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The Power to Regulate: State vs. Federal Authority in Immigration Law

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Political Science Honors Thesis

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Chapter 1

Immigration in the United States

One issue that has become increasingly relevant in American society over the past several years is that of immigration. The Department of Homeland Security Office of Immigration Statistics published a report in January of 2010 that shares estimates of the number of unauthorized immigrants residing in the United States at that time. These estimates were found by subtracting legal permanent residents (LPRs), naturalized citizens, asylees, refugees, and nonimmigrants from the current estimates of the total foreign-born population (Hoeffler, Rytina, and Baker 2010, 1). The estimate given in the report states that in January of 2010, the approximate number of unauthorized immigrants living in the United States was 10.8 million, and the report goes on to explain that between 2000 and 2010, the population of unauthorized immigrants in the United States had grown by 27% (Hoeffler, Rytina, and Baker 1).

Because of the significant increase in the unauthorized immigrant population since 2000, politicians and the public have moved issues concerning immigration into the political spotlight, citing problems such as a lack of jobs for U.S. citizens and national security issues as cause for the necessity of immigration policy reform. Due to such concerns more recently, states have been making an effort to deal with what they perceive as the immigration problem on a state level, instead of relying solely on the efforts of the federal government and federal law. States have voiced concerns over the role of the federal government in dealing with illegal immigration. Republican Arizona Governor Jan, who has been involved in Arizona's immigration policy reform, explains that "decades of federal inaction and misguided policy have created a dangerous and unacceptable situation," which represents the cynical view currently being taken by many

state governments toward the federal government's lack of adequate action, which has led to an increase in the creation and enactment of state immigration law (Vicini 1). One significant instance of this comes from Arizona, where a law created in 2007, the Legal Arizona Workers Act, aimed at discouraging employers from hiring unauthorized aliens sparked an interesting debate on what authority the states should have and what authority belongs only to the federal government concerning the control and regulation of immigration in the United States. As can be seen from the Court's decision in the case, Arizona appears to be setting a trend amongst many states that have and will use the Court's opinion in this case to form their own immigration policies and regulations. It is also important to consider, though, the complexities involved in federal immigration law and how they affect what is and is not allowed of states, an idea that is not necessarily clear-cut.

Arizona Ignites State Immigration Law Debate

On May 26, 2011 in *Chamber of Commerce of the United States of America et al. v. Whiting et al.*, the U.S. Supreme Court upheld, in a 5-3 decision, the Legal Arizona Workers Act. The Act, which went into effect on January 1, 2008 and was later amended, effective May 1, 2008, requires Arizona employees to use a system called E-Verify upon hiring all new employees. Congress created E-Verify, an online system offered by the Department of Homeland Security that allows employers to check the "work authorization status of employees" in the hopes of improving the "verification process in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)." (*Chamber of Commerce of the United States of America et al. v. Whiting et al.* 2011, 1) In connection with this program, some states, such as Arizona, have created laws intended to discourage employers from hiring unauthorized aliens by requiring

employers to use E-Verify. Under the Legal Arizona Workers Act, employers who “knowingly or intentionally” hire an “unauthorized alien,” which the statute defines as “an alien who does not have the legal right or authorization under federal law to work in the United States,” may lose their business licenses (Home 1). By requiring employers to use the E-Verify Internet system, Arizona intends to avoid rebuttals stating that an employer unknowingly hired an unauthorized alien.

Understanding Federal Preemption

It is important to understand the function of preemption in federal law in order to further consider the implications of the Arizona case that has been an influential aspect of the immigration reform debate. Stephen Wermiel succinctly distinguishes between different types of preemption. He points out that preemption does not always exist “simply because a federal law and a state law relate to the same subject.” (2) There must be some sort of preemption present within the wording of a federal law in order for it to exist and have influence over state law. Wermiel first discusses express preemption, which is when Congress “specifically says that it intends to preempt all state laws in a field.” (2)

Then, there is what is known as implied preemption, which Wermiel notes is more difficult in legal disputes (2). Implied preemption exists when “Congress has not made its intention entirely clear,” hence the difficulty in dealing with it (Wermiel 2). Wermiel states that implied preemption can be seen in two types of scenarios. The first he refers to as “conflict preemption,” which occurs when a conflict arises between federal and state laws, meaning that it is either “difficult or impossible to comply with both.” (Wermiel 2) The second type of implied preemption happens when a law is passed by Congress that “leaves no room for state regulation,”

which Wermiel says is sometimes referred to as “field preemption, because Congress has occupied the field.” (2)

The Role of Federal Preemptions to State Immigration Policy

The Arizona case was brought forward against the Legal Arizona Workers Act by the Chamber of Commerce of the United States, as well as various businesses and civil rights organizations who claimed that the law’s “license suspension and revocation provisions were both expressly and impliedly preempted by federal immigration law, and that the mandatory use of E-Verify was impliedly preempted.” (*Chamber* 2011, 2) The federal immigration law to which they referred is the Immigration Reform and Control Act of 1986 (IRCA), which makes it unlawful for someone to “hire, or to recruit or refer for a fee, for employment...an alien knowing the alien is an unauthorized alien.” 8 USC Section 1324a (a)(1)(A) According to the IRCA, violators of the law may be subject to federal civil and criminal sanctions. The law also includes a preemption clause in Section 1324a(h)(2) that preempts a state or local law that would impose criminal or civil sanctions, “other than through licensing and similar laws,” upon employers of unauthorized aliens, a fact that the Chamber of Commerce used to argue the invalidity of Arizona’s legislation.

The District Court ruled that the “plain language” of the preemption clause in IRCA did not make the Arizona law invalid, because the Arizona law dealt with licensing conditions, which the IRCA clearly expressed as an exception to the stated preemptive clause concerning state imposed sanctions. For this reason, the law could be considered to be neither explicitly not impliedly preempted. The Court also ruled that the state law was not preempted in regards to E-Verify. While Congress did not make participation in the program mandatory on a national scale,

Congress had “expressed no intent” to prohibit the states from requiring participation in the program (*Chamber* 2011, 2). The Ninth Circuit Court affirmed the judgment of the District Court, and the U.S. Supreme Court followed suit, with Chief Justice Roberts delivering the opinion of the Court.

Roberts begins his opinion by explaining the Immigration and Nationality Act (INA) of 1952, which established a “comprehensive federal statutory scheme for regulation of immigration and naturalization,” and was primarily focused on the terms and conditions of admission to the country and the treatment of aliens that are lawfully in the United States (*Chamber* 2011, 2). As Roberts explains in the Court’s opinion, after the INA was enacted, multiple states created laws that, like Arizona’s law, prohibited employers from hiring people who were not legal residents of the United States, showing that the employment of unauthorized aliens has been an issue for more than just the last decade.

De Canas v. Bica Gives Power to the States

Chief Justice Roberts cited *De Canas v. Bica*, 424 U.S. 351 (1976) as a precedent in his opinion. The *De Canas* case was the first in which the Court dealt with the relationship between federal immigration law and state laws that dealt with the issue of employment of unauthorized aliens. In that case, as Roberts explains, the Court found that the states have the power to regulate employment in a way that may protect workers within a state. Ten years after *De Canas*, the IRCA was put into law, which does not allow states to “combat employment of unauthorized workers” through criminal or civil sanctions such as fees, which were deemed valid in *De Canas*.

Chief Justice Roberts found that Arizona’s Legal Arizona Workers Act reflects the interest of the state in protecting its workers. Although fines such as those that were implemented

in the statute in *De Canas* to employers who hired unauthorized aliens were preempted by the IRCA, Arizona's statute still fell in line with the concepts in *De Canas* that pointed out employment protection as a valid function of the state. Because one major concern over a growing immigrant population in the United States is consistently a supposed loss of jobs for citizens, since the jobs are being cited as taken by unauthorized aliens, the Arizona policy functions as a form of employment protection for U.S. citizens, by prohibiting those jobs from going to unauthorized aliens and leaving more jobs open for Americans, an idea that clearly matches the decision of the Court in *De Canas*.

