Do State and Local Immigration Laws Violate Federal Law?

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Faced with what they consider a lack of comprehensive immigration reform at the federal level, many states and localities are enacting their own immigration-related laws and ordinances. Many of these laws impose restrictions on unauthorized immigrants, while some aim to promote integration of immigrants into the society.[1] Such laws raise a number of constitutional issues, including whether federal law preempts them. What is the permissible scope of state and local action in this area?

There is no general answer to this question, for the analysis varies across different areas of regulation. This article explains general principles of preemption and provides an analytical framework for determining whether state and local laws relating to housing, employment, and public benefits may be preempted by federal law (and thus invalidated).[2] The article also briefly discusses free speech and civil rights laws that may be violated by laws establishing English as the official language. (For information on actions related to immigration already taken by local jurisdictions in North Carolina, see the sidebar on this page.)

To make the article relevant both to experts (such as county and city attorneys) and to administrators and officials with broader responsibilities, each section offers a detailed analysis of the kinds of laws that may be preempted by federal laws and a summary providing best guidance on the permissible scope of state and local action.

The law related to preemption is somewhat unsettled. Some cases address preemption with apparently inconsistent findings. The area is fraught with legal challenges, so lawmakers should work closely with their attorneys in crafting ordinances relating to immigrants.

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General Principles of Preemption

Under the Supremacy Clause of the U.S. Constitution, federal law is the supreme law of the land.[3] State and local governments are "preempted" from enacting legislation in areas in which Congress has asserted its exclusive authority or in areas that would conflict with federal legislation. In the immigration field, the U.S. Supreme Court has recognized three tests to determine whether federal law preempts a state or local law: (1) constitutional preemption, (2) field preemption, and

Summary of Actions on Immigration Concerns by North Carolina Local Jurisdictions

Services or Benefits Limited on the Basis of Immigration Status
Gaston County

Prohibition on Hiring of Unauthorized Immigrants by Public Employers, or by Contractors Working for the Government
Forsyth County
Gaston County

Establishment of English as the Official Language
Town of Landis (Rowan County)
Town of Southern Shores (Dare County)
Beaufort County
Cabarrus County
Dare County
Davidson County

Sources: Mai Thi Nguyen, "Anti-Immigration Ordinances in North Carolina: Ramifications for Local Governance and Planning," *Carolina Planning Journal* 32: 36–46 (2007); city and county clerks in the jurisdictions listed, e-mail exchanges and telephone conversations with John Stephens, February–March 2009; Davidson County Board of Commissioners, Minutes of the Meeting, November 14, 2006, www.co.davidson.nc.us/media/pdfs/32/4045.pdf; Gaston County Board of Commissioners, Minutes of the Meeting, November 9, 2006, www.co.gaston.nc.us/CountyCommission/minutes/2006/2006-11-09minutes.pdf; Lincoln County Board of Commissioners, Minutes of the Meeting, Monday, June 18, 2007, www.lincolncounty.org/archives/37/061807Min.pdf; "Resolution Outlining Compliance with the Federal Immigration Laws in County Recruitment, Hiring and Contracting Practices," Minutes of the October 23, 2006, Meeting of the Forsyth County Board of Commissioners, p. 1103376.

(3) conflict preemption.[4] Issues concerning each of the three types of preemption may arise when state and local governments enact laws related to immigration. A state or local law related to immigration that fails any one of these three tests is preempted by federal law and therefore unconstitutional and invalid.[5]

What is constitutional preemption? The U.S. Supreme Court has consistently ruled that the federal government has broad and exclusive power to regulate immigration.[6] A state or local law will be constitutionally preempted if it attempts to regulate immigration. Under this test, the relevant question is: Does the state or local law *regulate* immigration—does it make a determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain—or does it simply *pertain* to immigrants?[7] State and local laws that attempt to regulate immigration violate the Supremacy Clause of the U.S. Constitution and are therefore preempted by federal law, even in the absence of federal legislation.

What is field preemption? Even if the state or local law is not an impermissible regulation of immigration, it may be field preempted if it attempts to operate in a field already occupied by federal law, either expressly or impliedly. Under this test, the relevant question is: Did Congress intend a "complete ouster" of state power in the field of legislation?[8] Or did Congress intend for states to regulate in the area to the extent consistent with federal law? If Congress intended to occupy the field of regulation, then a local or state law will be preempted, even if it mirrors federal law. Often, looking at the statutory language or the legislative history of the federal law is necessary to make such a determination.

What is conflict preemption? Even if Congress has not occupied the field of regulation, a state or local law may be conflict preempted if it burdens or conflicts with federal law. A conflict exists if complying with both federal and state or local law is impossible.[9] A conflict also exists if the state or local law is an obstacle to the accomplishment and the execution of the full purposes and objectives of Congress in enacting the federal legislation.[10] Testing for conflict preemption requires an analysis of the specific provisions of the law at issue.

