

stake,<sup>76</sup> the fact that the Court is now giving substantial weight to the agency in *implied* preemption inquiries is disconcerting. By eliminating the criterion that considers the agency’s present view of a regulation’s preemptive effect, the Court could alleviate many of the concerns raised in this comment.

2. *Immigration Law*. — In 1986, Congress passed the Immigration Reform and Control Act<sup>1</sup> (IRCA or the Act), making it unlawful for American employers to hire undocumented workers.<sup>2</sup> The IRCA marked Congress’s first foray into the regulation of immigrant employment and signaled that “combating the employment of illegal aliens” had become “central” to federal immigration policy.<sup>3</sup> Congress included an express provision in the IRCA noting that the new law would preempt any state legislation imposing civil or criminal sanctions on businesses found to be employing undocumented workers.<sup>4</sup> The Act also featured a parenthetical savings clause that exempted state licensing laws from the preemption provision.<sup>5</sup>

Last Term, in *Chamber of Commerce v. Whiting*,<sup>6</sup> the Supreme Court held that the IRCA’s savings clause exempts from preemption an Arizona law<sup>7</sup> allowing, and in some cases requiring, state courts to suspend or revoke the business licenses of Arizona employers who “knowingly or intentionally employ an unauthorized alien.”<sup>8</sup> *Whiting* was right to entertain both express and implied preemption arguments against the validity of the new state law. However, *Whiting*’s focus in its implied preemption analysis on the IRCA’s express savings clause did significant harm to the Court’s established preemption framework and undermined the comprehensive federal immigration scheme the IRCA sought to create. As the Court has in years past, the *Whiting* Court should have acknowledged the IRCA’s intended impact and invalidated a state law that intrudes on the federal government’s long-established purview over the regulation of immigrant employment.

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<sup>76</sup> See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 512 (1996) (O’Connor, J., concurring in part and dissenting in part) (“It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference . . .”) (emphasis in original).

<sup>1</sup> Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

<sup>2</sup> 8 U.S.C. § 1324a(a)(1) (2006).

<sup>3</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002).

<sup>4</sup> 8 U.S.C. § 1324a(h)(2).

<sup>5</sup> *Id.*

<sup>6</sup> 131 S. Ct. 1968 (2011).

<sup>7</sup> Legal Arizona Workers Act, 2007 Ariz. Sess. Laws 1312 (codified at ARIZ. REV. STAT. ANN. §§ 13-2009, 23-211 to -214 (2008)).

<sup>8</sup> *Whiting*, 131 S. Ct. at 1976; see *id.* at 1987.

Congress passed the IRCA in an effort to inject an explicit federal prohibition of the knowing employment of undocumented workers<sup>9</sup> into the federal immigration scheme.<sup>10</sup> Beyond this basic prohibition, the IRCA also requires employers to verify each employee's immigration status<sup>11</sup> and to swear under penalty of perjury on a Department of Homeland Security Form I-9 that they "ha[ve] verified that the individual is not an unauthorized alien by examining [the relevant documentation]."<sup>12</sup> Employers found to engage in a pattern of misconduct under the Act may be subject to criminal penalties, including prison time, as well as hefty fines.<sup>13</sup>

In addition to regulating the employment of undocumented workers, the IRCA includes a provision on preemption. In a brief subsection, the IRCA states that "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."<sup>14</sup> The IRCA's use of a savings clause to exempt state "licensing" laws from preemption paved the way for several states to establish their own restrictions on, and their own business licensing sanctions for, the employment of undocumented workers.<sup>15</sup> Arizona was one such state. In 2007, the Arizona legislature passed the Legal Arizona Workers Act<sup>16</sup> (LAWA), authorizing state courts to revoke or suspend the operating licenses of businesses that knowingly employ undocumented workers.<sup>17</sup> A separate subsection of LAWA also requires all employers to verify the employment status of new employees through the federal E-Verify system,<sup>18</sup> a process that the Illegal Immigration Reform and Immigrant

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<sup>9</sup> The IRCA 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." 8 U.S.C. § 1324a(a)(1)(A).

