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Chamber of Commerce of U.S. v. Whiting: The Possibility of Anti-Discriminatory Immigration Reform in an Era of Resurgent Federalism

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CHAMBER OF COMMERCE OF U.S. V. WHITING: THE POSSIBILITY OF ANTI-DISCRIMINATORY IMMIGRATION REFORM IN AN ERA OF RESURGENT FEDERALISM

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I. INTRODUCTION

In April 2010, the Arizona legislature enacted Senate Bill 1070,[1] otherwise known as the Support Our Law Enforcement and Safe Neighborhoods Act,[2] to a chorus of national protest.[3] S.B. 1070 created new regulations that, in essence, outlawed the presence of undocumented immigrants within Arizona's borders by criminalizing the failure to carry immigration documents.[4] The bill's most controversial provision lent law enforcement officers broad discretion to monitor the immigration status of Arizona residents when officers possess a "'reasonable suspicion' that someone may be 'unlawfully present.'"[5] Despite the fact that critics of S.B. 1070 viewed it as gratuitous, it has inspired many other states, including Alabama,

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1. S.B. 1070, 49th Leg., 2nd Reg. Sess. (Ariz. 2010), *available at* www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf

2. Austin T. Fragomen, Jr., *State Immigration-Related Statutes and Federal Preemption: The Coming Supreme Court Decision*, 87 INTERPRETER RELEASES 2033, 2033 (2010).

3. *See e.g.*, Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES (Apr. 23, 2010). http://www.nytimes.com/2010/04/24/us/politics/24immig.html?scp=1&sq=Arizona%20SB%201070&st=cse.

4. *See id.*

5. Fragomen, *supra* note 2, at 2033. Critics charged that the "reasonable suspicion" requirement could only lead to racial profiling and institutionally-sanctioned discrimination against persons of Hispanic origin. *See, e.g.*, Alessandra Soler Meetze, *Q & A- Arizona's SB1070 Racial Profiling Bill*, ACLU (May 18, 2010), http://www.aclu.org/immigrants-rights-racial-justice/q-arizonas-sb1070-racial-profiling-bill. However, "[t]he law specifically states that police, 'may not solely consider race, color or national origin' when implementing SB 1070." Steven A. Camarota, *Center for Immigration Studies on the New Arizona Immigration Law, SB1070*, CTR. FOR IMMIGRATION STUDIES (April 29, 2010), http://www.cis.org/Announcement/AZ-Immigration-SB1070.

Georgia, Indiana, South Carolina and Utah[6]—some of which have immigrant populations significantly lower than Arizona[7]—to pass similar legislation. Since the passage of S.B. 1070, the tenor of the national debate on immigration and its effects has grown more intense, and the view espoused by proponents of enhanced subfederal[8] immigration restrictions that states are "policy innovators that represent the future of immigration enforcement"[9] seems to have become more widely accepted.[10]

Yet, under the Supremacy Clause of the United States Constitution,[11] the trend toward subfederal involvement in immigration regulation may pose a problem.[12] Decades of precedent view immigration law and regulation as areas traditionally reserved to the federal government.[13] Supremacy Clause jurisprudence thus dictates that the immigration framework embodied in the Immigration and Nationality Act (INA)[14] preempts certain subfederal legislation under the doctrines of express and implied preemption.[15] Federal preemption over certain areas of law, most notably immigration, has a long and storied history.[16] Recently, however, state and local governments have expressed an increased interest in regulating

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6. *State Omnibus Immigration Legislation and Legal Challenges*, NAT'L. CONFERENCE OF STATE LEGISLATURES (Dec. 23, 2011), http://www.ncsl.org/issues-research/immig/omnibus-immigration-legislation.aspx.

7. As of 2009, Alabama's foreign born population was 3.1% of its total population. *Alabama: Social & Demographic Characteristics*, MIGRATION POLICY INST., http://www.migrationinformation.org/datahub/state.cfm?ID=AL.
Compare this with Arizona's 14%. *Arizona: Social & Demographic Characteristics*, MIGRATION POLICY INST., http://www.migrationinformation.org/ datahub/state.cfm?ID=AZ.

8. In the context of this comment, the term "subfederal" refers to laws enacted by state and local governments as opposed to those enacted by the federal government. *See generally* Kati L. Griffith, *Discovering "Immployment" Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389, 389 (2011) (discussing subfederal employer sanctions laws and the implications and limitations Federal laws impose on subfederal laws).

9. Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1676 (2011).

10. *See generally* Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2007–2008) (arguing that immigration law has fallen naturally into the purview of state power via its increasing entanglement with criminal law).

11. The Supremacy Clause asserts that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . anything in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

12. *Id.*

13. *See infra* Part II.

14. Immigration and Nationality Act, 8 U.S.C. §§ 1101–1537 (2006).

15. *See infra* Part II.

16. *See infra* Part II.

immigration, based on a pervasive belief that the federal government has failed to control the population of undocumented immigrants and a widespread fear that states are "turning into . . . Third World cesspool[s] of illegal immigrants."[17]

When the United States Supreme Court granted certiorari to the petitioners in *Chamber of Commerce of U. S. v. Whiting*[18] on the issue of whether or not the Legal Arizona Workers Act (LAWA),[19] a statute that doles out harsh penalties to employers who fail to validate their employees' work authorization status using E–Verify,[20] was expressly or impliedly preempted by the "'comprehensive' federal scheme created by the [Immigration Control and Reform Act of 1986 (IRCA)],"[21] some pundits predicted that "the Court's conservative–leaning majority" would affirm the Ninth Circuit's prior decision in *Chicanos Por La Causa, Inc. v. Napolitano*[22] and uphold LAWA.[23] These predictions turned out to be correct, but *Whiting* hardly represents a definitive statement on the nature of immigration federalism.[24] The Roberts Court decided *Whiting* on the ground that the penalty LAWA imposes on businesses who violate its provisions falls within the licensing exception allowed for by IRCA in its savings

17. Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 13 (2007) (quoting Joseph Turner, an aide to a California state legislator who, in 2006, drafted anti–immigrant legislation that the California Superior Court eventually struck down). "The federal government's failure to achieve comprehensive immigration reform and enforce existing laws . . . has motivated local governments to implement their own immigration laws." *Id.* at 14.

18. 131 S. Ct. 1968, 1968 (2011).