The IRCA preempts civil and criminal sanctions from the state, but points out that the licensing laws and similar laws are an exception to the preemption. Because of this, as well as the fact that the Court had previously found that the states possess the power to regulate employment within their state, the Court held in the Arizona case that the federal preemptions did not apply, and therefore Arizona had the power to suspend or revoke the license of any employer who knowingly hires an unauthorized alien. Of course, the Court's decision meant that Arizona could implement its new law, but it also signified to other states that certain forms of state immigration policy would be deemed constitutional, with the Arizona case setting a new precedent in the American legal system.

A Current State Trend in Immigration Policy

Arizona's Legal Arizona Workers Act, as well as its various other immigration policy, some of which is still currently under scrutiny, such as Bill 1070, the Support Our Law Enforcement and Safe Neighborhoods Act, which would allow police to request documentation from individuals at a "lawful stop, detention or arrest," has caused Arizona to be viewed by

many other states as a model for immigration policy and reform. Several other states have begun creating their own immigration laws involving economic regulations, such as the E-Verify implementations found in Georgia, South Carolina, and Oklahoma; state police powers and documentation requirements, as can be seen in state legislation in Arizona, Alabama, Indiana, and Utah; and even some legislation that actually provides benefits for immigrants, such as providing them with in-state tuition, which is currently in the works or in place in states like Texas, California, and Maryland.

The Supremacy Clause: Limits to State Authority

While states are creating new policies that cover a wide array of topics concerning immigration, it is important to note that the Supreme Court's decision in *Chamber of Commerce v. Whiting* only states that Arizona's law concerning prohibition of the hiring of unauthorized workers is constitutional; however, that does not mean that states are now going to be able to put into effect any sort of immigration controls or regulations that they might like to implement.

Article VI of the United States Constitution contains what is referred to as the Supremacy Clause, which says the following:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding. (U.S. Const., Art. VI, cl. 2)

In other words, states have the authority to create and enforce laws; however, if a conflict arises between federal law and state law, then states must follow the federal law. The IRCA does

include preemptions that may invalidate different forms of state immigration law in the future, and if the Courts decide that a certain form of immigration policy from a state conflicts with the federal law of the IRCA, then it will most certainly be struck down.

Defining State and Federal Powers in Immigration Policy

Two questions arise from a consideration of the IRCA, the Court's decision in *Chamber of Commerce v. Whiting*, and the function of the Supremacy Clause in state versus federal authority. First, where does the line fall between federal and state authority in terms of immigration law and regulation? While the Supremacy Clause explains that governing authority is ultimately given to the federal government in areas that have been clearly set forth, states still have a certain degree of power in regulating immigration within their state, but the distribution of power between federal and state governments in regards to immigration policy should be clearly defined, something that the Courts may be deciding in the next few years. Second, if the states do have clear authority to regulate immigration, then in what specific areas are they allowed to do so under the IRCA? As was previously mentioned, immigration can be regulated through various means by the government, whether it is through economic policies or criminal and civil means concerning things like legal documentation, but it is important to form an understanding of which policies states should be trying to implement, if they choose, and which will fail the legal tests of the Courts. Ideally, a pattern can be determined by which states will be able to recognize where their authority truly lies in terms of immigration policy-making.

Chapter 2

Current State Legislation on Immigration

As was previously noted, the increasing immigrant population in the United States, as well as the appearance of laws such as the Legal Arizona Workers Act, have led to the creation and enforcement of other state immigration laws, which deal with issues ranging from economics, to documentation concerns, to even some laws that would benefit immigrants in areas like state education. As more laws are passed on a state level, the debate concerning where the power to regulate immigration lies will continue to become more and more relevant. By considering the bases and the intent of several different state laws, we may better understand the issues involved in the state versus federal authority debate, as well as the ramifications of these state bills on both a state and a national scale.

Economic Regulation

One way in which states have attempted to combat the increasing numbers of illegal immigrants is through the discouragement placed on employers to hire the immigrants. As will be addressed later, legislation focused on benefitting the economic interests of a state tends to have some leeway within the courts. Because of this, states such as Oklahoma, Georgia, and South Carolina have enacted laws that are centered on regulating local and state businesses by creating stringent requirements on which employment must be based.

Oklahoma and the Citizens and Taxpayers Protection Act

Oklahoma enacted HB 1804, the Citizens and Taxpayers Protection Act, in 2007. The law is described as being “tough on employers violating the law” and is said to prevent “illegal aliens from obtaining drivers licenses and benefits, while still protecting the privileges and immunities of U.S. citizens.” (Immigration Reform for Oklahoma Now) HB 1804 contains a combination of “criminal, fiscal, and anti-fraud provisions” restricting the “ability of illegal aliens to unlawfully work and reside” within the state of Oklahoma (Immigration Reform for Oklahoma Now). The intent of the law points to the problems that illegal immigration may cause for the state’s economy, and while it does include sections that directly concern themselves with non-economic issues such as police power and official documentation, the state of Oklahoma has focused overwhelmingly in this act on economic issues and has attempted to combat what they view as negative economic ramifications arising from the increasing population of illegal immigrant workers.

Section 7 of HB 1804 requires all public employers to use the “Basic Pilot electronic work authorization verification program.” (Immigration Reform for Oklahoma Now) Just as Arizona’s Legal Arizona Workers Act does, Oklahoma’s law requires the use of the current system, E-verify, before an employer hires a worker. Section 7 even goes so far as to require that all public contractors within the state of Oklahoma register with the program before they are even permitted to begin work on any “taxpayer-funded contract.” (Immigration Reform for Oklahoma Now) Finally, Section 9 of HB 1804 states that employers will withhold state income tax for independent contractors who do not provide a Social Security number, which Oklahoma hoped would reduce “the incentive to hire illegal aliens as cheap day laborers and contractors.” (Immigration Reform for Oklahoma Now) This aspect of the law was intended to “safeguard

workers compensation and other labor law protections against abuse.” (Immigration Reform for Oklahoma Now)

Sections 7 and 9 of HB 1804 both establish clearly economic intentions that reflect those of Arizona’s Legal Arizona Workers Act. Based on the similarities between the two state laws, in respect to their requirement that employers use an electronic verification system to ensure that illegal immigrants are not hired, it appears that Oklahoma’s law, whether truly successful in its fulfilling its intended purpose or not, fits the notion of the Supreme Court that economic regulation on a state level is constitutional, because its primary interest is the economic condition of the state. While illegal immigrants are clearly an important factor of the legislation, the ultimate goal, according to Oklahoma, is to safeguard jobs for citizens.

The Georgia Security and Immigration Compliance Act

SB 529 was passed in Georgia in 2007. The bill covered a wide array of issues, and only part of the law deals with issues of immigration. Its intent expresses a need to “provide for the comprehensive regulation of persons in this state who are now lawfully present in the United States.” (ga.gov) Section 1 of this law clearly states that the requirements listed in the act that concern immigration or the “classification of immigration status” will be “construed in conformity with federal immigration law.” (Sec. 1) The fact that such a statement was explicitly entered into the bill shows an awareness of the issues that can and do often arise with state immigration legislation. In this case, Georgia chose to directly address the issue by claiming that the act would conform to federal law concerning immigration.

Article 3 (13-10-90) requires the use of “the electronic verification of work authorization programs” that are operated by the United States Department of Homeland Security in order to

“verify information of newly hired employees, pursuant to the Immigration Reform and Control Act of 1986 (IRCA).” (ga.gov) Again, just as Arizona and Oklahoma have done, Georgia has provided a means by which the jobs and economy of the state may be “protected” through the use of a program that ensures that illegal immigrants are not being hired by businesses. Georgia enacted a law that would be enforced gradually over time, beginning with larger businesses of 500 or more employees, who would be required to follow the law as of July 1, 2007, while businesses of 100 or more employees would have until July 1, 2008 to comply with SB 529’s required use of E-verify (Article 3, 13-10-91 (3)(A)(B)(C). Just as Arizona and Oklahoma seem to have found a way in which to legitimize their immigration legislation, so too has Georgia used economic regulations and business legislation in order to provide their state with a means by which to control the increasing population of illegal immigrants.