<sup>10</sup> The IRCA amended the Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1537 (2006)). Although it represented a major federal effort to regulate immigration, the INA "at best" expressed "a peripheral concern with [the] employment of illegal entrants." *Whiting*, 131 S. Ct. at 1974 (alteration in original) (quoting *De Canas v. Bica*, 424 U.S. 351, 360 (1976)).

<sup>11</sup> See 8 U.S.C. § 1324a(b).

<sup>12</sup> *Id.* § 1324a(b)(1)(A); *Whiting*, 131 S. Ct. at 1974.

<sup>13</sup> 8 U.S.C. § 1324a(e)(4), (f)(1).

<sup>14</sup> *Id.* § 1324a(h)(2).

<sup>15</sup> See, e.g., COLO. REV. STAT. § 8-17.5-102 (2010); MISS. CODE ANN. § 71-11-3(7)(e) (2010).

<sup>16</sup> ARIZ. REV. STAT. ANN. §§ 13-2009, 23-211 to -214 (2008).

<sup>17</sup> *Id.* § 23-212(A), (F).

<sup>18</sup> *Id.* § 23-214(A).

Responsibility Act of 1996<sup>19</sup> (IIRIRA) had made voluntary for entities outside the federal government.<sup>20</sup>

In 2008, the United States Chamber of Commerce (the Chamber), along with several interest and civil rights groups, filed a pre-enforcement challenge to the new Arizona statute in federal district court.<sup>21</sup> The Chamber argued that the section of the Arizona law requiring the suspension and revocation of business licenses was both expressly and impliedly preempted by the IRCA.<sup>22</sup> The district court held that the provision was not preempted,<sup>23</sup> noting that the IRCA's savings clause expressly authorized "state licensing sanctions" like the kind mandated in the Arizona statute.<sup>24</sup>

The Chamber appealed, and the Ninth Circuit affirmed.<sup>25</sup> Writing for the majority, Judge Schroeder<sup>26</sup> held that the district court had "correctly determined that [LAWA] was a 'licensing' law within the meaning of the federal provision and therefore was not expressly preempted."<sup>27</sup> Pointing, as the district court had,<sup>28</sup> to the Supreme Court's decision in *De Canas v. Bica*,<sup>29</sup> the Ninth Circuit stated that the courts should operate under a presumption against preemption when considering a state regulation that, like the regulation of employment, "is 'within the mainstream' of the state's police powers."<sup>30</sup> The Ninth Circuit rejected the Chamber's argument that the IRCA, as interpreted by *Hoffman Plastic Compounds, Inc. v. NLRB*,<sup>31</sup> "brought the regulation of unauthorized employees within the scope of federal immigration law," holding that the regulation of employment "remains within the states' historic police powers" even when the regulation concerns undocumented workers.<sup>32</sup>

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<sup>19</sup> Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.). The IIRIRA was the statutory complement to the IRCA's I-9 employment verification process.

<sup>20</sup> See *id.* § 402(a), 110 Stat. at 3009-656.

<sup>21</sup> *Ariz. Contractors Ass'n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036, 1040-41 (D. Ariz. 2008).

<sup>22</sup> *Whiting*, 131 S. Ct. at 1977. The Chamber also argued that the section of LAWA requiring employers to use the formerly voluntary E-Verify system was impliedly preempted, this time by the IIRIRA. *Id.* This comment focuses on the Chamber's preemption challenge to LAWA's business licensing regime.

<sup>23</sup> *Candelaria*, 534 F. Supp. 2d at 1055.

<sup>24</sup> *Id.* at 1046.

<sup>25</sup> *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 869 (9th Cir. 2009).

<sup>26</sup> Judge Schroeder was joined by Judge N. Randy Smith and Senior Circuit Judge Walker of the Second Circuit, sitting by designation.

<sup>27</sup> *Chicanos Por La Causa*, 558 F.3d at 860.

<sup>28</sup> See *Candelaria*, 534 F. Supp. 2d at 1048.