19. ARIZ. REV. STAT. ANN. §§ 23–211–14 (2008).

20. A free, internet–based system designed to enable employers to check the work authorization status of their employees. *See* Fragoman, *supra* note 2, at 2036. "Employers who violate the prohibition against knowing or intentional employment of an unauthorized foreign national are subject to a range of graduated penalties—from temporary suspension of a state license up to revocation of such license." *Id.*

21. Fragoman, *supra* note 2, at 2039. *See also* IRCA, Pub. L. No. 99–603, 100 Stat. 3359 (Nov. 6, 1986).

22. 558 F.3d 856, 856 (9th Cir. 2009) (upholding LAWA on the ground that, among other things, it was not preempted by IRCA).

23. *See* Fragoman, *supra* note 2, at 2039–40. "[T]he case will implicate—and potentially place in conflict—two principal preoccupations of the Court's conservative–leaning majority: questions of federalism and states' rights on the one hand and promotion of the interests of corporations and other businesses in a uniform and predictable worksite compliance regime on the other hand." *Id.* at 2040.

24. Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1627 (1997) (explaining that "states are emerging as major players in immigration law . . . eschewing a century of judicially protected exclusive federal authority . . . . No longer will the alien's status be fixed only in Washington; no longer will the alien necessarily find herself identically situated from one state to the next.").

clause.[25] *Whiting*, in so many words, is "an opinion so narrow it squeaked when it upheld [LAWA]."[26] To understand the potential implications of *Whiting*, one must place it within the milieu of the resurgent immigration federalism that the last few years represent, and also within the broader context of post–S.B. 1070 legislation, some of which is even more extreme than its ideological forebear.[27]

Although the Court dismissed the petitioners' challenge to LAWA on the narrow ground that the penalty it imposed for violating the Act falls broadly within the category of "licensing," *Whiting* actually erodes the protections offered under federal immigration law.[28] In an era of extreme anti–immigrant sentiment, *Whiting* signifies not only that the Supreme Court will allow states to perform functions that have traditionally fallen within the purview of the federal government, but more importantly that the Court may be willing to tolerate states like Arizona and Alabama enacting even more harmful legislation.

Part II of this Comment addresses the sources of and limits to federal dominance over immigration law and regulation, otherwise known as the plenary power doctrine. This section examines nineteenth–century justifications for the plenary power doctrine as well as the presumptive foundation of this doctrine within the Supremacy Clause of the United States Constitution. Part II(a) describes the federal preemption framework, while Part II(b) considers the historical sources of the plenary power doctrine by examining some of the early foundational cases.

Part III of this Comment discusses some of the contemporary decisions that subtly eroded the plenary power doctrine and thus paved the way for the Court's decision in *Whiting*. Part IV examines *Chamber of Commerce of U. S. v. Whiting* in greater detail, describing the reasoning behind Chief Justice John G. Roberts's majority opinion

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25. *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1975 (2011). IRCA also restricts the ability of States to combat employment of unauthorized workers. The Act expressly preempts "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." § 1324a(h)(2). *Whiting*, 131 S. Ct. at 1975.

26. John Gibeaut, *Alien Resurrection: Justices Open the Door for States to Control Immigration Status*, A.B.A. J., (Aug. 19, 2011), http://www.abajournal.com/news/article/alien_resurrection_justices_open_the_door_for_states_to_control_immigration/.

27. This Comment will be focusing specifically on Arizona's SB 1070 and Alabama's H.B. 56. *See infra* Part V(a) and (b).

28. *See infra* Part II, V(c).

and Justices Stephen Breyer's and Sonia Sotomayor's dissenting opinions.

Part V of this Comment analyzes *Whiting*'s impact on current state–level legislation. Part V(a) looks to *Whiting*'s possible impact on Arizona's S.B. 1070, and part V(b) looks to its impact on Alabama's H.B. 56. Finally, Part V(c) considers whether other types of challenges to anti–immigrant laws—most notably challenges based on procedural due process—may ultimately prove more useful to opponents of state–level anti–immigrant legislation than challenges based on the preemption doctrine.

II. THE SOURCES OF AND LIMITS TO THE FEDERAL PLENARY POWER OVER IMMIGRATION

There are no specific provisions in the United States Constitution that explicitly authorize the federal government to regulate immigration,[29] and yet "[o]ver no conceivable subject is the legislative power of Congress more complete."[30] This source–less yet pervasive authority over immigration comprises the plenary power doctrine. Stephen Legomsky explains the extent of the plenary power doctrine by stating:

> When regulating immigration, Congress may discriminate on the basis of race. It may discriminate on the bases of gender and legitimacy. It may restrict aliens' political speech without having to establish a clear and present danger. With some qualifications, Congress may disregard procedural due process when excluding aliens . . . federal immigration statutes [have] been singled out for special judicial restraint . . . .[31]

In combination with the Supremacy Clause, which hypothetically "invalidates state laws that 'interfere with or are contrary to federal law,'"[32] the plenary power doctrine seemed, for a

29. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA, IN IMMIGRATION AND REFUGEE LAW AND POLICY 116 (Stephen H. Legomsky & Cristina M. Rodríguez eds., 2009).

30. *Id.* at 113 (quoting Kleindienst v. Mandel, 408 U.S. 753, 762 (1972)).

31. *Id.*

32. Lozano v. City of Hazleton, 496 F.Supp.2d 477, 518 (M.D. Pa. 2007) (quoting N. J. Payphone Ass'n, Inc. v. Town of W. N.Y., 299 F.3d 235 (3d Cir. 2002)).

time, to be unassailable.[33] This section examines the general framework of federal preemption, the nineteenth–century roots of the plenary power doctrine, and some of the foundational cases that expanded upon the federal government's dominance in the field of immigration law and policy.

A. Federal Preemption Framework: The Last, Best Hope for Federal Control Over Immigration?

The Supremacy Clause is the Constitutional basis for the doctrine of federal preemption.[34] This doctrine renders invalid any state or local law that runs counter to federal law.[35] Parties seeking to invalidate a state or local law using the preemption doctrine may choose to challenge it based on two general modes of preemption: express and implied.[36] A state or local law will be stricken down under express preemption when Congress has clearly authorized federal laws or regulations that explicitly preclude any subfederal legislation, thus making its intention apparent.[37] To determine whether the legislation manifests such an intention to preclude subfederal legislation, one must examine "the plain language of a federal statute."[38] In the context of immigration law, "a state statute is [generally] expressly preempted if it clearly attempts to regulate immigration" in a manner inconsistent with federal law.[39]

Implied preemption breaks down into two subcategories: field preemption and conflict preemption.[40] The doctrine of field preemption stipulates that "when Congress has legislated in a subject area to such an extent that it demonstrates a 'clear and manifest purpose' to keep states from enacting laws in that area," or when "a federal regulatory scheme is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,'"

33. *See, e.g, Lozano*, 496 F. Supp. 2d at 518 (quoting Gibbons v. Ogden, 22 U.S. 1, 211 (1824)).