South Carolina Illegal Immigration Reform Act

Passed in 2008, the South Carolina legislation expresses that all public employers must participate in the “federal work authorization program to verify the employment authorization of all new employees.” (Section 8-14-20)(A) Just as the laws in Oklahoma and Georgia state, South Carolina’s Illegal Immigration Reform Act explains that no contractor will be able to enter into a services contract with a public employer unless they have registered for and participate in the electronic verification program, which will cut back on the number of immigrants that are hired. South Carolina also includes a requirement that workers may only be employed if they have a valid South Carolina driver’s license or an identification card, or a license or identification card from another state, which has been verified by the Executive Director of the South Carolina Department of Motor Vehicles. (Section 8-14-20)(2)(a)(b)(c)

An interesting aspect of South Carolina's legislation on immigration appears in Section 8-14-30, which states that the provisions of chapter 14 on unauthorized aliens and public employment "are enforceable without regard to race, religion, gender, ethnicity, or national origin." This is not made evident in the other state laws previously discussed, but seems to allow South Carolina that much more leniency in regards to the legitimacy of their law. Although the issue of immigration in the United States centers in many ways around immigrants travelling to the United States from the border between the U.S. and Mexico, by adding this provision, South Carolina focuses the law more on the economic aspect of the issue, and less on the social or racial aspect of the immigration issue.

The Illegal Immigration Reform Act also covers issues of income tax in regards to hired workers. Section 8 of the law amends Chapter 8, Title 12 of the 1976 Code by adding that if an individual fails to "provide a taxpayer identification number or social security number," fails to provide correct identification, or provides an "Internal Revenue Service issues taxpayer identification number issued for nonresident aliens," then a withholding agent will "withhold state income tax at the rate of seven percent of the amount of compensation paid to an individual." Section 12-8-595 (A)(1)(2)(3) The amendment also punishes the withholding agent if they do not comply with this law by withholding the taxes by making them liable for the taxes that should have been withheld. Section 12-8-595(B)

As can be seen from the discussed sections of South Carolina's Illegal Immigration Reform Act, South Carolina has chosen to focus their law on economic issues within the state. They hope to discourage the hiring of illegal immigrants by businesses through the required use of E-verify. South Carolina also hopes to further discourage the employment of immigrants by penalizing workers who cannot produce proper documentation proving they are legal. Further,

those in control of the payment of these workers may themselves be penalized if they choose to not comply with South Carolina's law. The law's focus on economic issues provides them with the validity they need to enforce the law without conflicting with federal law on immigration.

Police Powers and Documentation

A highly controversial area of state immigration legislation involves state police powers. Some states have created legislation allowing police to request to see documentation from people in various scenarios. This would require aliens to carry documentation with them at all times. Unlike economic regulation, legislation concerning documentation is directly regulating immigrants, while economic regulation focuses on state employment as a whole. Legislation requiring immigrants to carry documentation is obviously strongly opposed by the immigrant population in states like Arizona, Utah, and Indiana, and many states with this type of legislation are currently holding off on its implementation. Arizona's legislation in this area is soon to be decided upon by the Supreme Court, which could decide whether or not other states are successful in this area of legislation.

Indiana's SB 590

Indiana's Senate Bill 590 was enacted in 2011 and was intended to cover a broad range of immigration regulation within the state. One controversial aspect of Indiana's legislation requires law enforcement officers to "verify the citizenship or immigration status of individuals in certain situations." (SB 590, Synopsis) Chapter 19 of SB 590, entitled "Verification of Immigration Status" allows a police officer to request "verification of identity and the citizenship or immigration status of the individual from federal immigration authorities under 8 U.S.C.

1373(c).” (Ch. 19, Sec. 5(1)(B) For a law enforcement official to request verification of identity in the form of documentation, he or she must (1) make a “lawful stop, detention, or arrest of an individual for a violation of a state law or local ordinance,” and (2) must have “reasonable suspicion to believe that the individual stopped, detained, or arrested” is an “alien” and is “not lawfully present in the United States.” (Ch. 19, Sec. 5(a)(1)(2)(A)(B) Finally, the legislation explains that a law enforcement official does not have to request verification of citizenship or immigration status if the officer “reports to the law enforcement agency that the attempt would hinder or obstruct a criminal investigation or the treatment of a medical emergency.” (Ch. 19, Sec. 5(b) In Indiana’s legislation concerning documentation, a person may be presumed to not be an alien unlawfully residing in the U.S. if they provide a valid Indiana driver’s license, a valid Indiana identification card, a valid tribal enrollment card, or any valid identification document issued by a federal, state, or local government (Ch. 19, Sec. 5(d)(1)(2)(3)(4)

Part of the controversy surrounding SB 590 in Indiana is the possibility of discrimination and racial profiling. While the law would theoretically only allow law enforcement officials to request verification of legal residency from individuals who have been detained or arrested for a legal violation of some sort, there could be those in law enforcement who would use race or ethnicity as a means to judge whether or not someone should be questioned, which is obviously not constitutional. Racial profiling is also a major concern for immigrants residing legally in the country who fear the furthering of a negative stereotype from this type of legislation. Because of risks like racial profiling, as well as many legal groups questioning the constitutionality of such a law, SB 590 has been held off until the Supreme Court hears a case concerning similar legislation in Arizona, which just began in April of 2012.

Utah Illegal Immigration Enforcement Act

Utah has created legislation similar to that of Indiana with the passing of House Bill 497 in March of 2011. The provisions in HB 497 are almost identical to those laid out in Indiana's HB 590. Just as in Indiana's legislation, Utah allows law enforcement officials who have lawfully stopped, detained, or arrested an individual for a violation of a local, state, or federal law to request verification of legal residence or citizenship in the United States. Utah's legislation requires that an officer "verify the immigration status of a person arrested for a felony or a class A misdemeanor and a person booked for class B or C misdemeanors." (HB 49, Highlighted Provisions)

The ACLU highlights the risks of racial profiling in this case, explaining that "by borrowing and even expanding the undefined 'reasonable suspicion' standard used in Arizona's law as a basis to reject identification documents," HB 497, or the "Show Me Your Papers Law," as the ACLU has called it, "effectively endorses a policy of harassment and profiling of those who look or sound 'foreign.'" (ACLU, HB 497 FAQ) According to the ACLU, the provisions of HB 497 allowing police officers to request documentation put the officers in the "position of relying on stereotypes and characteristics such as race, ethnicity, or accent in deciding whom to stop and investigate." (ACLU, HB 497 FAQ) The ACLU has been successful in having a temporary restraining order ("TRO") placed on HB 497 until the hearing of the Arizona case concerning similar legislation in the Supreme Court.

Arizona's Support Our Law Enforcement and Safe Neighborhoods Act

Arizona signed Senate Bill 1070 into law in 2010 under Governor Jan Brewer. The provisions of the act reflect those addressed above in both Indiana's and Utah's legislation. In

fact, Arizona's SB 1070 was the legislation that sparked similar legislation to be created in a hand full of other states and really fueled the immigration debate on a national scale. Set to go into effect in July of 2010; however, before the law went into effect, an injunction was placed on the law due to the lawsuits filed by various civil rights groups.

Arizona's SB 1070 is incredibly relevant in the immigration reform debate, because in April of 2012, the Supreme Court began hearing arguments for and against portions of the bill. The federal administration argues that Arizona is overstepping its bounds, as the law is "in conflict with federal efforts," as Solicitor General Donald B. Verrilli Jr. explained to the Court (*New York Times*). Paul D. Clements, representing Arizona in the case, argues that Arizona is "making an effort to address an emergency situation with a law that complemented federal immigration policy." (*New York Times*) It is said that the Court could decide on the case as early as June of 2012.

In the mean time, the media is implying that the justices appear to be inclined toward siding with Arizona, as Justice Scalia has discussed sovereignty including the "ability to defend your borders," and Chief Justice Roberts pointed out that the law would only require that "the federal government be informed of immigration violations." (*New York Times*) Chief Justice Roberts even went so far as to state, "it seems to me that the federal government just doesn't want to know who is here illegally and who's not." (*New York Times*) If the Court upholds the constitutionality of SB 1070, then many states, such as Indiana and Utah, will be free to enforce their similar legislation. In the meantime, state legislation that seeks to reform immigration policy by requiring people to carry around documentation proving citizenship or legal residency is highly controversial and has yet to be easily implemented.