Preemption in the Context of Housing Laws

Some state and local governments have proposed or enacted laws that prohibit property owners from renting or leasing property to unauthorized immigrants, and penalize them for doing so. (Such laws are labeled "housing laws" in this article.) Some housing laws require property owners or landlords to determine the immigration status of potential renters. They have been challenged on federal preemption grounds. Are they preempted by federal law? Courts that have thus far examined such housing laws have found that they carry serious concerns of federal preemption.[11]

Are Housing Laws Constitutionally Preempted?

Are housing laws constitutionally preempted? That is, are they considered a regulation of immigration? The answer depends on how such laws are constructed. The authority to create standards determining a person's immigration status belongs exclusively to the federal government.[12] Thus any type of state or local law (including a housing law) that creates or adopts standards different from federal standards to classify immigrants as lawfully present or unlawfully present will probably be deemed a regulation of immigration and thus be preempted.[13]

For example, a housing law in Farmers Branch, Texas, was found to be an impermissible regulation of immigration. The law classified a tenant's immigration status on the basis of federal housing regulations (which outlined restrictions on federal housing subsidies to immigrants), instead of federal immigration law.[14] The court found that the standards adopted by the local law prohibited several classes of authorized immigrants—immigrants who *lawfully* reside in the United States but are ineligible for federal housing assistance, such as student

visa holders—from renting an apartment in Farmers Branch.

Further, any sort of state or local law that authorizes a local or state entity to make an independent assessment of a person's immigration status also may be deemed an impermissible regulation of immigration and preempted by federal immigration law.[15] Immigration law generally vests authority in the U.S. attorney general and the secretary of the U.S. Department of Homeland Security to administer and enforce all laws relating to immigration and naturalization, including determinations regarding a person's immigration status (though such determinations are subject to judicial review in many circumstances).[16]

For example, in the Farmers Branch case, the court suggested that the law also was preempted because it required private people and city officials to make independent judgments regarding the immigration status of potential renters, instead of verifying their status with federal authorities or under federal guidance.[17]

Are Housing Laws Field Preempted?

Housing laws that are not a regulation of immigration may still fail the test of field preemption.[18] The issue is whether such laws attempt to legislate in a field that is occupied by the federal government. Even if state and local laws are consistent with federal objectives, they may be preempted if Congress has occupied the field.

The federal government has established a system of laws, regulations, procedures, and administrative agencies to determine, subject to administrative and judicial review, whether and under what conditions a given person may enter, stay in, and work in the United States. The federal government has not imposed any sanctions on landlords for renting to unauthorized immigrants, but it does regulate and impose penalties on various forms of assistance to unauthorized immigrants, including "harboring" an unauthorized immigrant. Specifically, federal immigration law penalizes people who knowingly or recklessly "conceal, harbor, or shield from detection" any person not lawfully present in the United States.[19] Some courts have interpreted the scope of this provision broadly, finding it to cover the act of providing shelter to an unauthorized immigrant knowing or recklessly disregarding the immigrant's unauthorized status, regardless of whether shelter was provided surreptitiously.[20]

The federal immigration laws do not expressly preempt states and localities from imposing additional penalties on people who harbor or provide shelter to unauthorized immigrants. However, by legislating in this area, the federal government may nonetheless have occupied the field and preempted state or local laws that prohibit property owners from renting to unauthorized immigrants. It depends on whether or not Congress intended a complete ouster of state or local power. One court has found that a local law in Escondido, California, that penalized property owners who "harbor" (rent an apartment to) unauthorized immigrants raised serious concerns of field preemption.[21] In granting a temporary restraining order against the proposed law, the court found that the federal immigration laws proscribing harboring may occupy the field in which the local law attempted to legislate.[22]

Are Housing Laws Conflict Preempted?

Are housing laws conflict preempted? That is, do they conflict with federal law or stand as an obstacle to the accomplishment and the execution of the full purposes and objectives of Congress? What is a sufficient obstacle is determined by examining the federal statute and identifying its purpose and intended effects.[23] Conflict-preemption analysis also requires an examination of the particular provisions of the state or local law.