34. McKanders, *supra* note 17, at 20–21.

35. *Id.* at 20–21.

36. *See* Fragoman, *supra* note 2, at 2034.

37. *Id.*

38. *Id.*

39. McKanders, *supra* note 17, at 21. States tend to rely on their Tenth Amendment police powers as a means of legitimating subfederal immigration legislation. *Id.* at 22. The Tenth Amendment to the United States Constitution provides that: "The 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.

40. McKanders, *supra* note 17, at 21.

state legislation may be preempted.[41] In other words, if Congress' intends to completely regulate the field with which the challenged legislation deals, there is "a 'complete ouster of state power'" and the state law will be pre–empted.[42] The doctrine of conflict preemption breaks down into three independent articulations: (1) conflict preemption exists when it would be impossible to comply with both the challenged state or local law and a federal statute; (2) conflict preemption exists when "the state law frustrates the purposes of the federal law;" and, (3) conflict preemption exists when "the state or local law is 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[43] Due in part to the pressure exerted by the combined doctrines of express and implied preemption, "state power in the area [of immigration regulation has been] reduced to a virtual nullity, [while] federal power [has been] unfettered."[44]

B. Historical Sources of the Federal Plenary Power

The Nineteenth Century saw a historic increase in the number of immigrants wishing to enter the United States.[45] Despite the fact that the Constitution does not contain any explicitly enumerated powers regarding the development of an integrated federal scheme to regulate immigration, the United States Supreme Court decided that the federal government should have nearly absolute power over immigration—or, plenary power.[46] Because the plenary power doctrine stands for the principle that "when Congress exercises [its] powers [over immigration], its decisions are final," it is closely tied to the doctrine of federal preemption.[47] In *Chae Chan Ping v. United States*,[48] otherwise known as "the Chinese Exclusion Case," the Supreme Court articulated the principle that would become known as

41. Fragoman, *supra* note 2, at 2034 (footnote omitted).

42. McKanders, *supra* note 17, at 21.

43. Fragoman, *supra* note 2, at 2034 (footnotes omitted).

44. Spiro, *supra* note 24, at 1629.

45. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 127–30 (Stephen H. Legomsky & Cristina M. Rodríguez eds., 5th ed. 2009) (discussing anti–immigrant sentiment in the late nineteenth century). *See also* Ryan Terrance Chin, Comment, *Moving Toward Subfederal Involvement in Federal Immigration Law*, 58 UCLA L. REV. 1859, 1886–89 (2011) (discussing the post–Civil War historical context of the development of a federal regulatory framework for immigration).

46. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889).

47. *See* LEGOMSKY, *supra* note 29, at 113.

48. 130 U.S. 581, 581 (1889).

the plenary power doctrine.[49] The plenary power doctrine can be thought of as a type of "immigration exceptionalism,"[50] in which federal control over immigration law and policy substantially limits, but does not eliminate, judicial review despite the clear directive of *Marbury v. Madison*.[51]

Chae Chan Ping represents the earliest, and one of the strongest, articulations of the plenary power doctrine. In this case, a Chinese laborer who had been living legally in the United States was excluded upon returning from a trip abroad even though he had obtained a certificate evidencing his right to return.[52] The Chinese Exclusion Act of 1888, which "prohibit[ed] Chinese laborers from entering the United States who had departed before its passage, having a certificate . . . granting them the right to return," barred him from reentry.[53] The Court, in upholding this exclusion, reasoned that "[t]he government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which [these] powers shall be called forth," even if the exercise of these powers may involve "exclud[ing] foreigners from the country whenever, in [Congress's] judgment, the public interests require such exclusion."[54] According to the Court in *Chae Chan Ping*, the United States government, as the representative body of a sovereign nation, possessed "sovereign powers delegated by the

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49. *See id.* at 609 (stating that "[t]he power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the constitution [sic], the right to its exercise at any time when, in the judgment of the government; [sic] the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Passage of immigration laws and the determination of rights emanating therefrom are] held at the will of the government, revocable at any time, at its pleasure.").

50. Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 339 (2002).

51. *See* 5 U.S. 137, 180 (1803) (explaining that "the particular phraseology of the constitution [sic] of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts . . . are bound by that instrument.").

52. *Chae Chan Ping*, 130 U.S. at 582–83 (1889).

53. *Id.* at 589. *See also* Act of Oct. 1, 1888, ch. 1064, §§ 1, 2, 25 Stat. 504. It is important to note that *Chae Chan Ping* was decided at a time when "racist and nativist anti–Chinese sentiment became widespread in California, and gradually gained influence on the national political scene." Hiroshi Motomura, *Immigration Law After A Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550 (1990).

54. *Id.* at 606.

constitution [sic]," and thus had the ability to ignore extant laws or adopt new ones "at its pleasure," and without legal recourse.[55]

Four years later, the Court decided *Fong Yue Ting v. United States*,[56] which presented a similar scenario, and the Court responded with a similarly expansive justification for cruel and seemingly arbitrary decisions regarding the exclusion of otherwise eligible noncitizens.[57] In *Fong Yue Ting*, Justice Horace Gray begins his majority opinion by citing a principle he traces back to *Chae Chan Ping*: "[i]t is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty . . . to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."[58] *Fong Yue Ting* upheld a law requiring Chinese laborers who wished to remain in the United States to obtain the testimony of "at least one white witness" that the laborers had been residents of the United States at the time of the passage of the Act.[59] Although *Fong Yue Ting* echoed the arbitrary justifications espoused in *Chae Chan Ping*, the Court did, in fact, reason that the Chinese laborers who filed the suit might be "permitted by the government of the United States to remain in the country," and therefore may be "entitled . . . to the safeguards of the Constitution."[60] However, the Court stated that the government of the United States still retained the unlimited "power to exclude aliens and the power to expel them," as well as the "right" to develop a more comprehensive system of immigration registration.[61] Thus, *Fong Yue Ting* articulated both that "aliens residing in the United States" are entitled to "protection of the laws" and that they "remain subject to the power of Congress to expel them"—that they are entitled to some protection, in other words, but only as much as Congress chooses to dispense.[62]

These early cases largely served to deny immigrants their procedural and substantive due process rights, but they also articulated the areas in which judicial intervention into the realm of immigration policy may have been acceptable. Although the Court in *Chae Chan Ping* deferred to Congress's plenary power over immigration, it still

55. *Id.* at 609.

56. 149 U.S. 698, 698 (1893).

57. *Id.*

58. *Id.* at 698.

59. Geary Act, ch. 60, § 6, 27 Stat. 25 § 6 (1892) (repealed 1943); *See also Fong Yue Ting*, 149 U.S. at 698–702.

60. *Fong Yue Ting*, 149 U.S. at 713.

