12-2012

Reverse-Commandeering

Margaret Hu

Reverse-Commandeering

Margaret Hu[*]

Although the anti-commandeering doctrine was developed by the Supreme Court to protect state sovereignty from federal overreach, nothing prohibits flipping the doctrine in the opposite direction to protect federal sovereignty from state overreach. Federalism preserves a balance of power between two sovereigns. Thus, the reversibility of the anti-commandeering doctrine appears inherent in the reasoning offered by the Court for the doctrine's creation and application. In this Article, I contend

 Visiting Assistant Professor, Duke Law School. I deeply appreciate the comments from and conversations with those who had generously taken the time to help me with this work, including Jane Bahnson, Jack Balkin, Kate Bartlett, Lawrence Baxter, Sara Beale, Stuart Benjamin, Joseph Blocher, Jamie Boyle, Rachel Brewster, Sam Buell, Guy Charles, Gabriel "Jack" Chin, John Coyle, Michael Dreeben, Atiba Ellis, Bruce Friedman, David Gans, Chris Griffin, Lisa Griffin, Kate Griffith, Deep Gulasekaram, Lucas Guttentag, Larry Helfer, Kevin Johnson, Trina Jones, Fred Kameny, Suzanne Katzenstein, Catherine Kim, Jennifer Koh, Ron Lee, Stephen Lee, Maggie Lemos, Marin Levy, David Martin, Marc Miller, Julie Maupin, Ian Millhiser, Steve Miskinis, Hiroshi Motomura, Jeff Powell, Jed Purdy, Arti Rai, Jayson Rathod, Barak Richman, Victor Romero, Bertrall Ross, David Rubenstein, Kathryn Sabbath, Stephen Sachs, Rich Schmalbeck, Neil Siegel, Juliet Stumpf, Phil Telfeyan, Shoba Wadhia, Mark Weidemaier, Ernie Young, and apologies to anyone whom I may have inadvertently omitted. I am also grateful for the feedback received from the participants of the Duke Law Summer Faculty Workshop; the Constitutional Law Schmooze hosted by Mark Tushnet and the American Constitution Society in Washington, D.C.; the "Crimmigration" panel discussion hosted by the Southeastern Association of Law Schools (SEALS) Annual Meeting in Amelia Island, FL; the Immigration Law Workshop hosted by Hofstra Law; the "Immigration Law & Civil Liberties" panel discussion at the ACLU Northwest Regional Conference in Portland, OR, hosted by Lewis and Clark Law School; the LatCrit XVI, Latina & Latino Critical Legal Theory Conference in San Diego, CA, hosted by California Western School of Law, Thomas Jefferson School of Law, and UNLV William S. Boyd School of Law; the Emerging Immigration Law Scholars Conference, hosted by the Washington College of Law at American University in Washington, D.C.; the Duke-UNC Junior Faculty Workshop; and the constitutional law panel discussion at the North Carolina Political Science Association Conference, hosted by UNC Charlotte University in Charlotte, NC. Finally, I would like to thank the UC Davis Law Review staff for their editorial care, and Doug Dreier, Brittany Edwards-Franklin, Hassan Kanu, and Julia Wood for their research assistance.

that reversing the anti-commandeering doctrine is appropriate in the context of contemporary immigration federalism laws. Specifically, I explore how an unconstitutional incursion into federal sovereignty can be seen in state immigration laws such as Arizona's controversial Senate Bill 1070 (SB 1070), the subject of the Court's recent decision in Arizona v. United States, and also in the Legal Arizona Workers Act (LAWA), the subject of the Court's consideration in Chamber of Commerce v. Whiting during the prior term. The Court upheld Section 2(B) of SB 1070 in Arizona, and upheld LAWA in Whiting, finding these state laws were not preempted by federal immigration law. Yet, in this Article, I conclude that these laws nonetheless interfere with the federal government's exclusive power to control immigration policy at the national level. Thus, the constitutionality of state immigration laws such as SB 1070 and LAWA should be interpreted within an anti-commandeering framework. This doctrinal shift, from the preemption doctrine to the anti-commandeering doctrine, allows federal courts to examine the constitutionality of state immigration laws through a more explicit federalist lens.

TABLE OF CONTENTS

INTRODUCTION 537
I. COMMANDEERING & REVERSE-COMMANDEERING 542
A. *Anti-Commandeering Doctrine & Protecting Federal Sovereignty* 546
B. *Applying Anti-Commandeering Doctrine to Reverse-Commandeering Laws* 553
II. FROM PLENARY POWER TO PREEMPTION 557
A. *Plenary Power Doctrine: Exclusive Federal Jurisdiction in Immigration Law* 560
B. *IRCA & IIRIRA: Concurrent Jurisdiction in Immigration Law* 562
C. *Displacement of Plenary Power Doctrine with Preemption Doctrine* 568
D. *Displacement of Preemption Doctrine with Mirror-Image Theory* 574
1. *Chamber of Commerce v. Whiting* 579
2. *Arizona v. United States* 586
III. REVERSE-COMMANDEERING & THE DEVOLUTION OF IMMIGRATION POWER TO STATES 592
A. *Reverse-Commandeering Database Screening Protocols & Resources* 596
B. *Reverse-Commandeering Policy Discretion in Round-Ups* .. 604
C. *Balkanization of State Immigration Laws* 607

D. Over-Cooperative Immigration Federalism: Impact on Foreign Policy 613
IV. ANTICIPATING OBJECTIONS TO REVERSING THE ANTI-COMMANDEERING DOCTRINE 614
A. Objection to Reinvigorating the Plenary Power Doctrine 616
B. Objection that Congress Can Correct State Commandeering Legislatively 617
C. Objection to Depriving States Concurrent Power to Regulate Immigration 621
D. Objection that Anti-Reverse-Commandeering Is Preemption by Another Name 622
CONCLUSION 625

INTRODUCTION

The Supreme Court's federalism jurisprudence is designed to protect the dual system of government established by the Constitution. To that end, the Court has prohibited the federal government from trenching upon state sovereignty. The anti-commandeering doctrine, therefore, was developed to restrain the federal government from commandeering or coercing state legislatures, as well as state officers, to enact and enforce federal regulatory programs.[1] But, how should federal courts respond if the situation is reversed? Does the logic of the Court's anti-commandeering doctrine extend to posting limits on state governments in cases where the state has the capacity to usurp, by commandeering or coercing, crucial aspects of federal sovereignty?

In this Article, I examine this question: whether the Court's anti-commandeering jurisprudence can be flipped in the opposite direction. In the name of federalism, the anti-commandeering doctrine has been employed by the Court to prevent the exercise of otherwise constitutional powers by the federal government where the effect is to commandeer states to the detriment of their status as co-equal sovereigns in the federal system. The Court has noted, however, that federalism involves two sovereigns and both must be restrained from encroaching on the sovereignty of the other. Thus, I explore whether the underlying reasoning of the anti-commandeering doctrine lends

[1] *E.g.*, Printz v. United States, 521 U.S. 898, 935 (1997) (holding Congress may not commandeer state officials to be enforcement agents of federal regulatory programs); New York v. United States, 505 U.S. 144, 161 (1992) (asserting that Congress may not commandeer the legislative process of the states by compelling the enactment and enforcement of federal regulatory programs).

itself to, or even logically implies, protecting the federal sovereign as well as the state sovereign.

In other words, I discuss whether there is an anti-reverse-commandeering doctrine that is inherent within the Court's anti-commandeering doctrine.[2] Anti-reverse-commandeering as a doctrine simply means reversing — without, of course, undoing — the protections that the anti-commandeering doctrine provides to the state sovereign. Such a flip in the doctrine thereby institutes judicially-enforced constitutional limits on state and local governments in the name of preserving federal sovereignty. I argue flipping the anti-commandeering doctrine in the opposite direction is necessary and appropriate in some instances to preserve the system of dual sovereignty of which federal sovereignty is a component.

[2] The term "reverse-commandeering" is first mentioned, to my knowledge, in James Leonard's article, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91, 183 n.646 (2000). In a footnote, Leonard reserves development of the concept of reverse-commandeering for future scholars, noting, "I will let others decide whether 'reverse commandeering' should enter the English language." *Id.* Thus far, it appears that, in addition to myself, two other scholars have taken up Leonard's call: Jessica Bulman-Pozen and Paul Diller. *See* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 484 (2012); Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1154 n.231 (2012) (citing Leonard, *supra*). In Bulman-Pozen's article, she examines the various forms of "cooperative federalism" between the federal and state governments, and argues this phenomenon serves to promote "separation of powers values." Bulman-Pozen, *supra*, at 461-63. In the course of this discussion, which includes cooperative federalism between the state and federal governments in environmental protection, administration of federal benefits, and consumer protection, she briefly examines whether Arizona's Senate Bill 1070 in effect "commandeers the federal executive in a relatively limited way." *Id.* at 485. Bulman-Pozen's use of the term is closest to my own, although my Article concludes that state reverse-commandeering laws pose a threat to the vertical separation of powers, while Bulman-Pozen characterizes this commandeering as a form of state "goading," and concludes that state "goading" serves to protect the horizontal separation of powers. *Id.* at 485-86. In other words, according to Bulman-Pozen, the separation of powers is protected by state attempts to "goad" the federal executive in enforcing federal immigration control laws, finding Arizona's state immigration law "effectively compels federal executive action." *Id.* at 485. Consequently, although we both agree that the state statute, Senate Bill 1070, is a form of commandeering, we appear to draw opposite conclusions on whether the Arizona immigration law positively or negatively impacts federalism values. In Diller's article, he argues that the primary justification for the "'private law exception'" to "broad 'home rule' authority" does not justify the costs. Diller, *supra*, at 1109. Specifically, he cites to Leonard in a brief discussion exploring whether city and municipal courts can reverse-commandeer federal judicial resources by creating "new private rights of action enforced in those courts . . . . [and] why the reverse-commandeering objection does not justify a private law exception." *Id.* at 1154.

The need to protect federal sovereignty is particularly clear in the context of the current tidal wave of state immigration laws. Specifically, I explore how an unconstitutional incursion into federal sovereignty can be seen in state immigration laws such as Arizona's controversial Senate Bill 1070 (SB 1070),[3] the subject of the Court's recent decision in *Arizona v. United States*,[4] and also in the Legal Arizona Workers Act (LAWA),[5] the subject of the Court's consideration in *Chamber of Commerce v. Whiting*[6] during the prior term. The Court upheld Section 2(B) of SB 1070 in *Arizona* and upheld LAWA in *Whiting*, finding these state laws were not preempted by federal immigration law. These state immigration laws were drafted pursuant to what legal scholars have come to call "mirror-image theory."[7] Under this theory, states argue that their immigration laws can survive federal preemption challenges by parroting federal immigration law and policy, often word-for-word. Yet, in this Article, I contend that these mirror-image laws nonetheless interfere with the

[3] Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450 (codified in scattered sections of ARIZ. REV. STAT. ANN. §§ 11, 13, 23, 28, 41 (2010), *amended by* Act of Apr. 30, 2010, ch. 211, 2010 Ariz. Sess. Laws 1070. In *United States v. Arizona,* 641 F.3d 339, 366 (9th Cir. 2011), *cert. granted* 132 S. Ct. 845 (2011), *aff'd in part, rev'd in part*, 132 S. Ct. 2492 (2012).

[4] 132 S. Ct. 2492 (2012).

[5] Legal Arizona Workers Act, 2007 Ariz. Sess. Laws 1312 (codified at ARIZ. REV. STAT. ANN. §§ 13-2009, 23-211 to 23-214 (2008)).

[6] Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1973 (2011).

[7] Gabriel "Jack" Chin and Marc Miller are responsible for formally introducing the term "mirror-image theory" into legal discourse. They provide an excellent and thorough discussion on this theory and its constitutional implications in the context of state attempts to regulate immigration through state criminal laws such as SB 1070. *See* Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 253-54 (2011). The theory is attributed to former constitutional law scholar Kris Kobach, Kansas Secretary of State and the "architect" of SB 1070, who argues that "[s]tate governments possess the authority to criminalize particular conduct concerning illegal immigration, provided that they do so in a way that mirrors the terms of federal law." Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 475 (2008) [hereinafter Kobach, *Reinforcing*]. Kobach was involved in the drafting of LAWA, SB 1070, and other state immigration laws. *See, e.g.*, Jeremy Duda, *Some States Take Lessons From Arizona's SB 1070, Others Ignore Them*, ARIZ. CAPITOL TIMES, June 23, 2011 (stating that Kobach contributed to similar Alabama legislation); Gary Grado, *Architect of Arizona's SB1070 Insists Immigration Law Will Survive Appeals*, ARIZ. CAPITOL TIMES, Sept. 10, 2010 (explaining Kobach's contribution to both LAWA and SB 1070); Kris W. Kobach, *Defending Arizona: Its Statute Will Withstand the Inevitable — and Already Begun — Challenges in Court*, NAT'L REV., June 7, 2010, at 31 (asserting Kobach's role as "architect" of SB 1070).

federal government's exclusive power to control immigration policy at the national level.[8]

Consequently, the Article proceeds in four parts. Part I provides an overview of the anti-commandeering doctrine and explains why the logic of the doctrine permits flipping it in the opposite direction to protect federal sovereignty from state reverse-commandeering. Part II focuses on the respective roles the federal and state governments have held in the field of immigration law and policy.[9] It critiques a problem of concurrent jurisdiction in immigration law.[10] Under the trend of

[8] *See* David Martin, *Reading Arizona*, 98 VA. L. REV. In Brief 41, 42 (2012), *available at* http://www.virginialawreview.org/inbrief/2012/04/14/Martin_Web.pdf (noting that "this mirror-image reasoning undergirds many of the recent state and local efforts to adopt their own restrictive immigration laws").

[9] Migration policy is, and historically has been, a politically charged issue. *See, e.g.*, HIROSHI MOTOMURA, AMERICANS IN WAITING 8 (Oxford University Press 2006) (deemphasizing exclusion and placing emphasis of immigration law on the inclusive treatment of all immigrants, documented and undocumented, "as future citizens, and immigration as a transition to citizenship"). This in turn provides an incentive for states to take action with regard to the policing of migrants and guarding the entrance and conditions of residence of migrants in a state. *See, e.g.*, GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION viii (Princeton University Press 1996) (exploring a variety of early state-imposed immigration policies "conducted primarily as an exercise of 'police power,'" and "involved qualitative restrictions on undesired migrants"). Scholars have particularly focused on the shaping of migration law and policy in a post-9/11 political environment and historically in times of national insecurity. *See also* DAVID COLE, ENEMY ALIENS (The New Press 2006) (discussing the treatment of immigrants as state enemies and threats to national security historically); LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS 2-4 (Mary L. Duziak & Leti Volpp eds., The Johns Hopkins University Press 2006) (explaining that borders are constructed through legal controls on entry and exit, as well as the conferral or denial of rights and privileges).

[10] *See, e.g.*, Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2008) [hereinafter Stumpf, *States of Confusion*] (discussing the shift of immigration law from subset of foreign policy to being entrenched within other domestically-based and concurrent federal-state enforcement schemes: "Federal immigration law has evolved from a stepchild of foreign policy to a national legislative and regulatory scheme that intersects with the triumvirate of state power: criminal law, employment law, and welfare."); *see also* Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1811-12 (2011) ("What Arizona has done is move criminal immigration law from the exclusively federal jurisdiction of immigration law into the concurrent state-federal realm that dominates much of criminal law. In this way, the Arizona project invites localities to leave behind their role of merely supporting the federal government in the enforcement of federally defined immigration priorities. Instead, Arizona empowers its officials to direct their own system for handling illegal immigration.") (citing Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L. J. 1256, 1263 (2009)); Stephen Lee, *De Facto Immigration Courts,* 101 CALIF. L. REV. (forthcoming 2013) (on file with author) (exploring

concurrent jurisdiction,[11] the federal government's attempt to re-assert its traditional primacy in immigration policy faces significant obstacles because the federal statutory and policy scheme itself invites states to play a role in the enforcement of immigration law. Yet, historically, the federal government's exclusive power to dictate immigration policy was grounded constitutionally, not in the federal statutory scheme.[12] The shift of immigration law away from a constitutional framework to a statutory one is crucial because of the advent of mirror-image theory.[13] State mirror-image statutes are intentionally drafted to mirror federal laws and standards as a way to survive preemption analysis.[14] Because the Court ratified mirror-image theory in *Whiting* and adapted this mirroring theory in *Arizona*, the preemption doctrine has been significantly weakened.

Specifically, Part III examines how mirror-image laws allow for the devolution of the federal power to control immigration to the states and enables state reverse-commandeering. The state takeover of federal immigration database screening protocols effectually commandeers federal resources to serve state ends. Those databases, in turn, enable state authorities or their delegates to screen individuals for violations of federal immigration laws, which state and local authorities can now prosecute under mirror-image laws. This enables another form of reverse-commandeering: the usurpation of federal enforcement discretion because state authorities can now make

manner in which state criminal courts and prosecutors are seizing reins of federal policymaking discretion through state and local immigration screening and exercise of prosecutorial discretion, resulting in downstream consequences, such as deportation).

[11] *See generally* Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253 (2011) (discussing the manner in which the historical trend of concurrent jurisdiction has challenged the development of a consistent preemption doctrine as the Court's role is no longer simply sorting what matters of law should fall on the "truly local" or "truly national" side of previously recognized lines of federal-state division).

[12] *See, e.g.*, T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (Harvard University Press 2002) (discussing the historical underpinnings for the immigration law's plenary power doctrine despite no mention of immigration law in the Constitution); NEUMAN, *supra* note 9 (exploring the history of constitutional governance of immigration law, and the increasingly complex relationship between immigration policy and constitutional foundations); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-54 (1990) [hereinafter Motomura, *Phantom Constitutional Norms*] (observing that the foundation of what is considered classical immigration law is rooted in constitutional law, including the story of the rise of the plenary power doctrine).

[13] *See* Chin & Miller, *supra* note 7.

[14] *Id.*

competing choices about where, when, and how vigorously to enforce the federal laws mirrored in their state statutes. Mirror-image laws also reverse-commandeer in another respect: while they enable state authorities to make independent immigration policy and enforcement decisions, they also leave the national government accountable for any fallout in the sphere of foreign relations for treatment of foreigners by state authorities. The anti-commandeering doctrine was designed precisely to prevent the shifting of the fiscal and political costs by one sovereign's policies onto the back of the other sovereign in our dual sovereign federalist system.

In Part IV, I anticipate potential objections to reversing the anti-commandeering doctrine. In spite of potential objections, I conclude that the preemption doctrine is incapable of protecting federal sovereignty in the same way that the Court's anti-commandeering doctrine protects state sovereignty.[15] The strong claim explored here is that the anti-commandeering doctrine should be, according to its inherent logic, applicable to the federal sovereign to prevent reverse-commandeering. The more modest claim is that the Court's preemption doctrine, to fully satisfy its purpose, can be reinvigorated through adopting principles set forth in the Court's federalism jurisprudence and relying more heavily upon the logic of the anti-commandeering doctrine. This reinvigoration is needed to address the usurpation of federal sovereignty that state laws can now achieve when the state law mirrors or incorporates federal provisions and standards.

I. COMMANDEERING & REVERSE-COMMANDEERING

An unprecedented historical movement is underway: a hostile takeover of federal immigration law and policy by state and local governments.[16] Since Congress's failure to pass comprehensive

[15] *See, e.g.*, Lauren Gilbert, *Immigrant Laws, Obstacle Preemption and the Lost Legacy of McCulloch*, 33 BERKELEY J. EMP. & LAB. L. 153 (2012) (stating that many state and local immigration laws challenged under preemption will be upheld as long as they track federal standards).

[16] *See* Keith Aoki & John Shuford, *Welcome to Amerizona — Immigrants Out! Assessing "Dystopian Dreams" and Usable Futures" of Immigration Reform, and Considering Whether "Immigration Regionalism" is an Idea Whose Time Has Come*, 38 FORDHAM URB. L.J. 1, 4-5 (2010) (discussing historically unprecedented nature of contemporary state and local immigration activity); Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1674-75 (2011) ("Immigration law is undergoing an unprecedented upheaval . . . . These attempts to wrestle control of enforcement decisions from the federal government have cast into doubt the doctrinal core of immigration law: federal

immigration reform legislation during the 2006-2007 terms, state and local governments have considered over 7,000 immigration-related proposals and have enacted hundreds of them.[17] A tiny handful of the most controversial state laws — such as Section 2(B) of SB 1070, upheld in *Arizona* during the last term, and LAWA, upheld in *Whiting* in the prior term — have received challenges in federal court.[18]

exclusivity.").

[17] *State Laws Related to Immigration and Immigrants*, NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/immigration/state-laws-related-to-immigration-and-immigrants.aspx (last visited Feb. 1, 2012); *see also* Anna Gorman, *Ariz. Law Is Just One of Many*, L.A. TIMES, July 17, 2010, at A1 (discussing a horde of new or proposed state immigration laws). Not all state and local immigration-related proposals are restrictionist, and some are properly characterized as "pro-immigrant" actions. *See* PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, AM. CONSTITUTION SOC'Y FOR LAW AND POL'Y, RESTRICTIVE STATE AND LOCAL IMMIGRATION LAWS: SOLUTIONS IN SEARCH OF PROBLEMS 7 n.22 (Nov. 15, 2012), *available at* http://www.acslaw.org/sites/default/files/Gulasekaram_and_Ramakrishnan_-_Restrictive_State_and_Local_Immigration_Laws_1.pdf ("In our dataset of over 25,000 cities across the United States, from May 2006 to December 2011, 125 had proposed restrictive ordinances and 93 had proposed pro-immigrant ordinances, including measures limiting cooperation with federal authorities on deportations."). Multiple scholars have explored the benefits of state and local immigration regulations. *See, e.g.*, Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006) (stating that state and local governments are passing non-cooperation laws to limit their cooperation with federal immigration laws); Cristina Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (arguing any presumed "inherent authority" of state and local law enforcement to regulate immigrants is preempted under Supremacy Clause by existing federal immigration enforcement statutory scheme); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (arguing in favor of recent state and local immigration efforts as constitutional notwithstanding plenary power doctrine); Peter J. Spiro, *Learning to Live with Immigration Federalism,* 29 CONN. L. REV. 1627 (1997) (arguing that state regulation of immigration policy is more efficient and reflects variation in voter preferences); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1619 (2008) (addressing the limitations of federal immigration legislation, advocating instead that these regulations are best addressed through a localism perspective in which "the incentive structure of localism channels local action").

[18] The constitutionality and legality of immigration federalism efforts has been at the center of a robust academic discussion. *See, e.g.*, Jennifer M Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010) (addressing the procedural deficiencies of immigration enforcement); Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341 (2008); Pratheepan Gulasekaram, *No Exception to the Rule: The Unconstitutionality of State Immigration Enforcement Laws*, 5 ADVANCE: J. OF ACS ISSUE GROUPS 37 (2011) (arguing that the *Whiting* decision does not alter the division of power between federal and state governments regarding immigration policy); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 788 n.6 (2008) (arguing that the text and structure of the Constitution allows for

Consequently, such challenges mark only the tip of an immigration federalism iceberg.[19]

shared authority between state and federal governments in the realm of immigration policy); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011) [hereinafter Motomura, *The Discretion That Matters*] (arguing federal policies delegating immigration gatekeeping to state and local law enforcement, or allowing gatekeeping laws such as Arizona SB 1070 to stand, permit state and local governments undue discretion in dictating the terms of federal immigration enforcement priorities in violation of the federal government's plenary power to control immigration policy); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 34 (2007) (suggesting that state and municipal legislation intended to regulate immigration generally is unconstitutional, while local efforts that do not interfere with federal authority, such as in-state tuition privileges, are constitutional); Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (utilizing membership theory to explore and explain the growing convergence of criminal law and immigration law); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 532-52 (2001) (exploring within the context of the 1996 Welfare Reform Act whether Congress has authority to extend a historically federal power, such as immigration regulation, to the states). Many scholars specifically explore the equal protection consequences of state immigration laws. *See, e.g.*, Linda S. Bosniak, *Immigrants, Preemption and Equality*, 35 VA. J. INT'L L. 179 (1994) (addressing immigration law in the equal protection context); Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-"Alien" Laws and Unity-Building Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905 (2011) (analyzing anti-alien legislation as a product of political unrest and a desire to express race-based distrust, and exploring the role of federal preemption in preventing discriminatory legislation); Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV 313 (2012) (discussing the racially disparate impact immigration laws have on undocumented and lawful immigrants).

[19] Hiroshi Motomura is credited with first coining the term "immigration federalism" in legal discourse. *See, e.g.*, Huntington, *supra* note 18, at 788 n.6 (2008) (citing Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1361 (1999) (defining immigration federalism as "states and localities play[ing a role] in making and implementing law and policy relating to immigration and immigrants")); Spiro, *supra* note 17, at 1627 n.a1 (crediting Hiroshi Motomura with coining the term "immigration federalism"). Examined through the scholarship of Motomura and others, immigration federalism can be understood as the efforts of states and local governments to assert a role for themselves in shaping a national immigration policy. Immigration federalism describes both a historical phenomenon (insofar as states and local governments have always sought to regulate immigration within their jurisdictions) and, as used here, the contemporary manifestation of that phenomenon. As a historical phenomenon, states and localities have always played a role in shaping migration policies. *See* Huntington, *supra* note 18, at 837-38. Typically, the federal government, rather than assuming a proactive role in establishing a national immigration policy, has crafted its immigration policies in reaction to state and local efforts. *See* Hiroshi Motomura, *The*

Although setting and enforcing a national immigration policy has traditionally been understood to be an exclusively federal responsibility,[20] the recent tsunami of state and local immigration laws aim, often expressly, to commandeer federal immigration laws.[21] Thus, the growing proliferation of thousands of state and local immigration laws can best be described as reverse-commandeering — a deliberate attempt to break the exclusive power of the federal government to dictate immigration policy.[22] Increasingly, state and local attempts to control unwanted immigration exemplify the inverse of the problem posed by the impermissible commandeering of state resources by the federal government under the Court's federalism jurisprudence.

Part I explains how the anti-commandeering doctrine is logically consistent with the goal of protecting federal sovereignty. Specifically, I show how the Court has developed its anti-commandeering jurisprudence in order to protect our federalist system of dual sovereignty. The Court's commandeering cases thus far have protected state sovereignty from federal encroachment. Yet, their guiding principle is designed to protect the federalist system, not just state sovereignty. Accordingly, states, like the federal government, should be subject to the Court's anti-commandeering doctrine and thereby prohibited from commandeering aspects of federal sovereignty. Likewise, state efforts to carve themselves a role in areas committed by the Constitution to the federal government should be subject to an anti-reverse-commandeering analysis.

Rights of Others: Legal Claims and Immigration Outside the Law, 59 DUKE L.J. 1723, 1729 (2010) ("Only after the Civil War did today's prevailing view of immigration federalism — that federal immigration regulation displaces any state laws on the admission and expulsion of noncitizens — begin to emerge.").

[20] *See* discussion *infra* Part II.A. *See, e.g.*, Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984) (examining the history of the plenary power doctrine and arguing that the "the Court should abandon the special deference it has accorded Congress in the field of immigration").