A housing law may conflict with provisions of federal immigration law if it prohibits certain immigrants who are legally authorized to work in the United States from residing in its jurisdiction. The federal government permits several categories of people to legally work and presumably live in the United States, even though they may be technically violating immigration laws. For example, a person who has filed an application for a green card or for asylum technically does not have a lawful immigration status until the application is granted, but may obtain interim permission to work in the United States while that application is pending.[24] One court has used this analysis to invalidate a local ordinance. The city of Hazleton, Pennsylvania, passed a law that in part prohibited property owners from renting a dwelling unit to an unlawfully present immigrant. A reviewing federal court found the housing provisions of the law in conflict with federal law and therefore preempted because the provisions denied housing in Hazleton to a number of people who were authorized to work and implicitly to remain in the United States under federal immigration laws.[25]

Even if a state or local law does not explicitly conflict with a specific provision of federal law, it still may be preempted under this analysis if it creates an obstacle to the accomplishment and the execution of the full purposes and objectives of Congress.[26] When Congress has enacted a federal policy, a state or local law imposing different sanctions or punishing different people for the same conduct may interfere with the objectives of Congress. Congress does not require landlords or others actively to ascertain the immigration status of potential tenants. State and local housing laws that do so and that implement their own enforcement mechanisms, sanctions, and interpretations may be viewed by a court as upsetting the balance struck by Congress regarding the reach of the federal harboring law and the applicability of its penalties.[27] Under such a view, state and local housing laws may be conflict preempted.

Summary of Impact on State and Local Housing Laws

Together, the three types of preemption analysis suggest the following impact on state and local housing laws: Reviewing courts have found that housing laws raise serious preemption issues and have struck them down. Whether any housing law would survive a preemption challenge is not clear because immigrant housing may be an area that state and local governments may not regulate or an area in which a housing law may inherently conflict with the reach and the purpose of federal immigration law. However, a housing law carries less risk of being invalidated on the basis of pre-

emption if it adopts the federal definitions of immigration status and requires verification of the immigration status of renters with federal authorities.

Preemption in the Context of Employment Laws

Some local and state governments have enacted laws that prohibit the hiring or the employment of unauthorized workers and penalize employers for doing so through a variety of sanctions. (Such laws are labeled "employment laws" in this article.) Some employment laws have been challenged on the grounds of federal preemption. Four recent cases have ruled on the legality of state laws in Arizona and Oklahoma and local laws in Hazleton, Pennsylvania, and Valley Park, Missouri.[28] The Hazleton decision suggests that almost any type of employment law regulating unauthorized workers is probably preempted by federal law, and the Oklahoma case suggests that certain types of employment laws are preempted. The Arizona and Valley Park cases, however, suggest that certain employment laws, depending on how they are constructed, may be valid under the Supremacy Clause. The Ninth Circuit Court of Appeals affirmed the ruling in the Arizona case, and federal appeals are pending in the other cases.[29]

Are Employment Laws Constitutionally Preempted?

Are employment laws constitutionally preempted? That is, are they considered a regulation of immigration? The U.S. Supreme Court has held that a state employment law was not a regulation of immigration because it did not determine "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[30] An employment law will probably not be considered a regulation of immigration as long as it adopts the federal government's standards to classify immigration status and requires verification of an employee's work authorization with federal authorities (see the earlier section titled "Are Housing Laws Constitutionally Preempted?").

For example, the federal district court in the Arizona case found that the state

employment law was not a regulation of immigration because it adopted the federal government's classifications of immigration status and relied on the federal government's verification of a person's immigration status and employment authorization.[31]

Are Employment Laws Field Preempted?

Are employment laws field preempted? That is, do they attempt to legislate in a field that is occupied by the federal government, either expressly or impliedly? In 1986, Congress enacted the Immigration Reform and Control Act (IRCA).[32] IRCA prohibits the employment of unauthorized immigrants, while safeguarding against employment discrimination as the prohibition is enforced.[33] The law sets out a process for verifying work eligibility, and the penalties to employers include cease-and-desist orders, civil and criminal fines, and imprisonment.

IRCA also contains an express preemption clause: "the provisions of

this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[34]

What effect does express preemption have? When a federal law contains an express preemption provision, states and localities may not regulate in the field covered by the provision even if their efforts complement or further federal objectives.[35] Thus IRCA's express preemption provision clearly preempts any state or local law that imposes criminal or civil sanctions (other than through licensing and similar laws) on employers of unauthorized immigrants. The Oklahoma court found that civil sanctions most likely include the penalties of an increased tax rate, a loss of contract, and civil liability, and that the regulation of unauthorized workers through such sanctions is expressly preempted by IRCA.[36]

States and localities may be able independently to regulate the employment of unauthorized workers through "licensing and similar laws" because of the specific exemption in the preemption clause. What types of licensing and similar laws are covered by the exception? The courts in the Arizona and Valley Park cases construed this exception broadly, indicating that states and localities may enact laws that deny or suspend the business licenses of employers who knowingly or intentionally employ unauthorized immigrants.[37] On review of the Arizona case, the Ninth Circuit Court of Appeals agreed that states and localities can enact such licensing laws.[38] The court in the Hazleton case, however, construed the provision narrowly, finding a similar business license law to be preempted.[39]

What effect does implied preemption have? Even if a licensing law related to the employment of unauthorized workers is not expressly preempted (as per the courts in the Arizona and Valley Park cases), such a law may be impliedly preempted by IRCA if Congress intended to occupy the field.