<sup>29</sup> 424 U.S. 351 (1976).

<sup>30</sup> *Chicanos Por La Causa*, 558 F.3d at 864 (quoting *De Canas*, 424 U.S. at 356).

<sup>31</sup> 535 U.S. 137 (2002).

<sup>32</sup> *Chicanos Por La Causa*, 558 F.3d at 864-65.

The Supreme Court affirmed.<sup>33</sup> Writing for the majority, Chief Justice Roberts,<sup>34</sup> engaging initially in an express preemption analysis, held that LAWA's license suspension and revocation provisions fell squarely within the IRCA's express savings clause.<sup>35</sup> Explaining that the Arizona statute functioned as a "licensing law," Chief Justice Roberts first noted that the statute "parrot[ed] the definition of 'license' that Congress codified in the Administrative Procedure Act."<sup>36</sup> He next turned to dictionary definitions of the word "license," finding that the Arizona statute's provisions for license suspension and revocation were "typical attributes of a licensing regime"<sup>37</sup> concerned, as *Webster's* defines it, with "right[s] or permission[s] granted in accordance with law . . . to engage in some business or occupation . . . which but for such license would be unlawful."<sup>38</sup>

In a portion of the opinion joined by a plurality of the Court, Chief Justice Roberts also rejected the Chamber's argument that LAWA was impliedly preempted. First reiterating that the IRCA's savings clause granted Arizona explicit permission to pass its new licensing law, he noted that, far from establishing a regulatory regime that would operate in conflict with federal law, "Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects."<sup>39</sup> Next, Chief Justice Roberts identified two balances the IRCA sought to strike and explained how LAWA respected those balances: First, he acknowledged that the IRCA sought to strike a balance between "detering unauthorized alien employment" and "guarding against employment discrimination."<sup>40</sup> Responding to the dissent's concerns that the Arizona law's severe set of sanctions would undermine this balance by compelling employers to discriminate against all Hispanic job applicants, Chief Justice Roberts argued that the LAWA

<sup>33</sup> *Whiting*, 131 S. Ct. at 1973.

<sup>34</sup> Chief Justice Roberts was joined by Justices Scalia, Kennedy, and Alito. Justice Thomas joined Parts I, II-A, and III-A of the opinion and concurred in the judgment. Justice Kagan took no part in the consideration of the case.

<sup>35</sup> *Whiting*, 131 S. Ct. at 1981.

<sup>36</sup> *Id.* at 1978 (citing 5 U.S.C. § 551(8) (2006)).

<sup>37</sup> *Id.* at 1983.

<sup>38</sup> *Id.* at 1978 (first alteration in original) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1304 (2002)) (internal quotation mark omitted). Chief Justice Roberts rejected the Chamber's attempt to distinguish laws that grant business licenses from laws such as LAWA that allow for suspension and revocation of such licenses, holding that a construction of the term "licensing" to include only licensing grants would "run[] contrary to the definition that Congress itself has codified." *Id.* at 1979. Chief Justice Roberts derived this congressional definition from the Administrative Procedure Act. See 5 U.S.C. § 551(9) ("[L]icensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license . . .").

<sup>39</sup> *Id.* at 1981 (plurality opinion).

<sup>40</sup> *Id.* at 1983. Chief Justice Roberts also noted that the IRCA sought to balance other policy considerations, including the burden on employers and the need for employee privacy. *Id.*

provision immunizing employers from liability if they used the existing I-9 and E-Verify systems in good faith makes it unlikely that employers would seek to insulate themselves further through discriminatory employment practices.<sup>41</sup> Second, Chief Justice Roberts noted that the IRCA sought to balance its grant of regulatory authority between the federal government and the states.<sup>42</sup> “Part of that balance,” he wrote, involved “preserv[ing] state authority over a particular category of sanctions — those imposed ‘through licensing and similar laws.’”<sup>43</sup>