[21] *See, e.g.*, Bulman-Pozen, *supra* note 2, at 484 ("A strong instance of [state] goading, which we might call reverse commandeering, is playing out across the country right now in the realm of immigration law, as states seize on mandatory provisions of federal law to attempt to drive federal executive action. Following Arizona's lead, numerous states have passed laws that challenge the enforcement of federal immigration law and seek not only to supplement federal enforcement with state enforcement, but also to force the federal executive itself to take more action.") (citations omitted).

[22] *See, e.g.*, Eagly, *supra* note 10 (discussing how SB 1070, when viewed comprehensively within the framework of Arizona's body of criminal immigration law enacted in recent years, illuminates Arizona's functional regulation of immigration law and policy).

A. Anti-Commandeering Doctrine & Protecting Federal Sovereignty

Structurally, the Constitution establishes federalism as a system of shared governance. This system of dual sovereignty, in theory, allocates specific enumerated powers to the federal government and leaves all other powers to the states.[23] Defense of the dual sovereign system of governance has been a complex and difficult endeavor.[24] In fact, how best to structure that defense has been referred to by constitutional law scholar H. Jefferson Powell as "the oldest question of constitutional law."[25]

This defense typically involves asserting the values derived from strong state governments.[26] State governments offer a multiplicity of

[23] *See, e.g.*, AKHIL AMAR, AMERICA'S CONSTITUTION, A BIOGRAPHY 29-31 (Random House 2005) (explaining process by which "each ratifying state pledged vertical allegiance to the United States" through ratification of the Constitution, with the vertical separation of powers now being the federal and state governmental structure).

[24] *See, e.g.*, Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 39-40 (2010) (questioning traditional federalism defenses, such as preserving traditional values within a locality and promoting innovation, by arguing that such rationales may disrupt national harmony or require a common federal framework of "uniform standards"); Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1326 (2004) ("[A] broad vision of inferred preemption invalidates beneficial state laws."); Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 492 (2012) (arguing that there are limits to federal use of economic incentives to encourage state action because a state cannot consent to waive a limit the people placed upon the federal government); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 938 (1998) (rejecting existence of mutually exclusive dual sovereign spheres and favoring anti-commandeering doctrine's role in protecting state autonomy because it serves federal-state intergovernmental relations functionally); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180 (1998) (arguing that an analysis of the benefits of federalism is not dispositive of whether courts should enforce categorical federalism-based limits on federal legislation, and advocating for a more flexible approach).

[25] H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 635 (1993) (discussing Justice O'Connor's opinion in *New York v. United States*, 505 U.S. 144 (1992), within context of "the historical search for a principled law of federalism," and noting that this search is "'perhaps our oldest question of constitutional law'; the underlying basis for 'the proper division of authority between the Federal Government and the States'" (quoting Justice O'Connor, *New York*, 505 U.S. at 149)).

[26] Debates about the values of federalism rage on as the basis for academic critiques of the Court's jurisprudence and whether it is properly giving effect to the federalist values of our founders. That debate is complicated and long-running, and this Article makes no attempt to contribute to it here. My present point is much humbler: federalism is designed to protect two sovereigns, not just to foster state sovereignty, and the anti-commandeering doctrine's logic can be extended in both

regulatory regimes, which in turn provides both a testing lab and a competitive framework for developing the best policies.[27] The multiplicity of state governments provides the national citizenry with choices about which state policies are most conducive to their needs.[28] Moreover, political processes occurring at the state level (as opposed to the national level) are said to provide more opportunity for accountability, meaningful political participation, and the promotion of community (resulting from people working together to achieve meaningful political ends).[29] Finally, states can serve as rallying points for opposition to national policies and as a restraining force against overreach by the national government.[30]

These justifications for a robust federalist system react against an unconstitutional alternative: the consolidation of all real governing authority at the national level. At the same time, federalism is much more than a vehicle for advancing the rights of state power and autonomy. Federalism involves two bodies of sovereignty. The well-being of that system of governance requires that both bodies of sovereignty remain intact and in a careful balance with each other. The powers reserved to the states by the Tenth Amendment, therefore, are only meaningful in the context of those powers expressly granted to the federal government.[31] Moreover, the Court has recognized that

directions to protect federal sovereignty as well as state sovereignty.

[27] For a summary of these federalist values, see Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 51-63 (2004). Young's concern is not so much to argue the merits of these values as to summarize them in order to question whether the Supreme Court's federalist jurisprudence adequately serves "the values that motivate our attachment to federalism in the first place." *Id.* at 64; *see also* Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1648-50 (2006) (providing a detailed discussion concerning scholarship addressing federalism values and how best to protect state sovereignty).

[28] Young, *supra* note 27, at 57.

[29] *See id.* at 60.

[30] The Court, of course, is not shy about iterating federalist values in decisions where it intends to curb national power. For example, in *Gregory v. Ashcroft*, the Court explained: "This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[31] Put slightly differently, "[T]he creation of a list of enumerated powers was not simply an attempt to limit the new federal government for its own sake. It was designed to realize a basic structural idea [of dual sovereignty]." JACK M. BALKIN, LIVING ORIGINALISM 146 (Harvard Univ. Press 2011). That is also the view of the

the federal government is not the only sovereign capable of overreach and, thus, not the only sovereign subject to restraints in the federalist system: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[32] Under this federalist system, the state sovereign must live with the national sovereign and vice versa. And it is the responsibility of the judicial branch to ensure that neither makes inroads on the sovereignty of the other in derogation of the Constitution.[33]

Constitutional scholars have noted a renewed commitment by the judicial branch to police the boundaries of federal and state power in order to ensure that any inroads on state sovereignty are proscribed. Specifically, much academic discourse has been dedicated to a discussion on the significance of a "federalism revival" in the Court's jurisprudence in recent decades that seeks doctrinal and prudential methods to more robustly protect state autonomy and sovereignty.[34] In addition to the "federalism revival" attached to "breath[ing] new life into the [Tenth] amendment's seemingly truistic language,"[35] scholars have noted that "the Commerce Clause, the Eleventh Amendment, and Section Five of the Fourteenth Amendment experienced similar federalism revivals."[36] As will be discussed in more detail below, the Supreme Court's recent decision in the Affordable Care Act during the last term now sweeps the Spending Clause into the "federalism revival" as well. Most relevant to this Article, however, is the manner in which the anti-commandeering doctrine was born from the Tenth Amendment jurisprudence set forth by the Rehnquist Court of the 1990s.

Through principles set forth in *New York v. United States*,[37] and reinforced in *Printz v. United States*,[38] the Court has concluded that commandeering is unconstitutional under principles of federalism, as

Court: "The principles of limited national powers and state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it." Bond v. United States, 131 S. Ct. 2355, 2366 (2011).

[32] *Ashcroft*, 501 U.S. at 458.

[33] *See* M'Culloch v. Maryland, 17 U.S. 316, 359 (1918).

[34] Siegel, *supra* note 27, at 1630-31; Jackson, *supra* note 24, at 2213.

[35] Siegel, *supra* note 27, at 1630-31.

[36] *Id.* at 1630 n.3 (citations omitted).

[37] 505 U.S. 144, 185-86 (1992).

[38] 521 U.S. 898, 935 (1997).

commandeering violates the vertical separation of powers between the state and federal governments. What this means in practice is that while federal law can regulate people, it cannot regulate states.[39] *New York* held that the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 was unconstitutional.[40] Specifically, the federal law mandated states to "take title" to radioactive waste by a certain date or otherwise "be liable for all damages directly or indirectly incurred."[41] The Court concluded that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[42] Thus, federal laws may not require state legislatures to enact specific laws to implement federal regulatory programs because doing so amounts to the commandeering by one sovereign of the legislative power of another. Along similar lines, the federal government may not compel state officers to implement federal ends because this also amounts to the commandeering of one sovereign by another. *Printz*'s specific holding prohibited a federal law that would have required state law enforcement officers to temporarily screen firearm sales to ensure they are lawful under the Brady Handgun Violence Prevention Act of 1993.[43] The general principle remains that one sovereign may not commandeer another sovereign to the detriment of the latter sovereign's co-equal status under our federalist system of government.

In *New York*, the first anti-commandeering case, the Court initially appeared to rely upon the Tenth Amendment as the basis for the doctrine it articulated.[44] The Court acknowledged that the Tenth Amendment has traditionally been regarded as a "tautology" or "truism." The Tenth Amendment reserves to states all powers not explicitly committed to the federal government by the Constitution.[45] Thus, if the federal government lacks a power, then the states must have it; resolving one inquiry must resolve the other.[46] However, the

[39] *Printz*, 521 U.S. at 920.

[40] *New York*, 505 U.S. at 175.

[41] *Id.* at 153.

[42] *Id.* at 188.

[43] *Printz*, 521 U.S. at 920.

[44] *New York*, 505 U.S. at 156-57.

[45] U.S. CONST. amend. X.

[46] *New York*, 505 U.S. at 156. The Tenth Amendment, in other words, was once viewed as a "tautology," simply resolving a question of which sovereign can claim what remaining powers are not expressly delegated by the Constitution. This is why it has also been traditionally read as a "truism" and not as an Amendment that should be read for implicit meaning. The Court has continued to recognize the viability of this view of the Tenth Amendment even if it is no longer predominant in light of the

New York Court appeared to give this Amendment teeth when it departed from this long-standing view and determined instead that the Tenth Amendment was something much more than a truism. The Court found this Amendment could be read to have positive content and that it in fact "restrains the power of Congress" by shielding state sovereignty from the exercise of powers that otherwise are constitutionally permissible.[47] These aspects of state sovereignty thus mark a positive limit posted by the Tenth Amendment on federal prerogatives.[48] In other words, the Court has begun to delineate a limiting principle or border for federal constitutional powers, even plenary powers, where those powers trench on state sovereignty through unconstitutional commandeering. [49] That inquiry has given rise to the Court's anti-commandeering jurisprudence.[50]

The Court's transformation of the Tenth Amendment inquiry moves beyond asking whether a federal action finds its authority in some part of the Constitution and instead tries to locate a dividing line between what is properly within the sphere of federal sovereignty and what is properly within the sphere of state sovereignty.[51] As explained by the

evolution of the anti-commandeering doctrine. *See* Bond v. United States, 131 S. Ct. 2355, 2367 (2011) ("Whether the Tenth Amendment is regarded simply as a 'truism,' or whether it has independent force of its own, the result here is the same.") (internal citations omitted) (citing *New York*, 505 U.S. at 156).

[47] *New York,* 505 U.S. at 156; *see* Powell, *supra* note 25, at 675-88 (discussing how although *New York* cannot locate a justification for the expansion of this new federalism principle based in a historical examination of the founders' discussion or subsequent historical record of the constitutional debate, this conception of federalism is justified on prudential grounds).

[48] For a discussion of the evolution of the Court's Tenth Amendment jurisprudence over time, see Siegel, *supra* note 27, at 1636-42. Siegel sees *Gregory v. Ashcroft*, 501 U.S. 452 (1991), as marking the starting point of the "Rehnquist Court's reinvigoration of the Tenth Amendment." Siegel, *supra* note 27, at 1637.

[49] *See* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1060-88 (1995) (exploring normative objections to nonjudicial commandeering and critiquing the Court's anti-commandeering doctrine as "reflect[ing] a wooden, simplistic response to a problem that is conceptually and normatively complex").

[50] *See id.*

[51] That at least is the inquiry that gives rise to Court holdings that find the national government is improperly commandeering the states to achieve national ends. In practice, the inquiry appears to boil down to whether a federal enactment commandeers either a state legislature in contravention of the Court's holding in *New York*, or whether the enactment commandeers state actors in contravention of *Printz*. For example, in *Reno v. Condon*, the Court dismissed a Tenth Amendment commandeering claim, explaining that the federal statute under challenge "does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating

New York Court, the "Tenth Amendment thus directs us to determine [in a given case] whether an incident of state sovereignty is protected by a limitation on a [federal power]."[52] This inquiry is in effect a sorting process, determining what belongs on the state side of the dual sovereign line. Thus, that inquiry can be flipped, so to speak, to determine what aspects of federal sovereignty cannot be usurped by states in the process of exercising their sovereign powers.[53]

In *Printz*, the Court made clear that the anti-commandeering doctrine really derives from the nature of our federalist system of government, rather than from the Tenth Amendment, which the Court now characterized as a signifier of that federalist system of government. In so doing, the Court developed anti-commandeering principles to engage in a constitutional inquiry as to whether a federal statute requiring state law enforcement officers to participate in its implementation violated the vertical separation of powers, even though "there is no constitutional text speaking to this precise question."[54]

The Court starts out by recognizing that the Constitution establishes a "system of 'dual sovereignty." It then proceeds to elaborate how the Constitution positively protects a "residuary and inviolable [state] sovereignty." The Court ends its analysis on this score by noting that the Tenth Amendment merely "rendered express" the protection of "residual state sovereignty" in the Constitution's limiting of Congress to "discrete, enumerated" governmental powers.[55] All of this is not a departure from the approach in *New York*, but rather reflects a shift in

private individuals." Reno v. Condon, 528 U.S. 141, 151 (2000). Of course, the Court remains free to expand the scope of the anti-commandeering doctrine based on its view that it is charged by the Tenth Amendment with protecting aspects of state sovereignty from federal incursion. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604-05 (2012).

[52] *New York*, 505 U.S. at 157.

[53] Typically one does not expect states to attempt to usurp federal prerogatives and, in any event, the Supremacy Clause and the corresponding preemption doctrine provide the typical vehicle for addressing state incursions onto the federal side of the dual sovereign line the Court purports to patrol with its anti-commandeering jurisprudence. However, as discussed below and illustrated by *Whiting*, preemption doctrine is not always adequate to protect federal sovereign prerogatives from state usurpation. Finally, in *Printz*, the Court often takes a "what's good for the goose is good for the gander" approach in assessing when the federal exercise of constitutional powers infringes on state sovereignty — which is to say, the Court notes that if states tried to pull the same thing on the federal government, it would be clearly unacceptable.

[54] Printz v. United States, 521 U.S. 898, 905 (1997).

[55] *Id.* at 919.

emphasis. Anti-commandeering analysis serves federalism by engaging the Court in a query as to whether an otherwise valid federal action in this instance threatens the "structural protection[]" provided by the Constitution's establishment of a "separation of the two [state and federal] sovereign spheres."[56]

The application of the anti-commandeering doctrine, therefore, does not hinge upon an inquiry or challenge pursuant to the Tenth Amendment. In fact, the Tenth Amendment arguably has been misread as the primary vehicle for protecting federalism values.[57] In light of these considerations, the Court's analysis in *New York* and *Printz*, in other words, is not simply designed to protect the state sovereign from overreaching action by the federal government. Though, as a practical matter, that is what the Court's anti-commandeering cases have accomplished thus far. Rather, it is important to note that the doctrine's purpose is to protect the federalist system of governance, which requires maintaining a careful balance between the dual sovereigns comprising that system. It was just such a balance that the Court concluded was threatened when it determined in *Printz* that the "power of the federal government would be augmented immeasurably if it were able to impress into its service — and at no cost to itself — the police officers of the fifty States."[58]

Consequently, although the anti-commandeering doctrine was developed by the Court to protect state sovereignty from federal overreach, nothing prohibits flipping the doctrine in the opposite direction to protect federal sovereignty from state overreach. Indeed,

[56] *Id.* at 921.

[57] *See, e.g.*, BALKIN, *supra* note 31, at 141-49 ("[T]he purpose of enumeration was not to *displace* the [structural] principle but to *enact* it[.]"); Siegel, *supra* note 27, at 1634 ("This disconnect between legal doctrine and animating values suggests that the Rehnquist Court's Tenth Amendment legacy has more to do with a symbolic and judicially manageable gesture in the direction of 'states' rights' than with the substance of federalism as constitutional law intended to safeguard state autonomy."). The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Thus, the Tenth Amendment operates in a unidirectional manner; therefore, if the Tenth Amendment were the purported basis for the anti-reverse-commandeering doctrine, the doctrine would collapse. But, as the *Printz* Court has said, "This argument also falsely presumes that the Tenth Amendment is the exclusive textual source of protection for principles of federalism. Our system of dual sovereignty is reflected in numerous constitutional provisions and not only those, like the Tenth Amendment, that speak to the point explicitly. It is not at all unusual for our resolution of a significant constitutional question to rest upon reasonable implications." Printz v. United States, 521 U.S. 898, 923 n.13 (1997) (citation omitted).

[58] *Printz*, 521 U.S. at 922.

such a potential reversal of the doctrine seems implicit in its federalist logic because the doctrine serves to ensure a balance between the dual sovereigns of the federalist system, not to advance the prerogatives of one of the sovereigns in particular.

B. Applying Anti-Commandeering Doctrine to Reverse-Commandeering Laws

It follows from all this that where the powers of the states would be augmented immeasurably — and to the detriment of a functioning system of dual sovereignty — anti-commandeering principles would have equal application to state reverse-commandeering laws that may threaten federal sovereignty. If states, for example, could put federal officers and resources to state ends, implement federal law directly, or coerce the enactment of federal law or regulations indirectly, then the same constitutional principles that protect states from commandeering should come into play to protect the federal government from reverse-commandeering. The *Printz* Court makes exactly this point: "It is no more compatible with this independence and autonomy that [state] officers be 'dragooned' . . . into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws."[59]

Specifically, *Printz* holds unconstitutional federal legislation that seeks to compel state law enforcement officers to carry out federal aims. In reaching its holding, the Court considered a wide range of troubling implications that would derive from otherwise holding such legislation constitutional. The Court noted the obvious power imbalance resulting from allowing one sovereign, whether state or federal, to require another's law enforcement personnel to carry out its ends. But, it also noted that such commandeering was also problematic because it effectually allowed one sovereign to shift the fiscal burdens of implementing its policies and programs to another sovereign.[60]

Moreover, such commandeering is problematic because it allows a legislature to evade the consequences of its own actions in terms of its public perception and thereby allows it to evade accountability. That is

[59] *Id.* at 928.

[60] "By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Id.* at 930.

because by commandeering a second sovereign's officers to implement its laws or policies, the second sovereign becomes the public face of the policy and the target of all popular disapprobation for that policy's limits and failings.[61]

Finally, the Court explained that regardless of how ministerial the function for which another sovereign's officers are commandeered, there would inevitably be a usurpation of that sovereign's ability to make independent policy and regulatory choices. The Court expressed doubt about the feasibility of distinguishing "between 'making' law and merely 'enforcing' it, between 'policymaking' and mere 'implementation' " because "Executive action that has utterly no policymaking component is rare."[62] The Court developed this point, explaining that by commandeering state officers, the federal government was also commandeering state policymaking authority insofar as the state now had to determine how to allocate law enforcement resources and time between the new federal directive and the other state objectives.[63]

Additionally, the anti-commandeering doctrine's reach was expanded with the Court's recent healthcare ruling, *National Federation of Independent Business v. Sebelius (NFIB)*.[64] The Court, in effect, transformed the anti-commandeering doctrine into an anti-coercion doctrine. Under the new conceptualization of the anti-commandeering doctrine, even when Congress does not compel states to act, a law can be struck on anti-commandeering grounds if the practical impact of the law is one that coerces another sovereign's power. "The relevant inquiry is now practical rather than formal: has Congress left the states with a 'real option' of saying no to the federal government's conditions?"[65]

NFIB demonstrates that the Court does not view the doctrine as limited to restraining the federal government's exercise of its Commerce Clause powers because here the doctrine limits the scope of the conditional spending power under the Spending Clause as well.[66] In *NFIB*, the Court held that, although state participation in

[61] "And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects." *Id.*

[62] *Id.* at 927.

[63] *Id.* at 927-28.

[64] *See* 132 S. Ct. 2566, 2659-61 (2012).

[65] Bradley W. Joondeph, *The Health Care Cases and the New Meaning of Commandeering* (forthcoming 2012), *available at* http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1333&context=aca.

[66] *See NFIB*, 132 S. Ct. at 2603.

Medicaid was technically voluntary, the Affordable Care Act (ACA) violated anti-commandeering principles by attempting to unconstitutionally coerce state participation in the ACA's new Medicaid provision. Specifically, the recent holding makes clear that commandeering does not have to be express to be unconstitutional. A sovereign can be commandeered without an explicit legislative pronouncement, for example, by prescribing duties for the other sovereign or commandeering the officers or fiscal resources. The upshot is that the Court found one sovereign can be commandeered or coerced in fact, even if that sovereign is not commandeered or coerced in form.[67] This is a dramatic re-conceptualization of the prior anti-commandeering doctrine.

Specifically, in *NFIB*, the Court found the ACA's amendments to Medicaid amount to an impermissible "commandeering" of the states, in essence, because of the sheer volume of federal funding states stand to lose if the states fail to comply with the ACA's mandates.[68] Under an anti-reverse-commandeering analysis, state attempts to coerce the allocation of federal resources for the enforcement of state laws can be read as posing a similar offense to federalism. Even if Congress can take action to correct a state action that may be perceived as coercive or commandeering in nature, the Court's recent healthcare decision indicates that the practical coercive effect of a law alone can justify striking down a provision on anti-commandeering grounds.

In summary, the Court's anti-commandeering doctrine does not turn on concerns specific to the states that cannot also be shared by the federal government.[69] Federal commandeering of state law enforcement officers is not, for example, objectionable because it disrupts the regulatory diversity presented by fifty different state governments fashioning independent policies. Rather, through its anti-commandeering doctrine, the Court has expressed concern that permitting such commandeering would enable federal sovereignty to

[67] Bradley W. Joondeph, Conditional Spending, Coercion, and Commandeering: The Affordable Care Act and the Federal Regulation of State Taxation 2 (Sept. 21, 2011) (unpublished manuscript) (Tax Law Speaker Series at the University of San Diego: Conditional Spending, Coercion, and Commandeering), *available at* http://works.bepress.com/bradley_joondeph/3/.

[68] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604-05 (2012).

[69] *NFIB*'s holding that Congress's tax and spending power can be used coercively in a way that amounts to commandeering a state's ability to make a choice does not concern a power that states also have. But *NFIB* more broadly shows that commandeering does not require a clear mandate from one sovereign to another in order to upset the federalist system and run afoul of the anti-commandeering doctrine.

overshadow state sovereignty and thereby disrupt the balance between the two sovereigns that is federalism.

One of the Court's primary concerns, in fact, has been that through commandeering, the federal government could evade political and fiscal accountability for national policies by shifting their costs onto the states.[70]

The federal government possesses expansive powers the states lack and if commandeering occurs, it is most likely to be the federal sovereign that is doing the commandeering. However, it still remains possible for the state sovereign to commandeer as well. Indeed, the real concern of states usurping, through state legislation, powers constitutionally committed to the national government can be seen as early as *Gibbons v. Ogden*.[71] Spheres of power that have been considered truly "national" in scope have included, for example, foreign affairs and entering into foreign treaties, national security and national defense strategies, matters of national and international commerce, and setting a national currency.[72] Thus, although this Article grounds the notion of reverse-commandeering by states in the context of state immigration laws, an anti-reverse-commandeering doctrine could be applicable in any context in which states might encroach upon exclusive federal powers in a way that interferes with the federal government's ability to exercise a national responsibility.

I next turn to the immigration context to suggest a concrete instance where states are engaged in attempting to commandeer or usurp federal authority. The federal government is currently wrestling with state governments over the direction of national immigration policy, with state governments enacting laws designed to carve out a role for themselves in enforcing federal immigration statutes. Examining this struggle between sovereigns in some detail will, hopefully, demonstrate that states also can shift political and fiscal responsibility

[70] New York v. United States, 505 U.S. 144, 182-83 (1992).

[71] 22 U.S. 1, 199-200 (1824) ("But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do."). The Court developed its dormant commerce clause jurisprudence to ensure state sovereignty does not overshadow federal sovereignty in the sphere of commerce regulation. Erin F. Delaney, Note, *In the Shadow of Article I: Applying a Dormant Commerce Clause Analysis to State Laws Regulating Aliens*, 82 N.Y.U. L. REV. 1821, 1840-42 (2007).

[72] *See, e.g.*, BALKIN, *supra* note 31, at 145-47 ("Examples of federal problems include questions of foreign and military policy where the nation needs to speak with a single voice, to marshal resources for the common defense, and to prevent foreign powers from pushing the state around or engaging in divide-and-conquer strategies — whether relating to trade, immigration, military threats, or diplomatic alliances.").

for their actions to the federal government. The power to set and implement immigration policy has been traditionally construed as falling within the sole prerogative of the federal government because immigration policy has been deemed by the Court to be a subset of the foreign affairs power.[73] Consequently, these laws present an unconstitutional incursion into federal sovereignty.[74]

II. FROM PLENARY POWER TO PREEMPTION

Immigration policy is a field where domestic economic policy intertwines with foreign policy. The field of immigration law has traditionally, and perhaps more so than other fields, been a place where state and federal sovereign interests merge and collide. The migration of foreigners into the country has historically been a matter for Congress to regulate.[75] The decisions about which nationals are welcome and which are not has obvious ramifications on foreign policy, which is a sphere committed to the federal government, not the states.[76]

---

[73] *See* Brief for Madeline K. Albright at 9-10, *Arizona v. United States*, 132 S. Ct. 845 (2012) (No. 11-182), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-182_respondentamcufmrgovofficials.authcheckdam.pdf (asserting that authority to regulate immigration lies solely within the federal domain) (citing Demore v. Kim, 538 U.S. 510, 522 (2003); Toll v. Moreno, 458 U.S. 1, 10 (1982); Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982); Kleindiest v. Mandel, 408 U.S. 753, 765 (1972)).

[74] I should note that scholars question just how effectively the anti-commandeering doctrine serves federalist values. *See* Siegel, *supra* note 27, at 1673 (arguing that prohibiting federal commandeering may actually frustrate federalism insofar as the federal government may resort to other means, like preemption, which leave states with less of a role to play in a given regulatory regime than they would have had if they had been simply commandeered); Young, *supra* note 27, at 23 (arguing that the Court's federalism cases, while promoting state sovereignty, do not do much for state autonomy). That debate takes me too far afield. For present purposes, it is enough that the anti-commandeering doctrine exists and that to the extent that doctrine's purpose is to preserve federalism, it should have application to state commandeering as well as federal commandeering.

[75] De Canas v. Bica, 424 U.S. 351, 354 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 101, § 274A(h)(2), 100 Stat. 3359, 3368, *as recognized in* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011).

[76] *See* CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 327 (2d ed. 2006) (comparing landmark immigration cases such as *Hines v. Davidowitz* and *De Canas v. Bica*); *see also* U.S. CONST. art. I, § 10 cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . . ."); U.S. CONST. art. I, § 10. cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary . . . ."); U.S. CONST. art. I, § 10. cl. 3 ("No State shall, without the Consent of Congress, lay any duty of

At the same time, foreign nationals entering this country do not merely enter the United States; they must also enter individual states and communities. Although their presence is a matter of foreign policy, it is also both a contribution to and a burden on the local and state jurisdictions where they reside. This is, of course, true of the presence of any person within the bounds of a state. Immigrants have been seen as different historically, however, because they are not citizens, and they have often been perceived as having deleterious impacts on local governments and residents.[77] Those arguing in favor of state immigration laws which strive to curb migration or expel migrants have claimed such unwanted migrants threaten jobs;[78] overburden schools;[79] pose health, safety, and welfare risks;[80] impose language and cultural challenges; and other social burdens.[81]

The federal government early on asserted its prerogative to regulate in the field with the Alien and Sedition Acts of 1798.[82] Supporters of

Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

[77] *See* Kobach, *Reinforcing*, *supra* note 7, at 462 (arguing "consequences of illegal immigration — health care costs and criminal costs — only exacerbate the fiscal burdens imposed by illegal immigration upon states and cities").