The U.S. Supreme Court has described IRCA as a "comprehensive scheme" that "made combating the employment of illegal aliens in the United States central to the policy of immigration law."[40] IRCA regulates every area of immigrant employment: categories of people who may be employed, categories of people who may not be employed, the punishment for employing unauthorized workers, and the appeals process. On the one hand, IRCA may be so comprehensive that any state or local law seeking to regulate workers on the basis of immigration status would duplicate the federal law or conflict with it.[41] The opposing argument is that, by enacting the specific exemption allowing some licensing regulations to exist, Congress did not intend to preempt the entire field of employment regulation of unauthorized workers.[42]

Are Employment Laws Conflict Preempted?

Are employment laws conflict preempted? As discussed earlier, state and local employment laws relating to unauthorized workers are expressly preempted by IRCA, with the exception of licensing laws. But a licensing law may be preempted if its specific provisions conflict with or burden the federal law.

Some local and state licensing laws contain provisions that may be inconsistent with those of IRCA—for example:

- A stricter standard of conduct, such as strict liability for employment of unauthorized workers (versus the federal law's prohibition of knowingly employing unauthorized workers)

- A new system of verifying work eligibility (versus the federal law's verification scheme, which places the responsibility on the employer)
- A requirement that all categories of employees be screened for work eligibility (versus the federal law's exemptions for some independent contractors and domestic workers)
- No employee right to appeal an eligibility determination (versus the federal law's employee right to appeal)
- No antidiscrimination provisions (versus the federal law's measures to prevent discrimination against legal immigrants)
- Creation of new remedies, such as a civil cause of action against violators of the law (versus no such remedy created by the federal law)

The three cases addressing these issues reached varying conclusions on whether such provisions resulted in conflict preemption. In the Hazleton case, the court found that because such types of employment provisions created a new system of verification, compliance, and enforcement, they conflicted with IRCA and were therefore preempted.[43] The court explained that although the federal and local laws shared a similar purpose—to deter the employment of unauthorized workers without overburdening employers and increasing discrimination—the local law struck a different balance between those interests. The courts in the Arizona and Valley Park cases reached a different result.[44] Both courts found that the proposed laws did not conflict with the objective of Congress—to regulate the employment of unauthorized workers—and that any differences with the federal law were insignificant.

Are laws that mandate the use of E-Verify conflict preempted? Several local and state licensing laws require the use of E-Verify (formerly known as Basic Pilot), an Internet-based system that allows employers to verify electronically the employment eligibility of their newly hired employees. E-Verify is a voluntary program operated by the U.S. Department of Homeland Security in partnership with the Social Security Administration. The Department of Homeland Security encourages the use of E-Verify but, by federal law, may not require employers to use it.[45] There are ongoing concerns about the accuracy of the program.[46]

Some local and state licensing laws have made the use of E-Verify mandatory for all businesses that are required to have a business license to operate in the jurisdiction. Are such laws preempted by the federal law that makes participation in the program voluntary?[47] Under the Hazleton court's analysis, such a provision conflicts with federal law.[48] However, the Arizona and Valley Park courts found no conflict. These courts reasoned that although E-Verify may not be made mandatory at the national level, there was no indication that Congress intended to prevent the states from requiring the use of the system in their licensing laws.[49] On appeal, the Ninth Circuit Court of Appeals affirmed that no conflict existed between the federal law and the Arizona state law that mandated use of E-Verify.[50]

Summary of Impact on State and Local Employment Laws

Together, the three types of preemption analysis suggest the following impact on state and local employment laws: Clearly a state or local law regulating the employment of unauthorized immigrants through criminal sanctions, fines, or other nonlicensing sanctions (such as an increased tax rate or loss of a contract) is preempted by federal law. A state or local law regulating the employment of unauthorized immigrants through licensing provisions may or may not be preempted by federal law. The existing case law is directly conflicting on the legality of such licensing laws. One case suggests that most licensing laws are probably preempted, and two cases suggest that licensing laws may be valid if they adopt federal immigration classifications, require verification of immigration status and work authorization with the federal government, and are consistent with the provisions of the federal law (IRCA) in significant respects.

Preemption in the Context of Public Benefit Laws

Some state and local governments have enacted laws setting out immigration eligibility rules for state and local public benefit programs, such as restricting or extending state-funded medical insurance to certain groups of immigrants. (Such laws are labeled "public benefit laws" in this article.) There has not been much litigation in this area, but public benefit laws are probably preempted if they diverge from the federal welfare law.

Are Public Benefit Laws Constitutionally Preempted?