Justice Breyer dissented.<sup>44</sup> In his express preemption analysis, Justice Breyer acknowledged that, as Chief Justice Roberts had pointed out, basic dictionary definitions of the word “licensing” are “broad enough to include virtually any permission that the State chooses to call a ‘license.’”<sup>45</sup> However, Justice Breyer argued that statutory context was vital in determining the meaning of “licensing” “in this federal statute.”<sup>46</sup> Pointing to the statute’s legislative history, Justice Breyer argued that Congress had three distinct and at times conflicting objectives in passing the IRCA: 1) to prevent employers from hiring undocumented workers;<sup>47</sup> 2) to prevent “harassment” of “innocent employers” by federal and state prosecutors and agencies;<sup>48</sup> and 3) to eliminate discrimination in hiring on the basis of race or national origin.<sup>49</sup> Noting that the federal statute had established a delicate regulatory balance in order to achieve these goals,<sup>50</sup> Justice Breyer argued that the Arizona law “seriously threatens the federal Act’s antidiscriminatory objectives by radically skewing the relevant penalties . . . [and] subjects lawful employers to increased burdens and risks of erroneous prosecution.”<sup>51</sup> As a result, Justice Breyer would have read the IRCA’s savings clause more narrowly to permit state licensing laws involving only “state licensing systems applicable primarily to the licensing of firms in the business of recruiting or referring workers for employment.”<sup>52</sup>

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<sup>41</sup> *Id.* at 1984. The plurality also noted that “[i]mplied preemption analysis does not justify a ‘freewheeling judicial inquiry into whether a state statute is in tension with federal objectives’; such an endeavor ‘would undercut the principle that it is Congress rather than the courts that preempts state law.’” *Id.* at 1985 (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).

<sup>42</sup> *Id.* at 1984.

<sup>43</sup> *Id.* (quoting 8 U.S.C. § 1324a(h)(2) (2006)).

<sup>44</sup> Justice Breyer was joined by Justice Ginsburg.

<sup>45</sup> *Whiting*, 131 S. Ct. at 1988 (Breyer, J., dissenting).

<sup>46</sup> *Id.* (emphasis omitted).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* (quoting S. REP. NO. 99-132, at 35 (1985)) (internal quotation marks omitted).

<sup>49</sup> *Id.* at 1988–89.

<sup>50</sup> *Id.* at 1989–90.

<sup>51</sup> *Id.* at 1990.

<sup>52</sup> *Id.* at 1993.

Justice Sotomayor wrote separately in dissent.<sup>53</sup> Like Justice Breyer, Justice Sotomayor contended in an express preemption analysis that it would be impossible to understand the IRCA's use of the term "licensing" without considering the context in which the legislation was passed.<sup>54</sup> Justice Sotomayor argued that Congress enacted the IRCA in order to make employment law more uniform "amidst [a] patchwork of state laws" on the subject of undocumented workers.<sup>55</sup> The Arizona law undermined this uniformity by granting state courts and prosecutors discretion "to determine the significance of [federal information regarding immigration status] to an alien's *work authorization* status, which will often require deciding technical questions of immigration law."<sup>56</sup> Against the backdrop of the IRCA's legislative history, and in order to maintain uniformity in the regulation of immigrant employment, Justice Sotomayor would have read the IRCA's savings clause "to permit States to impose licensing sanctions following a final federal determination that a person has violated [the IRCA]."<sup>57</sup>

*Whiting* failed to acknowledge the full scope of the IRCA's intended impact on federal immigration policy. In its implied preemption analysis, the *Whiting* plurality focused in part on the balance the IRCA struck between state and federal power to regulate immigrant workers, taking the IRCA's savings clause as a sign that states may legislate to strengthen the federal regulation of immigrant employment.<sup>58</sup> *Whiting's* focus, however, was misplaced. Instead of emphasizing the IRCA's express savings clause in its implied preemption analysis, the Court should have acknowledged what a prior Court already had in *Hoffman Plastic Compounds*: namely, that the IRCA created a "comprehensive scheme" to prevent American employers from hiring undocumented workers and "made combating the employment of illegal aliens central to '[t]he policy of immigration law.'"<sup>59</sup> A focus on this broader congressional purpose would have made clear that a state law like LAWA stands as an obstacle to the IRCA's primary objective and must be invalidated as impliedly preempted.