[78] *See, e.g.*, *Making Immigration Work for American Minorities: Hearing Before Subcomm. on Immigration Policy and Enforcement of the Comm. on Judiciary Subcomm. Jurisdiction*, 112th Cong. (2011) (statement of Rep. Elton Gallegly, Chairman, Subcomm. on Immigration Policy and Enforcement), *available at* http://www.house.gov/gallegly/media/media2011/030111immigration.htm (examining the relationship between unemployment and immigration, arguing that immigrants should not be permitted to fill jobs that U.S. citizens would be otherwise qualified to undertake).

[79] *See, e.g.*, Jonathan Serrie, *School Officials: Alabama Law on Reporting Illegal Students is 'Impractical'*, FOX NEWS (July 26, 2011), http://www.foxnews.com/politics/2011/07/26/illegal-immigration-crackdown-stirs-debate-in-alabama/ (asserting that the national cost of educating children of unauthorized immigrants is nearly $52 billion per year).

[80] *See, e.g.*, *Is Illegal Immigration Bad for America's Health?*, FOX NEWS (July 26, 2010), http://www.foxnews.com/health/2010/07/26/illegal-immigration-bad-americas-health/ (arguing that unauthorized immigrants pose an especial health risk because they have not been checked for, *inter alia*, tuberculosis, syphilis, HIV, gonorrhea, and narcotic drug addiction).

[81] *See, e.g.*, *Welfare Tab for Children of Illegal Immigrants Estimated at $600M in L.A. County*, FOX NEWS (Jan. 19, 2011), http://www.foxnews.com/politics/2011/01/19/welfare-tab-children-illegal-immigrants-estimated-m-la-county/ (reporting that Los Angeles County Supervisor released statistics estimating that taxpayer burden for foodstamps, public safety, and health benefits total approximately $600 million for the children of undocumented immigrants).

[82] The Alien Enemies Act, ch. 66, 1 Stat. 577 (1798), codified at 50 U.S.C. §§ 21-24 (authorizing President to deport resident aliens when the United States is at war

the Acts claimed that the Commerce Clause, Necessary and Proper Clause, Migration Clause, and the War Powers Clause suggested that the U.S., as a sovereign, had the inherent authority to regulate "aliens."[83] Nevertheless, throughout the nineteenth century, states also passed laws regulating who was permitted to enter their borders, spurring a series of court challenges. By 1875, the Court held that the power to regulate migration was exclusively federal pursuant to its power to regulate foreign commerce,[84] as well as its foreign affairs power.[85]

Thus, Part II focuses on the respective roles the federal and state governments have in the field of immigration law and policy. While setting immigration policy is clearly committed to the federal government, without question state governments often bear the burdens associated with immigration, and thus have a continuing incentive to attempt to regulate immigration and immigrants at the state level.[86] Moreover, in recent decades, the federal government has

with the alien's home country); The Sedition Act, ch. 74, 1 Stat. 596 (1798) (criminalizing the publication of "false, scandalous, and malicious writing" against the United States); The Alien Act, ch. 58, 1 Stat. 570 (1798) (authorizing President to deport resident aliens determined to be "dangerous to the peace and safety of the United States").

[83] *See also* Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 90 (2002) (detailing the historical genesis of the Alien and Sedition Acts of 1798 and its constitutional justification). *See generally* NEUMAN, *supra* note 9 (introducing historical overview of constitutional foundations of U.S. immigration law).

[84] *See* Henderson v. Mayor of New York, 92 U.S. (2 Otto) 259, 271-72 (1876) (invalidating a New York statute that required the master of every vessel arriving at the port of New York to report all aliens on board and post a bond of $300 to indemnify the state and local authorities against expenses incurring in public assistance for the alien within four years, or pay $1.50 per arriving alien passenger; according to the Court, this statute unconstitutionally infringed upon the federal power to "regulate commerce with foreign nations").

[85] *See* Chy Lung v. Freeman, 92 U.S. (2 Otto) 275, 280 (1875) (The Supreme Court invalidated a California statute that gave state officials discretion to refuse admission to certain arriving passengers unless the master or owner of their transport vessel met one of two conditions. Either he could post a bond of $500 in gold to indemnify all California counties, towns, and cities against liability for support and maintenance for two years, or he could pay a sum to be set by the state official (who would retain twenty percent "for his services"). The Court reasoned that the statute unconstitutionally interfered with the conduct of foreign affairs by the federal government.).

[86] Immigration is, and historically has been, a politically charged issue and that also provides an incentive for political branches at the state level to take action with regard to immigrants entering and residing in a state.

encouraged states to assist it in enforcing federal immigration laws. State and local governments have gone further and, through the enactment of mirror-image laws, now seek to assert an independent role in the enforcement of federal immigration law standards. These laws are drafted to survive preemption challenges by mirroring federal statutes. Preemption doctrine thus far has had only limited success in protecting federal sovereignty in the same way that the Court's anti-commandeering doctrine protects state sovereignty. This is borne out by a discussion of how the preemption claims made by the United States fared in both *Whiting* and *Arizona*.

A. Plenary Power Doctrine: Exclusive Federal Jurisdiction in Immigration Law

Court acknowledgment of federal supremacy in the immigration field is enshrined in the plenary power doctrine.[87] "Scholars and courts generally understand the plenary power doctrine in immigration law to sharply limit judicial scrutiny of the immigration rules adopted by Congress and the President."[88] The doctrine is commonly seen "as a statement of uniquely unconstrained congressional authority."[89] That doctrine significantly limited the ability of the states to regulate immigration. States could not exclude individuals from their territories on the basis of national origin, determine the length or conditions of their stay in the United States, nor discriminate between citizens and noncitizens outside of the entry and removal context.[90] In addition, the plenary power doctrine gave full authority to the federal legislative and executive branches to regulate immigration.[91] By the close of the nineteenth century, "the Court's holdings [had] stripped the states of the power to act where they had previously reigned almost alone, and enthroned the federal government as the exclusive sovereign over immigration."[92]

---

[87] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 704-07 (1893).

[88] Adam B. Cox & Christina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 460 (2009).

[89] *Id.* at 477.

[90] Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289, 289-90 (2000); Motomura, *Phantom Constitutional Norms*, *supra* note 12, at 565; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 6, 22 n.117 (1984); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1091 (1995).

[91] Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889).

[92] Stumpf, *States of Confusion*, *supra* note 10, at 1576.

In the 1876 case of *Chy Lung v. Freeman*,[93] the Court explained that states have only a limited role in immigration matters because state laws addressing immigration can have foreign policy implications and create foreign policy problems that the national government will be tasked with resolving.[94] The Court noted that the state which promulgated the law, here California, would not be held responsible because "by our Constitution, she can hold no exterior relations with other nations."[95] Rather, the federal government would be held accountable for the state's conduct toward foreigners.[96] This logic would be repeated by the Court over the years, most recently in *Arizona*.[97] Thus, from the nineteenth century on, the Court recognized that state immigration laws presented the impermissible possibility of co-opting national authority to establish foreign relations because such state laws could impact ongoing national relations with foreign countries. At the same time, the Court recognized that state sovereigns were not restrained by political accountability for their foreign relation impacts because, in the end, any problems caused would be the federal government's responsibility. In effect, the state was commandeering a power committed to the federal government for its own ends, and that was constitutionally impermissible.[98]

Chy Lung did not necessarily foreclose all state legislation touching upon immigration matters. The Court made clear, however, that it was not faced with a statute that constituted a proper exercise of the state's police power in the context of immigration law. It noted that a state's power "to protect herself by necessary and proper laws against paupers and convicted criminals from abroad," when exercised "in the absence of legislation by Congress," might be proper if limited to "provisions necessary and appropriate to that object alone."[99] Along similar lines,

[93] 92 U.S. 275, 279-80 (1876).

[94] *Id.* Specifically, the Court explained that a state immigration law affecting foreign citizens could lead to an "international inquiry" or a "direct claim of redress." *Id.* at 279.

[95] *Id.* at 279.

[96] "If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer or all the Union?" *Id.*

[97] *See* Arizona v. United States, 132 S. Ct. 2492, 2498 (2012).

[98] It is worth noting at this juncture that the *Chy Lung* Court did not strike the statute on preemption grounds — there were no federal laws regulating immigration that potentially conflicted with the California law, or at least none that the Court considered. Rather, the problem with the statute was that it in effect usurped a power committed by the Constitution to the national government with the practical effect that a state policy would have national implications for which the state would not be held accountable.

[99] *Chy Lung*, 92 U.S. at 280.

two years later, the Court struck down a Missouri statute that prohibited bringing cattle into the state during certain months of the year, explaining that "unless the [state] statute can be justified as a legitimate exercise of the police power of the State, it is a usurpation of the power vested exclusively in Congress."[100] The Court recognized the overlap of federal and state authority over the matter of commerce. It struggled to define the proper scope of state authority over that field insofar as it implicated interstate commerce.[101] It recognized, at the same time, that none of a state's "large police powers [] can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution."[102] The Court concluded by describing its role in negotiating the ground where state police powers and federal constitutional commitments might overlap: "And as its [state police power] range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."[103]

These types of cases make clear that at earlier points in our history, the Court has expressed concern about state sovereignty overshadowing its federal counterpart. In more contemporary times, the Court has increasingly expressed its concern that federal sovereignty must not overshadow historic state powers. In some respects, the Court's anti-commandeering doctrine is merely a continuation of the judicial responsibility enunciated in cases such as *Chy Lung*, ensuring that federal constitutional powers do not work to unnecessarily denude states of their historically-recognized police powers, just as state powers may not usurp traditional national powers.

B. IRCA & IIRIRA: Concurrent Jurisdiction in Immigration Law

Although it is well-settled that immigration law is a federal responsibility, states have consistently sought ways to play a role in the regulation of immigrants. States have argued that this position is reasonable given that they shoulder the day-to-day problems associated with those who reside within their borders, including immigrant populations. Moreover, in recent decades, federal immigration policy has embraced a concurrent jurisdiction approach

[100] R.R. Co. v. Husen, 95 U.S. 465, 468-69 (1877).
[101] *Id.* at 470-71.
[102] *Id.* at 472.
[103] *Id.* at 474.

seeking to partner with states.[104] In other words, even though the Court has resolved the question of federal supremacy over immigration matters, states continue to play a role in immigration policy, sometimes at the invitation of the federal government, and federal authority continues to be challenged at the state and local level.

Thus, states have fought hard to develop some type of meaningful role in setting immigration policy. The Court, in turn, has been willing to let states regulate immigrants even as it has struck down state laws that it viewed as seeking to establish an independent immigration policy. For example, in the 1970s, at the height of a severe economic recession, state lawmakers became frustrated with the perceived failure of the federal government to take appropriate action to curb unauthorized immigration from Mexico.[105] Consequently, states began to pass employer sanctions laws: state immigration laws that penalized and sanctioned employers for hiring undocumented workers.[106] In *De Canas v. Bica*, the Supreme Court upheld one of these laws after concluding that the regulation of the employment and labor of state residents, including employment of unauthorized immigrants, was a historic state police power.[107] The Court reasoned that a state could engage in historic police powers that regulated the activities of immigrants, but it could not regulate federal immigration policy, as the "[p]ower to regulate immigration is unquestionably exclusively a

[104] For a discussion of concurrent jurisdiction see *supra* notes 10-11.

[105] *See* BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 156-160 (Temple University Press 2004); GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES: ILLEGAL ALIENS: ESTIMATING THEIR IMPACT ON THE UNITED STATES 45-49 (1980), available at http://www.gao.gov/assets/130/129063.pdf; Carl E. Schwarz, *Employer Sanctions Laws, Worker Identification Systems, and Undocumented* Aliens, 19 STAN. J. INT'L L. 371, 371-79 (1983).

[106] *See* CAL. LAB. CODE § 2805 (1971); CONN. GEN. STAT. § 31-51K (1972); DEL. CODE ANN. tit. 19, § 705 (1976); FLA. STAT. § 448.09 (1977); KAN. STAT. ANN. § 21-4409 (1973); ME. REV. STAT. tit. 26, § 871 (1977); MASS. GEN. LAWS ch. 149, § 19C (1976); MONT. CODE ANN. § 41-121 (1977); N.H. REV. STAT. ANN. § 275-A:4-a (1976); VT. STAT. ANN. tit. 21, § 444a (1977); VA. CODE ANN. § 40.1-11.1 (1977).

[107] De Canas v. Bica, 424 U.S. 351, 356 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 274A(h)(2) (1986), 100 Stat. 3359, 3368, *as recognized in* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1974 (2011). The Court explained that "[i]n attempting to protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, [the statute] focuses directly upon these essentially local problems . . . ." *Id.* at 357.

federal power."[108] Consequently, the *De Canas* Court created a carve-out exception for immigration enforcement.

A federal response came in the mid-1980s, through the enactment of the Immigration Reform and Control Act of 1986 (IRCA). In that statute, Congress incorporated an employer sanctions provision into a comprehensive immigration reform bill. In a historically unprecedented way, Congress thus experimented in the delegation of immigration enforcement to private third-parties, namely employers.[109] For the first time in history, employers faced federal civil and criminal penalties for knowingly hiring undocumented workers if the employers failed to adequately screen the identity and immigration documents of new hires.[110] Thus, IRCA deputized third-party immigration screeners (e.g., all private and public employers) to help control immigration.[111] At the same time, IRCA expressly preempted the growing patchwork of state immigration laws regulating the workplace that had proliferated after *De Canas*.[112]

The next wave of immigration federalism laws marked a change of course, in that new federal immigration laws now responded to the growing patchwork of state immigration laws by requiring the states to participate in the enforcement of federal law. In the early 1990s,

[108] *Id.* at 354. The Court characterized the California statute as a "local regulation" having no more than a "purely speculative and indirect impact on immigration" which was therefore not a "constitutionally proscribed regulation of immigration." *Id.* at 355-56. Thus, *De Canas* is often cited for the proposition that while states may not regulate immigration ("essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain"), they are free to pass statutes impacting aliens and immigrants ("the fact that aliens are the subject of a state statute does not render it a regulation of immigration"). *De Canas*, 424 U.S. at 355. The distinction is not particularly clarifying since the question remains when does regulation of aliens effectually amount to the regulation of immigration? *See, e.g.*, Huntington, *supra* note 18, at 845-47.

[109] Immigration Reform and Control Act of 1986, Pub. L. No. 96-603, § 101, 100 Stat. 3359, 3360 (1986) (codified as amended at 8 U.S.C. § 1324a).

[110] *Id.*

[111] Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1130 (2009); Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 780-81 (2008).

[112] *See* GENERAL ACCOUNTING OFFICE, *supra* note 105, at 45-49 ("States that have enacted employer sanctions legislation include California (1976), Connecticut (1972), Delaware (1976), Florida (1977), Kansas (1973), Maine (1977), Massachusetts (1976), Montana (1977), New Hampshire (1976), Vermont (1977), and Virginia (1977)."); *see also* De Canas v. Bica, 424 U.S. 351 (1976) (holding that a state provision that affects immigrations is not necessarily immigration policy and that Congress had not expressly preempted legislation regulating the relationship between employers and employees regarding immigration status).

Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which required states to screen the identity and immigration status of those receiving federal benefits.[113] After the terrorist attacks of September 11, 2001, the Department of Justice and the Department of Homeland Security (DHS) increasingly encouraged state and local police to engage in third-party immigration screening as well where, for example, an individual was booked in jail or detained at a local facility.[114] Over time, therefore, federal immigration policy has moved away from its former status as an exclusively federal foreign affairs and regulation of commerce matter.[115] The result has been the "domestication of immigration."[116]

The federal government's encroachment upon the states' historic police power through the domestication of immigration policy weakens the federal government's argument that it is defending its exclusive power to control immigration under the Supremacy Clause. Conversely, the cooperative nature of immigration enforcement activities between the federal and state governments weakens a state government's argument that this domestication is a form of commandeering or a Tenth Amendment violation of state sovereignty.[117] Nevertheless, this contested boundary is becoming the target of increasing controversy, as witnessed by recent legal challenges. Multiple state and local jurisdictions are increasingly rejecting federal proposals for further cooperation in federal immigration enforcement efforts.[118] As this movement of "uncooperative federalism"[119] grows into a new wave of immigration

[113] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-3546 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.).

[114] RANDY CAPPS, MARC R. ROSENBLUM, CRISTINA RODRÍGUEZ, & MUZAFFAR CHISHTI, DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 8-17 (Migration Policy Institute 2011), *available at* http://www.migrationpolicy.org/pubs/287g-divergence.pdf; Stumpf, *States of Confusion*, *supra* note 10, at 1594-95.

[115] *Id.* at 1565 ("Beginning the mid-1980s, federal immigration law has evolved from a stepchild of foreign policy to a comprehensive legislative and regulatory scheme that intersects the triumvirate of state power: criminal law, employment law, and welfare. Shifting immigration law from international foreign policy to a more domestic connection with crime, employment, and welfare casts immigration law into a world infused already with state regulation." (internal citations omitted)).

[116] *Id.* at 1600.

[117] *Id.* at 1570-79.

[118] *See id.* at 1603-04 (describing multiple such cases).

[119] Bulman-Pozen & Gerken, *supra* note 10, at 1258.

federalism, it is likely that state and local governments will raise anti-commandeering principles under the Tenth Amendment as a method to challenge this encroachment by the federal government into states' historic police powers.

At the same time, states and local governments have not been passive spectators to the recent evolution, or devolution, of federal immigration law. As noted above, IRCA was a federal response to state efforts to discourage the hiring of undocumented illegal immigrants by sanctioning employers who hired such immigrants. In recent years, state and local governments have once again begun asserting their right to shape and enforce immigration policy at the state and local level through a remarkable growth of laws and ordinances, many of which can be viewed as encroachments upon the federal government's exclusive power to control immigration.[120]

The contemporary movement of immigration federalism can more or less trace its genesis back to Hazleton, Pennsylvania. On July 13, 2006, the township of Hazleton, Pennsylvania, passed its own version of immigration reform, an ordinance titled the "Illegal Immigrant Relief Act."[121] The Hazleton ordinance touched off something virulent. Three months later, thirty-nine localities in sixteen states considered immigration-related ordinances similar to the Hazleton ordinance.[122] Thus began a national movement of state and local proposed immigration legislation, which now numbers in the thousands and has not abated. In the first quarter of 2011, for example, 1,538 immigration bills and resolutions were considered in all fifty states

[120] *See supra* notes 15-19 and accompanying text.

[121] Hazleton, Pa., Ordinance 2006-10 (2006), *replaced by* Hazleton, Pa., Ordinance 2006-18, *amended by* 2006-40, 2007-6. Michael Powell & Michelle Garcia, *Pa. City Puts Illegal Immigrants on Notice: "They Must Leave," Mayor of Hazleton Says After Signing Tough New Law*, WASH. POST, Aug. 22, 2006, at A3.

[122] Immigration-related ordinances had passed or were considered in Gadsden, Ala.; Huntsville, Ala.; Phoenix, Ariz.; Escondido, Cal.; Landis, Cal.; San Bernardino, Cal.; Vista, Cal.; Aurora, Colo.; Avon Park, Fla.; Palm Bay, Fla.; Carpentersville, Ill.; Newton, Mass.; Sandwich, Mass.; Valley Park, Mo.; Mint Hill, N.C.; Suffolk County, N.Y.; Riverside, N.J.; Allentown, Pa.; Altoona, Pa.; Ashland, Pa.; Bridgeport, Pa.; Courtdale, Pa.; Forty Fort, Pa.; Frackville, Pa.; Hazleton, Pa.; Lancaster, Pa.; Lansford, Pa.; McAdoo, Pa.; Nesquehoning, Pa.; Poccono, Pa.; Shenandoah, Pa.; Sunbury, Pa.; West Mahanoy, Pa.; Wilkes-Barre, Pa.; Beaufort, S.C.; Farmers Branch, Tex.; Kennewick, Wash.; and Arcadia, Wis. *See also* AMERICAN IMMIGRATION LAWYERS ASSOCIATION, NAVIGATING THE IMMIGRATION DEBATE: A GUIDE FOR STATE & LOCAL POLICYMAKERS AND ADVOCATES (2009), *available at* http://www.aila.org/content/fileviewer.aspx?docid=24681&linkid=172618; *see also State Legislation Related to Immigration: Enacted and Vetoed*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 12, 2012), http://www.ncsl.org/issues-research/immig/immigrant-policy-2006-state-legislation-related-t.aspx.

and in Puerto Rico.[123] By December 7, 2011, forty-two states and Puerto Rico had enacted 197 new laws and 109 new resolutions in 2011.[124] Substantively, the scope and depth of these laws and ordinances is also unprecedented. For instance, state and local governments now delegate, or are attempting to delegate, third-party immigration screening duties to landlords, police officers, employers, teachers, and even doctors.[125]

One of these Hazleton copycat statutes, LAWA, was signed into law on July 2, 2007, and made effective on January 1, 2008.[126] Then-Governor of Arizona, Janet Napolitano, announced that the Arizona statute would allow state county prosecutors to impose the "business death penalty" (i.e., permanent revocation of business license) on employers that "knowingly" and "intentionally" hire unauthorized workers.[127] In her signing statement on July 2, 2007, Napolitano candidly admitted that LAWA was designed to compel congressional action reforming federal immigration law to comport with the harsher sanctions aimed at illegal immigrants and those who employ them in the Arizona statute.[128] She admitted that the law is not a regulation of

[123] *2011 Immigration-Related Laws, Bills and Resolutions in the States: Jan. 1–Mar. 31, 2011*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 31, 2011), http://www.ncsl.org/issues-research/immig/immigration-laws-and-bills-spring-2011.aspx.

[124] *2011 Immigration-Related Laws and Resolutions in the States (Jan. 1–Dec. 7, 2011)*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 7, 2011), http://www.ncsl.org/issues-research/immigration/state-immigration-legislation-report-dec-2011.aspx.

[125] Arizona, for example, is attempting to delegate immigration screening duties to landlords, police officers, employers, teachers, and doctors. *See, e.g.*, S.B. 1611, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (landlords); S.B. 1070, 49th Leg., 1st Reg. Sess. (Ariz. 2010) (document-based screening and database screening duties imposed on police officers); Legal Arizona Workers Act, 2007 Ariz. Sess. Laws 1312 (E-Verify screening duties imposed on employers); H.B. 2008, 49th Leg., 3d Spec. Sess. (Ariz. 2009) (state workers); S.B. 1407, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (teachers); S.B. 1141, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (teachers); .S.B. 1405, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (hospital workers).

[126] Legal Arizona Workers Act, 2007 Ariz. Sess. Laws 1312 (codified at ARIZ. REV. STAT. ANN. §§ 13-2009, 23-211 to 23-214 (2008)).

[127] David G. Savage, *The Enforcer of Border Laws: Janet Napolitano Could Be Taking her Tough Immigration Stance to the Department of Homeland Security*, L.A. TIMES, Nov. 23, 2008 at A17. For a first "knowing" violation, the court must require the dismissal of unauthorized aliens and order a three-year probationary period for the employer (during which time the employer must file quarterly reports concerning each new hire). ARIZ. REV. STAT. ANN. § 23-212(F)(1) (2011). The court has discretion to further suspend all licenses necessary for the employer to do business for a minimum period of ten business days. *Id.* § 23-212(F)(1)(d). A second violation during the probationary period triggers the permanent revocation of all licenses necessary to do business. *Id.* § 23-212(F)(2).

[128] Letter from Janet Napolitano, Governor, Ariz., to Jim Weiers, Speaker, Ariz.

employment, something that would fall within a historic state police power, but rather is borne from "our desire to stop illegal immigration" and that such a law is needed "because it is now abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reforms our country needs."[129]

Shortly thereafter, in 2010, Arizona passed the highly controversial Senate Bill 1070 (SB 1070). Governor Jan Brewer and proponents of SB 1070 also argued that the Arizona immigration law was needed to coerce the federal government to take action on comprehensive immigration reform and to force the executive branch to more robustly enforce federal immigration law.[130] While the new wave of state and local immigration laws is too broad for easy generalizations, LAWA and SB 1070 both epitomize one of the movement's prominent tendencies — an effort at the state and local levels to challenge federal predominance in the field of immigration. State and local governments have not hidden that the purpose of these laws is commandeering, or coercive, in nature: to force the allocation of more federal resources and efforts to support immigration enforcement and deportation and to alter the nation's current immigration policy into one much tougher and more unforgiving of immigration law violations.[131]

C. Displacement of Plenary Power Doctrine with Preemption Doctrine

Historically, state efforts to assert themselves in the field of immigration would have had to come to terms with the plenary power doctrine's committal of that field to the federal government on constitutional terms. However, as scholars have recognized, the

House of Representatives (July 2, 2007) at 1, *available at* www.azsos.gov/public_services/Chapter_Laws/2007/48th_Legislature_1st_Regular_Session/CH_279.pdf.

[129] *Id.* Gilbert notes that the movement is driven, in part, by a perception of "institutional failure on the part of the Department of Homeland Security," which state and local governments view themselves as remedying. Gilbert, *supra* note 15, at 168.

[130] Jan Brewer, *Governor to Attend Federal Appellate Court Hearing on SB 1070*, OFFICE OF THE ARIZ. GOVERNOR (Oct. 22, 2010), http://azgovernor.gov/dms/upload/PR_102210_StatementBrewerAttendSB1070HearingNov1.pdf.

[131] *See generally* DANIEL KANSTROOM, AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA (Oxford Univ. Press 2012) (exploring the human rights consequences of the aggressive contemporary deportation policy of the United States); S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism* (forthcoming ARIZ. ST. L.J.) (manuscript at 48) (on file with author) ("[P]roliferating policies in politically receptive subfederal jurisdictions builds, rather than dissipates, pressure for restrictive action at the federal level and, more generally, enshrines a more restrictionist status quo.").

doctrine is "in some state of decline."[132] It is not that the Court has repudiated the plenary power doctrine, but rather that the doctrine has increasingly fallen into disuse and is not typically utilized in resolving immigration federalism cases.[133] Instead, as Congress enacted increasingly comprehensive federal immigration laws, a preemption framework evolved as the new norm for evaluating the legality and constitutionality of immigration federalism efforts.[134]

Recent challenges to immigration federalism laws bear this out, with both *Whiting*[135] and *Arizona*[136] turning on the question of whether state immigration laws are preempted by federal law. The shelving of the plenary power doctrine in favor of preemption doctrine can be witnessed as early as the 1930s and early 1940s. Thus, for example, in *Hines v. Davidowitz*, decided in 1941, the Court noted that a state's alien registration law was originally challenged as impermissibly "encroach[ing] upon legislative powers constitutionally vested in the federal government."[137] But given that in the interim between bringing the suit and review by the Supreme Court the United States had passed its own alien registration law, the Court concluded that it "must therefore pass upon the State Act in light of the Congressional Act."[138] Nonetheless, the Court did not eschew addressing the constitutional question of whether a state has the power to enact alien registration laws by articulating a rule of judicial avoidance. It merely noted that in light of its preemption holding, it need not reach other constitutionally-based arguments raised by the litigants.[139]

---

[132] Motomura, *Phantom Constitutional Norms, supra* note 12, at 549.

