Gray v. City of Valley Park, 567 F.3d 976, 980 (8th Cir. 2009).

127. *Collins Food Int'l, Inc. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991).

128. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 403, 100 Stat. 3359, 3441.

129. *Mazzoli*, *supra* note 24, at 51.

130. *Chen v. Mukasey*, 524 F.3d 1028, 1033 (9th Cir. 2008); *Ferreira v. Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004); *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994); *Brea-Garcia v. INS*, 531 F.2d 693, 699 (3d Cir. 1976).

131. Immigration Reform and Control Act § 115, 100 Stat. at 3384.

132. *See* Transcript of Oral Argument at 18–19, *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (No. 09-115).

133. U.S. CONST. art. I, § 8, cl. 3.

undocumented immigrants as a public nuisance.¹³⁴ The Supreme Court has repeatedly held that states may not push nuisances onto other states.¹³⁵ No matter how harsh Arizona's laws become, undocumented immigrants will still try to enter the United States. Arizona is, in effect, foisting the costs of undocumented immigration onto other states in violation of the dormant commerce clause.

It might be argued that other states can deal with this by passing their own restrictive laws, but this solution instigates a problematic "arms race" among states to impose more restrictive laws on immigration than their neighbors. This would upset the balance that Congress sought to strike between the need for regulation and the desire to make such regulation as light as practicable.¹³⁶ Moreover the federal courts have long recognized a close link between immigration and foreign policy,¹³⁷ so there is reason to worry that such an "arms race" could touch off foreign policy difficulties for the United States. This solution, therefore, will not solve the dormant commerce clause problem without engendering Supremacy Clause¹³⁸ and Article II problems.¹³⁹

Finally, as Justice Breyer noted in his dissent, the LAWA and laws like it encourage the sort of racial and ethnic discrimination that the IRCA sought to avoid.¹⁴⁰ Under the IRCA, employers face the same sanctions for discriminating against a documented worker based on race or ethnicity as they face for hiring an undocumented worker.¹⁴¹ By contrast, the LAWA imposes a potentially very harsh penalty (loss of business license) on employers who hire undocumented workers,¹⁴² but discrimination against racial or ethnic minority

134. *See, e.g.*, Minutes, *supra* note 125.

135. *See, e.g.*, *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 686 (1980) ("Iowa may not shunt off its fair share of the burden of maintaining interstate truck routes, nor may it create increased hazards on the highways of neighboring States in order to decrease the hazards on Iowa highways."); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978) ("The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. . . . [because it is an] attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."); *Edwards v. California*, 314 U.S. 160, 173 (1941) (stating that no limit to the scope of state authority "is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders").

136. *See supra* text accompanying note 24.

137. *See, e.g.*, *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875); *Quinchia v. Att'y Gen.*, 552 F.3d 1255, 1259 (11th Cir. 2008) ("[I]mmigration cases often involve complex public and foreign policy concerns . . .").

138. U.S. CONST. art. VI.

139. U.S. CONST. art. II, § 2.

140. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1990 (2011) (Breyer, J., dissenting).

141. *Compare* 8 U.S.C. § 1324a(e)(4) (2006), *with id.* § 1324b(g).

142. ARIZ. REV. STAT. ANN. § 23-212.01(F)(2) (Supp. 2010).

job applicants merely opens the employer to civil liability.¹⁴³ Imposing stiffer penalties for hiring an undocumented worker than for ethnic profiling in hiring incentivizes the employer to err on the side of discrimination.¹⁴⁴ This is an undesirable outcome from a public policy perspective.

D. Economic Considerations Favor De Canas's Reversal

Immigration, including illegal immigration, generates a net fiscal gain to the U.S. economy, so anti-immigration measures taken by individual states have a deleterious impact on the nation's fiscal health.¹⁴⁵ According to a study published by the National Academy of Sciences, even poorly educated, low-skill, undocumented immigrants and their U.S.-born descendants produce a net contribution of \$109,700 per immigrant to the public treasury over the long term.¹⁴⁶ Undocumented immigration may even be a net benefit to the states that purport to be most burdened by it; the nineteen states with the highest inflows of immigrants, the highest percentage of immigrants, and highest resident immigrant populations also all had higher than average gross state products, per capita personal incomes, per capita disposable incomes, and median household incomes.¹⁴⁷

Meanwhile, immigration enforcement is already expensive, and would become even more so if states were allowed to force the federal government's hand on the issue.¹⁴⁸ Those economists most critical of immigration have calculated that low-skill immigrants consume \$89.1 billion per year more in government benefits than they pay in taxes, in essence costing American taxpayers approximately one trillion dollars over ten years.¹⁴⁹ Such calculations ignore the full effects of immigration, however; by working for lower wages, low-skill immigrants make goods and services in the United States cheaper than they would otherwise be, thus increasing the buying power

143. *Id.* § 41-1463(B)(1).

144. *Whiting*, 131 S. Ct. at 1990 (Breyer, J., dissenting).