Are public benefit laws constitutionally preempted? That is, are they considered a regulation of immigration? A public benefit law will probably not be considered a regulation of immigration as long as it specifically adopts federal standards to classify and verify the immigration status of applicants (see the earlier section titled "Are Housing Laws Constitutionally Preempted?").[51] One federal court has held that a public benefit law is not a regulation of immigration because it does not amount to a determination of who should or should not be admitted into the country.[52]

Are Public Benefit Laws Field Preempted?

Are public benefit laws field preempted? That is, do they attempt to legislate in a field that is occupied by the federal government? In 1996, Congress passed a federal welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act.[53] The law created a statutory scheme for determining and verifying immigrant eligibility for most federal, state, and local benefits. In the law, Congress expressly stated a national policy of restricting the availability of public benefits to immigrants.[54] The law defined the benefits covered, and it created two categories of immigrants for purposes of benefit eligibility: "qualified" and "not qualified." The law also specifically designated the limited types of legislative actions that states can take in the area of immigrant eligibility for federal, state, or local benefits.[55]

In striking down a state public benefit law in California, a federal court found that the federal welfare law occupied the field of regulation of public benefits to immigrants, but the court allowed for instances in which states have the right

to determine immigrant eligibility for state or local public benefits.[56]

Under that court's analysis, states and localities may take the following actions in this area:

- States and localities may directly implement the federal welfare law. For example, in California, the court found that the state was permitted to promulgate regulations implementing the federal welfare law.[57]
- The federal law specifically allows states to further *restrict* the eligibility of certain groups of *authorized* immigrants (certain "qualified" immigrants) for designated federal and state public benefits.[58] For example, Alabama, Mississippi, North Dakota, Ohio, Texas, and Virginia do not provide Medicaid to certain groups of eligible qualified immigrants (lawful permanent residents who entered the United States after August 22, 1996, and have completed the five-year waiting period).[59] However, a similar state law was struck down in Arizona on equal protection grounds.[60] Thus state laws that further restrict designated public benefits for certain qualified immigrants are not federally preempted, but may raise equal protection concerns.
- Under the federal law, unauthorized immigrants are ineligible to receive state or local public benefits with certain, limited exceptions. However, states may choose to *extend* state and local benefits to *unauthorized* immigrants by affirmatively enacting a state law that provides for such eligibility.[61] For example, Illinois, New York, and Washington have enacted laws to provide state-funded medical insurance to all children, including unauthorized immigrants.[62]

Are Public Benefit Laws Conflict Preempted?

Are public benefit laws conflict preempted? That is, is it impossible to comply with both federal and state or local law, or is the state or local law an obstacle to the accomplishment and the execution of the full purposes and objectives of Congress?

State or local laws that diverge from the 1996 federal welfare law by creating their own immigration classifications or eligibility schemes are most likely preempted by federal law. For example, in California, the court found certain provisions of the state law to be conflict preempted because they restricted benefits to somewhat different categories of people than the federal welfare law, and made compliance with both impossible.[63]

A state or local law that calls for broader restrictions than the federal law is probably preempted by the federal welfare law, as well. For example, in California, the court also found provisions of the state law to be conflict preempted because they called for broader restrictions on unauthorized immigrants than imposed by the federal law.[64] Specifically, the court found that the state law, which denied all benefits to unauthorized immigrants, conflicted with the federal law, which made certain limited benefits available to unauthorized immigrants, such as Emergency Medicaid.

Summary of Impact on State and Local Public Benefit Laws

Together, the three types of preemption analysis suggest the following impact on state and local public benefit laws: State or local laws that diverge from the federal welfare law by creating their own immigration classifications or eligibility schemes are likely preempted. Laws that create greater restrictions than the federal law (with the second exception mentioned later) are also likely preempted. States and localities are permitted to take the following legislative actions in the area of public benefits:

- States and localities may enact a regulation to directly implement the federal welfare law.
- States may enact a law to further *restrict* the eligibility of certain groups of *authorized* immigrants for designated federal and state public benefits (although such a law may violate the Equal Protection Clause).
- States may affirmatively enact a law to *extend* state and local benefits to *unauthorized* immigrants, even though they would be ineligible for most benefits under the federal law.

Official-English Laws

A number of state and local governments have proposed or enacted laws making English the official language of the jurisdiction (such laws are labeled "official-English laws" in this article). Some of these laws prohibit the use of languages other than English, though many do not. Such laws do not raise federal preemption issues, but may raise other legal issues.