For years prior to its decision in *Geier v. American Honda Motor Co.*,<sup>60</sup> the Supreme Court struggled to determine the role of implied preemption analysis in cases like *Whiting*, where an express savings

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<sup>53</sup> *Id.* at 1998 (Sotomayor, J., dissenting).

<sup>54</sup> *See id.* at 1998–99.

<sup>55</sup> *Id.* at 1999.

<sup>56</sup> *Id.* at 2003.

<sup>57</sup> *Id.* at 2004.

<sup>58</sup> *See id.* at 1984–85 (plurality opinion).

<sup>59</sup> 535 U.S. 137, 147 (2002) (quoting *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 n.8 (1991)).

<sup>60</sup> 529 U.S. 861 (2000).

clause appears to define the boundaries of state action.<sup>61</sup> The Court finally clarified the doctrine in *Geier*, holding that an express savings clause “does not bar the ordinary working of conflict pre-emption principles.”<sup>62</sup> In privileging the role of implied preemption even in the presence of an express preemption clause, *Geier* established that the terms of a savings clause are irrelevant to implied preemption analysis.<sup>63</sup> Instead, the relevant consideration is whether the state law at issue “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>64</sup>

Tracking the *Geier* preemption framework, the plurality in *Whiting* turned from a discussion about the IRCA’s express preemption provision to an implied preemption analysis.<sup>65</sup> *Whiting* devoted half of its implied preemption discussion to the Chamber’s “more general[] [arguments] that [LAWA] is preempted because it upsets the balance that Congress sought to strike when enacting IRCA.”<sup>66</sup> In this section, Chief Justice Roberts focused on the two congressional balancing acts that he identified in the IRCA: the balance between “detering unauthorized alien employment” and “guarding against employment discrimination,”<sup>67</sup> and the balance between federal and state authority over immigration.<sup>68</sup>

*Whiting*’s analysis of this first congressional balance has come under heavy fire,<sup>69</sup> but the Court’s treatment of the IRCA’s second balancing act, and its evaluation of LAWA’s impact on that balance, will do the most significant harm to the IRCA’s intended impact on federal immigration law. *Whiting* focused its analysis of the IRCA’s balance between federal and state regulatory authority by repeated reference to

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<sup>61</sup> The Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), at first appeared to declare that implied preemption analysis is irrelevant in the face of an express preemption provision. *Id.* at 517. But the Court reversed course with its finding in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), that “*Cipollone* [at best] supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule.” *Id.* at 289.

<sup>62</sup> 529 U.S. at 869 (emphasis omitted).

<sup>63</sup> See *id.* at 874 (“Nothing in the statute suggests Congress wanted to complicate ordinary experience-proved principles of conflict pre-emption with an added ‘special burden’ [imposed by a savings clause].”).

<sup>64</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

<sup>65</sup> 131 S. Ct. at 1981 (plurality opinion).

<sup>66</sup> *Id.* at 1983.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1984.

<sup>69</sup> For example, Justice Breyer’s dissent took the *Whiting* plurality to task for expecting that Arizona employers would resist engaging in employment discrimination in the face of LAWA’s severe sanctions regime. *Id.* at 1990 (Breyer, J., dissenting); cf. David A. Selden et al., *Placing S.B. 1070 and Racial Profiling into Context, and What S.B. 1070 Reveals About the Legislative Process in Arizona*, 43 ARIZ. ST. L.J. 523, 534 (2011) (characterizing LAWA’s antidiscrimination provision as “the toothless approach to non-discrimination advocated by Southern segregationists 60 years ago”).