Benefits for Immigrants

While the majority of state legislation involving the regulation of immigration in the United States centers on controlling or reducing the number of illegal immigrants while protecting the rights of citizens in areas such as economics, there are a few states that have chosen to attempt to provide various benefits for immigrants, and more particularly, for the children of illegal immigrants. These tend to be socially controversial, as they seem to have the opposite intent as laws concerning economic regulation and police powers; however, states such as California, Texas, and Maryland have all created laws that aim to provide aid for illegal immigrants.

The California Dream Act

California's Dream Act was passed into law in two different bills, AB 130 and AB 131, in 2011. AB 130 of the California Dream Act of 2011 states the following:

It is the intent of the Legislature that all students who are exempt from nonresident tuition pursuant to Section 68130.5 of the Education Code and that are deemed to be in financial need shall be eligible for all financial aid. (Sec. 2, a, 1)

The California legislature notes that the enactment of this law “does not grant these pupils any advantage over the student population as a whole in determining who qualifies for, or receives, financial aid.” (Sec. 2, a, 2) The intent of the law is also made clear in Sec. 2(a)(3), which explains that an “increased access to financial aid for all students in California's universities and colleges increases the state's collective productivity and economic growth.” The students in California that this law directly affects are the immigrants. The law allows them more

opportunities to pursue higher education by allowing them equal access to financial aid and scholarships at the university and community college level.

AB 130 sets up a list of requirements that an immigrant must meet in order to be exempt from paying nonresident tuition at California State University or California Community Colleges and to receive financial aid and scholarship opportunities. First, the student must have attended high school in California for three or more years (Sec. 4, a, 1). Second, the student must have graduated from a California high school or must have attained the equivalent of a California high school degree (Sec. 4, a, 2). Third, the student must register as an entering student or must be currently enrolled at an “accredited institution of higher education in California not earlier than the fall semester or quarter of the 2011-12 academic year (Sec. 4, a, 3). Finally, if a person does not have a “lawful immigration status,” then they must file an affidavit with the institution of higher learning “stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.” (Sec. 4, a, 4) It is evident in Section 4 of AB 130 that there are strict requirements involved in providing benefits to immigrants wishing to pursue higher education; however, the benefits are, nonetheless, being provided through the enactment of this law.

The question of the constitutionality of this type of immigration policy on a state level is much different than the issue of economic legislation attempting to decrease the number of immigrants working within a state. Laws like the California Dream Act of 2011 are just as controversial, but in this case, it is because some Americans question whether or not the provision of benefits to immigrants and their children is justified, when many see immigration reform as necessary to combat the problem of an increasing immigrant population. The similarity between economic regulation of immigration and laws like the Dream Act, which actually

provide benefits to immigrants, is that both seek a state's economic interest above all else, at least in the way that the laws are framed.

Texas Adapts to Constitutional Issues

In 2001, Texas passed House Bill 1403, which “granted certain non-immigrant students, including undocumented students, access to in-state tuition rates” at Texas public colleges and access to state-based financial aid (Texas Higher Education Coordinating Board 1). The requirements for students to receive these opportunities were similar to the requirements previously listed in the California Dream Act. Students must have resided in Texas with a guardian while attending high school in Texas, they must have graduated from a high school in Texas, or must have received their GED in Texas, they must have resided in Texas for three years leading to graduation, and students must have provided institutions of higher learning with an affidavit which indicated “an intent to apply for permanent resident status.” (Texas Higher Education Coordinating Board 1)

As the Texas Higher Education Coordinating Board stated in their review of HB 1403, legal problems arose out of the passing of this bill. Claims were made that the law was unconstitutional, because “it allowed certain individuals to be treated differently than others.” (Texas Higher Education Coordinating Board 1) This would prove to be problematic in the enforcement of HB 1403. Instead, in the spring of 2006, Texas repealed provisions of HB 1403 and replaced it with Senate Bill 1528.

SB 1528 amended provisions of HB 1403 so that the provisions applied too “all individuals who had lived in Texas a significant part of their lives.” (Texas Higher Education Coordinating Board) Under SB 1528, “citizens, permanent residents and certain non-immigrant

students could establish a claim to residency following its provisions.” (Texas Higher Education Coordinating Board) SB 1528 also listed requirements. Students must have lived in Texas for three years prior to high school graduation, and they must have resided in Texas during the year prior to a student’s enrollment in an institution of higher education. The second requirement could overlap with the three-year period mentioned in the first requirement. Once again, any student who was neither a citizen nor a permanent resident had to file an affidavit stating that they would apply to become a permanent resident as soon as they were able to do so (Texas Higher Education Coordinating Board). Because the amendments included in SB 1528 make the law applicable to all high school graduates, the Texas law is relieved of the “state of any threat of a law suit based on preferential treatment.” (Texas Higher Education Coordinating Board) It seems that Texas has adjusted to and dealt with the constitutional issue of equal access, and while the law still may remain controversial, it sets an excellent example of an immigration law that is deemed constitutional.

The Dream Act Debate in Maryland

In Maryland, the Dream Act, a new law that would allow in-state tuition for illegal immigrants, was supposed to go into effect on July 1, 2011; however, the legislation is currently on hold, because it is being challenged in court. The law would “grant in-state rates” to immigrant students graduating from a Maryland high school, and “whose family filed state income taxes for three years.” (Fox News) Citizens filed a petition, wanting to allow voters an opportunity to vote in a referendum on the Dream Act in November of 2012 (Fox News). Supporters of the Dream Act, including students and an immigrant services group, filed a lawsuit against the state election board in August of 2011. They claimed that, among other problems, the

names in the petitions, which were collected by MdPetitions.com, were “susceptible to fraud.” (Fox News) Another argument was that the Dream Act “cannot be put to a referendum, because it provides money for government-funded education,” as Joseph Sandler, attorney for one of the plaintiffs, explained (Fox News).

Those supporting the petition have claimed that those opposed to the petition have simply filed a “frivolous” lawsuit, which will do nothing except delay the process. It appears that Maryland Judge Ronald Silkworth of Anne Arundel County Circuit Court is in favor of the petitioners, as in February of 2012 he dismissed the lawsuit that challenged the petition. He ruled that the Dream Act is in fact “subject to petition,” meaning that the law will be able to voted upon in a November referendum (Hill 1) It seems that an issue arising from Maryland’s Dream Act may be similar to the issue in Texas, where HB 1403 had to be amended by SB 1528, because of issues with equal access. Perhaps the referendum in November of 2012 will shed light on yet another aspect of the issue of constitutionality, as well as public response, to immigration legislation that has the intent of providing benefits for immigrants.

Chapter 3

The Supreme Court and the Role of Precedent

It is evident that there is a wide array of state legislation currently enacted or being proposed to regulate illegal immigration in several different ways, including focusing on economics, using police powers and regulating documentation laws, and even providing benefits in areas like education for some immigrants. Regardless of state trends in immigration policy reform, it is important to consider the role of the courts in the debate on federal versus state authority concerning this matter. While some states are enacting laws, the courts are preparing to hear cases refuting the constitutionality of some of those very laws.

A central function of the United States Supreme Court is the ability to set precedents through previous decisions. The Court uses these precedents through the years to help to determine decisions for current cases. While not every case is exactly the same, considering how many factors are generally involved in one case, general precedents still aid the Court by ensuring that there is a sense of consistency that will guide future legislation, as well as future court decisions on the constitutionality of that legislation. For this reason, it is essential to consider precedents set by the Supreme Court that may relate to the issue of state legislation on illegal immigration. Understanding the precedents set by various cases throughout United States history can help in determining which state laws can and will be considered valid and constitutional if they are ever sent to the courts.