61. *Id.* at 713, 714.

62. *Id.* at 713.

heard Chae Chan Ping's petition for a writ of habeas corpus.[63] Likewise, the Court in *Fong Yue Ting* acknowledged that under certain circumstances, the rights of noncitizens should fall within the aegis of the constitutional protection. The ideological rigidity implicit in the dictate of *United States ex rel. Knauff v. Shaughnessy*[64] that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned,"[65] diminished in later years. In the context of the late Twentieth Century, Supreme Court decisions largely respected the plenary power doctrine, with its assertion of the near–absolute powers of a "sovereign nation," but they also expanded the scope of judicial review and thereby began to carve out a space in which the constitutional rights of noncitizens could gain consideration.[66]

III. DEATH BY A THOUSAND CUTS: THE BUILDUP TO *WHITING*

In the context of the plenary power doctrine, the current trend of state–based initiatives aimed at wresting power from the federal government may seem like somewhat of an anomaly; how did states come to "reach[] into the murky regulatory zone that lies somewhere between immigration law and police authority to assert control over immigration enforcement?"[67] The answer may lie with *De Canas v. Bica*,[68] a case that, like *Whiting*, did not seem as if it would be an important statement on the continuing viability of the federal preemption framework when it was decided in 1976. Yet *De Canas*,

63. *Chae Chan Ping*, 130 U.S. at 582–83 (1889).

64. 338 U.S. 537 (1950).

65. *Id.* at 544.

66. *See, e.g.*, Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) (holding that a permanently excluded lawful permanent resident should be granted procedural due process rights, although he may be detained indefinitely due to the fact that he attempted to return to the United States after a prolonged period behind the Iron Curtain); Yamataya v. Fisher, 189 U.S. 86 (1903) (holding that procedural due process rights attach in the case of deportation proceedings, in that the noncitizen challenging her deportability status may argue that she was given neither notice nor an opportunity to be heard); Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (holding that lawful permanent residents who joined the Communist Party after their admission to the United States deserved a consideration of their procedural due process rights, even if these rights were trumped by the congressional determination that former Party members may be excluded); INS v. Chadha, 462 U.S. 919 (1983) (holding that Congress may not always argue against judicial review of matters relating to immigration based on the political question doctrine when there are legitimate constitutional issues involved); Zadvydas v. Davis, 533 U.S. 678 (2001) (arguing that the plenary power doctrine is subject to significant constitutional limitations).

67. *See* Cunningham–Parmeter, *supra* note 9, at 1688.

68. 424 U.S. 351, 351 (1976).

like *Whiting*, cracked the door open even wider for further subfederal control of immigration regulation.[69] Thus, both *De Canas* and *Whiting* can be thought of as constituting touchstones in the developing field of "'immployment' law," just as both of these decisions managed to find a middle ground between the federal preemption framework and subfederal employer–sanctions laws.[70]

A. De Canas v. Bica: The Slow Demise of the Plenary Power Doctrine

The Burger Court decided *De Canas v. Bica* in 1976, well "before the federal government enacted [its own] employer–sanctions law."[71] *De Canas* presented the issue of "whether California could enact a law that prohibited the employment of foreign nationals without work authorization . . . if such employment would have an adverse effect on lawful resident workers."[72] Writing for the majority, Justice William J. Brennan, Jr. reasoned that even though the "[p]ower to regulate immigration is unquestionably exclusively a federal power . . . the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre–empted by this constitutional power, whether latent or exercised."[73] In other words, "all state regulation of aliens [is not] *ipso facto* regulation of immigration."[74] Because the federal immigration scheme in 1976 did not necessarily "draw in the employment of illegal aliens as 'plainly within . . . [the] central aim of federal regulation,'" the Court held that the challenged California law was not preempted under the Supremacy Clause.[75] According to the Court in *De Canas*, Congress's failure to enact a federal statute sanctioning employers for knowingly hiring undocumented workers left state legislatures free to

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69. *See* Chin, *supra* note 45, at 1866 (stating that "[i]n holding that the California law was not preempted by federal law, the Court relied on the idea that the federal immigration scheme at the time did not 'draw in the employment of illegal aliens as plainly within . . . that central aim of federal regulation.'" (quoting *De Canas v. Bica*, 424 U.S. 351, 359 (1976)).

70. Griffith, *supra* note 8, at 390, 395. Griffith defines "immployment law" as "hybrids between immigration law and employment law" such as most subfederal employer–sanctions laws. *Id.* at 394.

71. *Id.* at 395.

72. Chin, *supra* note 45, at 1866; Joshua J. Herndon, *Broken Borders: De Canas v. Bica and the Standards That Govern the Validity of State Measures Designed to Deter Undocumented Immigration*, 12 TEX. HISP. J.L. & POL'Y 31, 50 (2006).

73. *De Canas*, 424 U.S. at 354–55 (citations omitted).

74. *Id.* at 355.

75. *Id.* at 359.

draft and enact their own employer–sanctions laws.[76] This logic paved the way for *Whiting* by suggesting that states need only look for gaps in the seemingly–comprehensive framework laid out by the INA or the IRCA if they wished to make incursions into immigration law and policy.

In articulating *De Canas*'s holding, Justice Brennan defined immigration regulation—the entirety of what may or may not be preempted by federal law—as "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[77] On its face, then, *De Canas* seems to shore up the preemption doctrine and thus the notion that the federal government retains plenary power over matters relating to immigration. However, Justice Brennan's definition of immigration regulation—which manages to be both narrow and vague at the same time—excludes many potentially significant categories, including employment and licensing.[78] According to the Court in *Whiting*, in *De Canas*, the federal government "had 'at best' expressed 'a peripheral concern with the employment of illegal entrants.'"[79] *De Canas* spelled out the Supreme Court's preemption framework for more than three decades until *Chamber of Commerce of U. S. v. Whiting* overruled it in 2011 on the ground that "state laws imposing civil fines for the employment of unauthorized workers like the one we upheld in *De Canas* are now expressly preempted."[80]

76. *Id.* at 358–60.

77. *Id.* at 355.

78. *See* Herndon, *supra* note 72, at 50–52.

79. Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1974 (2011), *aff'g* 558 F.3d 856 (9th Cir. 2009).

80. *See* McKanders, *supra* note 17, at 5. *Whiting*, 131 S. Ct. 1968 at 1975.