the authority the IRCA preserved for the states in its savings clause.<sup>70</sup> Acknowledging that Congress intended “to strike a balance among a variety of interests when it enacted IRCA,” Chief Justice Roberts noted that the Act achieved part of that balance by “allocating authority between the Federal Government and the States . . . [and by] preserv[ing] state authority over a particular category of sanctions.”<sup>71</sup> Chief Justice Roberts then went on to reason that, “in preserving to the States the authority to impose sanctions through licensing laws, Congress did not intend to preserve only those state laws that would have no effect.”<sup>72</sup> The plurality’s arguments here read as straw men: there can be no dispute that the IRCA’s savings clause preserved some power for the states to enact business licensing laws, and there can be no dispute that Congress intended those laws to have some effect in the context of immigrant employment. A more appropriate question in *Whiting’s* implied preemption analysis would have been whether LAWA goes too far in disrupting the balance the IRCA sought to strike. As *Geier* made clear, the answer to that question lies beyond the regulatory powers the IRCA reserved to the states in its express statutory text.

The IRCA was indeed concerned with far more than preserving state power over the regulation of in-state business licensing. The Act was designed as a “comprehensive scheme” that “made combating the employment of illegal aliens central to ‘[t]he policy of immigration law.’”<sup>73</sup> This scheme represented a sharp break from the immigration regime the Court had itself established with its 1976 decision in *De Canas*.<sup>74</sup> *De Canas* noted that the regulation of immigrant employment “is certainly within the mainstream of [the state’s] police power.”<sup>75</sup> Although *De Canas* acknowledged that the “[p]ower to regulate immigration is unquestionably exclusively a federal power,”<sup>76</sup> the Court stated that “there would not appear to be a similar federal interest in a situation in which the state law is fashioned to remedy local problems, and operates only on local employers.”<sup>77</sup> Ten years later, the IRCA turned the regulation of immigrant employment from a “local problem” into a federal one.<sup>78</sup> The IRCA was intended to curtail the

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<sup>70</sup> See 131 S. Ct. at 1984–85 (plurality opinion).

<sup>71</sup> *Id.* at 1984.

<sup>72</sup> *Id.* at 1984–85.

<sup>73</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (quoting *INS v. Nat’l Ctr. for Immigrants’ Rights, Inc.*, 502 U.S. 183, 194 n.8 (1991)).

<sup>74</sup> 424 U.S. 351, 356–63 (1976).

<sup>75</sup> *Id.* at 356.

<sup>76</sup> *Id.* at 354.

<sup>77</sup> *Id.* at 363.

<sup>78</sup> See Pub. L. No. 99-603, §§ 101–102, 100 Stat. 3359, 3360–80 (1986) (codified at 8 U.S.C. §§ 1324a, 1324b).

hiring of undocumented workers in order to dissuade undocumented immigrants from crossing the border into the United States and thereby to regulate immigrant *movement*.<sup>79</sup> Unlike the Court's decision in *De Canas*, the IRCA therefore understood the regulation of immigrant employment as "critical to federal immigration policy."<sup>80</sup>

In its implied preemption analysis, *Whiting* ignored this shift in congressional perspective. Instead of focusing on the broad and significant changes the IRCA wrought on the balance between federal and state power over the regulation of immigrant employment, *Whiting* returned repeatedly to the legislative powers the IRCA's savings clause preserved for the states.<sup>81</sup> *Whiting* reasoned that LAWA was justified because it "simply seeks [through business licensing] to enforce [the IRCA's existing] ban" on hiring undocumented workers.<sup>82</sup> But *Whiting* failed to recognize that a state law like LAWA, which uses the threat of significant sanctions to enforce an existing federal regulation, stands in opposition to the comprehensive federal immigration scheme the IRCA sought to create.<sup>83</sup>

Although *Whiting* was wrong to exclude broader considerations of congressional intent from its implied preemption analysis, *Whiting*'s focus on the unique text of the IRCA may limit the impact of the decision on the Court's upcoming consideration of another controversial Arizona law: the Support Our Law Enforcement and Safe Neighborhoods Act,<sup>84</sup> or S.B. 1070. In the months prior to the Court's ruling on LAWA, commentators had pointed to *Whiting* as a test case for the

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<sup>79</sup> The 1986 House Report on the purposes of the Act is clear on this point: "The purposes of the bill are to control illegal immigration to the U.S. . . . The bill establishes penalties for employers who knowingly hire undocumented aliens, thereby ending the magnet that lures them to this country." H.R. REP. NO. 99-682, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5649-50.