First Amendment Concerns

An official-English law may raise First Amendment concerns if it prohibits the use of foreign languages. A number of

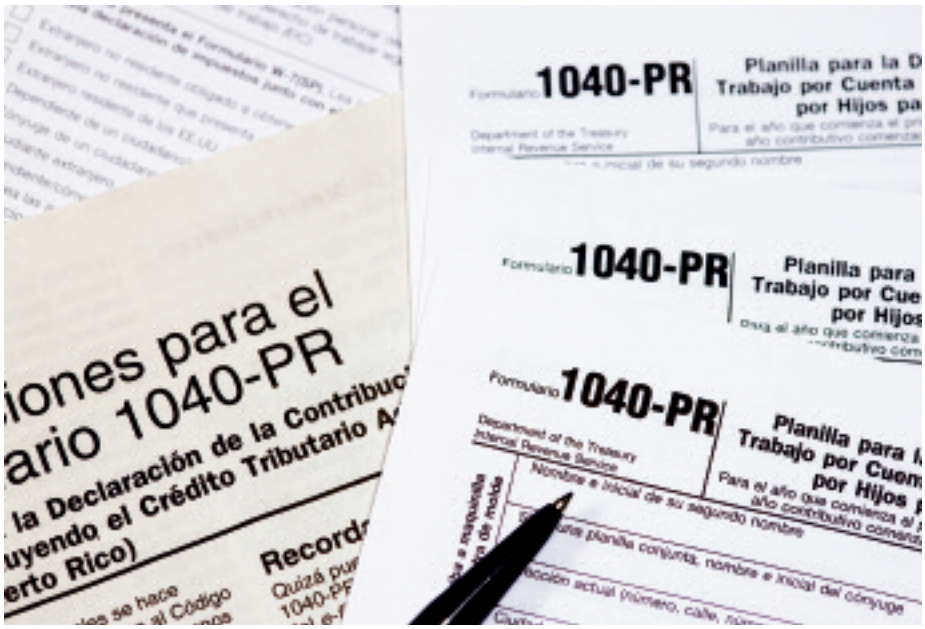
states have enacted official-English laws, including North Carolina.[65] A number of local governments across the United States also have enacted official-English laws, including the North Carolina counties of Beaufort, Cabarrus, Dare, and Davidson and the North Carolina towns of Landis and Southern Shores.[66] The content of these laws varies significantly. Some are simply statements that English is the state's or locality's official language, such as North Carolina's state law. Others designate English as the language of all official public documents, records, or meetings. A few laws have required that English be the only language used by government officials and employees in the course of all governmental actions, banning the use of other languages.[67] Laws in the last category have been struck down in Alaska, Oklahoma, and Arizona as violating the First Amendment rights of elected officials and public employees to communicate with their constituents and the public, and of non-English-speaking people to participate in and have access to government.[68] Official-English laws passed by local governments that ban the use of foreign languages also might be subject to legal challenge on state preemption grounds if exceptions are not made to comply with state law.[69]

Concerns about Discrimination on the Basis of National Origin

Certain official-English laws may raise concerns about discrimination on the basis of national origin under Title VI of the Civil Rights Act of 1964.[70] Title VI prohibits recipients of federal funding from discriminating against people on the basis of national origin, an obligation that includes providing reasonable language assistance to populations with limited English proficiency.[71] Official-English policies preventing agencies, programs, and services that receive federal funds from complying with these language-assistance requirements may violate Title VI.[72]

Summary of Impact on Official-English Laws

Together, these analyses suggest the following impact on official-English laws: An official-English law that bars the use of foreign languages in the course of governmental business may violate state and federal free speech laws. An official-English law is more likely to withstand a legal challenge if it does not restrict the use of foreign languages in the performance of government activity and if it is in compliance with federal and state laws, including the language-assistance requirements of Title VI.



Conclusion

North Carolina state and local government officials often question whether state and local laws relating to unauthorized immigrants are preempted or invalidated by federal law. There is no across-the-board answer to this question, for the analysis varies by area of regulation. This article provides an analytical framework for determining whether proposed or enacted state and local laws related to housing, employment, public benefits, education, and language policy are at risk of preemption. Future cases, including pending appeals in federal courts concerning regulation of immigrant housing and employment, may provide clearer direction.

Notes

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1. The term "laws" is used broadly in this article to describe state laws and local ordinances, resolutions, and policies. The term "unauthorized immigrant" is used to describe a person who is not lawfully present in the United States. *See generally* 8 U.S.C. § 1227(a)(1)(B) (2006); 8 C.F.R. § 103.12 (2008).
2. In this article, I focus on laws in these areas because they have been the subject of preemption challenges or appeared to be of particular interest to lawmakers in North Carolina. Such laws also may raise due process and equal protection concerns, but this article does not cover those areas of the law.
3. U.S. Const. art. 6, cl. 2.
4. DeCanas v. Bica, 424 U.S. 351 (1976).
5. The U.S. Supreme Court has previously struck down state laws relating to immigrants on one or more of these preemption grounds. *See, e.g.,* Toll v. Moreno, 458 U.S. 1, 10 (1982) (invalidating state denial of resident tuition benefits to certain visa holders); Graham v. Richardson, 403 U.S. 365, 377–80 (1971) (invalidating state welfare restriction); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418–20 (1948) (invalidating state denial of commercial fishing licenses); Hines v. Davidowitz, 312 U.S. 52, 62–68 (1941) (invalidating state alien-registration scheme).
6. *See, e.g., DeCanas*, 424 U.S. at 354–55 ("Power to regulate immigration is unquestionably exclusively a federal power.").