IV. *CHAMBER OF COMMERCE OF U.S. V. WHITING*: "FORCED FEDERALISM"[81] OR A NARROW EXCEPTION?

In *Chamber of Commerce of U.S. v. Whiting*, the United States Supreme Court held that federal law does not preempt a provision of LAWA that requires employers to use E–Verify because the penalties this law imposes upon employers who fail to comply with it "fall squarely within" the "licensing" exception allowed for under federal law.[82] The federal law in question was the Immigration Reform and Control Act (IRCA),[83] which was enacted ten years after *De Canas*, and which "makes it 'unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is . . . unauthorized."[84] IRCA defines "unauthorized alien" as someone who is "not 'lawfully admitted for permanent residence' or not otherwise authorized . . . to be employed in the United States.'"[85] Yet Chief Justice Roberts, writing for the majority, also admits that IRCA "restricts the ability of States to combat employment of unauthorized workers" by preempting "'any State or local law imposing civil or criminal sanctions (other than through licensing or similar laws) . . . .'"[86] Like *De Canas*, *Whiting* seems to want it both ways: it acknowledges the ostensible dominance of the federal government within the field of immigration law and regulation, and yet allows potentially problematic subfederal legislation to pass based upon a narrow, technical reading of the statutory text.

In the opinion, authored by Chief Justice Roberts, the Court holds that "Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not

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81. *See* Cunningham–Parmeter, *supra* note 9, at 1688. Cunningham–Parmeter describes "forced federalism" as "allocations of power between the two levels of government. . . . [in which] the states are . . . immigration intermeddlers. In contrast to dual federalism, which involves reserved powers, and cooperative federalism, which involves delegated powers, forced federalism involves demanded powers. The states now insist on having a seat at the table on immigration enforcement decisions, even though the federal government has not invited them . . . the source and scope of the states' authority within forced federalism constantly expends and contracts as courts produce differing pronouncements on the permissibility of the states' immigration–related conduct." *Id.* at 1688. Forced federalism "defines a legally amorphous zone between clearly impermissible state immigration actions . . . and clearly allowable conduct." *Id.* at 1724–25.

82. *Whiting*, 131 S. Ct. at 1973.

83. Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359.

84. *Whiting*, 131 S. Ct. at 1974 (quoting 8 U.S.C. § 1324(h)(3)).

85. *Id.*

86. *Id.* at 1975 (quoting § 1324a(h)(2)).

expressly preempted."[87] By holding that Arizona's law is neither expressly nor impliedly preempted by IRCA, the Court voiced support for Arizona's strategy of drafting LAWA so that its provisions mirrored those of IRCA. The Court explained that "Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects," which included adopting IRCA's definition of "unauthorized alien" and incorporating a provision that requires Arizona to request the Federal Government to verify "'whether an alien is authorized to work in the United States.'"[88] "As a result," the Court asserts, "there can by definition be no conflict between state and federal law as to worker authorization . . . ."[89] Furthermore, the Court charges that only the "egregious" act of "knowing[ly] or intention[ally] violat[ing]" LAWA triggers the revocation of a business's license;[90] thus, employers who hire unauthorized workers without affirmative knowledge or intent that they are doing so may not be penalized.[91] The Court also contends that Congress intended "to strike a balance" by "allocating authority between the Federal Government and the States" when it enacted IRCA.[92] Because Arizona was simply seeking to enforce the ban that IRCA, a federal statute, already imposed, the Court allowed LAWA to stand.[93]

In a dissenting opinion, Justice Stephen Breyer argues that LAWA does not fall within IRCA's licensing exception, despite its purposeful invocation of the word "licensing," and is thus preempted by federal law.[94] LAWA "strays beyond the bounds of the federal licensing exception" by defining license more inclusively than IRCA intended it to be defined.[95] Justice Breyer reasons that LAWA's definition of the term "license" "include[s] articles of incorporation and partnership certificates, indeed *virtually every* state–law authorization for *any* firm, corporation, or partnership to do business in the State."[96] Justice Breyer points out that according to the majority's interpretation of IRCA, the statute would "undermine" itself, and its proclaimed dominance over subfederal legislation, by "permit[ting]

87. *Id.* at 1981.
88. *Id.* at 1981 (quoting ARIZ. REV. STAT. ANN. § 23–212(B)).
89. *Whiting*, 131 S. Ct. at 1981.
90. *Id.* at 1984.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Whiting*, 131 S. Ct. at 1987 (Breyer, J., dissenting).
95. *Id.*
96. *Id.*

States to eviscerate the federal Act's preemption provision."[97] Additionally, Justice Breyer accepts the argument presented by the Chamber of Commerce and related business interests that LAWA's mandatory license suspension amounts to a so–called "business death penalty" due to the fact that it "subjects lawful employers to increased burdens and risks of erroneous prosecution," despite the majority's statements to the contrary.[98] Justice Breyer argues that these harsh penalties will disincentivize the hiring of *any* minorities within the state of Arizona, and thus will lead to increased discrimination in hiring practices.[99] Justice Breyer concludes that combined with the fact that E–Verify has actually proven to be an unreliable system for determining when someone is authorized to work in the United States, these arguments render the majority opinion in *Whiting* erroneous.[100]

Writing in a separate dissenting opinion, Justice Sonia Sotomayor argues that the majority's interpretation of IRCA's savings clause simply "cannot be reconciled with the rest of IRCA's comprehensive scheme."[101] Like Justice Breyer, Justice Sotomayor would have held that "federal law preempts the provision of the Arizona Act making mandatory the use of E–Verify" due to the fact that "Arizona has effectively made a decision for Congress regarding the use of a federal resource . . . "[102] Justice Sotomayor also points out that because Congress intended the IRCA to result in "'uniform' enforcement of 'the immigration laws of the United States,'"[103] Congress most likely did not intend "for the 50 States and countless localities to implement their own distinct enforcement and adjudication procedures for deciding whether employers have employed unauthorized aliens."[104] Justice Sotomayor suggests a reading of IRCA's savings clause that would permit States "to impose licensing sanctions after a final federal determination that a person has violated [IRCA]," thereby preserving the federal government's ultimate right to impose sanctions on those violating the law.[105]

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97. *Id.*

98. *Id.* at 1990.

99. *Id.* at 1996–97.

100. *Whiting*, 131 S. Ct. at 1997 (Breyer, J., dissenting).

101. *Id.* at 1998 (Sotomayor, J., dissenting).

102. *Id.*

103. *Id.* (quoting Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359)

104. *Id.* at 2003.

105. *Id.* at 1998.