De Canas v. BICA: The Employment of Unauthorized Aliens

As was previously addressed, *De Canas v. BICA* is a case that was decided by the Supreme Court in February of 1976. It was the first case in which the Court dealt with the relationship between federal immigration law and state laws that dealt with the issue of employment of unauthorized aliens. The *De Canas* case involved the California Labor Code Ann. Section 2805(a), which provides that “no employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.” The petitioners in *De Canas* were migrant farmworkers who brought the case forward in the California Superior Court against respondent farm labor contractors. The complaint set forth by the migrant farmworkers stated that the contractors had “refused petitioners continued employment due to a surplus of labor resulting from respondents’ knowing employment...of aliens not lawfully admitted to residence in the United States.” (*De Canas* 1976, 1) The petitioners wanted to have a permanent injunction placed against the respondents’ “willful employment of illegal aliens.” (*De Canas* 1976, 1)

The problem with the complaint and the request of the petitioners in *De Canas v. BICA* was that the Superior Court in California held the California Labor Code 2805 to be unconstitutional. The Court viewed the statute as encroaching upon a “comprehensive regulatory scheme enacted by Congress in the exercise of its exclusive power over immigration.” (*De Canas* 1976, 1) This led the Superior Court to dismiss the case, after which the Court of Appeal agreed with the views of the Superior Court, again emphasizing the exclusive congressional power to regulate the “conditions for admission of foreign nationals,” which they perceived the California Labor Code 2805 as attempting to do as well (*De Canas* 1976, 1). The Supreme Court

of California denied review of the De Canas case, and finally, the U.S. Supreme Court granted certiorari, eventually reversing the lower courts' decision.

The main question, as stated by Justice Brennan who wrote the opinion of the Court, was whether or not Section 2805 (a) of the California Labor Code was an “attempt to regulate immigration and naturalization” and if the statute was pre-empted by the Supremacy Clause in the U.S. Constitution, or by the INA (*De Canas v. Bica* 1976, 1) The United States federal government created the INA in 1952, which as previously stated, established a “comprehensive federal statutory scheme for regulation of immigration and naturalization.” (*Chamber* 2011, 2) The comprehensive federal scheme focused mainly on the terms and conditions of admission into the United States, as well as the treatment of aliens who reside lawfully within the country.

In the opinion of the Court, Justice Brennan acknowledges that the power to regulate immigration is “unquestionably exclusively a federal power.” (*De Canas* 1976, 1) However, he sets out to demonstrate two different reasons through which the California Labor Code 2805 is still constitutional and does not interfere with the power to regulate immigration that is specifically given to the federal government. The first considers what federal “regulation of immigration” entails. Second, Justice Brennan considers the federal government’s intent in the INA and how that relates to state statutes.

Understanding Federal Regulation of Immigration

As Justice Brennan explains, there had never up until the De Canas case been a precedent set by the court holding that any state enactment that dealt with aliens in any way “is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercise.” (*De Canas* 1976, 1) In fact, past court decisions had indicated the opposite notion

were true. Not all state statutes dealing with aliens strictly qualify as regulation of immigration. He cites previous cases such as *Graham v. Richard*, 403 U.S. 365, 372-373 (1971) and *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 415-422 (1948) as two examples of cases in which some “discriminatory state treatment of aliens” were upheld as lawful (*De Canas* 1976, 1-2). These cases show that the fact that the subject of a state statute may be aliens without signifying that the statute is a direct regulation of immigration, which the Court defines 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.” (*De Canas* 1976)

The main argument that Justice Brennan makes is that the Constitution cannot require pre-emption of state legislation simply “of its own force.” (*De Canas* 1976, 2) The Courts must consider the content and purpose of a state regulation concerning aliens to determine if the regulation is or is not attempting to regulate immigration. It cannot just be presumed as such. Justice Brennan then turns specifically to the California Labor Code in question, and states that it has “sought to strengthen” the economy of the state by “adopting federal standards in imposing criminal sanctions against state employers” who have knowingly employed aliens with “no federal right to employment within the country.” (*De Canas* 1976, 2) In doing so, California has not created a statute that proscribes regulation of immigration that “Congress itself would be powerless to authorize or approve,” and for this the Court does not think that Code 2805 is an incursion on federal power (*De Canas* 1976, 2).

The Power of the States

The second issue that Justice Brennan addresses in the Court’s opinion is the powers that the states do have and how this power relates to federal authority on immigration regulation.

According to Justice Brennan, states have broad authority under their police powers “to regulate the employment relationship to protect workers” within a state (*De Canas* 1976, 2). This can be seen from numerous child labor laws, as well as laws concerning wages, health and safety, workers’ compensation. The fact that California Labor Code 2805 is attempting to prohibit employment of those not lawfully residing in the United States is within the realm of the police power that the states are given.

Justice Brennan goes on to explain why a regulation like California Labor Code 2805 can be beneficial to the state’s economy. He explains that in a time of high unemployment, the employment of aliens who are not lawfully residing in the United States “deprives citizens and legally admitted aliens of jobs.” (*De Canas* 1976, 2) Illegal aliens may accept jobs with substandard wages and poor working conditions, which can, according to Justice Brennan, “seriously depress wage scales and working conditions of citizens and legal aliens.” (*De Canas* 1976, 2) The context is clearly important to the Court as well, as the opinion goes on to say that in California this problem can be particularly relevant because of the influx of illegal aliens from Mexico into the State (*De Canas* 1976, 2). Because Code 2805 attempts to protect the economic interests of the state of California, the Court believes that the code “focuses directly upon...essentially local problems.” (*De Canas* 1976, 2) For this reason, the code fits within the police power regulation given to the states.

Justice Brennan continues by explaining that some state regulations that attempt to protect essential state interests may “give way to paramount federal legislation.” (*De Canas* 1976, 2) However, this is not relevant to the case involving the California Labor Code, because the Court presumes that the enactment of the INA by Congress did not intend to “oust state authority to regulate the employment relationship covered by Code 2805 in a manner consistent

with pertinent federal laws.” (*De Canas* 1976, 2) According to the Court, the central concern of the INA is the “terms and conditions of admission to the country and the subsequent treatment of aliens lawfully” in the United States, as was previously addressed (*De Canas* 1976, 2). Such an interpretation of the intent of the INA means that the subject of the employment of illegal aliens, as is addressed in California Labor Code 2805, does not fall within the central goal of federal regulation. Therefore, as the Court decided, Code 2805 is constitutional and within the realm of state police power, leading the U.S. Supreme Court to reverse the decision of the California Court of Appeal.

The Significance of De Canas

So then what can essentially be taken away from the Court’s decision in *De Canas v. BICA*? It seems clear that the Court in 1976 was looking to protect the powers given to the states, and did not presume in any way that the federal government in all instances pre-empted the type of regulation outlined in California Labor Code 2805. While the *De Canas* case focuses particularly on illegal immigrants and employment, the case is still incredibly relevant today, which can be seen by the fact that *De Canas* is directly cited by Chief Justice Roberts in his opinion in the Whiting case in Arizona, concerning the Legal Arizona Workers Act.

Of course, as was previously noted, ten years after *De Canas*, the IRCA was created and put into law, which made it illegal for states to use criminal or civil sanctions such as fees to fight the employment of illegal aliens; however, while Code 2805 in California used fees as punishment, which is now unconstitutional for a state to do, the notion that Justice Brennan discussed that states have the power to regulate their economic interests still stands strong within the Court. This means that within reason of federal regulation, the Court deems it constitutional

for a state to regulate their economy by addressing the issue of illegal aliens and employment, as long as no such fees or other sanctions are used by the state. This will be an important point in considering the boundaries placed upon states in today's society who are attempting to regulate immigration through economic legislation.

***Plyler v. Doe*: Public Education for Undocumented Students**

Plyler v. Doe was a case decided by the Supreme Court in June of 1982. The case concerned whether or not Texas could “deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.” (*Plyler* 1982, 1) The case was based on Texas Education Code 21.031, which was created in 1975 to “withhold from local school districts any state funds for the education of children who were not legally admitted” into the country, and it “authorized local school districts to deny enrollment in their public schools to children not legally admitted” into the country (*Plyler* 1982, 1). *Plyler* was a class action filed in September of 1977 on behalf of some school-age children of Mexican origin who were residing in Smith County, Texas. The children could not establish that they had been legally admitted into the country, and complained in the action that they were excluded from public schools in the Tyler Independent School District (*Plyler* 1982, 1). In the District Court, it was decided that Code 21.031 did not have “either the purpose or effect of keeping illegal aliens out of the State of Texas.” (*Plyler* 1982, 2) The District Court also held that illegal aliens were “entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment,” and that Code 21.031 violated the Equal Protection Clause (*Plyler* 1982, 2). The decision of the District Court was then upheld by the Court of Appeals for the Fifth

Circuit, and the case, which was actually combined with another case of a similar concern, was eventually heard in the Supreme Court.