7. *DeCanas*, 424 U.S. at 355.
8. *DeCanas*, 424 U.S. at 356–57.
9. *See* Michigan Canners & Freezers v. Agric. Mktg. and Bargaining Bd., 467 U.S. 461, 469 (1984); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142–43 (1963).
10. *See* DeCanas v. Bica, 424 U.S. 351, 363 (1976).
11. *See, e.g.,* Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858 (N.D. Tex. 2008) (finding local housing law to be preempted and granting permanent injunction against its enforcement); Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (striking down local housing law on preemption grounds); Garrett v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Cal. 2006) (granting temporary restraining order against local housing law that raised serious concerns of federal preemption); *cf.* Reynolds v. City of Valley Park, Mo., No. 06-CC-3802 (St. Louis Cty. Cir. Ct. March 12, 2007) (finding that housing ordinance enacted by city of Valley Park was unlawful because it conflicted with state law).
12. *See* Plyler v. Doe, 457 U.S. 202, 225 (1982) ("The States enjoy no power with respect to the classification of aliens. This power is committed to the political branches of the Federal Government."); *see also* Equal Access Education v. Merten, 305 F. Supp. 2d 585, 602–03 (E.D. Va. 2004) (explaining that states cannot formulate their own standards for determining person's immigration status, which are "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain," and thus impermissible regulation of immigration).
13. *See, e.g.*, *Equal Access Education,* 305 F. Supp. 2d at 602–03 (finding that college admissions policy in Virginia might be invalid if, instead of adopting federal standards, it created and applied state standards to assess immigration status of college applicants); League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 768–70 (C.D. Cal. 1995) (invalidating state law provisions that created its own set of standards to classify immigration status of applicants).
14. *Villas at Parkside Partners,* 577 F. Supp. 2d at 868–71 (finding ordinance to be constitutionally preempted and permanently enjoining city from effectuating or enforcing it).
15. *See, e.g.*, *League of United Latin American Citizens,* 908 F. Supp. at 769 ("State agents are . . . . unauthorized to make independent determinations of immigration status . . . .; [such] determinations . . . . amount to immigration regulation").
16. *See generally* 8 U.S.C. § 1103 (2006).
17. Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858, 871–74 (N.D. Tex. 2008).
18. *See* Garrett v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Cal. 2006) (finding that although local housing ordinance was likely not regulation of immigration because it relied on federal immigration standards to classify immigration status of rental applicants, it might still be field preempted).
19. 8 U.S.C. § 1324(a)(1)(iii) (2006). Federal immigration law also penalizes related activities, including the bringing in, the transporting, and the encouragement or inducement of unauthorized immigrants to reside in the United States. 8 U.S.C. § 1324(a)(1)(A)(i)–(iv) (2006). Further, it is a criminal offense to aid or abet the commission of these offenses. 8 U.S.C. § 1324(a)(1)(A)(v) (2006).
20. *See, e.g.,* United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989) (finding that church official violated harboring provision when he invited unauthorized immigrant to stay in apartment behind his church); United States v. Rubio-Gonzalez, 674 F.2d 1067, 1072 (5th Cir. 1982) (indicating that harboring does not require any "trick or artifice"); United States v. Acosta de Evans, 531 F.2d 428, 430 (9th Cir. 1976) (finding defendant liable for providing unauthorized immigrants with apartment and defining "harboring" as "afford[ing] shelter," regardless of intent to avoid detection).
21. *Garrett,* 465 F. Supp. 2d at 1056.
22. The City of Escondido then agreed to a permanent injunction (entered on December 15, 2006) against enforcement of the ordinance.
23. *See* Crosby v. National Foreign Trade Council, 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.").
24. The federal government also may grant work authorization to certain people who may not have a lawful immigration status, but have permission to remain in the United States for humanitarian or equitable reasons. *See, e.g.,* 8 C.F.R. §§ 274a.12(c)(11), (14).
25. Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007). The court also found that Hazleton's requirement that city employees examine immigration documents and determine whether immigrants were lawfully present in the United States conflicted with federal law because only the federal government can determine conclusively who may remain in the United States through formal removal (deportation) hearings.
26. *See Crosby,* 530 U.S. at 378–80.
27. Congress has occasionally amended the statute to narrow or broaden its reach. For example, in 1952, Congress added a proviso that routine employment practices in hiring unauthorized immigrants are not considered harboring. In 1986, Congress removed that proviso. *See* United States v. Kim, 193 F.3d 567, 573–74 (2d Cir. 1999); United States v. Acosta de Evans, 531 F.2d 428, 430 (9th Cir. 1976).
28. Arizona Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036 (D. Ariz. 2008), *aff'd, rev'd sub nom.* Chicanos Por La Causa v. Napolitano, 544 F.3d 976 (9th Cir. 2008); Chamber of Commerce of the United States v. Henry, 2008 WL 2329164, ___ F. Supp. 2d ___ (W.D. Okla. June 4, 2008); Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007); Gray v. City of Valley Park, Mo., 2008 WL 294294, ___ F. Supp. 2d ___ (E.D. Mo. January 31, 2008).
29. *Chicanos Por La Causa*, 544 F.3d 976.
30. DeCanas v. Bica, 424 U.S. 351, 354–55 (1976).
31. *Arizona Contractors Ass'n,* 534 F. Supp. 2d at 1051–52; *see also Lozano,* 496 F. Supp. 2d at 524 n.45 (finding that, on basis of *DeCanas* Court's definition, employment ordinance was not regulation of immigration).
32. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (employer sanctions provisions codified at 8 U.S.C. § 1324a–1324c).
33. The law specifically prohibits the employment of "unauthorized" immigrants, who are neither admitted for permanent residence nor authorized under federal law to work in the United States. 8 U.S.C. § 1324a(h)(3) (2006) .
34. 8 U.S.C. § 1324a(h)(2)(2006).
35. *See, e.g.,* Morales v. TWA, 504 U.S. 374, 387 (1992) (stating that express preemption provision may displace "all state laws that fall within its sphere, even state laws that are consistent with [federal law's] substantive requirements").
36. Chamber of Commerce of the United States v. Henry, 2008 WL 2329164, ___ F. Supp. 2d ___ (W.D. Okla. June 4, 2008) (granting preliminary injunction against employment verification provisions of state law that are likely expressly preempted by federal law).
37. Arizona Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036, 1046–48 (D. Ariz. 2008), *aff'd, rev'd sub nom.* Chicanos Por La Causa v. Napolitano, 544 F.3d 976 (9th Cir. 2008); Gray v. City of Valley Park, Mo., 2008 WL 294294, at *10–12, ___ F. Supp. 2d, ___, ___ (E.D. Mo. January 31, 2008).
38. *Chicanos Por La Causa*, 544 F.3d at 983–85.
39. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 519–20 (M.D. Pa. 2007) (finding that Hazleton law on business-permit suspension did not fall into "licensing" exception and was pretext to regulate employment of unauthorized