V. THE ROAD TO NOWHERE?: *WHITING*'S IMPACT ON CURRENT STATE–LEVEL IMMIGRATION EFFORTS

Before the Court delivered its decision in *Whiting*, scholars speculated that the issue—a relatively technical and academic one on its face—had the capacity to "implicate—and potentially place in conflict—two principal preoccupations of the Court's conservative–leaning majority."[106] These preoccupations are "questions of federalism and states' rights on the one hand and the promotion of the interests of corporations and other businesses in a uniform and predictable worksite compliance regime on the other hand."[107] Given this context, *Whiting* managed to create an unusual alliance of civil rights activists and business organizations, including the Service Employees International Union,[108] the Asian American Justice Center,[109] the National Immigrant Justice Center,[110] Associated Builders and Contractors, Inc., and the Chambers of Commerce of Illinois, Indiana, Kansas, Kentucky, New Jersey, and West Virginia, as well as related business organizations from many other states.[111] All of these groups were united in opposition to LAWA and its potentially debilitating effects on both the immigrant and the business communities.[112]

Many current state–level immigration laws are unabashedly modeled after S.B. 1070,[113] and coalitions as unlikely as the one that

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106. *See* Fragomen, *supra* note 2, at 2040.

107. *Id.*

108. *See* Brief for Service Employees International Union et al. as Amicus Curiae Supporting the Petitioners, Chamber of Commerce of the U. S. v. Whiting, 131 S. Ct. 1968, 1968 (2011) (No. 09–115).

109. *See* Brief for Asian American Justice Center et al. as Amicus Curiae Supporting the Petitioners, Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1968 (2011) (No. 09–115).

110. *See* Brief for National Immigrant Justice Center et al. as Amicus Curiae Supporting the Petitioners, Chamber of Commerce of the U. S. v. Whiting, 131 S. Ct. 1968, 1968 (2011) (No. 09–115).

111. Brief for Business Organizations as Amicus Curiae Supporting Petitioners, Chamber of Commerce of the U. S. v. Whiting, 131 S. Ct. 1968, 1968 (2011) (No. 09–115).

112. John Gibeaut, *Alien Resurrection: Justices Open the Door for States to Control Immigration Status*, A.B.A. J., Aug. 2011, at 22, *available at* http://www.abajournal.com/magazine/article/alien_resurrection_justices_open_the_door_for_states_to_control_immigration/.

113. *See* Seth Freed Wessler, *Bills Modeled After Arizona's SB 1070 Spread Through States*, COLORLINES (March 2, 2011, 10:33 AM), http://colorlines.com/archives/2011/03/sb_1070_copycat_bills.html;Brian Lawson, *U.S. Supreme Court Look at Arizona Immigration Law Will Affect Alabama Law*, AL.COM (Dec. 12, 2011, 6:30 PM)), http://blog.al.com/breaking/2011/12/us_supreme_court_look_at_arizo.html (stating that

emerged to oppose LAWA have arisen in these states as well.[114] State officials "greeted [*Whiting*] as a signal that the high court may be willing to consider" hearing challenges to S.B. 1070.[115] Indeed, the Ninth Circuit Court of Appeals enjoined enforcement of S.B. 1070 in April 2011,[116] and on December 12, 2011, the Supreme Court issued an order announcing that it would hear Arizona's appeal of the Ninth Circuit decision.[117] Given that "the states and the courts likely will run immigration law and policy for the foreseeable future,"[118] and that there is such broad opposition to these laws among civil rights activists and traditionally conservative business organizations, it is important for advocates of comprehensive immigration reform to understand how the new state–level laws work and how to oppose them successfully.

A. Arizona's S.B. 1070

S.B. 1070 creates "a state trespassing violation for unlawful presence" in addition to "[r]equir[ing] state and local law enforcement to . . . attempt to determine the immigration status of a person involved in a lawful stop, detention or arrest" based on "reasonable suspicion."[119] Similarly, the statute makes it illegal "for an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor."[120]

S.B. 1070 is widely considered to be "the granddaddy of single–state immigration bills . . . ."[121] Yet, despite its broad–ranging

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"[s]ome sections of Arizona's law are nearly identical to Alabama's. Those include sections dealing with immigration checks by law enforcement and a section criminalizing job–seeking by day laborers.").

114. Gibeaut, *supra* note 112, at 22.

115. *Id.*

116. Adam Liptak, Justices *Uphold State Law Penalizing Hirers of Illegal Aliens*, N.Y. TIMES, May 27, 2011, at A18.

117. Ian Millhiser, *Supreme Court Will Hear SB1070 Case, Justice Kagan Is Recused*, THINKPROGRESS (Dec. 12, 2011, 10:29 AM), http://thinkprogress.org/justice/2011/12/12/387434/supreme–court–will–hear–sb1070–case–justice–kagan–is–recused/.

118. Gibeaut, *supra* note 112, at 22.

119. Ann Morse, *Arizona's Immigration Enforcement Laws*, NAT'L CONF. OF ST. LEGIS. (Jul. 28, 2011), http://www.ncsl.org/issues–research/immig/analysis–of–arizonas–immigration–law.aspx.

120. *Id.*

121. Scot Kersgaard, *Pearce Allies Attempt to Manipulate Recall Election*, COLO. INDEP. (Oct. 10, 2011, 9:01 AM), http://coloradoindependent.com/102069/pearce–allies–attempt–to–manipulate–recall–election.

influence, the Obama administration successfully challenged S.B. 1070—in a move seen as highly unusual[122]—and the law was enjoined by the Department of Justice in July 2010.[123] In a press release, Arizona Governor Jan Brewer, who signed S.B. 1070 into law, responded to the Obama administration's injunction by arguing that:

> The truth is the Arizona law is both reasonable and constitutional. It mirrors substantially what has been federal law in the United States for many decades. Arizona's law is designed to complement, not supplant, enforcement of federal immigration laws. Despite the Department of Justice's claims . . . Arizona is not trying 'to establish its own immigration policy' or 'directly regulate the immigration status of aliens.'[124]

In this statement, Brewer makes plain the Arizona legislature's strategy for circumventing preemption, which points to LAWA's success in "mirror[ing] substantially" IRCA's savings clause. That S.B. 1070 failed where LAWA succeeded is interesting indeed, and has given hope to some opponents of harsh subfederal anti–immigrant legislation.

The coming Supreme Court decision regarding S.B. 1070 may disclose exactly how much leeway the Roberts Court is willing to cede to states in determining the scope and extent of certain facets of their own immigration policy. Of course, the ultimate decision may be less surprising now that Justice Elena Kagen has recused herself.[125] Although Justice Kagan's absence may prove to be a boon to proponents of subfederal immigration regulation and anti–immigrant activists alike, it may also have no effect at all; if the remaining eight Justices split evenly down the middle, then the Ninth Circuit's

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122. *See* Kris W. Kobach, Op-Ed., *Why Arizona Drew a Line*, N.Y. TIMES, Apr. 29, 2010, at A31, *available at* http://www.nytimes.com/2010/04/29/opinion/29kobach.html?scp=4&sq=Arizona%20SB%201070&st=cse (stating "Predictably, groups that favor relaxed enforcement of immigration laws, including the American Civil Liberties Union and the Mexican American Legal Defense and Education Fund, insist the law is unconstitutional. Less predictably, President Obama declared it "misguided" and said the Justice Department would take a look.").