[133] Motomura traces the "decline" of the doctrine, noting that while the Court revitalized it during the McCarthy era, nevertheless it has suffered inroads. *Id.* at 549, 554-60. I should note that the decline of the doctrine is not subject to much mourning because, besides sharply limiting the role of state governments in the field of immigration, it also limits the role of courts in reviewing federal actions with regard to immigrants, effectually denuding immigrants of constitutional protections. *Id.* at 547. Thus, the inroads upon the doctrine of recent decades have resulted in an "expansion in the number and range of claims that courts, including the Supreme Court, would hear in immigration cases." *Id.* at 560.

[134] *See id.* at 613.

[135] Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1975 (2011).

[136] Arizona v. United States, 132 S. Ct. 2492, 2494 (2012).

[137] Hines v. Davidowitz, 312 U.S. 52, 60 (1941).

[138] *Id.*

[139] *Id.* at 62 (explaining that the Court was "expressly leaving open . . . the argument that the federal power in this field, whether exercised or unexercised, is exclusive"). *Hines*, like *Arizona*, is rich with language justifying federal supremacy in the field of immigration along the traditional line that laws affecting immigrants trigger foreign policy concerns. Nevertheless, in both cases that recitation is put in

Yet, this shift from a constitutional plenary power framework to a statutory-driven preemption framework in evaluating state immigration laws has proven to be critically consequential. Preemption analysis shifts the focus from whether a state is usurping a power committed to the federal government to a question of whether a state law or regulation conflicts with a federal law or regulation. As has been recognized, over the course of the twentieth century, federal immigration laws and regulations multiplied while a vast administrative apparatus arose to implement them.[140] Thus, state and local enactments now occur in the context of a detailed federal code addressed to regulate immigrants and immigration policy. Courts need not reach — or in any case, choose not to reach — the question of whether the Constitution deprives a state or local government of the power to make such an enactment. Instead, the question by which state and local enactments live or die is whether they are preempted by federal enactments. Federal laws guiding the Court's preemption analysis include the Immigration and Nationality Act of 1952 (INA), the Immigration Reform and Control Act of 1986 (IRCA), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Thousands of pages of regulatory code and administrative rulemaking attach to these laws.[141] They form a large part of what is considered immigration law.[142]

service of the invocation of the Supremacy Clause, rather than a more stringent ousting of the states altogether from the field regardless of federal enactments. *See id.* at 66 ("Consequently the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, 'the act of congress or the treaty is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.'") (citing *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824)).

[140] *See* Cox & Rodríguez, *supra* note 88, at 463 ("Over the twentieth century, Congress developed a detailed, rule-bound immigration code."). Cox and Rodríguez argue persuasively that the result has been a growth of the Executive Branch's discretion in determining how to enforce the numerous Congressional mandates. *See id.* (stating that "[t]his detailed code has had the counterintuitive consequence of delegating tremendous authority to the President to set immigration screening policy by making a huge fraction of noncitizens deportable at the option of the Executive").

[141] *See* Lucy Trevalyan, *Passport to Progress? Politically There Can Be Few More Hotly Contested Issues Than Immigration, but for Economists It's the Key to Long-Term Growth*, 64 No. 5 INT'L BAR NEWS 51, 52 (2010) ("Gregory Siskind, attorney at US firm Siskind Susser Bland, says the US immigration system is probably the world's most complex. 'It is largely based on legislation passed in 1952 and major amendments every few years have resulted in a system with dozens and dozens of categories, numerous agencies governing the process, thousands of pages of regulations and an immigration Bar numbering more than 12,000 lawyers, multiple times larger than in any other country.'"); Jose Antonio Vargas, *Not Legal Not Leaving*, TIME, June 25,

The Court's preemption doctrine is now the favored vehicle to examine the legality and constitutionality of state immigration laws. It is a doctrine that requires the Court to reconcile, often line-by-line and provision-by-provision, challenged components of the state immigration law with the federal immigration statutes and a vast immigration code. This doctrine includes several types of preemption: field preemption, obstacle preemption, and conflict preemption, for example.[143] Field preemption occurs "where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law."[144] Obstacle preemption occurs where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[145] Conflict preemption occurs where a state law "actually conflicts with federal law," making compliance with both laws impossible.[146]

Further complicating an already complicated doctrine, preemption can also be express or implied.[147] Express preemption analysis is required when Congress has expressly preempted state action.[148] This can occur, for example, through Congress's inclusion of a specific preemption clause in the enactment of federal law or any explicit statutory language prohibiting state laws in a specific field of regulation. Even in express preemption cases, however, scholars have noted that preemption rules remain notoriously unclear.[149] This is in

2012, *available at* http://www.time.com/time/magazine/article/0,9171,2117243,00.html#ixzz2Au1m4U83 ("As Angela M. Kelley, an immigration advocate in Washington, told me, 'If you think the American tax code is outdated and complicated, try understanding America's immigration code.'").

[142] *See* Cox & Rodríguez, *supra* note 88, at 476 ("As the modern administrative state developed in the latter half of the twentieth century . . . [there was an] increasing comprehensiveness of the statutory regime regulating immigration, coupled with Congress's increased delegation within that regime to executive officials."); Motomura, *Phantom Constitutional Norms*, *supra* note 12, at 548 (explaining "'constitutional immigration law'" encompasses "immigration rules in subconstitutional form, including statutes, regulations, and administrative guidelines").

[143] Mgmt. Ass'n for Private Photogrammetric Surveyors v. United States, 467 F. Supp. 2d 596, 603 nn.10-11 (E.D. Va. 2006); Gilbert, *supra* note 15, at 159.

[144] La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1986).

[145] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[146] English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990).

[147] *See* Jamelle C. Sharpe, *Toward (A) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367, 380-81 (2011).

[148] *Id.*

[149] *Id.* at 387.

part because the Court itself has admonished the application of formulaic preemption rules: "[T]here can be no one crystal clear distinctly marked formula."[150]

The preemption doctrine thus requires federal courts to determine whether state immigration laws can be construed as consistent with federal immigration laws. Where they cannot, the state enactments are overturned. At the same time, however, preemption focuses the judicial inquiry on reconciling specific provisions and statutes rather than addressing whether state enactments are constitutionally permissible in the first place.[151] The utilization of traditional tools of statutory interpretation to conduct an analysis under the preemption doctrine further removes from the inquiry a constitutional framework by which to interpret the constitutional implications of the state law. In effect, reliance on preemption doctrine moots the underlying constitutional inquiry that might have informed an appropriate evaluation of the legality and constitutionality of the state immigration scheme.[152] Even when the state immigration law has been challenged under both the Supremacy Clause and the Equal Protection Clause of the Fourteenth Amendment, the question of an unconstitutional incursion into federal sovereignty is not fully front and center.[153]

As a result of preemption's statutory-driven focus, the constitutional nature of the federal immigration statutory schema has been lost. Nonetheless, the plenary doctrine has never been expressly revoked, and the underlying concerns which drove the Court to elaborate it remain alive and vibrant today.[154] Indeed, in the recent *Arizona* decision, the Court reaffirmed federal authority over immigration policy as a sovereign interest and rationalized it in the same way it did as far back as the Chinese Exclusion cases of the 1880s,[155] and its

[150] *Hines*, 312 U.S. at 67.

[151] Young, *supra* note 11, at 3.

[152] *See* Huntington, *supra* note 18, at 844 ("Instead a statutory preemption understanding begins with the assumption that such laws are constitutionally proper, at least to the extent that such actions accord with the authority of subnational governments to regulate health, safety, and other matters of local concern, and then asks whether Congress has preempted the conduct at issue.").

[153] *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982) (invalidating a state law on equal protection grounds denying publicly funded K-12 school education to the children of unlawful immigrants, while opining that the better way to control unwanted migration was by targeting the employers who create an economic incentive for unwanted migration in the first place).

[154] WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 463 (Yale Univ. Press 2010).

[155] *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (establishing plenary power doctrine).

immediate predecessors, such as *Chy Lung*. The *Chy Lung* Court explained that "[i]t is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States."[156] Nevertheless, the *Arizona* Court then noted that "[f]ederal governance of immigration and alien status is extensive and complex" and proceeded down the path of a preemption analysis.[157]

Some may argue that the displacement of a plenary power analysis by a preemption analysis may, generally speaking, not mean much practically. The *Arizona* decision could be offered as evidence, for instance, that state and local laws which trench on federal turf are still likely to be struck down. The *Arizona* Court, after all, struck down three out of the four provisions of SB 1070 that were under federal preemption challenge. However, the preemption analysis is a treacherous venture in the immigration context because it demands that the federal courts sort through highly technical immigration statutes, and interpret a very dense immigration code and policy-regulatory apparatus, both of which are not always consistent with each other.[158] In fact, both federal immigration law enacted by Congress and federal immigration policy promulgated by the

[156] Arizona v. United States, 132 S. Ct. 2492, 2498 (2012).

[157] *Id.* at 2499-500. It is worth noting that the Court was merely following the path set forth by the litigants who established and argued which claims were before the Court.

[158] For example, the *Whiting* majority, in support of its decision to uphold the E-Verify mandate in LAWA, notes that, per an executive order issued under the Bush Administration, the federal government has "mandated" E-Verify use in the context of federal government contracts. Under what is called the FAR (Federal Acquisition Regulation) Rule, pursuant to Exec. Order No. 13465, 73 Fed. Reg. 33286 (2008), "executive agencies require federal contractors to use E-Verify as a condition of receiving a federal contract." Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1985 (2011). Whether or not this executive order was legal under the federal immigration statute governing E-Verify, IIRIRA, was the basis of a challenge in Chamber of Commerce of U.S. v. Napolitano, 648 F. Supp. 2d 726, 732-34 (D. Md. 2009), (granting summary judgment for defendant), *motion denied*, No. 09-2006 (4th Cir. 2009) (request for preliminary injunction to bar implementation of FAR Rule denied Sept. 3, 2009). The legality of requiring E-Verify use under the FAR Rule, therefore, remains unresolved because the issue has not been fully litigated. Yet, the Supreme Court relied upon the contested Executive Order to support its finding that LAWA did not conflict with federal immigration policy. *See Whiting*, 131 S. Ct. at 1985. The Court suggested that LAWA's mandatory expansion of E-Verify mirrored the federal policy of a mandatory expansion of E-Verify under the Executive Order. *Id.* at 1985-86 ("[T]he Federal Government has consistently expanded and encouraged the use of E-Verify.").

executive branch can be criticized for containing potentially irreconcilable provisions within the same law or the same regulatory apparatus in some instances.[159] This potential irreconcilability, and the problem it poses in the preemption doctrine, will be discussed below in the context of the *Whiting* decision.

D. Displacement of Preemption Doctrine with Mirror-Image Theory

Scholars have noted that preemption doctrine itself has not produced a particularly coherent body of case law precedent.[160] Regardless of the problems associated with the preemption doctrine and its application in the field of immigration law, the preemption doctrine has been a traditional bulwark in recent decades in ensuring federal objectives trump those set by state and local legislatures in the sphere of immigration law.[161] Typically, when federal and state interests collide, preemption doctrine is the means of enforcing the Supremacy Clause. That doctrine requires the courts to strike state legislation that conflicts with or obstructs federal legislation in areas committed by the Constitution to federal governance. Thus, in the past, state and local efforts to carve themselves a role in setting and enforcing federal immigration policy have been judicially restrained by the preemption doctrine.

But mirror-image theory is a game changer. In recent years, many of state and local immigration laws have been carefully crafted to survive federal preemption challenges through the application of what has been termed as mirror-image theory by criminal and immigration law scholars Gabriel "Jack" Chin and Marc Miller.[162] Laws drafted pursuant to this theory seek to survive preemption challenges by

[159] *See infra* Part II.D.1 (discussing how legislative history reveals that Congress recognized the potential that 8 U.S.C. § 1324a and 8 U.S.C. § 1324b could never be reconciled with one another). Future scholarship will address the irreconcilability of immigration law and policy. Also, it is important to note that the plenary power doctrine, as applied to state enactments, did not make for a more clear-cut analysis. The Court explained that states may regulate aliens so long as such regulation does not amount to "a determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain." De Canas v. Bica, 424 U.S. 351, 355 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 101, § 274A(h)(2), 100 Stat. 3359, 3368, *as recognized in* Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968.

[160] *See, e.g.*, Gilbert, *supra* note 15, at 160 (discussing trends in preemption jurisprudence and noting that "[t]he Court's preemption decisions . . . are hard to reconcile").

[161] Chin & Miller, *supra* note 7, at 263-66.

[162] *See id.* at 253-55.

mirroring, often word-for-word, federal statutes and incorporating by reference provisions defining immigration law violations. Based on these textual and substantive similarities, proponents argue that federal law does not preempt state law because the federal and state laws both criminalize or penalize the same behaviors, even if the state counterparts may offer different penalties and sanctions.[163] States have argued that there can be no obstacle or conflict preemption if the federal and state laws say and do the exact same thing. Mirror-image statutes thus seek to circumvent the traditional judicial safeguards that have traditionally reigned in state efforts to usurp federal responsibilities in the area of immigration policy.[164]

Mirror-image theory has had an enormous influence upon the unfolding immigration federalism movement.[165] LAWA, SB 1070, and their copycat siblings, either under consideration or passed by other states, are drafted in accord with mirror-image theory.[166] Through mirror-image theory, immigration federalism statutes are expanding the scope of third-party liability for supporting unauthorized immigrants into other realms. In Section 2(B) of SB 1070, recently upheld in *Arizona*, Arizona expands the structure into the realm of state and local law enforcement by delegating immigration screening duties to police officers in that state and imposing penalties on police officers that fail to properly screen.[167] In Alabama's copycat legislation,

[163] *See, e.g.*, United States v. Arizona, 641 F.3d 339, 360 (9th Cir. 2011), *cert. granted* 132 S. Ct. 845 (2011), *aff'd in part, rev'd in part*, 132 S. Ct. 845 (2011) (upholding the district court's preliminary injunction, rejecting Arizona's argument that the state immigration law serves the same ends as the federal immigration law). The Ninth Circuit noted that "'a common end hardly neutralizes conflicting means.'" *Id.* (citing Motor Coach Emps. v. Lockridge, 403 U.S. 273, 287 (1971)).

[164] Chin & Miller, *supra* note 7, at 253-54.

[165] Indiana, Georgia, Alabama, and Utah have enacted SB 1070-copycat laws. Chin & Miller, *supra* note 7, at 253-54 & nn.3-6. Dozens of state and local governments have already been spurred to create SB 1070-copycat legislation. NAT'L NETWORK FOR IMMIGRANT & REFUGEE RIGHTS, INJUSTICE FOR ALL: THE RISE OF THE U.S. IMMIGRATION POLICING REGIME 3 (2010), *available at* http://www.colawnc.org/files/pdf/injustice_2011.pdf; Kim Severson, *Immigrants Are Subject of Tough Bill in Georgia*, N.Y. TIMES, Apr. 16, 2011, at A14 (discussing the progress of proposed state legislation in Alabama, Indiana, Oklahoma, and South Carolina at the time of publication).

[166] Chin & Miller, *supra* note 7, at 253-54 & nn.1-14.

[167] As noted above, the Support Our Law Enforcement and Safe Neighborhoods Act, SB 1070, was signed into law in April of 2010. *See* ARIZ. REV. STAT. ANN. §§ 11, 13, 23, 28, 41 (2010)), *amended by* Act of Apr. 30, 2010, ch. 211, 2010 Ariz. Sess. Laws 1070. The law includes citizen suit provisions that appear to be designed to hold state and local law enforcement officials accountable for "the full extent" of the enforcement of federal immigration law. 2010 ARIZ. REV. STAT. § 11-1051(H) (2010) ("If there is a judicial finding that an entity has violated this section, the court shall

Alabama attempts to expand the structure into the realm of public education by delegating immigration screening duties on public school officials and teachers before admitting students.[168] Alabama is also attempting to expand the structure into the realm of all contract law by punishing anyone who enters into a contract with an undocumented immigrant, thereby implicitly delegating immigration screening duties to any resident of Alabama who enters into a contract.[169] In Georgia's copycat legislation, Georgia attempts to expand the structure by imposing criminal penalties for transporting and harboring undocumented immigrants, and inducing them to enter the state.[170] The ordinance challenged in Hazleton, Pennsylvania,

order that the entity pay a civil penalty of not less than five hundred dollars and not more than five thousand dollars for each day that the policy has remained in effect after the filing of an action pursuant to this subsection."); *see also* Gabriel J. Chin, Carissa Byrne Hessick, Toni Massaro & Marc L. Miller, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47, 75-77 (2010) ("The citizen suit and 'full extent' provisions may be unwise policies from the standpoint of public safety . . . . In any event, these provisions are so unfamiliar that it is not clear whether the 'full extent' and citizen suit provisions raise additional federal or state issues.").

[168] The Beason-Hammon Taxpayer and Citizen Protection Act (H.B. 56) was signed into law in June of 2011. *See* ALA. CODE § 31-13-2 (2011), *et seq*. The law includes section 28, codified in ALA. CODE § 31-13-27 (2011), which sets forth a process for school officials to conduct screening and collect data on the immigration status of students enrolled in public schools. *See* Hispanic Interest Coalition of Ala. v. Governor of Ala., No. 5:11-cv-02484-SLB (11th Cir. August 20, 2012) (holding that section 31-13-27 violates the Equal Protection Clause); *see also* United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012) (concluding that it was unnecessary to conduct the preemption analysis because section 28 was found to be in violation of the Equal Protection Clause, as held in the companion case, *Hispanic Interest Coalition of Alabama*).

[169] In August 2011, the U.S. intervened in the lawsuit challenging the Alabama immigration law. *See* United States v. Alabama, 691 F.3d 1269, 1293-95 (11th Cir. 2012) (enjoining enforcement of section of Alabama law that would prohibit "the right to enforce nearly any contract"); *see also* Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Acts 535 § 27 (codified at ALA. CODE § 31-13-26, (2011)) (refusing judicial enforcement of certain contracts entered into with undocumented immigrants).

[170] Georgia's Illegal Immigration Reform and Enforcement Act was signed into law as a part of H.B. 87 in April of 2011. *See, e.g.*, GA. CODE ANN. §§ 16-11-200(a)(1), 201(a)(2), 202(a) (codifying separate crimes for interactions with undocumented immigrants). The transporting, harboring, and inducing provisions were enacted within section 7 and codified at GA. CODE ANN. §§ 16-5-200(b), 16-5-201(b), 16-5-202(b) (2011). *See* Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250 (11th Cir. 2012) (affirming that section 7 is preempted by the INA's criminal provisions pursuant to 8 U.S.C. § 1324). "The comprehensive nature of these federal provisions is further evident upon examination of how § 1324 fits within the larger context of federal statutes criminalizing the acts undertaken by aliens and those who assist them in coming to, or remaining within, the United States . . . . and the breadth

attempts to expand the theoretical and programmatic structure of IRCA's third-party enforcement regime into the realm of the landlord-tenant relationship by delegating immigration screening duties to landlords and imposing penalties when landlords fail to properly screen.[171]

Many of these state immigration laws purport to be a mirror image of federal law or policy, with proponents arguing that they complement federal immigration enforcement efforts. Thus, mirror-image laws present themselves as instances of "cooperative enforcement."[172] Yet, these laws present a radically new conception of cooperative federalism that allows states to directly and independently enforce federal immigration law, not simply enter into state-federal partnerships to cooperate in the enforcement of such laws as is often done, for example, in formal memoranda of understanding between DHS and state and local governments.[173]

Mirror-image theory, rather, produces state legislation that mimes its federal counterpart as a means of enabling state enforcement initiatives that proceed independently of federal initiatives.[174] As a consequence of "over-cooperative immigration federalism,"[175] if the

of these laws illustrates an overwhelmingly dominant federal interest in the field" *Id.* at 21 (citing 8 U.S.C. §§ 1323, 1325, 1327, 1328).

[171] The "Illegal Immigrant Relief Act" ordinance was signed into law in September 2006. *See* Hazleton, Pa., Ordinance 2006-10 (2006), *replaced by* Hazleton, Pa., Ordinance 2006-18, *amended by* 2006-40, 2007-6. The ordinance included an anti-harboring provision that subjected landlords to penalties for "harboring" undocumented immigrants in rental properties. *Id.* at section 5.B.(4). Specifically, it imposed a rental prohibition on undocumented tenants and included a potential revocation of rental licenses for violators. *Id.* In a companion ordinance, the "Rental Registration Ordinance," Hazelton established a registration and screening protocol for residential property owners. Hazelton, Pa., Ordinance 2006-13. The "Rental Registration Ordinance" requires landlords to conduct immigration screening of tenants, or face civil and criminal penalties. *Id.*

[172] *See generally* Kobach, *Reinforcing*, *supra* note 7 (arguing in favor of local immigration enforcement); Schuck, *supra* note 90 (tracing the historical evolution of American immigration law's tradition as a "maverick, a wild card," and concluding that "[t]he courts are busily razing the old structure and designing the new one, largely along the lines laid down by the contemporary administrative and constitutional orders." *Id.* at 1, 90).

[173] Chin & Miller, *supra* note 7, at 255.

[174] *Id.* at 253-55.

[175] Thank you to Ernie Young for this phrase. Ernest A. Young, Alston & Bird Professor of Law at Duke University School of Law, *Immigration Regulation after* Chamber of Commerce v. Whiting: *The States' Expanded Authority Over Immigrants and Employers*, American Law Institute (July 27, 2011), *webcast available at* http://www.ali-aba.org/index.cfm?fuseaction=courses.course&course_code=TSTU06. He attributes this phrase to his former student, Rocio Perez.

state can successfully argue that the state and federal government speak as one in text and purpose, there is no preemption conflict with the federal government. The state law, it is argued, does not frustrate or pose an obstacle to the federal enforcement effort, but rather establishes or reinforces a partnership in that effort. If the federal government provides an explicit avenue for state-federal partnerships in the enforcement of federal immigration law, either through congressional law or executive action, such as agency rulemaking or other executive indication,[176] it is argued that there is no field preemption.[177]

The Court's inclination toward utilizing a textualist approach to construing statutes only improves the chances of a mirror-image statute surviving a preemption challenge. As explained by Justice Scalia, the textualist approach does not favor ventures into legislative materials because discerning the intent of Congress in drafting a statute is a hazardous pursuit, particularly since a legislative body is unlikely to have any real collective intent regarding a statute's turn of phrase.[178] Congressional intent is displaced by a focus on giving effect to the words of the statute as they are understood "in accord with context and ordinary usage."[179] As we shall see, the *Whiting* decision suggests that such mirror-image statutes have a decent chance of surviving preemption challenges by closely replicating the statutory language of the federal statutes that threaten their preemption. By mirroring the language of federal statutes, the state statute's words will have the same "context and ordinary usage" as their federal counterparts. This will enable the state to argue that state immigration laws can harmoniously integrate state enforcement and regulatory schemes with federal ones that might normally have occupied the field.

[176] The dissent in the Ninth Circuit's *Arizona* decision cites to an Office of Legal Counsel (OLC), U.S. Department of Justice, memorandum concluding that state and local law enforcement have the "inherent authority" to conduct arrests for violations of civil immigration law. United States v. Arizona, 641 F.3d 339, 385 (9th Cir. 2011) (Bea, J., dissenting in part and concurring in part) (stating the inherent authority to arrest on the basis of violations of civil immigration law creates a method to detain and refer individuals to DHS for deportation), *cert. granted* 132 S. Ct. 845, *aff'd in part, rev'd in part*, 132 S. Ct. 2492 (2012). This inherent authority to arrest on the basis of violations of civil immigration law creates a method to detain and refer individuals to DHS for deportation. *Id.* at 384-85. The legality of this theory is contested. *See* Chin, Hessick, Massaro & Miller, *supra* note 167, at 63.

[177] *See* Gilbert, *supra* note 15, at 185.

[178] Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

[179] *Id.*

Whiting shows how the textualist approach to reading statutes works hand-in-glove with the mirror-image theory approach to legislatively drafting such state statutes. The ratification of mirror-image theory in *Whiting* in effect substitutes a traditional preemption analysis with an inquiry limited to whether a state statute sufficiently mirrors its federal counterpart textually, regardless of the effects on the ground of state implementation. In so doing, it displaces a fundamental tenet of preemption: "inquiry into the scope of a statute's pre-emptive effect is guided by the rule that '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case."[180]

1. *Chamber of Commerce v. Whiting*

Whiting involved a preemption challenge to Arizona's LAWA, a statute that allows for the permanent revocation of a state business license of an employer that "knowingly" and "intentionally" employs undocumented workers in violation of federal immigration law.[181] LAWA added a state law penalty to the already existing federal penalties mandated by IRCA in 8 U.S.C. § 1324a, known as the "employer sanctions provision."[182] LAWA does not itself create a new violation of immigration law, but it gives the Arizona Attorney General and county prosecutors authority and responsibility to prosecute violations of the federal immigration statute in state judicial forums for the purpose of assessing the new state penalty on the violator: the suspension of a business license for a first violation and the permanent revocation of a business license for the second violation.[183] Arizona contended that LAWA advances a cooperative partnership in the enforcement of IRCA because, under LAWA, state officials are precluded from making their own employment eligibility

[180] Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) (alteration in original) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)). Other Supreme Court precedents support this "touchstone" preemption principle. *See, e.g.*, Wyeth v. Levine, 555 U.S. 555, 565 (2009); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992); English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990); Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299 (1988); La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983).

[181] ARIZ. REV. STAT. ANN. § 23-212(F)(2) (2011).

[182] *Compare* ARIZ. REV. STAT. ANN. § 23-212(F) (2012) (describing the state penalties for employing unauthorized aliens), *with* 8 U.S.C. § 1324a(e) & (f) (2006) (describing the federal penalties for employing unauthorized aliens). For a more comprehensive discussion of LAWA's provisions and history, *see* Gilbert, *supra* note 15, at 157, 169-70.

[183] *See* ARIZ. REV. STAT. ANN. § 23-212(D) (empowering county attorneys to initiate actions alleging violations of the Legal Arizona Workers Act).

determinations of suspected unlawful workers without consultation with the federal government.[184] Yet, although the statute specifies that a state court may only consider the federal government's determination, it also states that such a determination "creates a rebuttable presumption of the employee's lawful status," implying an opportunity for the county attorney to offer evidence attacking that presumption.[185]

The Arizona statute also effectively requires employer participation in the federal E-Verify program. Before *Whiting*, E-Verify participation could not be made mandatory.[186] It was an experimental identity management technology that was under voluntary testing by the federal government that allowed employers to attempt to verify the identity and citizenship status of employees through internet access to government databases.[187] Under LAWA, if an employer uses E-Verify to check an employee's work eligibility, the employer can claim an affirmative defense to defeat any liability arising if the employee was nevertheless unauthorized.[188] Congress, however, expressly prohibited federal officials from requiring private employers to use E-Verify on anything other than a voluntary basis.[189] As the district court noted, LAWA "plainly made E-Verify mandatory," as "employers may be charged with knowledge of the E-Verify data that they wrongfully

[184] Under the Arizona act, where the state official determines a complaint is not frivolous, they must notify the U.S. Immigration and Customs Enforcement as well as local law enforcement authorities about the unauthorized individual. *Id.* § 23-212(C).