145. *See, e.g.*, Walter A. Ewing, *The Economics of Necessity: Economic Report of the President Underscores the Importance of Immigration*, IMMIGR. POL'Y IN FOCUS, May 2005, at 5.

146. THE NEW AMERICANS, *supra* note 33, at 334. The figures in this report are given in 1996 dollars, so to calculate the \$109,700 figure given above, I used the Bureau of Labor Statistics Inflation Calculator, which is available at <http://data.bls.gov/cgi-bin/cpicalc.pl>.

147. RICHARD NADLER, AMERICAS MAJORITY FOUNDATION, IMMIGRATION AND THE WEALTH OF STATES 5–8 (2008). Arizona was one of these states.

148. *See, e.g.*, RAJEEV GOYLE & DAVID A. JAEGER, CENTER FOR AMERICAN PROGRESS, DEPORTING THE UNDOCUMENTED: A COST ASSESSMENT 3 (2005).

149. *An Examination of Point Systems As A Method For Selecting Immigrants: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law of H. Comm. on the Judiciary*, 110th Cong. 112 (2007) (statement of Robert Rector).

of a working American's wages.¹⁵⁰ When these effects are considered in calculating low-skill immigrants' net economic impact, even immigration skeptics calculate a net cost of only ten billion dollars per year.¹⁵¹ The United States already spends more than this each year on border enforcement, so it would not be cost effective to increase border enforcement.¹⁵² It would, therefore, be detrimental to the nation's fiscal health for states to enact measures to discourage immigration or to force the federal government to undertake more vigorous enforcement.¹⁵³

Moreover, vigorous enforcement of LAW-like laws would damage the economy. If public authorities actually removed all undocumented workers from the workforce, the American economy would suffer a shortfall of nearly 2,500,000 low-skill workers, resulting in a severe shock to its productive capacities.¹⁵⁴ While there are enough out-of-work Americans to make up that loss, such a solution ignores the mismatch of skills between currently-employed undocumented workers and currently-unemployed Americans.¹⁵⁵ Additionally, some Americans are unemployed for reasons (mental illness, substance abuse, etc.) that would not be resolved by removing undocumented immigrants from the workforce.

Increased immigration enforcement is neither cost effective, nor well justified on other policy grounds. The most common anti-immigration arguments have no substantial merit. As detailed above, over the long term undocumented immigrants end up contributing more to the public treasury in taxes than they receive in benefits.¹⁵⁶ Despite claims that undocumented immigrants take jobs from natives,¹⁵⁷ economists agree that undocumented workers are as likely to create jobs for native workers as they are to take jobs from natives.¹⁵⁸ Low-skill immigrants have little effect on the labor market

150. GORDON H. HANSON, *THE ECONOMICS AND POLICY OF ILLEGAL IMMIGRATION IN THE UNITED STATES* 8–9 (2009); Patricia Cortes, *The Effect of Low-Skilled Immigration on U.S. Prices: Evidence from CPI Data*, 116 J. POL. ECON. 381, 414 (2008).

151. HANSON, *supra* note 150, at 12.

152. *Id.*

153. Of course, by the same token, it is detrimental to the nation's fiscal health for the U.S. Congress to enact laws designed to discourage immigration, but the legality of federal laws is not presently an issue before the Court. In any event, the fact that Congress has crafted some poor public policies is no reason for states to upset the federal public policy balance by crafting even worse ones.

154. See DAVID A. JAEGER, CENTER FOR AMERICAN PROGRESS, *REPLACING THE UNDOCUMENTED WORK FORCE* 4 (2006).

155. *Id.* at 4–5.

156. THE NEW AMERICANS, *supra* note 33, at 334.

157. Lamar Smith et al., *Reclaim 8 Million Jobs*, THE DAILY CALLER (Mar. 19, 2010, 12:57 AM), <http://dailycaller.com/2010/03/19/reclaim-8-million-jobs>.

158. See, e.g., Joseph Altonji & David Card, *The Effects of Immigration on the Labor Market Outcomes of Less-Skilled Natives*, in NATIONAL BUREAU OF ECONOMIC RESEARCH,

outcomes for natives.¹⁵⁹ While economists have historically disagreed about the effects of undocumented immigration on wages of natives, the most recent research on the subject indicates that low-skilled immigrants have no effect or even a modest positive effect on the wages of natives in a variety of developed nations including the United States.¹⁶⁰ Despite claims of undocumented immigrant criminality,¹⁶¹ undocumented immigrants are less likely than natives to commit violent crimes.¹⁶² Indeed, heavy immigrant inflows correlate with *declining* crime rates,¹⁶³ and immigration may even be causing the decline.¹⁶⁴

CONCLUSION

The Ninth Circuit rightly applied existing law in its *Chicanos Por La Causa* decision. The facts of this case are substantially similar to those of *De Canas*. Although Congress has changed immigration law in the years since *De Canas*, the holding is still ostensibly good law. The presumptions against preemption laid down in *De Canas* and other cases militated against the