123. *State Omnibus Immigration Legislation and Legal Challenges*, NAT'L CONFERENCE OF STATE LEGISLATURES, (Dec. 23, 2011), http://www.ncsl.org/default.aspx?TabId=22529.

124. Press Release, Governor Jan Brewer, Governor of the State of Arizona (July 6, 2010) (on file with author), *available at* http://azgovernor.gov/dms/upload/PR_070610_StatementGovBrewer.pdf.

125. Millhiser, *supra* note 117. Justice Kagen also took no part in deciding the writ of certiorari. *Id.*

decision, and the Department of Justice's injunction, may remain in place, and *Whiting*'s impact on the underlying issue of S.B. 1070's constitutionality may remain uncertain.[126]

B. Alabama's H.B. 56

Alabama's H.B. 56, otherwise known as the Beason–Hammon Alabama Taxpayer and Citizen Protection Act,[127] is generally described as the "harshest anti–immigrant state law . . ." among the wave of post–S.B. 1070 legislation, comprising "'a wish list of restrictionist immigration provisions at the state law level.'"[128] It has been almost "universally condemned by immigrant and civil rights groups,"[129] and holds the unique distinction of uniting prominent religious leaders, including Roman Catholic and United Methodist Bishops,[130] with more traditional advocates for immigrants' rights like the American Civil Liberties Union and the National Immigration Law Center.[131] Just as opposition to S.B. 1070 demonstrates that this law has the potential to adversely impact Arizona's economy, opposition to H.B. 56 reveals how the interests of many seemingly unrelated groups could be affected by such a drastic law. H.B. 56 "attempts to criminalize every aspect of life for immigrants by making it illegal for undocumented immigrants to work, rent housing, go to school and get a ride in the state."[132] H.B. 56 criminalizes any unauthorized presence in the state of Alabama, and renders undocumented immigrants' contracts void.[133] Alabama's law received harsh censure when media outlets reported that Hispanic families had withdrawn their children from school en masse[134] and that

126. *Id.*

127. ALA. CODE §§ 31–13–1–30 (2011)

128. Julianne Hing, *The Legal Case Against Alabama's Worst–in–the–Country Immigration Law*, COLORLINES (June 21, 2011, 10:45 AM), http://colorlines.com/archives/2011/06/whats_so_wrong_with_alabamas_hb_56.html (citing Kevin Johson, dean of law at the University of California, Davis).

129. *Id.* at 115.

130. Kent Faulk, *Religious Leaders Battle Alabama Immigration Law*, THE CHRISTIAN CENTURY (Aug. 19, 2011), http://www.christiancentury.org/article/2011–08/religious–leaders–battle–alabama–immigration–law.

131. *Federal Court Ruling on Alabama's Anti–Immigrant Law Undermines Fundamental American Values*, ACLU (Sept. 28, 2011), https://www.aclu.org/immigrants–rights/federal–court–ruling–alabamas–anti–immigrant–law–undermines–fundamental–american.

132. Hing, *supra* note 128.

133. *Id.*

134. Audrey Singer & Jill H. Wilson, *Why Immigration Uproar Went Nationwide*, CNN.COM (Oct. 24, 2011, 7:57 PM), http://www.cnn.com/2011/10/24/opinion/singer–immigration–nationwide/index.html.

"[m]uch of [Alabama's tomato] crop [rotted on the vine] as many of the migrant workers who normally work [the] fields . . . moved to other states to find work after Alabama's immigration law took effect."[135]

In October 2011, the United States Court of Appeals for the Eleventh Circuit struck down certain provisions of H.B. 56, including the requirements that public schools track the immigration status of all of their students and the provision "allow[ing] the state to charge someone who fails to produce proof of legal status with a criminal offense."[136] However, the remainder of H.B. 56 was allowed to stand, including the "reasonable suspicion" provision borrowed directly from S.B. 1070, which allows law enforcement officers to detain anyone they suspect of being present in the United States without authorization.[137] This is notable because when the Ninth Circuit enjoined S.B. 1070 in its entirety, it did so based in part on a provision similar to this one.[138] Although law enforcement officers in Alabama are currently permitted to do what those in Arizona are not to, H.B. 56 has met with resistance on such a broad scale that it has become a lesson in the principle of unintended consequences.[139]

C. Due Process Challenges: A Stronger Argument than Federal Preemption?

Unfortunately, *Whiting* may have opened the floodgates for more "copycat" legislation that mimics Arizona's tried and tested Legal Arizona Workers Act. While LAWA is certainly not as far-reaching or reactionary as S.B. 1070, it has been granted the seal of approval by the Roberts Court.[140] Current challenges to subfederal legislation that focus on preemption now run the risk that, like Arizona, states will go the *Whiting*-sanctioned "extra mile" to ensure

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135. *The 10 Numbers You Need to Know About Alabama's Anti-Immigrant Law: State Can Say Goodbye to Hundreds of Millions in Tax and Farm Revenue*, CTR. FOR AM. PROGRESS (Nov. 14, 2011), http://www.americanprogress.org/issues/2011/11/top_10_alabama_immigration.html.

136. Muzaffar Chishti & Claire Bergeron, *Eleventh Circuit Ruling on Alabama's HB 56 Fuels Debate over the Limits of State Immigration Measures*, MIGRATION POLICY INST. (Oct. 18, 2011), http://www.migrationinformation.org/feature/display.cfm?ID=857.

137. *Id.*

138. *Id.*

139. Corey Dade, *Have the Crackdowns on Immigration Gone Too Far?*, NPR (Nov. 25, 2011), http://www.npr.org/2011/11/25/142674917/have-the-crackdowns-on-immigration-gone-too-far.

140. *See supra* text accompanying notes 82–93.

that they closely track federal provisions "in all material respects."[141] If opponents of anti–immigrant legislation wish to challenge H.B. 56 and similar statutes, they may need to look beyond preemption to the Due Process Clauses of the Fifth and Fourteenth Amendments,[142] which have historically afforded procedural rights to certain noncitizens,[143] and may also provide a foundation for economic challenges to subfederal legislation that mirrors S.B. 1070 and H.B. 56.