[185] *Id.* § 23-212(I). *See also* 8 U.S.C. § 1373(c) (2006) ("The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information."); ARIZ. REV. STAT. ANN. § 23-212(H) ("[T]he court shall consider only the federal government's determination pursuant to 8 [U.S.C. §] 1373(c).").

[186] Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1972 (2011) ("'[T]he Secretary of Homeland Security may not require any person or . . . entity' outside the Federal Government 'to participate in' E-Verify." (quoting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 402 (a), (e))).

[187] Margaret Hu, *Biometric ID Cybersurveillance*, 88 IND. L.J. (forthcoming Apr. 2013) (discussing experimental identity verification technologies such as E-Verify that rely upon internet-driven database matching that purport to confirm identity and citizenship status).

[188] *See* ARIZ. REV. STAT. ANN. § 23-212(I) ("[P]roof of verifying the employment authorization of an employee through the E-Verify program creates a rebuttable presumption that an employer did not intentionally employ an unauthorized alien.").

[189] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 402, 110 Stat. 3009, 3009-3656 (codified at note following 8 U.S.C. § 1324a).

refuse to obtain."[190] The *Whiting* Court, using a strict textualist approach, concluded that Congress only prohibited the federal government from mandating E-Verify use. The federal law did not prohibit a state government from mandating E-Verify use. Immediately after *Whiting* was issued, in order to regain control of the reverse-commandeering of E-Verify by Arizona and bring uniformity to E-Verify use across all fifty states, Congress considered legislation that would mandate E-Verify use nationally.[191]

The first issue in *Whiting* concerned whether LAWA was expressly preempted by IRCA. The Court therefore was required to construe IRCA's express preemption clause, 8 U.S.C. § 1324a(h)(2):[192] "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."[193] The Chamber of Commerce contended that Arizona's law was expressly preempted, while Arizona countered that the law fell within the licensing exception because its sanctions did not reach beyond the suspension or withdrawal of business licenses.[194]

In other words, Arizona argued that Congress saved "licensing and similar laws" from federal preemption and, thus, these four words of IRCA's savings clause became a key focus of the Court's preemption analysis. Finding the savings clause's language to be plain and unambiguous, the Court dismissed the Chamber's resort to IRCA's legislative history and statutory structure to provide a narrowing

[190] Ariz. Contractors Ass'n v. Napolitano, 526 F. Supp. 2d 968, 981 (D. Ariz. 2007), *aff'd in* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011).

[191] Legal Workforce Act, H.R. 2885, 112th Cong., § 2 (2011), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h112-2885 (introduced by Lamar Smith (R-TX)) (mandating national expansion of E-Verify and online employment eligibility verification system that purports to verify identity and citizenship status through government database screening); *see also* Julia Preston, *Separate Bills Focus on Two Pieces of Immigration Puzzle*, N.Y. TIMES, June 16, 2011, at Section A (reporting an increase in immigration bills introduced in Congress responding to immigration policy concerns following the *Whiting* decision).

[192] Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1973 (2011).

[193] 8 U.S.C. § 1324a(h)(2) (2006).

[194] *Whiting*, 131 S. Ct. at 1977. For a discussion of a similar argument see Lozano v. City of Hazleton, 620 F.3d 170, 207 (3d Cir. 2010), *vacated sub nom.* City of Hazleton, Pa. v. Lozano, 131 S. Ct. 2958 (2011). The case is currently pending in the Third Circuit on remand. Lozano v. City of Hazleton, Pa., 620 F.3d 170 (3d Cir. 2012). Like Arizona in *Whiting*, Hazleton in *Lozano* argues that the Hazleton ordinance is a licensing law that falls within IRCA's licensing exception and therefore is not preempted by IRCA. *Id.*

"context" for understanding the meaning of "licensing."[195] With regard to the only legislative material on these four words of IRCA's savings clause ("licensing and similar laws"), a House Report, the Court explained: "we have previously dismissed that very report as 'a rather slender reed' from 'one House of a politically divided Congress.'"[196] The majority deemed the rest of the legislative record irrelevant.[197]

The majority dismissed the dissenting Justices' efforts to look outside the text in part because, in the end, the two dissents arrive at materially different views of IRCA's preemption clause.[198] Justice Breyer offers a reading of the clause that is guided by IRCA's overall goal of balancing competing policy aims of: (1) deterring unlawful immigration through employer sanctions; (2) avoiding placing an undue burden on employers; and (3) preventing employer discrimination against those who might appear foreign.[199] He rejects the majority's reading of the savings clause because it allows Arizona to disrupt that delicate balance by adding draconian employer sanctions into the mix: the permanent revocation of a business license without any countervailing anti-discrimination protections for lawful workers who might appear or sound foreign.[200]

Meanwhile, for Justice Sotomayor, IRCA's statutory scheme shows that Congress meant to foreclose any independent state action against employers for hiring unauthorized aliens.[201] Rather, Justice Sotomayor concludes that IRCA allows for state penalties only after the federal government has taken action against the employer. In other words, the state licensing sanctions may attach to the business licenses of an employer who violates IRCA, but only in cases where the federal government has first investigated the employer and has proven such a federal immigration violation occurred in the first place.[202] Thus, even if a state law license revocation skews Congress's balance of concerns

[195] *Whiting*, 131 S. Ct. at 1980 (noting peremptorily that "[w]e have already concluded that Arizona's law falls within the plain the text of IRCA's savings clause").

[196] *Id.* (quoting Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149, 150 n.4 (2002)).

[197] *Whiting*, 131 S. Ct. at 1980.

[198] *See id.* at 1980 n.6.

[199] *Id.* at 1988 (Breyer, J., dissenting).

[200] *See id.* at 1992 (Breyer, J., dissenting) ("Either directly or through the uncertainty that it creates, the Arizona statute will impose additional burdens upon lawful employers and consequently lead those employers to erect ever stronger safeguards against the hiring of unauthorized aliens — without counterbalancing protection against unlawful discrimination.").

[201] *Id.* at 1998 (Sotomayor, J., dissenting).

[202] *Id.* at 2004 (Sotomayor, J., dissenting).

between the employer sanctioning provision of IRCA and the anti-discrimination provision of IRCA, it is nevertheless appropriate according to Justice Sotomayor, provided that state enforcement is limited to cases where the state licensing sanction follows federal enforcement.[203] All this allows the majority to quip: "It should not be surprising that the two dissents have sharply different views of how to read the statute. That is the sort of thing that can happen when statutory interpretation is so untethered from the text."[204]

Nevertheless, the dissenters reached thoroughly defensible interpretations of IRCA, and the fact that they arrived at inconsistent results reflects more the complex and often conflicting congressional intentions underlying federal immigration law. Justice Breyer focused his analysis more on 8 U.S.C. § 1324b of the Immigration and Nationality Act, as amended by IRCA. Through this analysis, he found that LAWA conflicted with the anti-discrimination provision of the federal immigration code. Specifically, Justice Breyer concluded that LAWA's harsh employer sanctioning provision is likely to undermine IRCA's purpose of discouraging the discrimination against those appearing foreign.[205]

Justice Sotomayor, meanwhile, focused her analysis more on 8 U.S.C. § 1324a of the Immigration and Nationality Act, as amended by both IRCA and IIRIRA. She found that LAWA upset the congressional purpose of reasserting federal control over the prosecution of immigration law violations occurring in the workplace. Justice Sotomayor explained: "I cannot believe that Congress intended for the 50 States and countless localities to implement their own distinct enforcement and adjudication procedures for deciding whether employers have employed unauthorized aliens."[206]

Whiting's two dissents thus revealed a fundamental tension within two sister provisions of federal immigration code passed under IRCA, codified within 8 U.S.C. § 1324a and 8 U.S.C. § 1324b. In fact, a careful review of the legislative history reveals that Congress itself recognized that it could be possible that both 8 U.S.C. § 1324a and 8 U.S.C. § 1324b could never be reconciled with one another. Therefore, when IRCA was passed in 1986, Congress anticipated that it was possible that one or both provisions could be subject to repeal.[207] The

[203] *Id.*

[204] *Id.* at 1980 n.6.

[205] *Id.* at 1987-88 (Breyer, J., dissenting).

[206] *Id.* at 2003 (Sotomayor, J., dissenting).

[207] *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101(l)(1), 100 Stat. 3359, § 101(l)(1) (1986) (establishing conditions under which 8

congressional record further demonstrated that there were multiple attempts to repeal 8 U.S.C. § 1324a in the early 1990s.[208] Thus, *Whiting* demonstrates how the majority and two dissents can all reach three correct results under the existing preemption jurisprudential framework.

In the end, however, it was the majority's textualist approach which prevailed, and that approach similarly guided the Court's finding that LAWA was not impliedly preempted as well. In addressing that claim — that even if the licensing exception permits legislation like LAWA, the Arizona statute is still preempted because its provisions conflict with the congressional purposes IRCA was meant to achieve — the majority's approach seems to vindicate mirror-image theory.[209] The Court takes pains to demonstrate that "Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects."[210] The Court compares the state and federal statutes and approvingly notes the multitude of similarities. First, the Court notes that the definition of license, as used in the Arizona statute, comports with that used by Congress for the same word in the Administrative Procedure Act.[211] The Court explains that the Arizona law adopts IRCA's definition of "unauthorized alien"; that state investigators must verify work authorization with the federal government; that state courts can only consider the federal government's determination; that the state law tracks its federal counterpart in its prohibitions on knowingly employing unauthorized aliens and provides that its terms are to be interpreted consistently with IRCA; that employers have the

U.S.C. § 1324a will terminate, which includes a GAO report of widespread discrimination). Specifically, IRCA's original statutory language provides that the employer sanctions provision, 8 U.S.C. § 1324a, will terminate if the GAO determines that it has led to widespread discrimination, running afoul of the anti-discrimination provision of 8 U.S.C. § 1324b. *Id.* ("(1) IF REPORT OF WIDESPREAD DISCRIMINATION AND CONGRESSIONAL APPROVAL. – The provisions of this section shall terminate 30 calendar days after receipt of the last report required to be transmitted under section (j), if . . . there is enacted . . . a joint resolution [by Congress] approv[ing] the findings."). In 1990, the GAO found that IRCA had led to widespread discrimination. *See generally* Pham, *supra* note 111, at 781 (discussing GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 38-39 (1990)). However, Congress did not repeal 8 U.S.C. § 1324a.

[208] *See, e.g.*, H.R.J. Res. 536, 101st Cong. (1990) (introduced by Rep. Bill Richardson (D-NM)) (recommending repeal of employer sanctions provision, 8 U.S.C. § 1324a, because it had been found by GAO to produce widespread discrimination).

[209] *See generally* Chin & Miller, *supra* note 7, at 253 ("The [mirror-image] theory proposes that states can help carry out federal immigration policy by enacting and enforcing state laws that mirror federal statutes.").

[210] *Whiting*, 131 S. Ct. at 1981.

[211] *Id.* at 1978.

same affirmative defense under the state law as they do under federal law; and that under both state and federal law, an employer using E-Verify acquires a rebuttable presumption of statutory compliance.[212]

Along the way, the Court uses phrasings that ratify the mirror-image theory approach to legislative drafting by the states. The Court approves of the manner in which Arizona "largely parrots"[213] the federal text of the federal employer sanctions provision, 8 U.S.C. § 1324a, stating that it "went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects";[214] "continues to trace the federal law [in defining the state violation]";[215] and "provides employers with the same affirmative defense."[216] The Court then notes approvingly that unlike other state actions that were struck down on preemption grounds, "[t]here is no similar interference with the federal program in this case; that program operates unimpeded by the state law."[217]

Yet, the Court concedes that the state and federal statutes are not a perfect reflection of each other. It recognizes that LAWA and the federal immigration law part company most glaringly in: (1) the imposition of what then-Governor Janet Napolitano referred to as "business death penalty" sanctions against employers found by Arizona courts to hire undocumented immigrants (e.g., permanent revocation of a business license at the state level and no such draconian penalty at the federal level); and (2) the failure of Arizona to enact an anti-discrimination provision that is a mirror-image of the federal statute's anti-discrimination provision, 8 U.S.C. § 1324b of the INA, to protect lawful employees from LAWA's spillover discrimination (e.g., employment discrimination against those lawful employees who may be targeted by employers attempting to comply with LAWA because the employee may look or sound foreign).

The Court defuses the notion that Arizona is trenching on properly federal turf by recalling that the workplace is a typical site of state regulation and that "[r]egulating in-state businesses through licensing laws has never been considered such an area of dominant federal concern."[218] Thus, while the sanctions levied by the Arizona law might well outweigh the sanctions in the federal scheme — and an employer

[212] *Id.* at 1981-83, 1987.
[213] *Id.* at 1978.
[214] *Id.* at 1981.
[215] *Id.* at 1982.
[216] *Id.*
[217] *Id.* at 1983.
[218] *Id.*

might well fear state sanction for hiring unauthorized aliens much more than it fears federal sanction for unlawful discrimination — at the end of the day, the Court concluded that license revocation is simply a "typical attribute[] of a licensing regime," because all state licenses come with conditions for their "suspension and revocation."[219]

2. *Arizona v. United States*

If *Whiting* appeared to signal judicial approval for mirror imaging as a means to circumvent preemption challenges, *Arizona* suggested sharp limits on what mirror-image statutes will survive scrutiny.[220] Thus, the *Arizona* Court only upheld Section 2(B), arguably, the closest mirror of the four provisions that were challenged. The statute at issue, SB 1070,[221] was much more controversial than LAWA, being referred to by critics as Arizona's "racial profiling" law and "show me your papers" statute.[222]

In *Arizona*, the dissenters in *Whiting* were able to craft a majority opinion by joining with Chief Justice Roberts and Justice Kennedy, resulting in a preemption analysis with more teeth than that utilized in *Whiting*. However, *Arizona* does not spell the end of the current immigration federalism movement, nor the mirror-image legislation promoted by it, for the same reason that the decision does not purport

[219] *Id.* at 1983-84. *See also Leading Cases*, 125 Harv. L. Rev. 291, 291 (2011) ("*Whiting*'s focus in its implied preemption analysis on the IRCA's express savings clause did significant harm to the Court's established preemption framework and undermined the comprehensive federal immigration scheme the IRCA sought to create.").

[220] *See generally* Chin & Miller, *supra* note 7 (defining mirror-image theory and exploring the constitutionality of its application in the context of SB 1070).

[221] Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450 (codified in scattered sections of ARIZ. REV. STAT. ANN. §§ 11, 13, 23, 28, 41 (2010)), *amended by* Act of Apr. 30, 2010, ch. 211, 2010 Ariz. Sess. Laws 1070.

[222] As noted below, SB 1070 effectively requires persons to carry evidence of their legal status by enabling police to arrest those believed to be unlawfully present. The statute's controversy is explained in part by a decades old observation of the Court that "[t]he requirement that cards be carried and exhibited has always been regarded as one of the most objectionable features of proposed registration systems, for it is thought to be a feature that best lends itself to tyranny and intimidation." Hines v. Davidowitz, 312 U.S. 52, 71 n.32 (1941); *see also* Gilbert, *supra* note 15, at 169 (asserting that SB 1070 "imposed a tangible threat to virtually anyone in Arizona who looked or sounded foreign, including Arizona residents and persons just passing through who were identified by State or local police as present in violation of the immigration laws").

to overturn *Whiting*. At this juncture, all the *Arizona* decision marks is a competing approach to *Whiting*. This competing approach is favored by Justices Breyer, Ginsburg, and Sotomayor and opposed by Justices Scalia, Alito, and Thomas.[223]

A quick overview of the federal preemption challenge in *Arizona* illustrates how mirror-image theory was adapted from the *Whiting* approach, but nonetheless allowed for the theory to be further entrenched deep within the Court's preemption doctrine. Four provisions of SB 1070 were challenged as preempted by federal law. First, the statute in Section 3 made it a state misdemeanor to fail to comply with federal alien registration requirements.[224] Second, in Section 5(C), the statute made it a state misdemeanor for an unauthorized alien to seek or engage in work in Arizona.[225] Third, in Section 6, SB 1070 authorized state police officers to arrest individuals a police officer believes (with probable cause) to be unlawfully present in the country.[226] Fourth, and finally, in Section 2(B), SB 1070 required police officers conducting a stop, detention, or arrest of an individual to make a reasonable effort to ascertain the person's immigration status.[227]

With regard to Section 3, the state argued that its statute adopted federal standards and served the same purpose as the federal statutory provisions it mirrors.[228] These arguments were embraced by the Court in *Whiting* with regard to LAWA's mirroring of federal law, but, unlike in *Whiting*, there was no federal provision expressly permitting state regulation within a narrowly circumscribed area. Consequently, the *Arizona* Court was free to find the field occupied by federal law, just as it had years earlier in the case it relied upon, *Hines v. Davidowitz*.[229] In *Arizona*, the Court elaborated concerns about whether the mere fact of mirroring federal law resolved questions of federal-state conflict.

The Court in *Arizona* noted first that, although arguably complementary, the state law actually represented a usurpation of what would otherwise be a federal monopoly on prosecutorial discretion. That, in turn, created a potential for prosecutions that

[223] Justice Kagan was recused in *Whiting* and *Arizona*.

[224] ARIZ. REV. STAT. ANN. § 13-1509 (2012); Arizona v. United States, 132 S. Ct. 2492, 2497 (2012).

[225] ARIZ. REV. STAT. ANN. § 13-2928(C) (2012); *Arizona*, 132 S. Ct. at 2497-98.

[226] ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2012); *Arizona*, 132 S. Ct. at 2498.

[227] ARIZ. REV. STAT. ANN. § 11-1051(B) (2012); *Arizona*, 132 S. Ct. at 2498.

[228] *Arizona*, 132 S. Ct. at 2502.

[229] *Id.* at 2503.

served state ends but frustrated federal policies.[230] This in effect was the point of Justice Sotomayor's dissent in *Whiting*: that the savings clause in IRCA was most properly construed to allow the state to piggyback on federal prosecutions, but that it was not an independent grant of prosecutorial authority to the states. Along similar lines, the Court noted the difference between state and federal penalties and concluded that the difference upset the federal scheme.[231] And that, in turn, was the point of Justice Breyer's dissent in *Whiting*: that the severe state sanctions for hiring unauthorized aliens would disrupt a carefully designed federal statutory scheme — one designed to discourage employment discrimination against those who may look or sound foreign *as well as* discourage the hiring of unauthorized workers.

In *Whiting*, the textualist approach employed discarded the dissenters' concerns as too ephemeral to warrant influencing its interpretation of IRCA's express preemption provision as well as its implied preemption analysis. None of this is to suggest that *Arizona* marks a repudiation of *Whiting*, a case the *Arizona* Court relies upon in its preemption analysis. Rather, it is to note the uncertainty facing future mirror-image legislation affecting areas outside the scope of the workplace or alien registration requirements.

With regard to the second challenged provision, Section 5(C), the Court found no mirroring insofar at the provision criminalized a behavior (seeking work by those unauthorized to do so) that was only subject to civil penalties under federal law.[232] While the Court noted that IRCA's express preemption clause was silent on whether employment applicants could be subject to state laws, it concluded that "the text, structure, and history of IRCA" make clear that "Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment."[233] Similarly, with regard to Section 6, the provision allowing for the warrantless arrest of persons suspected of unauthorized presence in the country, the Court noted this provision parted from federal law, which provided narrow circumstances in

[230] *Id.* ("Were § 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.").

[231] *Id.* ("This state framework of sanctions creates a conflict with the plan Congress put in place.").

[232] *Id.* at 2505.

[233] *Id.*

which a federal officer may arrest an individual subject to removal under federal law.[234] The Court also stressed again that independent state authority to arrest individuals would be exercised in derogation of federal authority: "This would allow the state to achieve its own immigration policy."[235] Accordingly, the Court found this provision preempted as well.[236]

The one provision upheld by the Court, Section 2(B), was challenged on two grounds: first, that the mandatory checks of a person's immigration status "interferes with the federal immigration scheme"; and second, that a person may be detained a constitutionally impermissible length of time while a check of the person's immigration status is undertaken.[237] The Court disposed of the second concern by noting that Section 2(B) need not be construed to raise a Fourth Amendment problem.[238] As to the first concern, the Court found no interference thanks to its mirroring, by express incorporation, of federal law. In other words, Section 2(B) was arguably the most precise mirror, and, thus, was upheld.

Section 2(B) is a mirror-image provision by virtue of its express incorporation of a federal standard, 8 U.S.C. § 1373(c). That federal provision requires DHS to: "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status" of individuals within the jurisdiction of the requesting agency.[239] However, unlike other mirror-image provisions rejected in *Arizona*, the Court determined that Section 2(B) did not appear to potentially usurp federal prosecutorial discretion, insofar as inquiring about a person's status is not the same

[234] *Id.* at 2496 ("Section 6 attempts to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers.").

[235] *Id.* at 2506. While Arizona argued that its authority was cooperative insofar as state officers were only arresting those in violation of federal law, the Court countered that "the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government" was outside any "coherent understanding of the term 'cooperation.'" *Id.* at 2507.

[236] *Id.*

[237] *Id.* at 2508.

[238] *Id.* at 2507. The Court noted that the provision only requires a "reasonable attempt" to verify a person's immigration status and concluded that a reasonable attempt would not involve unconstitutionally prolonging the detainment of person solely for the purpose of ascertaining their immigration status. Rather, the requirement to verify immigration status operates only so long as the person is reasonably detained for other reasons (like suspicion of a crime). *Id.* at 2507-08.

[239] 8 U.S.C. § 1373(c) (1996).

as undertaking their removal or imposing some other sanction.[240] Because federal law permits such inquiries and the state statute merely directed state officers to act pursuant to the federal provision, that was the end of the inquiry for the Court.[241]

Thus, while *Arizona* rejected a number of mirror-image provisions, it did not reject them all and, in any event, it is worth reiterating that *Whiting* remains good law. Yet, *Whiting* is highly problematic in that it allows states to structure concurrent state employer sanctioning regimes that run parallel to the federal employer sanctioning regime under 8 U.S.C. § 1324a. The *Whiting* decision now allows states to pass laws that mirror the "employer sanctions" provision of the INA, so long as the state sanctions are characterized as licensing penalties.[242] Under LAWA, Arizona county attorneys can now seek the suspension and permanent revocation of business licenses of employers that state superior courts determine have violated a provision of federal law which prohibits employers from "knowingly" hiring undocumented workers.[243] In a dramatic departure from past precedent, under *Whiting*, states can now prosecute, adjudicate, and assess penalties for violations of federal immigration law before the federal government has had an opportunity to investigate or find a violation of federal immigration law — a state of affairs rejected by the *Arizona* Court in its analysis of SB 1070.[244]

Some may argue that, on a substantive level, LAWA and SB 1070 differ significantly, and these differences can explain the Court's divergent approach to the preemption doctrine in *Whiting* and *Arizona*. One might contend, for instance, that a key difference between the two decisions is that LAWA purports to primarily impact the behavior of employers and advertised itself as a licensing law, not as an immigration enforcement law. Meanwhile, SB 1070 does not hide that its objective is to impact the behavior of immigrants directly. In fact, as the *Arizona* Court noted at the outset of its opinion, the stated purpose of SB 1070 is to "discourage and deter the unlawful

[240] The federal government noted that its enforcement priorities were irrelevant to state authorities, while the Court noted that state "officers must make an inquiry even in cases where it seems unlikely that the Attorney General would have the alien removed." *Arizona*, 132 S. Ct. at 2508.

[241] *Id.*

[242] *See* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1978 (2011) ("[E]ven if a law . . . is not itself a 'licensing law,' it is at the very least 'similar' to a licensing law, and therefore comfortably within the savings clause." (quoting 8 U.S.C. § 1324a(h)(2)).

[243] ARIZ. REV. STAT. ANN. § 23-212(F)(2) (2011).

[244] *See Leading Cases*, 125 HARV. L. REV. 291 (2011).

entry and presence of aliens and economic activity by persons unlawfully present in the United States."[245] Consequently, SB 1070 advertised itself as an immigration statute and appeared on its face to run afoul of the plenary power doctrine. Thus, it could be argued that the kinds of international and foreign policy concerns at play in *Arizona* are not found in *Whiting*. Or one may argue that the state has greater leeway to regulate in the workplace because, as the Court in *Whiting* stressed, that is the site of the exercise of traditional state police powers. At this juncture, however, it is instructive to note that Chief Justice Roberts and Justice Kennedy are the only two members of the Court who found themselves with the majority in both cases. In other words, the jury is still out with regard to how other mirror-image statutes will fare against preemption challenges.

In summary, it appears that the Court has developed two approaches to mirror-image statutes under the preemption doctrine that is now unfolding within this new wave of immigration federalism laws. The first approach, undertaken by the *Whiting* Court, favors a strict textualist approach, examining whether the state statute "largely parrots" the federal statute textually. The second approach is a more traditional preemption approach.[246] The *Arizona* Court examined whether the mirroring statute might nonetheless pose an obstacle to or conflict with the federal statute, or whether Congress intended to occupy the field.

Yet, in both approaches — the *Whiting* textualist approach and the *Arizona* non-textualist approach — the Court has started with an assumption of the validity of mirror-image theory and that assumption informs the initial preemption inquiry.[247] In the first approach, the

[245] *Arizona*, 132 S. Ct. at 2497 (quoting Note following ARIZ. REV. STAT. ANN. §11-1051 (2012)).

[246] Some scholars assert that mirror-image theory had been rejected in *Arizona*. *See, e.g.*, Martin, *supra* note 8, at 42 (arguing that in *Arizona* the Court "rejected a 'mirror-image' theory propounded by SB 1070's proponents that promised much future state legislative mischief").

[247] After *Whiting*'s ratification of mirror-image theory, Arizona, in its briefs and at argument, pressed the theory before the Court a second time in Arizona v. United States and thereby implicitly urged *Whiting*'s textualist approach. *See, e.g.*, Brief for the Petitioner 52, Arizona v. United States, 132 S. Ct. 2492 (2012) (No.11-182). "The Court also noted that 'Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects.' So too here. Section 3 simply seeks to enforce the federal registration requirements and tracks federal law in all material respects." (quoting *Whiting*, 131 S. Ct. at 1981); Transcript of Oral Argument at 28, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182) ("MR. CLEMENT [Arizona]: . . . I do think, as to Section 3, the question is really — it's — it's a provision that is parallel to the Federal requirements and imposes the same

Court asks whether the state immigration law is mirroring federal immigration law textually. In *Whiting*, the majority appears to find this textual mirroring as dispositive: there is no conflict or obstacle where the state and federal government can speak with textual and substantive unity. In the second approach, the Court asks whether, in light of the textual and other similarities between the state and federal immigration laws, the state law can proceed under concurrent jurisdiction. In *Arizona*, the majority answered in the affirmative in one provision, Section 2(B). The Court struck the remaining three provisions that were under challenge. The Court reasoned that Section 5(C) and Section 6 were not a close enough mirror to justify Arizona's argument in favor of concurrent jurisdiction in the implementation of those provisions. The Court held that Section 3 could not be upheld as just a mirror-image statute because it determined that Congress had already intended to occupy the field of alien registration laws.