<sup>80</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002).

<sup>81</sup> See Lauren Gilbert, *Presuming Preemption: Implications of Chamber of Commerce v. Whiting*, SCOTUSBLOG (July 15, 2011, 9:31 AM), <http://www.scotusblog.com/2011/07/presuming-preemption-implications-of-mchamber-of-commerce-v-whiting> ("The Supreme Court majority in *Whiting* appeared more focused on how IRCA preserved the right of *states* to regulate through licensing laws than on how state law interfered with IRCA's protection of *workers'* rights to be free from discrimination in hiring based on national origin.").

<sup>82</sup> 131 S. Ct. at 1985 (plurality opinion).

<sup>83</sup> *Whiting* was surely correct that the IRCA preempts "state laws imposing civil fines for the employment of unauthorized workers like the one [the Court] upheld in *De Canas*." *Id.* at 1975 (majority opinion). But the Act was also intended to rebut *De Canas*'s broader understanding of the state role in regulating immigrant employment. Cf. Gary Endelman & Cynthia Lange, *The Perils of Preemption: Immigration and the Federalist Paradox*, in IMMIGRATION AND NATIONALITY LAW HANDBOOK 1061 (2009-2010) ("[O]ver three decades after *De Canas*, it seems clear that our national comprehension of immigration, and what it really means to the domestic economy, must be significantly updated with a resulting constitutional reinterpretation.").

<sup>84</sup> 2010 Ariz. Legis. Serv. 113 (West). S.B. 1070 authorizes law enforcement officials who have stopped or arrested someone in Arizona to determine if that person is an unauthorized alien where reasonable suspicion exists that the person is in the United States unlawfully. *Id.* § 2.

constitutionality of S.B. 1070.<sup>85</sup> However, many analysts now argue that *Whiting's* reliance on the IRCA's savings clause in its implied preemption analysis limits *Whiting* to its facts.<sup>86</sup> These analysts are right to point to *Whiting's* focus on the IRCA's savings clause, but they ignore *Whiting's* broader effort to narrow the obstacle preemption analysis in the context of immigration legislation. After spending the bulk of its implied preemption discussion on the text of the savings clause, *Whiting* noted at the end of its analysis that "[i]mplied preemption . . . does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.'"<sup>87</sup> *Whiting's* effort to caution future courts against such "freewheeling judicial inquir[ies]" may indeed determine whether the Court upholds the Ninth Circuit's decision granting an injunction against some of S.B. 1070's most severe provisions,<sup>88</sup> especially since the Ninth Circuit appears to have engaged in the kind of freewheeling implied preemption inquiry that *Whiting* was so careful to avoid.<sup>89</sup>

Of course, a narrow obstacle preemption doctrine in the context of immigration law is not patently unwise as a matter of public policy. Since the IRCA was introduced in 1986, critics have claimed that the federal government is a poor regulator when it comes to immigrant movement: as recently as 2007, even offices within the U.S. government joined the chorus of voices arguing that federal regulation of the immigrant population, including the IRCA's regulation of immigrant employment, is inadequate.<sup>90</sup> Meanwhile, President George W. Bush's administration actively encouraged states and localities to increase their own involvement in the regulation of immigrant populations.<sup>91</sup> Advocates of a restrained obstacle preemption analysis in the context of immigration regulation argue that such an approach "reflects the re-

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<sup>85</sup> See, e.g., Bill Mears, *New Supreme Court Term Begins; Kagan to Recuse from Dozens of Cases*, CNN.COM (Oct. 4, 2010, 8:26 PM), <http://www.cnn.com/2010/POLITICS/10/04/scotus.new.term/index.html>.

<sup>86</sup> See, e.g., Selden et al., *supra* note 69, at 556 ("[T]he Supreme Court decision . . . in the *Chamber of Commerce v. Whiting* case, which relied on the Savings Clause as an all-encompassing exception for any law that deals with immigration through licensing statutes[,] does not serve as a precedent for upholding S.B. 1070." (footnote omitted)).