In 2005, the Supreme Court decided *Clark v. Martinez*,[144] which extended the guarantee of procedural due process to inadmissible noncitizens by holding that they may not be detained indefinitely beyond a period "reasonably necessary" to achieve their removal.[145] Alabama's law stipulates, in part, that people who are stopped and arrested without a valid license may be brought before a magistrate and detained until prosecution.[146] This specific provision resulted in significant negative publicity for the state when a German Mercedes–Benz executive was arrested and detained for driving

141. *Whiting*, 131 S. Ct. at 1981 (2011).

142. U.S. CONST. amend. V. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.* U.S. CONST. amend. XIV, § 2. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

143. *See, e.g.*, INS v. Chadha, 462 U.S. 919 (1983) (holding that Congress may not always argue against judicial review of matters relating to immigration based on the political question doctrine when there are legitimate constitutional issues involved); Zadvydas v. Davis, 533 U.S. 678 (2001) (arguing that the plenary power doctrine is subject to significant constitutional limitations).

144. 543 U.S. 371 (2005).

145. *Id.* at 385–87. Ninety days is considered to be a reasonable period, although inadmissible noncitizens may be detained for longer periods. *Id.*

146. ALA. CODE § 32–6–9 (2011). "Every licensee shall have his or her license in his or her immediate possession at all times when driving a motor vehicle and shall display the same, upon demand of a judge of any court, a peace officer or a state trooper. . . . if a law officer arrests a person for a violation of this section and the officer is unable to determine by any other means that the person has a valid driver's license, the officer shall transport the person to the nearest or most accessible magistrate. . . . If the person is determined to be an alien unlawfully present in the United States, the person shall be considered a flight risk and shall be detained until prosecution or until handed over to federal immigration authorities." *Id.*

without his passport.[147] Given the Supreme Court's dictate in *Martinez* that even undocumented noncitizens may not be detained indefinitely, it is possible that H.B. 56 and legislation containing comparable provisions may be vulnerable to attack on this front. Likewise, S.B. 1070, H.B. 56, and similar laws may be susceptible to challenges based on the theory that their far-reaching economic consequences deprive citizens and noncitizens alike of property without due process of law. Despite the optimistic title of H.B 56—the Taxpayer and Citizen Protection Act—"the law is certain to be a drag on economic development even without considering costs associated with enforcement of the law."[148] Alabama's economy could potentially lose an estimated $40 million as a result of the departure of undocumented workers and laborers,[149] a figure that does not factor in the loss of the state and local tax revenue paid by families headed by undocumented immigrants, which totaled $130,298,333 in 2010.[150] The labor shortages that resulted from H.B. 56 have also caused significant losses in Alabama's agricultural industry. Alabama farmers have claimed losses of $100,000 and $300,000 due to the labor shortages that followed in H.B. 56's wake.[151] It is true that H.B. 56 is less than one year old, and thus the full measure of its economic effects may be difficult to ascertain. If H.B. 56 does indeed prove to have a detrimental impact on Alabama business and industry, then advocates for immigrants' rights may have an easier time making arguments based on due process claims, as there may be demonstrable proof that citizens were deprived of "property, without due process of law."[152] Whether these advocates choose to foreground the plight of

147. Will Oremus, *Mercedes Exec Arrested Under Ala. Immigration Law*, SLATE (Nov. 21, 2011, 7:48 PM), http://slatest.slate.com/posts/2011/11/21/mercedes_benz_executive_arrested_under_alabama_immigration_law.html.

148. SAMUEL ADDY, THE NEW ALABAMA IMMIGRATION LAW: A PRELIMINARY MACROECONOMIC ASSESSMENT 1(2011), *available at* http://cber.cba.ua.edu/rbriefs/New%20AL%20Immigration%20Law%20-%20Prel%20Macro%20Assessment-1.pdf.

149. *Id.* "For example, conservatively assuming that an illegal worker makes $5,000 a year (about $20 a day for 250 days of work or some other combination), the absence of say 10,000 illegal workers would mean a $40 million contraction in the Alabama economy allowing for repatriation of 20 percent of income to home countries." *Id.*

150. *Unauthorized Immigrants Pay Taxes, Too*, AM. IMMIGRATION COUNCIL (Apr. 18, 2011), http://www.immigrationpolicy.org/just-facts/unauthorized-immigrants-pay-taxes-too.

151. *The 10 Numbers You Need to Know About Alabama's Anti-Immigrant Law: State Can Say Goodbye to Hundreds of Millions in Tax and Farm Revenue*, CTR. FOR AM. PROGRESS (Nov. 14, 2011), http://www.americanprogress.org/issues/2011/11/top_10_alabama_immigration.html.

152. U.S. CONST. amend. XIV, § 2.

noncitizens subject to periods of potentially indefinite detention or the dilemma faced by farmers whose customary labor force has evaporated may rely, in large part, on the Supreme Court's decision regarding the constitutionality of S.B. 1070.

VI. CONCLUSION

In holding that federal law neither expressly nor impliedly preempts LAWA, *Chamber of Commerce of the U.S. v. Whiting* did not noticeably undermine the requirement that subfederal immigration laws and regulations must comply with the federal preemption framework, nor did it depart radically from the precedent established by *De Canas v. Bica* and earlier decisions. It did, however, serve to reveal a failsafe method to states wishing to enact their own immigration policy; they must simply, like Arizona, go "the extra mile" to ensure that their laws closely track federal law "in all material respects."[153] While it unambiguously revealed a method for circumventing preemption, the Court in *Whiting* limited itself to the facts of the case before it by hinging its decision on "a single concept—the idea of license . . . ."[154] Even within the circumscribed context of this case, however, opponents of future subfederal anti–immigrant legislation may still have a more difficult time asserting arguments based upon the Supremacy Clause and the doctrine of federal preemption when challenging state and local laws. This difficulty becomes more evident considering that a legal scholar recently claimed that the Supreme Court's preemption jurisprudence continues to be, at worst, "a disorderly jumble that . . . obscure[s] . . . federalism's boundaries," and at best an area governed by an overly narrow holding that may be difficult to apply to subsequent cases.[155]

What is certain, however, is that while *Whiting* may have "amounted to a green light for vigorous state efforts to combat the employment of illegal workers,"[156] these efforts have not had uniform success, and have had the unintended consequence of solidifying a diverse coalition of opponents whose criticism grows louder—and more public—every day.

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

154. Gibeaut, *supra* note 112, at 22.

155. Cunningham–Parmeter, *supra* note 9, at 1691(footnote omitted).

156. Adam Liptak, *Illegal Workers: Court Upholds Faulting Hirers*, N.Y. TIMES, May 27, 2011, at A18, *available at* http://www.nytimes.com/2011/05/27/us/27scotus.html?_r=1&hp.

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