III. REVERSE-COMMANDEERING & THE DEVOLUTION OF IMMIGRATION POWER TO STATES

The fate of mirror-image statutes, and the current immigration movement whose legislative initiatives often hang on mirror-image theory, remains in doubt after *Arizona*. Yet, as I noted above, it is far from foreclosed because *Whiting* remains good law. The current movement is, in some respects, a deliberate attempt to break the sole prerogative power of the federal government to dictate immigration policy. This growing movement represents an effort to control the terms of what federal resources must be allocated to accommodate state immigration programs. These laws attempt to coerce the appropriation of additional federal resources and federal officers to

punishments as the Federal requirement. So it's, generally, not a fertile ground for preemption."). The Court analyzed SB 1070 within the framework proffered by Arizona, preempting those portions of the statute that failed to properly mirror federal law, and upholding Section 2(B), the one provision that mirrored, through express incorporation, a screening protocol "where the federal government had encouraged its use." *Arizona*, 132 S. Ct. at 2508. "The federal scheme thus leaves room for a policy requiring state officials to contact ICE as a routine matter. Cf. *Whiting*, 563 U.S., at --, 131 S. Ct., at 1985-86 (rejecting argument that federal law preempted Arizona's requirement that employers determine whether employees were eligible to work through the federal E-Verify system where the Federal Government had encouraged its use)." *Arizona*, 132 S. Ct. at 2508. Thus, through its reference to *Whiting*, the Court suggested that Section 2(B) mirrored federal policy. *See id.* The express incorporation of Section 1373(c) of the INA within the text of Arizona's Section 2(B) ensured there was a perfect textual mirror between state and federal law regarding the screening protocol.

carry out state immigration enforcement schemes and, thus, turn them to state ends. In the process, these laws usurp the policymaking powers of Congress, as well as usurp the prosecutorial and other discretionary policy authority of the Executive.[248] The stated goal of some state lawmakers and proponents of SB 1070-copycat laws is to force the political branches to follow the states' lead in immigration reform.[249] The state takeover of federal immigration database screening protocols in particular imposes significant resource costs and prosecutorial conflict, thereby frustrating the implementation of a coherent immigration policy at the federal level.

While LAWA, Section 2(B), and similar laws may survive preemption scrutiny, they nevertheless undermine the federal government's ability to dictate and implement a coherent immigration policy across all fifty states. Moreover, these state laws usurp federal law enforcement prerogatives and resources.[250] These laws, in effect, exemplify the inverse of the problem posed by the federal commandeering of state resources. This reverse-commandeering is both express and implicit. It is express in that the state and local laws typically rely on federal databases to perform the screening to determine if an individual is work-authorized, lawfully present, or otherwise compliant within the federal immigration scheme.[251] It is implicit in that insofar as state authorities can now investigate and independently prosecute federal immigration violations, under the guise of enforcing state law, federal prosecutorial discretion — with all its policymaking implications about where and how intensively to enforce — has been usurped.[252]

---

[248] Motomura, *The Discretion that Matters*, *supra* note 18, at 1826-36.

[249] *See, e.g.*, GULASEKARAM & RAMAKRISHNAN, *supra* note 17, at 1 ("[P]olitical dynamics at the subnational level on immigration are also tied to political dynamics at the national level. This is particularly true in the case of restrictive local policies on immigration, where activist groups such as the Federation for American Immigration Reform (FAIR) and NumbersUSA have sought to stall moderate legislation at the federal level that includes some form of legalization, while at the same time fomenting restrictionist legislation at the state and local level.").

[250] Motomura, *The Discretion that Matters*, *supra* note 18, at 1822 ("In fact, state and local criminal arrests are just as likely to trigger federal civil removal. This allows state and local police to use arrest powers to decide who will be exposed to federal immigration enforcement.").

[251] *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-212(B) (2011) ("When investigating a complaint, the attorney general or county attorney shall verify the work authorization of the alleged unauthorized alien with the federal government pursuant to 8 United States Code section 1373(c).").

[252] Vesting state prosecutors, subject to the pressures of political election, with the power to prosecute federal immigration law increases the risk of politicizing the

Moreover, these state laws attempt to dictate the terms on which federal databases will be used within a given state. In LAWA, for example, Arizona mandates that all employers in that state screen new hires through the E-Verify databases. In Section 2(B) of SB 1070, Arizona mandates that local law enforcement determine — during the course of any lawful stop, arrest, or detention — whether an individual is lawfully present in the U.S., if the officer has reasonable cause to believe the individual may be unlawfully present. Section 2(B), as upheld in *Arizona*, first requires an inspection of physical documents (e.g., driver's license or immigration document). A follow-up database screening is mandated under Section 2(B) if an inspection of the physical identity document cannot confirm an individual's identity and citizenship status.

In the progression of immigration legislation and policymaking in recent decades, and particularly after 9/11, the federal government is increasingly attempting to compel identity verification database screening by private entities (e.g., employers through E-Verify) and state officials (e.g., local law enforcement through Secure Communities) in order to "secure the border."[253] Moreover, when examining the prevailing trend in federalism generally, and federal immigration policy in particular as it has unfolded for the past few decades, scholars have observed that the federal government is increasingly encroaching upon states' historic police powers.[254] Specifically, through both congressional legislation and executive regulatory action, the political branches are actively engaged in the "devolution" of immigration law by delegating essential immigration screening, or federal immigration gatekeeping duties and responsibilities, to private third-parties, such as employers, and state agents, such as state and local police officers.[255]

prosecutorial discretion of an already highly charged political issue. Even at the federal level, immigration-related prosecutions can lead to political consequences. *See, e.g.*, Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys,* 6 OHIO ST. J. CRIM. L. 369, 379 (2009) (explaining that the firing of U.S. Attorney Carol Lam for the Southern District of California was motivated in part by "her failure to adhere to the President's and Department's priorities by bringing an insufficient number of gun and immigration cases").

[253] Hu, *supra* note 187 (discussing increasing reliance on identity management technologies to implement immigration control objectives and counterterrorism goals simultaneously).

[254] *See* Stumpf, *States of Confusion*, *supra* note 10, at 1613-14.

[255] *See* De Canas v. Bica, 424 U.S. 351, 356 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 274A(h)(2) (1986), 100 Stat. 3359, 3368, *as recognized in* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1974 (2011) (permitting states to require employers to

Laws like LAWA and SB 1070 take this trend one step further, although it is a constitutionally questionable step. Instead of being federal partners, willing or unwilling, in the job of policing the population for violators of federal immigration laws, these state laws effectually put state authorities in the driver's seat for the federal laws they enforce with state sanctions.[256] These state and local laws derive not from a desire to cooperate with the federal government, but, rather, arise from what the Ninth Circuit characterized as "rising frustration with the United States Congress's failure to enact comprehensive immigration reform."[257] The implication of such statements, of course, is not that states wish to complement federal immigration laws, like IRCA, with their own immigration initiatives through a model of cooperative federalism, but, instead, that states such as Arizona wish to discard IRCA as inefficacious. Mirroring IRCA's language is the means whereby state authorities seize control of immigration policy from their federal counterparts. By seizing control of the federal immigration legal and regulatory apparatus, and displacing federal immigration efforts, state and local governments are attempting to skew the immigration enforcement power in their favor.

In Part III, I now attempt to explain how this state and local effort amounts to the reverse- commandeering of federal resources, federal policy and prosecutorial discretion, the ability of the national government to establish a national immigration enforcement policy and strategy, as well as the ability of the federal government to control the foreign policy implications of federal immigration policy.

conduct identity and citizenship status database screening of employment applicants through E-Verify). *See generally* Wishnie, *supra* note 18, at 532-52 (concluding that the legislative and executive branches may, by statute, devolve to the states some power to regulate immigration, but these activities cannot be granted the same judicial deference afforded federal immigration legislation).

[256] *See* Chin & Miller, *supra* note 7, at 278-85.

[257] Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 860 (9th Cir. 2009). Arizona includes the purpose of SB 1070 in Section 1, titled "Intent." Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450 (2010) (codified in scattered sections of ARIZ. REV. STAT. ANN. §§ 11, 13, 23, 28, 41), *as amended by* Act of Apr. 30, 2010, ch. 211, 2010 Ariz. Sess. Laws 1070. The drafters of SB 1070 first set forth a theory of cooperative immigration federalism: "The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona." *Id.* Next, SB 1070 explains that "attrition through enforcement" is the objective. *Id.* "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." *Id.*

A. Reverse-Commandeering Database Screening Protocols & Resources

Reverse-commandeering may occur where state cooperation in enforcement of federal immigration provisions enables the state to require federal resources that would not otherwise be committed.[258] This occurs most concretely where the federal government needs to shoulder the fiscal burden of widespread usage of federal databases.

A crucial component of mirror-image laws is the availability of federal databases to serve state and local ends. Because these statutes operate by mirroring or simply incorporating federal standards, they typically establish as a violation of state law something that previously violated only federal law. Doing so, however, requires use of federal resources in the form of national databases accumulating information about the identity and citizenship or immigration status of individuals nationwide. SB 1070 does this by using the databases maintained by two federal agencies: DHS's Immigration and Customs Enforcement (ICE) and the Federal Bureau of Investigation (FBI).[259] In implementing SB 1070, under Section 2(B), upon a request from an Arizona law enforcement official, DHS performs the relevant status checks on detained individuals through the screening of personally-

[258] *See* New York v. United States, 505 U.S. 144, 156, 161 (1992) ("Congress exercises its conferred powers subject to the limitations contained in the Constitution . . . . As an initial matter, Congress may not simply 'commandee[r] the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program.'" (alteration in original) (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

[259] The FBI maintains the IAFIS (Integrated Automated Fingerprint Identification System) database. *Integrated Automated Fingerprint Identification System*, FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis (last visited Feb. 26, 2012). DHS maintains the IDENT (Automated Biometric Identification System) database. "IDENT is a Department of Homeland Security (DHS)-wide system for the collection and processing of biometric and limited biographic information for DHS." U.S. DEP'T OF HOMELAND SEC., US-VISIT PROGRAM OFFICE, PRIVACY IMPACT ASSESSMENT FOR THE AUTOMATED BIOMETRIC IDENTIFICATION SYSTEM (IDENT) 2 (July 31, 2006), *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_usvisit_ident_final.pdf. The database screening process can be summarized as follows: "1. The arresting LEA [law enforcement agency] sends the subject's fingerprints and associated biographical information to CJIS [Criminal Justice Information Services]/IAFIS . . . 2. CJIS electronically routes the subject's biometric and biographic information for all criminal answer required (CAR) transactions to US-VISIT/IDENT to determine if there is a fingerprint match with records in that system." U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., SECURE COMMUNITIES: QUARTERLY REPORT – FISCAL YEAR 2010 REPORT TO CONGRESS FOURTH QUARTER (Jan. 3, 2011), *available at* http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy104thquarter.pdf.

identifiable data through DHS and FBI databases, pursuant to the authority of 8 U.S.C. § 1373(c).[260] LAWA mandates database-driven status checks through resort to the federal E-Verify program,[261] primarily relying upon the databases of two additional federal agencies, DHS's United States Citizenship and Immigration Services (USCIS) and the Social Security Administration (SSA).[262]

Specifically, under Section 2(B) of SB 1070, state and local law enforcement officers are required to screen out unauthorized immigrants from the street. During the course of a lawful stop, detention, or arrest, the law enforcement officer may confirm identity and citizenship status "where reasonable suspicion exists that the person is an alien [unlawfully present in the U.S.]." Yet, how exactly can Arizona's law enforcement officials assess the immigration status of the individual, since lawful immigration status is a federal determination and only the federal government has access to this information?[263] First, Section 2(B) of SB 1070 creates a list of

[260] United States v. Arizona, 703 F.Supp. 2d 980, 995 (D. Ariz. 2010). "Pursuant to 8 U.S.C. § 1373(c), DHS is required to 'respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status . . . for any purpose authorized by law, by providing the requested verification or status information.' DHS has, in its discretion, set up LESC [Law Enforcement Support Center], which is administered by ICE and 'serves as a national enforcement operations center that promptly provides immigration status and identity information to local, state, and federal law enforcement agencies regarding aliens suspected of, arrested for, or convicted of criminal activity.' (Pl.'s Mot. at 6–7 (citing Palmatier Decl. ¶¶ 3–6).)." *Id.*

[261] ARIZ. REV. STAT. ANN. § 23-212 (2011).

[262] The Social Security Administration maintains the NUMIDENT (Numerical Identification System) database, which includes the name, place of birth, date of birth, and other biographical information of Social Security Administration applicants. Andorra Bruno, CONG. RESEARCH SERV., R40446, ELECTRONIC EMPLOYMENT ELIGIBILITY VERIFICATION 2 (2009). United States Citizenship and Immigration Services maintains the VIS (Verification Information System) database, which is "comprised of citizenship, immigration, and employment status information from several DHS system of records." U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT STATEMENT FOR THE VERIFICATION INFORMATION SYSTEM SUPPORTING VERIFICATION PROGRAMS 2 (April 1, 2007), *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_vis.pdf.

[263] Section 2(B) of SB 1070 provides: "For any lawful stop, detention or arrest made by [an Arizona] law enforcement official or a law enforcement agency . . . in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released." ARIZ. REV. STAT. ANN. § 11-1051 (2012).

documents that are acceptable proof of lawful presence in the U.S.[264] If the officer is unable to confirm lawful presence through the document inspection, next SB 1070 relies upon the database screening protocol. In particular, 8 U.S.C. § 1373(c) of the INA allows the state to seek database-driven information from DHS to determine whether an individual is lawfully present. This database screening protocol requires the collection of the biometric data (e.g., fingerprints) and facilitates the screening of personally-identifiable data and biometric data through the DHS and FBI databases.

Similarly, LAWA mandates employer use of the federal E-Verify database. E-Verify allows Arizona authorities to seek, in effect, a federal determination of who is lawfully present without actually having to confer with any federal authorities.[265] This is crucial to the ambition of the new immigration federalism movement, which seeks to enable states to independently formulate and implement enforcement strategies. E-Verify is an internet-based database screening program that purports to allow an employer to electronically verify identity and citizenship status by screening employee social security numbers and other personally-identifiable data through databases maintained by DHS and SSA.[266]

Because federal law does not mandate use of E-Verify by employers, the petitioners in *Whiting* argued that LAWA's transformation of a voluntary program into a mandatory one within Arizona was preempted by federal law. The Court rejected this aspect of the challenge. The majority acknowledged that IIRIRA prohibits DHS from requiring any person or entity to use the E-Verify program and

[264] The documents permitted under SB 1070 are much more restrictive than the documents provided on the DHS Employment Eligibility Verification Process (Form I-9). SB 1070 only allows for the following documents set forth in Section 2(B). Section 2(B) of SB 1070 states that "A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following: 1. A valid Arizona driver license. 2. A valid Arizona nonoperating identification license. 3. A valid tribal enrollment card or other form of tribal identification. 4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification." *Id.*

[265] *See* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 2006 (2011) (Sotomayor, J., dissenting) ("[T]he Arizona Act directly regulates the relationship between the Federal Government and private parties by mandating use of a federally created and administered resource.").

[266] *See id.* at 1975 ("Originally known as the 'Basic Pilot Program,' E–Verify 'is an internet-based system that allows an employer to verify an employee's work-authorization status.'" (quoting Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 862 (9th Cir. 2009)).

expressly states that E-Verify participation is by "voluntary" election. Yet, the majority concluded that the statute says nothing with regard to whether a state law may mandate its use.[267] For a textualist approach that "begin[s] again with the relevant text," that is dispositive since "E-Verify contains no language circumscribing state action."[268]

Analyzing a claim of implied preemption, the Court noted the three statutorily expressed policy objectives underlying E-Verify: "ensure reliability in employment authorization verification, combat counterfeiting of identity documents, and protect employee privacy."[269] Without any analysis, the Court concluded that the mandated use of E-Verify frustrates none of these objectives.[270] The remainder of the discussion addressed two policy arguments raised to support why the E-Verify mandate is impliedly preempted: (1) whether E-Verify could feasibly be expanded to the other states; and (2) whether E-Verify is reliable.[271] In both cases, it is enough for the majority to note that the federal government, in its submissions to the Court, disagrees that the concerns are valid.[272] Moreover, the Court concluded that LAWA is a mirror of the broader policy mandate of the federal government since DHS has itself supported expansion of the program.[273] Although the Court never expressed its own views about the propriety of E-Verify's transition from a voluntary to a mandatory program, at the same time, the Court failed to exercise judicial restraint in leaving matters of policy to the political branches because the majority seeks to justify its textual reading of IIRIRA on policy grounds.

In addition to LAWA, Arizona, like many other states, is experimenting in the creation of other third-party liability enforcement sanctioning regimes and the delegation of immigration screening to third-party immigration screeners. For example, in addition to the establishment of a police sanctioning regime in SB 1070,[274] the state proposes a landlord sanctioning regime in SB

[267] *Whiting*, 131 S. Ct. at 1985.

[268] *Id.*

[269] *Id.* at 1986.

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450 (2010) (codified in scattered sections of ARIZ. REV. STAT. ANN. §§ 11, 13, 23, 28, 41), *amended by* Act of Apr. 30, 2010, ch. 211, 2010 Ariz. Sess. Laws 1070.

1611,[275] a state worker sanctioning regime in HB 2008,[276] a hospital worker sanctioning regime in SB 1405,[277] and a public school worker or teacher sanctioning regime in SB 1407[278] and SB 1141.[279] Each of these sanctioning regimes requires an immigration screening protocol, either paper-based inspection of identity documents or database screening, because otherwise Arizona could not verify who is an unauthorized immigrant and who is not. The gatekeeping screening aspect of various state and local laws has resulted in an unprecedented expansion of document inspection and database-driven screening protocols.[280]

The current movement characterizes these efforts to make federal databases serve state ends as cooperative in nature, proposing a state-federal partnership in immigration enforcement. State and local immigration federalism laws passed or under consideration attempt a dramatic expansion of IRCA's third-party liability enforcement scheme to hold individuals beyond employers — such as police officers, landlords, teachers, hospital workers, and state workers administering benefits — vicariously liable for the presence of unauthorized immigrants in the United States.[281] They also expand — oftentimes into uncharted waters — the developing utilization of specific immigration screening protocols, either through document screening, database screening, or both. This trend at the state level tracks the prevailing federal trend to implement database screening protocols and identity management technologies in a broad spectrum of contexts, purportedly to advance national security objectives and to control immigration and crime.[282] At the same time, it also empowers the state to determine whether such protocols are voluntary or mandatory, and what sanctions apply in the wake of failure to

[275] S.B. 1611, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

[276] H.B. 2008, 49th Leg., 3d Spec. Sess. (Ariz. 2009).

[277] S.B. 1405, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

[278] S.B. 1407, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

[279] S.B. 1141, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

[280] *See, e.g.*, Hu, *supra* note 187 (discussing unprecedented expansion of data surveillance, or "dataveillance," and biometric ID cybersurveillance technologies as a result of federal and state immigration policy).

[281] *See* Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450 (codified in scattered sections of ARIZ. REV. STAT. ANN. §§ 11, 13, 23, 28, 41 (2010)), *amended by* Act of Apr. 30, 2010, ch. 211, 2010 Ariz. Sess. Laws 1070.

[282] *See, e.g.*, Hu, *supra* note 187 (surveying multiple identity verification protocols and database-driven identity management systems, which are purportedly implemented to "secure the border").

implement the immigration screening protocol or the failure to conduct database screening through various identity verification programs. For example, state and local third-party liability schemes may hold third-party immigration screeners, or deputized immigration gatekeepers, strictly liable for the presence of unauthorized immigrants where the gatekeepers fail to inspect identity documents or fail to use the mandated database screening protocols.[283]

The mandated use of database screening in laws like LAWA and SB 1070 requires the federal allocation of resources to support such screening protocols. Thus, both the dissenting opinions in *Whiting* found Arizona's requirement that employers use the E-verify system to determine employment eligibility objectionable in part because it involved allowing states to require an allocation of federal resources.[284] The dissenters noted that an increased use of the E-Verify database nationally, on terms set by the states, will require federal resources — to both maintain and develop the database, as well as to iron out the various wrinkles in this experimental technology — as resort to E-Verify becomes a state law prerequisite to employment. Justice Breyer explained that Congress has "strong reasons for insisting on the voluntary nature of the [E-Verify] program," because "making the program mandatory would have been hugely expensive," and the E-Verify records against which employers check employee data "are prone to error."[285]

Justice Sotomayor's dissent in *Whiting* specifically focused more directly on the question of the use of federal resources for state ends. For Justice Sotomayor, the problem was not simply that a state law makes mandatory something otherwise voluntary under federal law. The problem was that "the Arizona Act directly regulates the relationship between the Federal Government and private parties by mandating use of a federally created and administered resource."[286] After stating this principle, her approach was pragmatic. Congress refused to mandate E-Verify because a mandatory national program was estimated to cost over $11.7 billion annually and require a

[283] Lozano v. City of Hazleton, 620 F.3d 170, 177-80 (3d Cir. 2010), *vacated sub nom.* City of Hazelton, Pa. v. Lozano, 131 S. Ct. 2958 (2011). The case is currently pending in the Third Circuit on remand. Lozano v. City of Hazleton, Pa., No. 07-3531 (3d Cir. 2012).

[284] Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1995 (2011) (Breyer, J., dissenting); *see also id.* at 2006 (Sotomayor, J., dissenting).

[285] *Id.* at 1996 (Breyer, J., dissenting).

[286] *Id.* at 2006 (Sotomayor, J., dissenting).

significant increase in the E-Verify program staffing.[287] Allowing states to mandate the E-Verify program in effect allows them to overturn the Congressional decision not to incur the costs and burdens of a national E-Verify program at this time.[288] In sum, for Justice Sotomayor, a federally created and managed resource is the site of a "uniquely federal interes[t]" which a state may not commandeer.[289] Just as the federal government may not commandeer state legislatures and state officers as tools to implement federal policies across the public body, so states may not "regulate[] the relationship between the Federal Government and private parties" by altering the terms on which federal databases are available to the general public.[290]

The same problem of the reverse-commandeering of federal database screening resources is posed under Section 2(B) of SB 1070. From a query conducted pursuant to 8 U.S.C. § 1373(c), it is implied that DHS will use the current database screening protocol structured under the Law Enforcement Support Center of DHS. In *Arizona*, the federal government argued that the immigration system, nonetheless, would be overwhelmed by such inquiries. The district court in enjoining this provision agreed, finding: "Federal resources will be taxed and diverted from federal enforcement priorities as a result of the increase in requests for immigration status determination that will flow from Arizona if law enforcement officials are required to verify immigration status whenever, during the course of a lawful stop, detention, or arrest, the law enforcement official has reasonable suspicion of unlawful presence in the United States."[291] The Ninth Circuit agreed and affirmed.[292]

The *Arizona* Court, however, disagreed. The majority did not find persuasive that Section 2(B) amounted to a commandeering of federal resources and officers during the course of Arizona's new data collection and database check protocol required under SB 1070. Congress has recognized in recent years, however, the cost of expanding state-federal cooperation in immigration enforcement and the database check process required under 8 U.S.C. § 1373(c). For

[287] *Id.*

[288] *Id.*

[289] *Id.* (alteration in original) (quoting Boyle v. United Technologies Corp., 487 U.S. 500, 504 (1988)).

[290] *Id.*

[291] United States v. Arizona, 703 F. Supp. 2d 980, 998 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845, *aff'd in part, rev'd in part*, 132 S. Ct. 2492 (2012).

[292] United States v. Arizona, 641 F.3d 339 (9th Cir. 2011), *cert. granted* 132 S. Ct. 845, *aff'd in part, rev'd in part*, *remanded by*, 132 S. Ct. 2492 (2012).

example, congressional appropriations for the 287(g) program (state-federal partnership in enforcement of federal immigration law) have risen dramatically in recent years, from $16 million in Fiscal Year 2007 to $68 million in Fiscal Year 2010.[293] During oral argument in *Arizona*, the federal government itself admitted that there are limitations to the efficacy of the federal database screening protocol.[294] The reason for the limitation was articulated when the federal government explained the following to the Justices: "There isn't a citizen database . . . . [T]here is no reliable way in the database to verify that you are a citizen unless you are in the passport database. So you have lots of circumstances in which people who are citizens are going to come up [as a database] no match."[295]

Arizona would be unable to implement its immigration laws without co-opting the federal immigration screening databases, as Arizona does not have its own national database on the citizenship status and identity of individuals present in the U.S. Even if Arizona could establish its own citizenship and identity verification database and, thus, could establish its own criteria for work eligibility or its own criteria for lawful presence, such new criteria would be preempted.[296] The federal effort to enlist all employers as mandatory immigration gatekeepers under IRCA,[297] and to enlist all state and local law enforcement as voluntary immigration screeners under IIRIRA, now provides the states an avenue for reverse-commandeering in the digital age. In fact, paradoxically, Section 2(B) forces state and local law enforcement officers to conduct mandatory status checks in a way that likely would be prohibited under the anti-commandeering doctrine had Congress not made such status checks voluntary under IIRIRA. Under *Printz*, the Court found that enlisting state law enforcement to

---

[293] CAPPS, ROSENBLUM, RODRÍGUEZ, & CHISHTI, *supra* note 114, at 29.

[294] Transcript of Oral Argument at 65-66, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182), *available at* http://www.supremecourt.gov/oral_arguments/argument _transcripts/11-182.pdf.

[295] *Id.* at 65.

[296] *See* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1981 (2011) ("[T]he Arizona law expressly provides that state investigators must verify the work authorization of an allegedly unauthorized alien with the Federal Government, and 'shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States.' [ARIZ. REV. STAT. ANN.] § 23-212(B). What is more, a state court 'shall consider *only* the federal government's determination' when deciding 'whether an employee is an unauthorized alien.' § 23-212(H) (emphasis added). As a result, there can by definition be no conflict between state and federal law as to worker authorization . . . .").

[297] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360 (codified as amended at 8 U.S.C. § 1324a (2012)).

conduct background checks on behalf of the federal government was proscribed by anti-commandeering principles. Under Section 2(B), however, Arizona now mandates state law enforcement to conduct background checks on behalf of the federal government through reverse-commandeering.

In summary, the reverse-commandeering of federal immigration law can now occur through states agile enough to craft their enforcement and regulatory regimes around the databases. Arizona, in effect, found a method to reverse-commandeer the E-Verify-SSA-DHS database screening protocol mandated in LAWA, as well as reverse-commandeer the DHS-FBI database screening protocol enabled by 8 U.S.C. § 1373(c) utilized in both LAWA and SB 1070.