IMMIGRATION, TRADE, AND THE LABOR MARKET 201 (John M. Abowd & Richard B. Freeman eds., 1991) (“The analysis of changes shows no effect of increased immigration on participation or employment rates of less-skilled natives.”); David Card, *Is the New Immigration Really So Bad?*, 115 *Econ. J.* F300, F321 (2005) (“New evidence from the 2000 Census reconfirms the main lesson of earlier studies: although immigration has a strong effect on relative supplies of different skill groups, local labour [sic] market outcomes of low skilled natives are not much affected by these relative supply shocks.”); Heidi Shierholz, *Immigration and Wages: Methodological Advancements Confirm Modest Gains for Native Workers 2* (Econ. Policy Inst., EPI Briefing Paper No. 255, 2010), available at <http://www.epi.org/publications/entry/bp255> (“In the ongoing debate on immigration, there is broad agreement among academic economists that . . . although new immigrant workers add to the labor supply, they also consume goods and services, which creates more jobs.”). *But see* CONGRESSIONAL BUDGET OFFICE, *THE ROLE OF IMMIGRANTS IN THE U.S. LABOR MARKET* 22 (2005), available at <http://www.cbo.gov/doc.cfm?index=6853> (“A large number of studies have attempted to estimate the effects of immigration on native workers, but their conclusions reveal little consensus.”).

159. Cortes, *supra* note 150, at 384.

160. Frédéric Docquier et al., *The Wage Effects of Immigration and Emigration* 13–14 (Trade and Integration Team, Dev. Research Grp., Policy Research Working Paper No. 5556, 2011); Cortes, *supra* note 150, at 414.

161. See, e.g., Kobach, *supra* note 40, at 461.

162. RUBÉN G. RUMBAUT & WALTER A. EWING, IMMIGRATION POLICY CTR., *THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG FOREIGN-BORN MEN* 6 (2007) (“[T]he incarceration rate of native-born men in this [the 18–39 year] age group (3.5 percent) was 5 times *higher* than the incarceration rate of foreign-born men (0.7 percent).”); John Hagan & Alberto Palloni, *Sociological Criminology and the Mythology of Hispanic Immigration and Crime*, 46 *SOC. PROBS.* 617, 629 (1999); Matthew T. Lee et al., *Does Immigration Increase Homicide? Negative Evidence from Three Border Cities*, 42 *SOC. Q.* 559, 571 (2001).

163. NADLER, *supra* note 147, at 9, 53.

164. Lesley Williams Reid et al., *The Immigration-Crime Relationship: Evidence Across US Metropolitan Areas*, 34 *SOC. SCI. RES.* 757, 775 (2005).

LAWA's suppression, so the Ninth Circuit had no choice but to uphold the Arizona statute.

Nevertheless, the Supreme Court should have taken this chance to change the law for the better by reversing the Ninth Circuit. To leave the LAW A in place creates inconsistency in federal law and confusion about the respective roles of states and the federal government in immigration and employment law. Leaving the LAW A in place creates multiple levels of *de facto* immigration courts, because actions brought under the LAW A and similar laws in other states lie within the jurisdiction of state courts and beyond the review of the federal court system. By allowing the LAW A to stand, the Supreme Court has obliged American firms to contend with federal, state, and local immigration laws, a complication that runs counter to the light regulatory burden that Congress deliberately crafted in the IRCA.

Leaving the LAW A in place creates incentives for Arizona employers to engage in ethnic profiling in hiring, an outcome that the IRCA was intended to avoid. It also creates a curious and undesirable exception to the dormant commerce clause prohibition against one state foisting problems onto another.

Finally, the ruling in favor of the LAW A will have deleterious economic effects. For better or worse, the American economy requires the labor of many undocumented immigrants, and successive presidential administrations have tacitly (and sometimes explicitly¹⁶⁵) admitted as much by assigning comparatively few resources to workplace raids and other such employment-based efforts to enforce immigration laws.¹⁶⁶ Therefore, the proliferation of LAW A-like laws will create undesirable disruptions in the American labor market.

For all of these reasons, the Supreme Court should have taken this opportunity to clarify the balance of power between the federal government and the state governments with regard to immigration. By striking down the LAW A, the Court would have eliminated the inconsistencies in federal law wrought by *De Canas* and headed off the economic shocks that a rash of LAW A-style laws will engender. The Court's holding should have impinged as little as necessary on the states' historic police powers, but should nevertheless have made clear that the federal government occupies the field of regulations governing immigrant employment, such that there is no room for concurrent state regulations.

GREGORY DELASSUS*

165. Jerry Seper, *Rounding Up All Illegals 'Not Realistic'*, WASH. TIMES, Sept. 10, 2004, at A1.

166. William Branigin, *INS Shifts 'Interior' Strategy to Target Criminal Aliens*, WASH. POST, Mar. 15, 1999, at A3.

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