<sup>87</sup> 131 S. Ct. at 1985 (plurality opinion) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).

<sup>88</sup> *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011).

<sup>89</sup> See Kris W. Kobach, *Arizona's S.B. 1070 Explained*, 79 UMKC L. REV. 815, 815 n.5 (2011) (noting that "the Ninth Circuit has engaged in exactly the sort of free-wheeling judicial inquiry that the Supreme Court has condemned").

<sup>90</sup> See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 5-8 (1990), available at <http://archive.gao.gov/d24t8/140974.pdf>.

<sup>91</sup> See Nchimunya D. Ndulo, Note, *State Employer Sanctions Laws and the Federal Preemption Doctrine: The Legal Arizona Workers Act Revisited*, 18 CORNELL J.L. & PUB. POL'Y 849, 851 (2009).

ality on the ground that it is states and localities that must accommodate immigrants.”<sup>92</sup> Critics may have valid concerns about the capacity of the federal government to regulate immigration.<sup>93</sup> However, it should be left up to Congress, and not the courts, to cede regulatory control to the states. Courts should not decide on their own that federal statutes like the IRCA have become inadequate to police immigrant employment. If the Court wishes to narrow the range of state laws that are impliedly preempted under the IRCA and similar federal statutes, it should wait for Congress to make the first move.

3. *Tort Law*. — The multitude of preemption cases heard during the October 2010 Term<sup>1</sup> suggested a confused and confusing preemption jurisprudence. The Court has struggled to consistently apply the presumption against preemption.<sup>2</sup> While the presumption has been vigilantly applied in areas of traditional state regulation,<sup>3</sup> “[i]n the realm of products liability preemption, the presumption does yeoman’s work in some cases while going AWOL . . . in others.”<sup>4</sup> This seemingly arbitrary application of the presumption has fostered scholarly arguments about its very existence.<sup>5</sup> Last Term, in *Bruesewitz v. Wyeth LLC*,<sup>6</sup> the Supreme Court held that the National Childhood Vaccine Injury Act<sup>7</sup> (NCVIA) bars state design-defect claims against vaccine manufacturers.<sup>8</sup> The Court failed to recognize the ambiguity in the statute and, based on its distrust of the operation of state tort law, imposed its own policy views. Instead, the Court

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<sup>92</sup> Maria Marulanda, Note, *Preemption, Patchwork Immigration Laws, and the Potential for Brown Sundown Towns*, 79 *FORDHAM L. REV.* 321, 362 (2010).

<sup>93</sup> For an example of such critics, see Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 *MICH. L. REV.* 567, 623–28 (2008). However, a federal failure to act does not automatically justify state action. See Gilbert, *supra* note 81.

<sup>1</sup> See, e.g., *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011) (preemption of state failure-to-warn claims); *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (legislative preemption of federal common law); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (conflict preemption of state labor law); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (preemption of state contract law); *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011) (preemption of state tort law); *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068 (2011) (preemption of state design-defect claims).

<sup>2</sup> See Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 *GEO. WASH. L. REV.* 449, 458 (2008) (“I join a veritable chorus of scholars pointing out the Court’s haphazard application of the presumption.”).

<sup>3</sup> See, e.g., *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

<sup>4</sup> Sharkey, *supra* note 2, at 458 (footnote omitted).

<sup>5</sup> Compare Erwin Chemerinsky, *Empowering States when It Matters: A Different Approach to Preemption*, 69 *BROOK. L. REV.* 1313, 1315 (2004) (“[T]he recent Supreme Court preemption cases clearly put the presumption in favor of preemption.”), with Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 *S.C. L. REV.* 967, 1013 (2002) (“[T]here is no meaningful presumption against preemption.”).

<sup>6</sup> 131 S. Ct. 1068.

<sup>7</sup> 42 U.S.C. §§ 300aa-1 to -34 (2006).

<sup>8</sup> *Bruesewitz*, 131 S. Ct. at 1082.