B. Reverse-Commandeering Policy Discretion in Round-Ups

State statutes that in effect enable state enforcement authorities to exercise independent discretion in investigating and prosecuting what are federal immigration violations[298] may pose a reverse-commandeering problem.[299] To the extent that such discretion enables state authorities implementing their statute to set the terms of when, where, and how intensively federal violations will be prosecuted independently of federal authorities, federal legislation, and federal prosecutorial authority have been reverse-commandeered.[300] Federal resources may also be commandeered to the extent that the state efforts to round up individuals subject to potential deportation may require federal follow-through in the deportation proceedings.

Under LAWA and LAWA-copycat laws, states may bring investigations and prosecutions (in state courts) of those employers allegedly in violation of IRCA's employer sanctions provision.[301] Under SB 1070 and SB 1070-copycat laws, the states may round up those suspected of "unlawful presence" but leave it to the federal officials to investigate, prosecute, and deport those detained by state law enforcement officers.[302] All of these actions amount to a

[298] Motomura, *The Discretion That Matters*, *supra* note 18, at 1829-36; *see also* Lee, *De Facto Immigration Courts*, *supra* note 10, at 4-6.

[299] Printz v. United States, 521 U.S. 898, 922 (1997).

[300] My discussion of the importance of executive discretion in the context of immigration law is deeply indebted to Hiroshi Motomura and, in particular, his forthcoming work, IMMIGRATION OUTSIDE THE LAW (Oxford Univ. Press).

[301] Legal Arizona Workers Act, 2007 Ariz. Sess. Laws 1312 (codified at ARIZ. REV. STAT. ANN. §§ 13-2009, 23-211 to 23-214 (2008)).

[302] Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450 (codified in scattered sections of ARIZ. REV. STAT. ANN. §§ 11, 13,

commandeering of federal enforcement discretion — in both its policymaking form and in the shape of prosecutorial discretion.[303]

It is useful to note that state and local authorities are not directly commandeering federal officers in the precise way the federal government did in *Printz*. But the coercive on-the-ground impact plays out as if they were. The Court noted in *Printz* that the problem with conscripting state officers to perform even the most ministerial tasks was that the state officers then became the face of the federal policy, thereby rendering the states accountable for the political costs of enforcing the federal program.[304]

The *Printz* Court also instructed that executive action, however ministerial, almost always involves some policymaking component.[305] While federal officers may not be directly commandeered, the policy and prosecution decisions of state authorities can nullify federal decisions. Decisions not to prosecute individuals of one national origin because of the politically sensitive nature of foreign relations with the relevant country can be vitiated by a state authority decision to go after that very group. And, of course, a decision to implement a policy impartially can be voided by state authorities seeking political leverage by heavily prosecuting against specific groups or regions in the state. In short, once state authorities have the power to independently prosecute federal law, federal authorities have lost control of enforcement discretion. That is precisely the reason why the Court has often enforced federal supremacy in the realm of immigration — because state immigration "policies" may lead to foreign policy ramifications for which only the national government can be held accountable.[306]

In the case of SB 1070, state authorities cannot conduct independent prosecutions, but they may still conduct round-ups of those suspected of being present in the country unlawfully. The immigration round-

23, 28, 41 (2010), *amended by* Act of Apr. 30, 2010, ch. 211, 2010 Ariz. Sess. Laws 1070.

[303] As Motomura has noted, discretion is exercised by federal authorities at two levels. One level is that of prosecutorial discretion, the case-by-case decision of who to arrest as well as who to prosecute; and the other level is that of policy: "systemic choices to commit resources and to set priorities." Motomura, *The Discretion That Matters*, *supra* note 18, at 1826.

[304] *Printz*, 521 U.S. at 930.

[305] *Id.* at 927.

[306] Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) ("It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.").

ups themselves can be problematic or the source of foreign tensions where foreign nationals of specific countries or regions appear to be the targets.[307] Moreover, even if the federal government retains discretion about whether to begin investigations, prosecutions, and deportations, the very fact of forcing the question will have political fallout that acts as a curb on the exercise of federal enforcement discretion. The federal government will, in the end, bear the political blowback, whether it chooses to see through immigration enforcement actions initiated by Arizona or whether it declines to enforce. In the first case, by effectively ratifying Arizona's enforcement efforts, the federal government will become the target of objectors concerned about immigrant civil rights as well civil liberties in general.[308] In the second case, the federal government will bear the brunt of public frustration with underenforcement of immigration laws — which state actors mobilized as political capital in the passage of state immigration laws in the first place.[309] Along with the commandeering of federal discretion, there is also the commandeering of the federal resources necessary for the follow-through, resources that otherwise could be committed by federal policy makers and enforcement authorities to other objectives.[310]

[307] Motomura discusses the political costs of "[t]he decision not to proceed" by federal authorities in the face of round-ups by state or local authorities, noting that "the federal government is much more politically exposed. The decision not to proceed — whether it reflects resource constraints or policy priorities — is much more likely to attract criticism, including the accusation that the government is disregarding the law." Motomura, *The Discretion that Matters*, *supra* note 18, at 1853.

[308] *See* Mariano-Florentino Cuellar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV., 101 (2012), *available at* SSRN: http://ssrn.com/abstract=2027278 ("Drastic changes in employer verification – involving either increased enforcement or greater federal surveillance and control – would generate either interest group opposition or concern over civil liberties and the centralization of state power.").

[309] *See id.* at 59 (noting growing public concern over immigration issues mounting steadily since the passage of IRCA in 1986). Cuellar notes that immigration laws meant to crack down on undocumented immigrants have the effect of increasing the size of the population subject to deportation, which, in turn, exacerbates public frustration and concern about the national government's inability to effectively enforce immigration laws. *See id.* at 69.

[310] Bulman-Pozen makes this point as well in connection with the effect of Section 2 of SB 1070: "As a practical matter, section 2 is likely to force DHS to remove individuals it has identified as being unlawfully present." Bulman-Pozen, *supra* note 2, at 485. Bulman-Pozen finds this upshot to be salutary and constitutionally unproblematic; but nevertheless, she is in agreement that SB 1070 will effectively divert federal enforcement discretion and federal resources to the attainment of state enforcement objectives.

C. Balkanization of State Immigration Laws

Reverse-commandeering may occur where the federal government needs to counterbalance state immigration enforcement efforts with increased civil rights enforcement to address spillover discrimination or racial profiling of groups targeted by state enforcement efforts. As noted above, IRCA made employers subject to penalties for hiring persons not work-authorized, but it also made it unlawful to discriminate against individuals on the basis of citizenship status and national origin.[311] State and local laws punish the employment of non-work-authorized aliens, but do not speak to the question of employment discrimination that may derive from employer sanction laws. This also effectively usurps federal prerogatives and either reverse-commandeers the federal resources necessary to counterbalance the foreseeable discrimination deriving from immigration enforcement or simply allows a state to discard federal efforts to establish carefully balanced immigration and civil rights enforcement efforts.

As exemplified by LAWA, *Whiting* now ratifies the balkanization of state laws imposing state employment eligibility verification requirements on some or all employers. These requirements may go beyond those already imposed by the federal government as part of the federal employer sanctioning regime pursuant to 8 U.S.C. § 1324a.[312] The Hazleton ordinance, for example, imposes a strict liability standard and does not require that an employer have knowledge that an employed individual was unauthorized in order to be liable for his employ, unlike the federal statute.[313] Furthermore, the Hazleton ordinance makes no allowance for a "good faith" defense for employers to avoid liability.[314] As a 1980 General Accounting Office (GAO) report indicated, these were two of the most problematic aspects of state employer sanctioning laws, problems that Congress sought to correct through IRCA.[315] In addition, the report had indicated that this combination of strict liability and no evidentiary method to establish an affirmative defense elevates the potential for racial profiling by "gatekeepers" because there is no amount of "good

[311] 8 U.S.C. § 1324b(a) (2006).

[312] *See supra* Part II.

[313] *See* Lozano v. City of Hazleton, 620 F.3d 170, 177-80 (3d Cir. 2010), *cert. granted*, *vacated sub nom.* City of Hazelton, Pa. v. Lozano, 131 S. Ct. 2958 (2011). The case is currently pending in the Third Circuit on remand. Lozano v. City of Hazleton, Pa., No. 07-3531 (3d Cir. 2012).

[314] *See id.* at 199.

[315] *See* GENERAL ACCOUNTING OFFICE, *supra* note 105, at 47-49.

faith" screening that can protect against liability and prosecution.[316] Furthermore, almost no state or local immigration-enforcement law includes an antidiscrimination provision that mirrors the civil rights protections articulated in IRCA to prevent immigration-related discrimination that might result from such laws.[317]

The state-by-state patchwork of E-Verify schemes is especially problematic, as several states require some or all employers use E-Verify. Alabama, Arizona, and Mississippi require all employers to use E-Verify.[318] Georgia, Louisiana, North Carolina, South Carolina, Tennessee, and Utah require most employers to use E-Verify.[319] South Carolina requires that all employers either participate in E-Verify or employ only workers who: (1) have a valid South Carolina license; (2) are eligible for a South Carolina license; or (3) are possibly eligible for a driver's license or identification card from a state with requirements at least as strict as South Carolina's.[320] Beyond concerns that these laws may contradict federal law, which makes E-Verify largely voluntary, South Carolina's law contradicts the E-Verify enabling statute and rules by requiring — rather than permitting — an employer to terminate any employee not found work authorized by E-Verify.[321] Utah also requires that contractors use an electronic verification program to verify new hires but permits contractors to choose from more than one verification program, including E-Verify and the Social

[316] *Id.*

[317] *See* Kati L. Griffith, *Discovering "Immployment" Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389, 423 (2011) ("[W]hen subfederal laws place additional burdens and penalties on employers (beyond IRCA) they increase the incentives for employers to discriminate based on race and national origin in order to avoid new forms of potential liability under the subfederal law.").

[318] ALA. CODE § 31-13-25 (2011); ARIZ. REV. STAT. ANN. § 23-214 (2011); MISS. CODE ANN. § 71-11-3 (2011).

[319] GA. CODE ANN. § 13-10-91 (2011); LA. REV. STAT. ANN. § 38:2212 (2010); N.C. GEN. STAT. §§ 153A-99.1, 160A099.1, 64-26 (2011); S.C. CODE ANN. §§ 8-14-20, 41-8-20 (2008); TENN. CODE ANN. § 50-1-703 (2012); UTAH CODE ANN. §§ 63G-12-301, 63G-12-302 (2011).

[320] S.C. CODE ANN. § 41-8-20(D) (2008).

[321] *Compare* S.C. CODE ANN. § 41-8-20(D) ("If a new employee's work authorization is not verified by the federal work authorization program, a private employer must not employ, continue to employ, or re-employ the employee."), *with* E-VERIFY, MEMORANDUM OF UNDERSTANDING Art. II.C.10 (2009), *available at* http://www.uscis.gov/USCIS/E-Verify/Customer%20Support/Employer%20MOU%20(September%202009).pdf ("If the employee does not choose to contest a tentative nonconfirmation or a photo non-match or if a secondary verification is completed and a final nonconfirmation is issued, then the Employer can find the employee is not work authorized and terminate the employee's employment.").

Security Number Verification Service ("SSNVS").[322] Utah's law is particularly problematic because SSNVS is intended only to "verify SSNs and names solely to ensure that the records of current or former employees are correct for the purpose of completing Internal Revenue Service (IRS) Form W-2 (Wage and Tax Statement)" and does not make any statement about an employee's immigration status.[323] Many other states require subsets of employers — such as public employers, contractors, and subcontractors — to enroll in E-Verify. These states include Colorado, Florida, Idaho, Indiana, Michigan, Missouri, Nebraska, Oklahoma, Pennsylvania, Virginia, West Virginia.[324] Whether the *Whiting* Court's interpretation of E-Verify may conflict with the Privacy Act is now an unresolved matter of law.[325]

[322] *See* UTAH CODE ANN. §§ 63G-12-302(3)(a)(i), 63G-11-103(4)(b)(iii) (2011).

[323] SOC. SEC. ADMIN., SOCIAL SECURITY NUMBER VERIFICATION SERVICE (SSNVS) HANDBOOK 4 (2011), *available at* http://www.ssa.gov/employer/ssnvshandbk/ssnvsHandbook.pdf. The Privacy Act allows SSA to disclose Social Security numbers for certain restricted purposes. *See* Privacy Act of 1974, 5 U.S.C. § 552a(b)(3) (2006). The Privacy Act and the Social Security Act both impose limitations on SSA's ability to disclose information from the SSA database. *See id.*; Social Security Act § 1106, 42 U.S.C. § 1306(a) (2006). SSA through promulgating regulations has set forth a "routine use" definition to guide its disclosure of Social Security numbers and includes within its "routine use" definition the disclosure of numbers to employers for the purpose of ensuring accurate wage reporting. *See* 20 C.F.R. § 401.150 (2007) (describing the regulatory basis to issue a routine use disclosure of Social Security number information to employers). Whether disclosure of Social Security number information to employers for immigration control purposes under state requirements that an employer engage in SSNVS database screening would violate the Privacy Act and Social Security Act is an unsettled matter of law.

[324] COLO. REV. STAT. ANN. § 8-17.5-102 (2011); IND. CODE §§ 22-5-1.7-10, 22-5-1.7-11 (2011); MO. ANN. STAT. § 285.530 (2011); NEB. REV. STAT. § 4-114 (2009); OKLA. STAT. tit. 25 § 1313 (2007); SB 637; Act of July 5, 2012, 2012 Pa. Laws SB 637; VA. Code Ann. §§ 40.1-11.2, 2.2-4308.2 (2011); Act of March 10, 2012, WV Laws SB 659; Executive Order Number 11-02, Verification of Employment Status (2011), *available at* http://www.flgov.com/wp-content/uploads/2011/01/scott.eo_.two_.pdf; Executive Order Number 2009-1, Establishing a Policy for All State Agencies Concerning Public Funds Repealing and Replacing 2006-40 (2009), *available at* http://gov.idaho.gov/mediacenter/execorders/eo09/eo_2009_10.html.

[325] IIRIRA's creation of E-Verify technically did not violate the Privacy Act because E-Verify was considered a voluntary "test pilot" program. If Congress makes E-Verify mandatory, Congress most likely would need to revise the Privacy Act to allow for the mandatory disclosure of Social Security numbers under the E-Verify program. Whether LAWA violates the Privacy Act by mandating Social Security number disclosure by virtue of requiring E-Verify use is a separate legal matter that is unresolved. Those attempting to challenge the mandatory disclosure of Social Security numbers to employers under IRCA and the federal "Employment Eligibility Verification Process" under the DHS Form I-9 have been rejected. *See, e.g.*, Cassano v. Carb, 436 F.3d 74 (2d Cir. 2006) (per curiam) (rejecting plaintiff's claim that

Further, many states and localities impose other employment eligibility verification requirements on employers beyond or even in conflict with the INA's requirements, pursuant to the DHS Employment Eligibility Verification Process (Form I-9).[326] For example, Colorado requires employers to make copies of the documentation employees provide them when completing their Form I-9,[327] while the INA solely permits making copies of Form I-9 documentation and only to comply with the INA's verification requirements.[328] West Virginia restricts the types of documents an employee may present to establish his or her employment eligibility in that state.[329] West Virginia's list conflicts with the federal list of acceptable documents because, for example, under West Virginia's law, "a valid photo identification card issued by a government agency" is acceptable to establish work authorization, whereas under federal law, a state identification card is acceptable only to establish one's identity.[330] Though Louisiana does not create additional documentary requirements, an employer is shielded from liability under its law if the employer maintains for each employee a copy of a document from a list contained in the law.[331] That list includes three documents no longer accepted for completing the Form I-9, and it omits several accepted documents.[332]

In addition to state laws creating additional verification requirements, some states require contractors to certify they do and

mandatory disclosure of Social Security number to employer is a violation of law including the Privacy Act).

[326] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 402, 110 Stat. 3009, 3009-3656 (codified at note following 8 U.S.C. § 1324a(b)) (establishing documentary verification process for employers to verify identity and citizenship status of employees in order to avoid criminal and civil penalties).

[327] COLO. REV. STAT. § 8-2-122 (2011).

[328] 8 U.S.C. § 1324a(b)(4) (2006).

[329] W. VA. CODE ANN. § 21-1B-3(c) (2011) ("For purposes of this article, proof of legal status or authorization to work includes, but is not limited to, a valid social security card, a valid immigration or nonimmigration visa, including photo identification, a valid birth certificate, a valid passport, a valid photo identification card issued by a government agency, a valid work permit or supervision permit authorized by the Division of Labor, a valid permit issued by the Department of Justice or other valid document providing evidence of legal residence or authorization to work in the United States.").

[330] *Id.*; *see* 8 U.S.C. § 1324a(b)(1); 8 C.F.R. § 274a.2(b)(1)(v) (2010).

[331] LA. REV. STAT. ANN. § 23:992.2 (2011).

[332] *See id.*

will employ a lawful workforce.[333] Other states impose sanctions against employers who employ unauthorized workers, without mandating additional verification or certification requirements.[334] Penalties for failure to comply with these state laws vary. Penalties can include loss of a license required to do business in the state,[335] civil fines,[336] damages for breach of contract for state contractors,[337] debarment,[338] and even criminal penalties for "paperwork" or "database screening" violations.[339]

Although most states use the federal definition for unauthorized worker, at least two states appear to vary from federal law in identifying which individuals are considered unauthorized to work in the state. The Arkansas definition of "illegal immigrants" in its state immigration law includes any person who is not a U.S. citizen who entered the United States in violation of the INA.[340] This definition has raised concerns that any work-authorized non-U.S. citizen whose entry to the United States was unlawful is prohibited from working in

[333] *E.g.*, ARK. CODE ANN. § 19-11-105(c) (2011); COLO. REV. STAT. ANN. § 8-17.5-102(1) (2011); TENN. CODE ANN. §12-4-124(a)(3) (2011); TEX. GOV'T CODE ANN. § 2264.051 (2011); VA. CODE ANN. § 2.2-4311.1 (2011); Idaho Exec. Order No. 2006-40 (Dec. 13, 2006); Mass. Exec. Order No. 481 (Feb. 23, 2007), *available at* http://www.mass.gov/governor/legislationeexecorder/executiveorder/executive-order-no-481.html.

[334] *See, e.g.*, FLA. STAT. ANN. § 448.09 (2011) (imposing penalties against employers who employ unauthorized workers in Florida); HAW. REV. STAT. § 444-17 (2011) (imposing penalties against contractors found to have "knowingly or intentionally" employed an unauthorized worker); LA. REV. STAT. ANN. § 23:992 (2011) (imposing penalties against employers who employ unauthorized workers in Louisiana); N.H. REV. STAT. ANN. § 275-A:4-a (2011) (prohibiting employers from employing unauthorized workers in New Hampshire).

[335] ARIZ. REV. STAT. ANN. § 23-212 (2011); MISS. CODE ANN. § 71-11-3(7)(e) (2011); MO. ANN. STAT. § 285.535 (2011); S.C. CODE ANN. § 41-8-50(D) (2011); W. VA. CODE ANN. § 21-1B-7 (2011); *see also* VA. CODE ANN. § 13.1-931 (2011) (allowing the state to dissolve or revoke relevant certifications for a variety of corporate entity types if an entity "has been convicted for a violation of 8 U.S.C. § 1324a(f), as amended, for actions of its officers and directors constituting a pattern or practice of employing unauthorized aliens in the Commonwealth").

[336] COLO. REV. STAT. ANN. § 8-2-122 (2006); FLA. STAT. ANN. § 448.09(2); LA. REV. STAT. ANN. § 23:993 (2011); N.H. REV. STAT. ANN. § 275-A:5 (2011); S.C. CODE ANN. § 41-8-50(D); W. VA. CODE ANN. § 21-1B-5 (2011).

[337] ARK. CODE ANN. § 19-11-105; COLO. REV. STAT. ANN. § 8-17.5-102(3); MISS. CODE ANN. § 71-11-3(7)(e); MO. ANN. STAT. § 285.535; Mass. Exec. Order No. 481.

[338] MISS. CODE ANN. 71-11-3(7)(e); MO. ANN. STAT. § 285.535; TENN. CODE ANN. §12-4-124(b); Minn. Exec. Order No. 08-01 (Jan. 7, 2008).

[339] *See* FLA. STAT. ANN. § 448.09(3); W. VA. CODE ANN. § 21-1B-5.

[340] ARK. CODE ANN. § 19-11-105.

Arkansas.[341] New Hampshire's law prohibits employers from employing an individual the employer knows is "not a citizen of the United States and not in possession of Form I-151, Alien Registration Receipt Card, or any other document issued by the United States Immigration and Naturalization Service or the Attorney General of the United States which authorizes him to work."[342] This is problematic because it invites employers to commit document abuse in violation of 8 U.S.C. § 1324b(a)(6) by requiring non-citizens to produce DHS-issued documentation to complete the Form I-9. Louisiana exempts from its law employees working in several categories of agricultural-related jobs.[343] West Virginia's enforcement scheme is problematic because it relies on information held by state agencies to determine if a worker is unauthorized.[344]

This overview describes mass proliferation of state immigration laws in the narrow area of immigration regulation in the workplace. The upshot is that there is no longer a coherent national policy with regard to employer obligations to ensure persons not work authorized are not hired — something the Chamber of Commerce complained would be the impact of a favorable ruling for Arizona in *Whiting*. This flourishing body of state and local immigration laws means that the federal government's constitutional responsibility to implement a national immigration policy has been commandeered by non-federal laws that, on their face, mirror federal provisions even as they reshape, state by state and locale by locale, the legal regime employers and employees must cope with on a daily basis. National policy objectives, like addressing national origin discrimination alongside with setting immigration policy, are frustrated and lost in this web of state and local law.

[341] *See* ACLU Arkansas, 2007 Legislative Session, *available at* http://www.acluarkansas.org/content/index.php?option=com_content&task=category&sectionid=1&id=2&Itemid=99999999&limit=30&limitstart=0 (discussing HB 1024, now ARK. CODE ANN. § 19-11-105, and its definition of "illegal immigrant").

[342] N.H. REV. STAT. ANN. § 275-A:4-a (2011).

[343] LA. REV. STAT. ANN. § 23:992.1(B) (2011) ("The provisions of this Part shall not apply to: (1) Aliens employed in the planting and harvesting, on the premises where produced, of agricultural, forestry, or horticultural products. (2) Aliens employed in the production and gathering on the premises where produced, of livestock, dairy, or poultry products. (3) Aliens employed in the field of animal husbandry. (4) Aliens employed in the care, feeding, and training of horses.").

[344] To determine whether a worker is employment eligible in an enforcement action under the state law, West Virginia permits the West Virginia Labor Commissioner to "access information maintained by any other state agency, including, but not limited to, the Bureau of Employment Programs and the Division of Motor Vehicles . . . ." W. VA. CODE ANN. § 21-1B-3(d) (2011).

D. Over-Cooperative Immigration Federalism: Impact on Foreign Policy

The state-by-state patchwork of immigration enforcement law not only interferes with the sphere of federal immigration policy, however, but also the spheres of foreign policy and commerce policy as well. The *Arizona* Court cited immigration decisions dating back to *Chy Lung* for the proposition that immigration policy implicates foreign policy, and, therefore, the power to establish immigration policy is properly a national one. The Third Circuit in *Lozano v. City of Hazleton* likewise justified its decision to invalidate the Hazleton ordinance on the grounds that it would interfere with federal immigration policy and thus foreign policy.[345] The Ninth Circuit used this same reasoning in granting the preliminary injunction of key sections of SB 1070.[346]

Indeed, in the case of SB 1070, its passage precipitated expressions of concern from numerous governments with nationals likely to be affected, as the Ninth Circuit noted:

> Thus far, the following foreign leaders and bodies have publicly criticized Arizona's law: The Presidents of Mexico, Bolivia, Ecuador, El Salvador, and Guatemala; the governments of Brazil, Colombia, Honduras, and Nicaragua; the national assemblies in Ecuador and Nicaragua and the Central American Parliament; six human rights experts at the United Nations; the Secretary General and many permanent representatives of the Organization of American States; the Inter-American Commission on Human Rights; and the Union of South American Nations.[347]

In response to the concern that state governments might interfere with foreign policy, one state, Utah, enacted state immigration reform legislation that encourages fostering cooperation with Mexico.[348] First, Utah modifies its SB 1070-copycat legislation with a softer approach, requiring state and local police officers to verify identity and

---

[345] Lozano v. City of Hazleton, 620 F.3d 170, 196-206 (3d Cir. 2010), *cert. granted and judgment vacated sub nom.* City of Hazleton, Pa. v. Lozano, 131 S. Ct. 2958 (2011). The case is currently pending in the Third Circuit on remand. Lozano v. City of Hazleton, Pa., No. 07-3531 (3d Cir. 2012).

[346] *See* United States v. Arizona, 641 F.3d 339, 353-54 (9th Cir. 2011), *cert. granted* 132 S. Ct. 845, *aff'd in part*, *rev'd in part*, 132 S. Ct. 2492 (2012).

[347] *Id.* at 353.

[348] UTAH CODE ANN. §§ 17-22-9.5, 76-9-1003 to 1009 (2011); *see also* Utah Coal. of La Raza v. Herbert, No. 2:11-cv-401 CW 2011 WL 7143098 (D. Utah 2011) (challenging the Utah SB 1070-copycat law).

immigration status for offenders of serious crimes only.[349] Second, Utah creates a state-level guest worker visa program for unauthorized workers.[350] Under this state-level approach to immigration reform, Utah proposes to issue work permits to undocumented workers after these workers pass background checks by Utah police and pay fines to the Utah Treasurer for the violation of unlawful presence in Utah. Utah suggests seeking a federal waiver of federal immigration law in order to issue such state-level work permits. The Utah law further proposes to allow the Utah Governor to work directly with the government of Mexico to supply workers to Utah employers through the state-level guest worker program.[351]

In effect, Utah recommends the implementation of a state work visa regime that "mirrors" the federal work visa structure. Utah, therefore, takes the mirror-image theory approach to immigration federalism to almost its furthest logical conclusion. If LAWA can allow Arizona to structure a state immigration enforcement scheme through concurrent jurisdiction over federal immigration law, Utah now under *Whiting* may attempt to argue that it should be allowed to mirror the federal effort in structuring a state-level guest worker program that runs concurrent with the federal guest worker program. Under *Arizona*, if the state law adopts a perfect mirror through the direct express incorporation of federal immigration law, the state mirror-image law might survive a preemption challenge.

The Utah approach merely renders most starkly the foreign policy implication of all state-level immigration laws: they represent a decentralization of the national government's responsibility to make a coherent foreign policy. To the extent a power committed to the national government is now being exercised by state authorities, reverse-commandeering is occurring to the detriment of the federalist system of governance.

IV. ANTICIPATING OBJECTIONS TO REVERSING THE ANTI-COMMANDEERING DOCTRINE

An anti-reverse-commandeering approach will, like the anti-commandeering approach of *New York* and *Printz*, derive from the judicial branch's obligation to the dual sovereignties instituted by the Constitution and ensure that neither of the two sovereigns infringes the sovereign prerogatives of the other. Ultimately, it simply ensures

[349] *See* UTAH CODE ANN. §§ 17-22-9.5, 76-9-1003 to 1009.