Justice Brennan wrote the opinion for *Plyler*. His opinion began by introducing the purpose of the Fourteenth Amendment to the U.S. Constitution, which states, “No State shall...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.” In *Plyler*, the Fourteenth Amendment becomes the central focus, as Justice Brennan and the Court seek to determine whether the Texas statute and the school district policy implementing the statute directly violate the Equal Protection Clause of the Fourteenth Amendment.

According to the appellants in the case, undocumented aliens are not considered “persons within the jurisdiction of the State of Texas, and that they therefore have no right to the equal protection of Texas law.” (*Plyler* 1982, 3) The Court, however, rejected this argument, explaining that an alien is indeed a “person in the ordinary sense of the term,” and may therefore be regarded as “persons guaranteed due process of law by the Fifth and Fourteenth Amendments.” (*Plyler* 1982, 3) The issue of whether or not the Fifth and Fourteenth Amendments hold the same notion is important in *Plyler*, because the appellants argued that the Equal Protection Clause in the Fourteenth Amendment “directs a State to afford its protection to persons within its jurisdiction,” while they claim that the Due process Clauses found in the Fifth and Fourteenth Amendments “contain no such assertedly limiting phrase.” (*Plyler* 1982, 3) The Court argued, though, that they recognized that “both provisions,” the Equal Protection Clause and the Due Process Clauses, “were fashioned to protect an identical class of persons, and to reach every exercise of state authority.” (*Plyler* 1982, 3) In other words, the Court finds the provisions to be universal.

After establishing that illegal aliens do apply under the Equal Protection Clause, the Court turns to consider the question of whether or not the Equal Protection Clause was violated by the Texas statute. An important point that Justice Brennan emphasizes is the significance of the plaintiffs in the case being children, who he refers to as “special members of this underclass” of illegal aliens (*Plyler* 1982, 6). This is important, he notes, because he views the children of those who have illegally entered the country as being forced due to the Texas law to “bear the consequences” of their parents (*Plyler* 1982, 6). Justice Brennan explains that the children who are plaintiffs in *Plyler* “can affect neither their parents’ conduct nor their own status” in the United States, and that denying them access to public education is “illogical and unjust” and is in fact “contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.” (*Plyler* 1982, 6) In other words, as Justice Brennan explains, “undocumented status is not irrelevant to any proper legislative goal.” (*Plyler* 1982, 6) In this case, it is the simple fact that Code 21.031 imposes a “discriminatory burden” on children on the “basis of a legal characteristic over which children can have little control.” (*Plyler* 1982, 6-7)

It is also important for Justice Brennan to emphasize the importance of education as an institution in the United States. While he notes that public education is not a right given by the Constitution, he writes that it is neither “merely some governmental benefit indistinguishable from other forms of social welfare legislation.” (*Plyler* 1982, 7) The lasting impact that Justice Brennan and those concurring with him view as deprivation of education as having on children is what “marks the distinction” that makes public education an essential part of the United States (*Plyler* 1982, 7). It is interesting that Justice Brennan and the Court refer to the “significant

social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests,” even though it is not a right expressly given.

Then, the Court turns to the State’s principal argument, that “the undocumented status of these children *vel non* establishes a sufficient rational basis for denying them benefits that a State might choose to afford other residents.” (*Plyler* 1982, 8) Justice Brennan explains that “the State enjoy no power with respect to the classification of aliens,” because the power to do so is expressly given to the federal government (*Plyler* 1982, 9). This means that consideration of the status of an alien within the country is rarely “relevant to legislation by a State.” (*Plyler* 1982, 9) Justice Brennan then cites *De Canas v. BICA*, a case that has clearly been important in the Court’s consideration of immigration regulation on a state level. Justice Brennan cites the notion that states have some authority to create and enforce legislation with respect to illegal aliens; however, this is only true where “such action mirrors federal objectives and furthers a legitimate state goal.” (*Plyler* 1982, 9) Using this argument, Justice Brennan points out that Code 21.031 of the Texas law does not appear to correspond to “any identifiable congressional policy,” and that the state does not claim that “the conservation of state educational resources was ever a congressional concern in restricting immigration.” (*Plyler* 1982, 9) Finally, Justice Brennan notes that Code 21.031 “does not operate harmoniously” within the federal scheme regulating immigration (*Plyler* 1982, 9).

Finally, Justice Brennan considers “three colorable state interests that might support” Code 21.031 of Texas law. The first he notes is that the state of Texas “may seek to protect itself from an influx of illegal immigrants.” (*Plyler* 1982, 10) This Justice Brennan rejects, because he does not see that Code 21.031 offers “an effective method of dealing with an urgent demographic or economic problem.” (*Plyler* 1982, 10) Second, he writes that the appellants in the case suggest

that the undocumented children within the school district are “appropriately singled out for exclusion” due to the “special burdens they impose on the State’s ability to provide high-quality public education.” (*Plyler* 1982, 10) To this Justice Brennan responds that there is no support for the claim that the exclusion of undocumented children may improve the quality of education within the school district. Thirdly, the appellants state that the unlawful presence of undocumented children in the country “renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State.” (*Plyler* 1982, 11) Once again, Justice Brennan points to the difficulty to quantify such a suggestion, and even writes that many of the undocumented children will and do remain in the United States, and some may even become lawful residents of even citizens of the United States in years to come.

In the end, the Court affirmed the decision of the lower courts. Justice Brennan noted that a denial of public education to a specific group of students, in this case undocumented children, must be justified “by a showing that it furthers some substantial state interest,” which the Court did not see that the appellants provided for Code 21.031 (*Plyler* 1982, 11). The possible state interests that were refuted by the Court provide important assistance in the consideration of a state model for legislation attempting to regulate immigration in any way. In particular, *Plyler v. Doe* helps to reach a better understanding of the stance the Supreme Court takes on any type of legislation that benefits or takes away from illegal aliens. As more states continue to attempt to regulate immigration through legislation concerning both public and higher education, as well as employment, it will be essential that these states consider *Plyler* and what the Court has set forth as a precedent for the requirement of specific state interests to justify state legislation affecting immigrants.

Printz v. United States: States' Roles in Federal Regulatory Programs

The U.S. Supreme Court decided the case *Printz, Sheriff/Coroner, Ravalli County, Montana v. United States* in June of 1997. While the case does not directly address an issue of immigration regulation or state legislation that is in any way concerned with aliens, the case concerns an issue very essential to the consideration of the relationship between federal and state authority on the topic of immigration regulation. Many states and their governmental institutions have expressed in recent years a lack of faith and confidence in what the federal government has done and is doing in regards to regulating immigration. For many states, such feelings are a large part of what has motivated them to create their own state regulations to attempt and control the problems they associate with illegal immigration into the country. The *Printz* case addresses the issue of what role states may or may not play in enforcing or participating in federal regulations, as well as what this can mean for states' power to create and enforce their own regulations.

Printz concerned the Brady Handgun Violence Prevention Act, which was created by Congress in 1993 in order to amend the Gun Control Act of 1968. The original Act had established a "detailed federal scheme governing the distribution of firearms." (*Printz v. United States* 1997, 1) The issue with the Brady Act, as expressed by petitioners Jay Printz and Richard Mack, both of whom were chief law enforcement officers (CLEOs) in their respective counties, was that the Brady Act purported to "direct state law enforcement officers to participate...in the administration of a federally enacted regulatory scheme." (*Printz* 1997, 2) Under the Act, CLEOs were supposed to perform certain duties concerning the transfer of handguns and the dealings of background checks. What the petitioners claimed was that the Act was unconstitutionally forcing them as state workers to participate in a federal regulation.