[350] *Id.*

[351] *Id.*

that the federal government receives the same judicial solicitude that the states receive when the Court invokes the Tenth Amendment as a restraint on federal power.[352]

In other words, maintaining federal supremacy in the immigration field requires more than a federal court inquiry into whether the state immigration law in question purportedly mirrors and cooperates with the federal immigration enforcement scheme — the preemption analysis undertaken in *Whiting*. In the wake of mirror-image theory, determining whether state immigration laws conflict textually with federal immigration laws does not suffice to preserve uniform coherency over the federal immigration scheme.[353] The federal courts need the anti-reverse-commandeering doctrine to examine the substantive impact of mirror-image theory on federal immigration policy as a coherent whole; otherwise, in the absence of a unified immigration policy, foreign diplomacy, international treaties, foreign aid policy, labor shortages, federal resource allocation, prosecutorial discretion, civil rights law, and interstate commerce may all be affected.[354] In short, an anti-reverse-commandeering doctrine recognizes, at least within the limited confines of immigration law, that traditional preemption doctrine post-*Whiting/Arizona* and post-mirror-image theory falls short.

In anticipation of potential objections to the arguments advanced in this Article, in Part IV, I briefly address the merits of four potential counter-arguments to flipping the anti-commandeering doctrine in the opposite direction: (1) objection to reinvigorating the Court's plenary power doctrine as it pertains to adjudicating immigration matters; (2) objection on the basis that Congress can correct any purported commandeering action by the states through legislative action (e.g., enacting future immigration laws that include strong express preemption language); (3) objection to limiting concurrent

[352] *See* Printz v. United States, 521 U.S. 898, 935 (1997).

[353] *See* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 2002 (2011) (Sotomayor, J., dissenting).

[354] For a discussion on how state immigration laws impact treaties, see John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. (forthcoming 2013) (on file with author) ("As late as 1946, for example, 48 states barred noncitizens from practicing law, 39 states barred them from the liquor trade, 17 states barred them from working as embalmers at funeral homes, 9 states barred them from working as barbers, and 2 states barred them from working as auctioneers. During this era, FCN [Friendship, Commerce and Navigation] treaties served as an important check on the ability of the states to enforce such laws against aliens whose home countries had entered into these treaties with the United States[.]") (citations omitted).

jurisdiction in the immigration policy realm and depriving states of power to regulate immigrants through historic state police powers; and (4) objection that an anti-reverse-commandeering doctrine is preemption doctrine by another name.

A. Objection to Reinvigorating the Plenary Power Doctrine

The plenary power doctrine is objectionable on a number of fronts, including, most prominently, that it sharply curtails judicial scrutiny of federal actions taken with regard to immigrants and thereby precludes judicial review of what would otherwise be cognized as constitutional violations.[355] While not advocating for the wholesale reinvigoration of that doctrine, this Article contends that the constitutional angle of immigration law must be resuscitated in order to grasp the constitutional impact of state immigration laws. The plenary power doctrine, at a minimum, recognized that there are constitutional limits on the kinds of laws state legislatures could enact — even in the absence of any federal statute that could preempt it.[356] A judicial ban on reverse-commandeering statutes reinvigorates only this aspect of the plenary power doctrine, without upsetting the Court's more recent proclivity towards end runs around that doctrine where the doctrine would otherwise deprive potential deportees of constitutional protections or judicial review. Indeed, because the argument is that the Court's anti-commandeering doctrine provides the basis for overturning state laws that usurp federal power, the plenary power doctrine is not really invigorated at all, even if it provides a precedential backdrop for the theory espoused here.

[355] Multiple scholars have discussed persuasively and eloquently why the plenary power doctrine is constitutionally anomalous and objectionable. *See, e.g.*, Cleveland, *supra* note 83 at 13 (examining the formulation of the inherent powers doctrine with regard to Indians, aliens, and territories and exploring how prohibiting judicial review in these areas undermines mainstream "principles of American political theory and national identity"); Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny,* 100 HARV. L. REV. 853 (1987) (surveying Supreme Court immigration caselaw and criticizing the plenary power doctrine's break from fundamental constitutional principles); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (asserting that the Court should "abandon the special deference" it traditionally gives to Congress in immigration law); Motomura, *Phantom Constitutional Norms*, *supra* note 12, at 583, 610-11 (arguing that "phantom constitutional norms" stemming from plenary power doctrine result in improper application of the avoidance canon and questionable statutory interpretation: "the court effectively undermines what would seem to be the governing principles of constitutional immigration law").

[356] See discussion *supra* Part II.A.

B. Objection that Congress Can Correct State Commandeering Legislatively

Along similar lines, it could be argued that there will never be a real need for such a flip in the doctrine because Congress will always have the power to address any reverse-commandeering problem. In other words, Congress could resolve the state usurpation of federal authority legislatively. Thus, there can never be any real reversal of the commandeering problem posed by the impermissible incursion of the federal government into state sovereignty. For example, to address the commandeering concern in *Whiting*, Congress could enact a law removing the licensing exception from IRCA, thereby ending any reverse-commandeering problems posed by LAWA. The fact that Congress could preempt a state law that trenches on federal prerogatives has not stopped the Court from fulfilling its judicial responsibility in the context of the plenary power doctrine, as noted above.

Yet, the Court noted in its recent healthcare decision, *NFIB*, the fact that Congress has the ability to circumvent a commandeering problem neither moots the commandeering controversy nor prevents the applicability of the anti-commandeering doctrine. The Court explained that when "conditions" upon the receipt of federal funds "take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes."[357] In applying the latter rule, the Court concluded that ACA's expansion of Medicaid amounted to the establishment of a new program. This logical leap enabled the Court to then conclude that by threatening to deny all Medicaid funds, Congress was actually threatening to punitively deny the funding of another separate program if the states did not buy into the ACA Medicaid expansion.[358]

The Court acknowledged Justice Ginsburg's point that, had Congress proceeded differently, it could have achieved the same result without offending the Constitution.[359] Justice Ginsburg argued that had Congress simply repealed the entire Medicaid program and then passed legislation that reinstated it with the new ACA expansion, there would be no commandeering problem even though states would have to make the exact same choice the ACA currently would

[357] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604 (2012).

[358] *Id.* at 2604-05.

[359] *Id.* at 2606 n.14.

unconstitutionally require of them.[360] The Court's riposte to this point is to note that "it would certainly not be that easy" given the practical constraints on such a legislative maneuver.[361] Justice Ginsburg also pointed out that Congress could simply alter Medicaid into a purely federal program in which the states play no role. This observation received the following response from Chief Justice Roberts in his majority opinion: something like that is easier said than done.[362] In short, the fact that Congress could have achieved its ends by a different path did not deter the Court from assessing whether the legislation currently before it presents a commandeering problem.

Along similar lines, the fact that Congress could either preempt or ratify, through a savings clause permission, a state law that potentially reverse-commandeers is not relevant to the judiciary's responsibility to assess the constitutionality of the law before it in the context of what Congress has *actually* done. Furthermore, within the preemption doctrine, scholars have noted that there is an institutional choice problem that creates a blind spot for Congress.[363] If the Executive follows a reading of a federal immigration statute that is inconsistent with Congressional intent, and if federal courts favor the Executive reading over Congress's intent, Congress is effectively locked out of the conversation. Congress, in other words, will have difficulty reasserting its primacy once the judiciary begins to favor the Executive as the authoritative institution of choice in the interpretation of the meaning of federal statutes.

The manner in which the federal immigration code is inconsistent with federal immigration policy, for example, has now come to a head in cases such as *Whiting* and *Arizona*. Legal scholarship has taken note that, in such instances, a substantive analysis about "the content of the law" is not necessarily the key question.[364] Instead, the key question becomes "which institution should determine the content of the law — that is, [the key question is] 'deciding who decides.'"[365] Who decides how to reconcile potentially irreconcilable conflicts between

[360] *Id.*

[361] *Id.* Justice Ginsburg notes that this amounts to a "ritualistic requirement" that Congress "repeal and reenact spending legislation" rather than simply amend it to accommodate changing national needs. *Id.* at 2629 (Ginsburg, J., dissenting).

[362] *Id.* at 2606 n.14.

[363] *See* Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 523 (2012); Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2127 (2009).

[364] Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV 727, 727 (2008).

[365] *Id.*

Congress's intent and the executive agency interpreting Congress's intent has created an institutional choice problem in the preemption doctrine.[366]

For example, the *Whiting* Court identified legal support in the current immigration regulatory scheme promulgated by the Executive.[367] To demonstrate that congressional intent had been satisfied, the *Whiting* Court seized upon four words in the Immigration Reform and Control Act of 1986 (IRCA): "licensing and similar laws."[368] IRCA in effect over-ruled the Court's decision in *De Canas* and preempted state governments from enacting laws that penalized employers for hiring undocumented workers.[369] But, as explained in the discussion above, in its express preemption language, Congress included a "savings clause" for licensing sanctions.[370] Congress "saved" one form of penalty that was not preempted by IRCA: states are permitted to penalize an employer for hiring undocumented workers through licensing laws and regulations.[371]

Arizona argued in *Whiting* that the state law is a licensing law and not an immigration law. The majority agreed and explained that it could not find any evidence in the legislative history on the crafting of those four words, "licensing and similar laws," that was helpful.[372] It is worth noting, however, that the original congressional sponsors of IRCA, former Representative Romano L. Mazzoli, former Senator Arlen Specter, and former Representative Howard L. Berman, filed a brief in favor of the Chamber of Commerce, stating explicitly their position on congressional intent: "The Exception in IRCA's Preemption Provision for 'Licensing and Similar Laws' Was Not Intended to Permit Laws Like the Legal Arizona Worker's Act."[373]

---

[366] *See id.*

[367] *See supra* note 158.

[368] Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1973 (2011) (discussing IRCA's preemption clause, codified at 8 U.S.C. § 1324a(h)(2) (2012)).

[369] *Id.* at 1974-75.

[370] *See id.* at 1973. The savings clause is technically seven words and not four words: "other than through licensing and similar laws." 8 U.S.C. § 1324a(h)(2).

[371] *Whiting*, 131 S. Ct. at 1973. The entire preemption clause (including the savings clause) reads as follows: "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).

[372] *Whiting*, 131 S. Ct. at 1980 (noting peremptorily that "[w]e have already concluded that Arizona's law falls within the plain the text of IRCA's savings clause").

[373] *See* Brief for Representative Romano Mazzoli, et al. as Amici Curiae Supporting Petitioners, Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011) (No. 09-115), 2010 WL 3511290, at *8.

Thus, even though Congress previously attempted to correct prior reverse-commandeering by the states in the immigration realm through passage of IRCA and the inclusion of strong express preemption language, *Whiting* demonstrates that where the Court favors Executive interpretation of the federal statute, Congress's ability to reassert its primacy in this sphere may be of limited utility. Further, even when members of Congress who drafted the legislation come forward to file a brief with the Court to offer evidence of congressional intent on whether a state law should be preempted, the Court can choose to ignore this evidence, as it did in *Whiting*.

Along similar lines, one might argue that because states cannot really force the federal government to do anything, they cannot coerce the national government and, therefore, there can be no real reverse-commandeering. *NFIB* should put that objection to rest insofar as there the federal commandeering technically did not force states to do anything: states remained free to opt out of the Medicaid program if they did not wish to comply with the ACA's new requirements. The Court, however, accepted the argument that coercion exists, even where there is a choice, because of the kind of fiscal pressure that could be exerted on which choice each state would make. *NFIB* moves the doctrine beyond *New York*, where the Court found commandeering to occur in the form of a choice presented to states by a federal statute of either taking title to low level radioactive waste generated within state borders or regulating such waste according to federal standards.[374] Either option, the Court explained, "would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments."[375] But in *NFIB*, the choice posed to states was either comply with federal standards or lose federal funding, a kind of choice the Court noted that it had upheld as constitutional in other contexts.[376] The problem in *NFIB* was not that Congress lacks the power to impose conditions on the receipt of federal funds, but that the conditions posed in that case were "properly viewed as a means of pressuring States to accept policy changes."[377] States may not be able to force the federal government to do anything in realm of

[374] New York v. United States, 505 U.S. 144, 175-6 (1992).

[375] Id. at 175.

[376] *NFIB*, 132 S. Ct. at 2603-04 ("We have upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds….").

[377] Id. at 2604.

immigration policy, but the same cannot be said about the ability of states to pressure the federal government and to effect policy changes through such pressure.

C. Objection to Depriving States Concurrent Power to Regulate Immigration

Some may object to depriving states of powers to regulate immigrants, and may point to the benefits of concurrent jurisdiction in the area of immigration law. Yet, application of the anti-commandeering doctrine in the specific context of state immigration law would not preclude state action with regard to immigrants. As discussed above, the Court has noted that states retain authority to pass laws regulating immigrants. In the context of plenary power doctrine cases, the court used language to the effect that state statutes be "necessary and proper" to achieving legitimate state ends.[378] Subjecting state laws to judicial scrutiny to determine if they reverse-commandeer only would provide a lens, outside the preemption context in the strong version of the argument, to assess whether state and local laws mirroring federal legislation are in fact usurping the federal responsibility to enforce national immigration law.

New York stands for the proposition that one sovereign cannot commandeer another's legislature.[379] *Printz* stands for the proposition that one sovereign cannot commandeer another's law enforcement officers.[380] Further, in explaining why such commandeering was a problem in *Printz*, the Court explained that it was objectionable in at least three respects. First, commandeering personnel was also a commandeering of fiscal resources and implicitly involved the ability of one sovereign to force another to pick up the tab for its regulatory policies and enforcement schemes. Second, the Court noted that commandeering personnel enabled one sovereign to force another sovereign to assume a regulatory program's public face and thereby to shoulder whatever popular discontent derives from such a program. Finally, the Court noted that commandeering personnel also involved commandeering another sovereign's policymaking discretion because executive action is not extricable from executive policymaking. All

[378] *See* Cleveland, *supra* note 83, at 90.

[379] *New York*, 505 U.S. at 179 ("No comparable constitutional provision authorizes Congress to command state legislatures to legislate.").

[380] Printz v. United States, 521 U.S. 898, 925-35 (1997) (holding that Congress cannot circumvent the anti-commandeering doctrine by conscripting the state officers directly).

those concerns are at play in laws like LAWA and Section 2(B) of SB 1070, even if, as *Whiting* and *Arizona* held, these state immigration laws pass legal muster when examined through the relatively myopic lens of preemption doctrine alone.

D. Objection that Anti-Reverse-Commandeering Is Preemption by Another Name

The question remains as to whether there is any real need for an anti-reverse-commandeering doctrine and whether the preemption doctrine already addresses the same issues. Courts finding mirror-image laws preempted have recognized that federal enforcement discretion can effectually be usurped by state statutes that textually adhere to federal standards.[381] Moreover, immigration scholar Hiroshi Motomura has argued persuasively that preemption analysis has to be more than a statutory inquiry in the sphere of immigration law because the exercise of federal enforcement discretion is the very substance of federal immigration law.[382]

[381] *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492, 2526-27 (2012). Justice Kennedy's majority opinion acknowledges the importance of executive discretion in immigration law. *Id.* at 2505 ("The federal statutory structure instructs when it is appropriate to arrest an alien during the removal process. For example, the Attorney General can exercise discretion to issue a warrant for an alien's arrest and detention 'pending a decision on whether the alien is to be removed from the United States.'") (quoting 8 U.S.C. § 1226(a)); *see also* Ga. Latino Alliance for Human Rights v. Deal, 793 F. Supp. 2d 1317, 1335 (N.D. Ga. 2011) ("Thus, although Section 7 appears superficially similar to § 1324, state prosecutorial discretion and judicial interpretation will undermine federal authority 'to establish immigration enforcement priorities and strategies.'") (quoting United States v. Arizona, 641 F.3d 339, 352 (9th Cir. 2011), *cert. granted* 132 S. Ct. 845 (2011), *aff'd in part, rev'd in part*, 132 S. Ct. 2492 (2012)), *aff'd sub nom*, Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250 (11th Cir. 2012) (affirming that section 7 is preempted by the INA's criminal provisions pursuant to 8 U.S.C. § 1324); United States v. South Carolina, 840 F. Supp. 2d 898, 917 (D.S.C. 2011) (holding that a South Carolina statute mirroring federal immigration law "was part of a larger state effort to alter federal immigration enforcement priorities and to assert state control over such policy decisions."), *on remand*, Nos. 2:11-2958, 2:11-2779, 2012 WL 5897321 (D.S.C. Nov. 15, 2012) (holding that in light of the *Arizona* decision, the court's preliminary injunctions were improper regarding provisions permitting law enforcement to check immigration status on individuals during lawful stops, and upholding injunctions on other provisions, including those making it unlawful to fail to carry immigration documents, and provisions criminalizing the transportation or housing of undocumented immigrants).

[382] "Federal immigration law consists of myriad highly discretionary decisions on the ground. Any state or local role that allows state or local employees to exercise meaningful discretion is preempted, because any state or local variation in discretionary outcomes represents a conflict with federal immigration enforcement."

But, the future of preemption doctrine and its role in addressing the tidal wave of immigration federalism efforts is not clear. There is no final word on this question, as the differing results of *Whiting* and *Arizona* show. The differences between *Whiting* and *Arizona* are particularly striking given both cases dealt with immigration federalism laws that were recently enacted by the Arizona legislature, and both preemption cases were decided by the Court in back-to-back terms. It has been noted, after all, that the Court's preemption doctrine pulls in different directions, in part because the Justices themselves have differing views on how to discern congressional intent, the touchstone of preemption analysis.[383]

Discerning congressional intent is further complicated by the trend of concurrent jurisdiction in federal immigration law. Contemporary federalism scholars, such as Ernest Young, argue persuasively that we have moved from a dual sovereign world to one of concurrent jurisdiction. According to Young and others, in this modern era of concurrent jurisdiction, federal courts have largely given up patrolling the jurisdictional boundaries of the state and federal sovereigns because it is a practical impossibility in the context of our integrated national economy.[384] Instead, Young contends that federalism values are protected today by using preemption doctrine to mediate federal supremacy and state autonomy.[385] As discussed above, both the Executive and Congress have invited states to play a more active role in the enforcement of federal immigration law in recent decades. Because the political branches have encouraged state cooperation in

MOTOMURA, IMMIGRATION OUTSIDE THE LAW, *supra* note 300, at 111; *see also* Motomura, *The Discretion That Matters*, *supra* note 18, at 1826; Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2063-64 (2008) ("De facto policy is still policy, and federal immigration law is a matter of inaction as much as affirmative decisionmaking. Consequently, any decisions by state and local officials put them in conflict with the knowing balance of enforcement and tolerance that constitutes actual federal immigration law."). In many respects, this Article is an attempt to build upon Motomura's important recognition of the role of enforcement discretion in the fabric of federal immigration law.

[383] *See* Young, *supra* note 11, at 255-56 ("Moreover, even though the Justices are beginning to develop broadly principled frameworks for deciding preemption cases, the different methodological commitments held by individual Justices have thus far prevented the Court from coalescing around a single theory. Textualists approach these cases differently from purposivists, and Justices willing to defer to administrative agencies will embrace distinct approaches from those who view the agencies with more skepticism.").

[384] *Id.* at 258.

[385] *Id.* at 261-65; *see also* Young, *supra* note 27, at 31 ("[P]reemption cases are the quintessential [state] autonomy cases.").

immigration enforcement, this trend of concurrent jurisdiction lends support for Young's view that preemption serves federalism values even in the context of immigration law. With concurrent jurisdiction as the operative norm, nothing guarantees that preemption doctrine can or should be solicitous of whatever happens outside the statutory text where the federal law text and the state law text establish the same standards and provide for their enforcement.[386]

By contrast, the anti-commandeering doctrine is a limited revitalization of a dual sovereign conceptualization of federalism. The doctrine establishes jurisdictional limits on the state and federal sovereigns by prohibiting the phenomena of commandeering. Like the Dormant Commerce Clause doctrine, the anti-reverse-commandeering and anti-commandeering doctrines are not keyed to congressional action or intent.[387] They are keyed to the federalist form of government established by the Constitution. The Court's role in conducting an anti-reverse-commandeering analysis is to ascertain whether a power reserved to or inherent in the sovereignty of one sovereign has been usurped by the other. *Printz* teaches that the executive actions of one sovereign, no matter how ministerial, have policymaking implications. Where one sovereign usurps another's policymaking authority, particularly in a field constitutionally committed to the other sovereign, reverse-commandeering occurs. An anti-reverse-commandeering doctrine, therefore, offers something a preemption doctrine does not: a role for the federal courts to continue to meaningfully police the boundaries of the dual sovereign system. The anti-commandeering doctrine preserves state sovereignty. The anti-reverse-commandeering doctrine preserves federal sovereignty.

Preemption doctrine, if it truly is conforming itself to a world of concurrent jurisdiction as Young suggests, may not effectively track federal-state conflict past the statutory letter and into where Motomura argues the heart of federal immigration law resides —

[386] Young suggests all areas of law should submit to the principle of concurrent jurisdiction, including those affecting foreign relations, like immigration law. In recognizing the implications of the Court's *Whiting* decision, Young urged the Court to follow through and use the (at the time) undecided *Arizona* case as a vehicle to make clear that "dual federalism is dead, and that concurrent regulation is the norm even in fields like immigration that impact foreign relations." *Id.* at 340.

[387] *See generally* Delaney, *supra* note 71, at 1826 (contending that the common methods for challenging state immigration laws, such as through preemption and Equal Protection challenges, "are insufficiently attentive to the national coordination concerns that lie at the heart of the federal interest in controlling immigration[,]" arguing that the Dormant Commerce Clause offers preferable constitutional analysis).

executive policymaking discretion.[388] Anti-commandeering doctrine is also a creature of modern federalism, but it is one that thus far has served to restrain the federal government from becoming too expansive even in the era of concurrent jurisdiction. An anti-reverse-commandeering doctrine would restrain the state government from becoming too expansive in the era of concurrent jurisdiction as well. And while Congress always has authority to cure a preemption decision it disapproves by enacting new legislation either expressly preempting or permitting the state conduct challenged, an anti-reverse-commandeering doctrine forces attention on hard constitutional limits to the authority of state and local governments to take the reins of federal immigration policy.[389]

An anti-reverse-commandeering doctrine offers a distinct and constitutionally necessary analysis that should be employed alongside, but separate from, the preemption doctrine. At a minimum, and in keeping with the modest claim, the federalism values embodied in an anti-reverse-commandeering doctrine should mobilize the preemption inquiry to address whether permitting concurrent jurisdiction in a given area of law allows states to exercise properly federal powers.

CONCLUSION

In *Arizona* and *Whiting* — two recent decisions issued back-to-back — the Supreme Court determined that state immigration laws such as Section 2(B) of SB 1070 and LAWA can survive preemption scrutiny. These laws nevertheless undermine the federal government's ability to dictate and implement a national immigration policy, and, moreover, they do so by usurping federal law enforcement prerogatives and resources. These laws, in effect, exemplify the inverse of the problem posed by federal commandeering.

Consequently, the growing proliferation of proposed state and local immigration laws should be examined doctrinally within an anti-commandeering jurisprudential frame. This is particularly needed if the Court returns to the textualist approach to reading statutes in the context of applying preemption doctrine as it did in *Whiting*. Otherwise state and local governments will have the ability to upset the carefully balanced system of dual state and national sovereignties that comprises our federalist system by passing laws that mirror federal standards while co-opting them to achieve state ends. Put another way, absent a judicial lens to assess whether federal

[388] Motomura, *Immigration Outside the Law*, *supra* note 383, at 2063-64.

[389] *See id.* at 2064; *supra* Part IV.B.

prerogatives and resources are being usurped at the state and local level, the federal government's ability to develop and implement a coherent, efficacious, and uniform immigration policy at the national level will be obstructed.

To resolve this concern, this Article simply proposes that federal courts apply the principles set forth in *Printz* and *New York* to protect federal sovereignty as well as state sovereignty. The Court has concluded that commandeering is unconstitutional when it allows one sovereign to infringe upon the sovereignty of the other in violation of principles of federalism. To decide whether a state or local government is commandeering federal law or resources, a court would need only to continue to apply its anti-commandeering principles in order to protect the sovereignty of both sovereigns in the federal system, the federal sovereign interest as well as state sovereign interests. This could be done as a specifically constitutional inquiry in the same manner as its anti-commandeering jurisprudence. Or it could be implemented in the form of a reinvigorated preemption doctrine. Either way, the Court would simply be ensuring that the balance between the dual sovereigns of our federalist system is maintained.

The future of state and local mirror-image legislation remains unclear in the wake of *Arizona* and *Whiting*. The upsurgence of support for state and local immigration laws is too politically virulent to believe that federal courts will not be further called upon to review new specimens of mirroring statutes. That review should not be limited to the question of preemption. An anti-reverse-commandeering frame is needed to assess the constitutionality of immigration federalism statutes crafted by state and local legislatures to mirror federal immigration law and place federal databases in service of state and local prosecutions. Applying anti-commandeering principles to state mirror-image statutes and other immigration federalism laws can critically assist federal courts. It creates a lens whereby textual mirroring can be understood as textual usurping where the cooperative harmony of the two statutes creates the space for discordant state and local policies, investigations, regulations, and prosecutions independent of federal efforts to enforce the same statutory provisions in derogation of federal immigration law and policy.

Specifically, applying an anti-reverse-commandeering doctrine to the current wave of immigration federalism laws is the logical evolution of an analytical framework that is needed to excavate the answer to a constitutional query. Immigration federalism laws were historically examined within a constitutional frame. A new constitutional frame, rather than the statutory interpretive frame of

preemption doctrine, now must be applied to quasi-constitutional immigration statutes in order to prevent usurpation of federal sovereignty in the immigration realm. The constitutional dimension of the anti-reverse-commandeering doctrine saves the substantive analysis and normative commitment of the inquiry, an inquiry that is now obscured in what misleadingly appears to be a preemption-driven inquiry, and, thus, misleadingly appears to be a statutory-driven question for the courts. In *Whiting* and *Arizona*, the preemption inquiry is too simplistic to capture the potential underlying constitutional harm. Under a preemption doctrine framework, the Justices were preoccupied with the following types of questions: Is the employer sanctions provision of LAWA in conflict with Sections 1324a and 1324b of the INA, as amended by IRCA? Is the E-Verify provision in LAWA in conflict with IIRIRA or DHS policy? Is Section 2(B) of SB 1070 in conflict with Section 1373(c) of the INA, as amended by IIRIRA?

The central concern is not whether any particular provision of a state immigration law is consistent or inconsistent with particular aspects of the federal immigration code and regulatory policy. The primary inquiry is whether these state laws pose a threat to the vertical separation of powers. Thus, the more relevant question, and the analysis required by federal courts applying an anti-reverse-commandeering jurisprudential framework, is whether the state immigration law allows state authorities to undermine or usurp the enforcement discretion of the federal government, while also potentially commandeering the federal resources and officers necessary to support such enforcement efforts. An anti-reverse-commandeering analysis would allow federal courts to protect sovereign identity and bring greater coherency to federal immigration law. This doctrinal shift, from the preemption doctrine to the anti-commandeering doctrine, allows federal courts to examine the constitutionality of state immigration laws through a more explicit federalist lens.