Justice Scalia delivered the opinion of the Court in the case. He explains in length the arguments presented by the respondents, in this case the federal government, for the constitutionality of the Brady Act. The Supremacy Clause, Article VI, clause 2 states, “the Laws of the United States...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.” While the U.S. government cited this as reason for the legality of the Brady Act, Justice Scalia notes that courts may understandably have been viewed within the realm of this clause; however, he notes that there is a clear distinction between the judicial system and the legislatures and executives within a state. The federal government also points to several federal statutes that require state or local officials to participate in “implementing federal regulatory schemes.” (*Printz* 1997, 5) Justice Scalia explains, though, that many of these federal statutes actually operate more as “conditions upon the grant of federal funding” than as “mandates to the States.” (*Printz* 1997, 5) Basically, the Court does not recognize the attempts of the federal government to justify the forced participation by state workers in federal regulation based on the proposed citations given by the federal government in the case.

The Balance between Federal and State Power

Justice Scalia describes the system of “dual sovereignty” that the Constitution established (*Printz* 1997, 6). This is what is most essential to the issue of state versus federal authority in terms of regulation, and more specifically, in immigration regulation. Justice Scalia notes the important fact that “although the States surrendered many of their powers to the new Federal Government, they retained a residuary and inviolable sovereignty.” (*Printz* 1997, 6) State sovereignty was made implicit, he also notes, “in the Constitution’s conferral upon Congress of not all governmental powers, but only discrete, enumerated ones,” which can be seen through the

Tenth Amendment, which says 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.” (*Printz* 1997, 6)

Another point that Justice Scalia makes in the decision can be easily understood through his citation of a Court’s previous decision in *New York v. United States*, 505 U.S. Justice Scalia directly quotes a part of the decision that addresses the Necessary and Proper Clause in the following lines:

Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts...[T]he Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.” (*New York v. United States*)

This illustrates the view of Justice Scalia and those that concurred with him in this case that not every federal law that is made requires that state officers be bound to it. While this argument has particular relevance in the *Printz* case concerning the role of CLEOs on a state level, it can also help to reach a better understanding of the federal and state struggle over the authority to regulate immigration.

The Relevancy of the Printz Case

It is clear that *Printz v. United States* in no way touches on the issue of immigration regulation, whether it be on a state or a federal level; however, it is still important in helping to understand the relationship between the federal and state levels of government in the creation and enforcement of legislation. The federal government, under the Supremacy Clause, is the

supreme law of the land, but the Court's opinion in *Printz* makes it clear that the federal government is still limited in the power they possess. In this issue of immigration regulation, it is less relevant that the federal government may not constitutionally impose its regulations on a state in many cases, or that Congress may not force state workers to implement federal policies. Instead, the great emphasis that is placed in Justice Scalia's opinion concerning the powers given to the states is of significance.

The federal government uses the IRCA to regulate immigration into the United States; however, based on the Court's view that the federal government's power is limited and the states have their own powers because of the dual sovereignty within the American government, it is clear that there is still room for the states to provide some types of regulation concerning the issue of immigration. The clearest way to understand this is through the reference to the *New York* case that states, "[T]he Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." (*New York* 1992) As long as states are not attempting to directly regulate in the way that only the federal government is able to according to the IRCA, it seems that the Court supports the notion that states may themselves regulate on things like the economy and education, which may directly affect immigrants to the United States.

Chamber of Commerce of the United States v. Whiting: The Case Heard 'Round the Country

It has already been noted that the *Whiting* case is of great significance in the debate over federal and state authority in the regulation of immigration in the United States. Since the emergence of the Legal Arizona Workers Act, up until the decision of the Supreme Court in May of 2011, *Whiting* has been a popular topic of discussion and a common reference in the

immigration debate. It represents the growing trend among states to attempt to regulate immigration on their own, and has in fact been a model for legislation in several other states, which has also already been addressed. Because of its significance in current American politics and within the immigration debate, it is essential that the case be clearly outlined in detail here. *Whiting* in many ways can help in the creation of a model for state legislation regulating immigration.

The Legal Arizona Workers Act of 2007 provides that the “licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked.” (*Whiting* 2011, 1) It also requires that Arizona employers use E-verify to confirm that workers they employ are legally authorized. This aspect of the Arizona statute has been an incredibly common one, as can be seen from the list of states enacting similar requirements of their employers. The Legal Arizona Workers Act works more specifically in the following way. If a person files a complaint that alleges that an employer hired an “unauthorized alien,” then under the Arizona law, the “attorney general or the county attorney first verifies the employee’s work authorization with the Federal Government pursuant to 8 U.S.C. section 1373(c).” (*Whiting* 2011, 3) The law “expressly prohibits state, county, or local officials from attempting” to determine themselves whether or not an alien is authorized to work within the country (*Whiting* 2011, 3). Only the federal government’s determination of the authorization of a worker is to be used in court if a complaint is filed against an Arizona employer.

The Legal Arizona Workers Act provides that a “first instance of knowingly employ[ing] an unauthorized alien requires that the court order the employer to terminate the employment of all unauthorized aliens” and enter a probationary period of three years during which the employer is required to submit quarterly reports on every new hire (*Whiting* 2011, 3). Under the

Arizona law a second intentional violation “requires the permanent revocation of all business licenses.” (*Whiting* 2011, 3) The requirement of the use of E-verify by Arizona employers provides a “rebuttable presumption that an employer did not knowingly employ an unauthorized alien,” which explains the significance of this provision of the Arizona law (*Whiting* 2011, 4). It seems clear that the Arizona law focuses on issues of employment within a state by attempting to prohibit the employment of unauthorized aliens through the use of E-verify and the threat of license revocation.

Chief Justice Roberts’ Opinion: Why the U.S. Chamber of Commerce was Wrong

In the opinion of the Court, Chief Justice Roberts outlines the argument of the petitioners in the case, represented by the Chamber of Commerce of the United States, as well as “various business and civil rights organizations.” (*Whiting* 2011, 4) The Chamber of Commerce, as Chief Justice Roberts explains, argued in *Whiting* that the Arizona law, which allowed the suspension or revocation of a business license of someone knowingly employing an unauthorized alien, was “both expressly and impliedly preempted by federal immigration law,” while the required use of E-Verify was “impliedly preempted.” (*Whiting* 2011, 4)

Chief Justice Roberts first considered whether or not federal law expressly preempted the Legal Arizona Workers Act, meaning that the plain wording of federal law contained evidence of “preemptive intent.” (*Whiting* 2011, 4) The IRCA, 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 an unauthorized alien,” expressly preempts the states from “imposing civil or criminal sanctions on those who employ unauthorized aliens, other than through licensing and similar laws.” (*Whiting* 2011, 2 and 4) Arizona’s law imposes sanctions through licensing, which

the IRCA allows of the states. Chief Justice Roberts goes as far as to note that the Arizona law defines “license” in a very similar fashion to the definition provided by Congress in the Administrative Procedure Act (*Whiting* 2011, 4). However, the Chamber argued in the case that Arizona’s law is not truly a licensing law, “because it operates only to suspend and revoke licenses rather than to grant them.” (*Whiting* 2011, 5) Chief Justice Roberts responds to this argument in the opinion by stating that Congress’ definition licensing includes both “revocation” and “suspension.” (*Whiting* 2011, 5) He goes on to say that it is illogical to assume that a law that grants licenses is a licensing law, while a law that revokes or suspends a license cannot be considered as such. Chief Justice Roberts writes that “IRCA expressly preempts some state powers dealing with the employment of unauthorized aliens and it expressly preserves others,” and that the Court finds that the licensing law in Arizona falls “within the confines of the authority Congress chose to leave to the States,” meaning that the law is not expressly preempted (*Whiting* 2011, 6).

Next, Chief Justice Roberts addresses the argument that the Legal Arizona Workers Act is impliedly preempted, “because it conflicts with federal law.” (*Whiting* 2011, 6) First, the Chamber claims, Congress “intended the federal system to be exclusive and that any state system therefore necessarily conflicts with federal law.” (*Whiting* 2011, 6) Chief Justice Roberts immediately rebuts by explaining that the procedures in Arizona’s law “implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws,” meaning that Congress “did not intend to prevent the States from using appropriate tools to exercise that authority.” (*Whiting* 2011, 6) According to the Court, Arizona’s law closely follows the provisions of the IRCA by adopting the federal definition of an “unauthorized alien,” as well as by expressly providing that “state investigators must verify the work authorization of an

allegedly unauthorized alien with the Federal Government.” (*Whiting* 2011, 6) In this way, Chief Justice Roberts supports the idea that there is no conflict between Arizona’s law and federal law concerning the authorization of workers. The Chamber also argues for the implied preemption of Arizona’s law due to the fact that they claim Arizona’s law “upsets the balance that Congress sought to strike when enacting IRCA.” (*Whiting* 2011, 7) Chief Justice Roberts explains that the Arizona law purports to enforce the prohibition on employing unauthorized aliens more effectively, meaning that the Arizona law does not seek to disturb the balance provided by the IRCA, but instead the state law seeks to enforce the ban provided in federal law in the IRCA (*Whiting* 2011, 8). For these reasons, the Court found that the Legal Arizona Workers Act was neither expressly nor impliedly preempted.

Finally, the Chamber claimed that the provision in the Arizona law requiring the use of E-Verify in order to determine whether a worker was authorized to work or not was impliedly preempted. The Court found that the Arizona requirement in no way conflicted with the “federal scheme” concerning the federal use of E-Verify, and that in fact the provision was completely consistent with federal law (*Whiting* 2011, 9). Chief Justice Roberts notes in his opinion that the U.S. government has actually “consistently expanded and encouraged the use of E-Verify,” which means that it would be difficult to understand the federal government’s problem with Arizona implementing the use of the system (*Whiting* 2011, 9). For this reason, the Court found that the Arizona law’s required use of E-Verify by employers was not impliedly preempted.

What Whiting Says about State Authority to Regulate Immigration

The first main point to take away from the *Whiting* case is that while aspects of *De Canas v. BICA* were no longer relevant at the time the *Whiting* case was heard by the Court, since ten

years after the Court's decision in that case the IRCA was enacted by Congress, the argument from *De Canas* that states have authority through police powers to regulate employment within a state is still considered completely valid by the Court. Once again echoing the decisions in both *De Canas* and *Printz*, the federal government does not have absolute authority over the states, but is instead limited, while states have their own sovereignty as well. In *Whiting*, while the federal government had enacted the IRCA to prohibit the employment of unauthorized aliens and to implement the federal use of E-Verify to further that purpose, this did not mean that the states were either expressly or impliedly preempted from enforcing such laws themselves, provided that they did not conflict with the federal law.

A second and related point is that the *Whiting* case indicates that as long as a state is not combatting the employment of unauthorized aliens through the use of criminal or civil sanctions such as fees, then the state is not in direct conflict with federal law and is therefore not preempted. In *Whiting*, the Court decided that the federal government in fact expressly allows for the creation of state regulations on employment enforced through the revocation or suspension of licensing. This second point is incredibly important in the consideration of other states wishing to regulate employment on a state level. Obviously, as Chief Justice Roberts acknowledges in the opinion of the Court, states have a particular interest in state fiscal well-being. Because of this, economic regulation of immigration is a growing trend. If states follow the model of the Legal Arizona Workers Act, it would seem that the Court would uphold the constitutionality of such laws.

Chapter 4

A Hypothetical Model for State Immigration Regulation

There are several significant points that arise from the precedents provided by the U.S. Supreme Court in *De Canas*, *Plyler*, *Printz*, and *Whiting* that can be beneficial to any state attempting to regulate immigration in any way. By analyzing the previous cases, it is possible to create a hypothetical model by which states may hope to be successful in creating legislation that the Courts will deem constitutional. While these four cases obviously do not cover every issue that could possibly arise within the American legal system concerning state legislation, and the model may therefore not be without flaws, it can provide an excellent starting point in the process of creating state legislation.

Compelling State Interests

The first criterion in the hypothetical model for state immigration regulation is based upon Justice Brennan's opinion in *Plyler v. Doe*, which concerns whether or not a state may prohibit illegal aliens from receiving a free public education just like American citizens. In the opinion, Justice Brennan notes that denying public education to a particular group, in this case undocumented children, has to be validated by "a showing that it furthers some substantial state interest." (*Plyler* 1982, 11) In *Plyler*, the Court decided that this was not the case, as the appellants did not provide a compelling state interest concerning Code 21.031. This precedent showed that the Court would require a specific state interest to be used as justification for any state legislation that would affect immigrants. Therefore, the first criterion for the model is just that. States should be able to provide evidence that any legislation that will affect illegal aliens,

whether it concern jobs, education, benefits for illegal aliens, etc., serves a compelling state interest.

The Court in *Plyler* may not have found such an interest; however, *De Canas* proved to have a positive outcome for the California state legislature. In *De Canas*, the Court held that Code 2805, which attempted to prohibit an employer from knowingly hiring unauthorized aliens, focused on “essentially local problems.” (*De Canas* 1976, 2) The state of California claimed to be concerned with the economy of the state, as well as the well being of their state citizens, who were unable to find work at businesses that were participating in the hiring of unauthorized aliens. The Supreme Court considered this to be a valid interest, and while other aspects of *De Canas* have since been overturned, which will be discussed later, the Court’s decision in *De Canas* supports the first criterion, that states should set out to create legislation that, if it affects unauthorized aliens, aims to serve a compelling state interest first and foremost.

State Police Powers: Requirement to Coincide with Federal Law

The Court explained in *De Canas v. BICA* that the power to regulate immigration is exclusively a federal power; however, it was understood by the Court that not all state statutes dealing with aliens strictly qualify as a regulation of immigration. Because of this, it is the job of the Court to consider the content and purpose of a state’s legislation concerning unauthorized aliens in order to determine if the regulation is or is not attempting to regulate immigration like the federal government. The second criterion arises from *De Canas*, where Justice Brennan states that states have a broad authority under their police powers to “regulate the employment relationship to protect workers” within a state (*De Canas* 1976, 2). The Court further stated in *De Canas* that the fact that California Labor Code 2805 attempts to prohibit employment of

unauthorized aliens is, in fact, within the realm of their police power, which the states have been given in the Constitution. Because states are given this police power, the second criterion for states creating legislation affecting unauthorized aliens is a requirement that state law coincide with federal law in a way that provides a harmonious balance between the two governmental institutions.

Printz v. United States also supports the second criterion, that states have certain police powers that are acceptable as long as there remains a sense of harmony between state and federal law. Justice Scalia's citation from *New York v. United States* represents this notion well, as it says, "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." The federal government uses the IRCA to regulate immigration into the United States; however, the Court holds that the federal government's power is limited and the states have their own powers because of the dual sovereignty within the American government. This makes it clear that there is room for the states to provide some types of regulation concerning the issue of immigration.

What states must consider in creating new legislation concerning immigration is whether or not the legislation will be in direct conflict with already existing federal law. Issues of preemption often arise when the Court considers the validity of state laws, which directly reflects the idea that states must be careful to remain in harmony with federal legislation, in particular, IRCA. *Whiting* provides an example of this in that the Court found that IRCA neither expressly preempted nor impliedly preempted the Legal Arizona Workers Act.

States May Not Impose Criminal or Civil Sanctions

IRCA was created by Congress to make it “unlawful for a person or other entity...to hire, or to recruit or refer for a fee, for employment...an alien knowing the alien is an unauthorized alien.” (*Whiting* 2011, 2) The federal legislation also expressly preempts states from imposing civil or criminal sanctions in the form of fees, but continues to allow states to use licensing and similar laws as a way to combat the employment of unauthorized aliens. This is the third criterion in a state model for immigration legislation. States looking to regulate immigration through legislation focused on the state economy should do so by implementing punishments based on licensing, just like the Legal Arizona Workers Act. A state law that follows this criterion based on the example set forth by *Whiting* should be safe within the American legal system.

A Growing Debate

The issue of immigration, legal and illegal, continues to become increasingly relevant in American political culture. Whether or not the legislation that states are attempting to pass and have enacted will prove to be effective in solving the “problems” that the states claim relate to illegal immigration into the United States has yet to be seen; however, if states do follow the hypothetical model explained previously, then they will have more success with creating legislation deemed constitution by the federal government. The debate over immigration spans across a range of factors and aspects, such as the national and state economies, social issues, and human rights. While focusing on the legal aspect of the immigration debate does not provide a clear answer as to the direction the nation will go concerning the hot topic of political conversation, it demonstrates the important role of the federal and state government in

determining how the issue is perceived by the public and handled by American political institutions.

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