workers locally, which is expressly preempted by IRCA).

40. Hoffman Plastic Compounds v. N.L.R.B., 535 U.S. 137, 147 (2002).

41. *See Lozano,* 496 F. Supp. 2d at 523 (finding that IRCA occupies field to exclusion of state or local laws regarding employment of unauthorized immigrants).

42. *Gray,* 2008 WL 294294, at *13, ___ F. Supp. 2d at ___ (finding that Congress's inclusion of provision allowing for some state licensing regulations clearly conflicts with intent to preempt entire field of employment regulation).

43. *Lozano,* 496 F. Supp. 2d at 525–29.

44. Arizona Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036, 1053 (D. Ariz. 2008) ("a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act . . ."); Gray v. City of Valley Park, Mo., 2008 WL 294294, at *13–19, ___ F. Supp. 2d, ___, ___ (E.D. Mo. January 31, 2008).

45. Pub. L. No. 104-208, § 402(a), 110 Stat. 3009, 3656 (1996) ("the Attorney General may not require any person or other entity to participate in [E-Verify].").

46. For example, in a September 2007 evaluation of the E-Verify program commissioned by the U.S. Department of Homeland Security, the evaluators concluded that "the database used for verification is still not sufficiently up to date to meet the [federal law] requirement for accurate verification, especially for naturalized citizens." *See* Westat, *Findings of the Web Basic Pilot Evaluation*, Report submitted to the U.S. Department of Homeland Security (Rockville, MD: Westat, 2007), www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf.

47. For a more detailed analysis regarding preemption of E-Verify laws, *see* Ben Stanley, "Preemption Issues Arising from State and Local Laws Mandating Use of the Federal E-Verify Program," *Public Servant* 6: 1–6 (March 2008).

48. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 526–27 (M.D. Pa. 2007).

49. *Arizona Contractors Ass'n,* 534 F. Supp. 2d at 1055–57; Gray v. City of Valley Park, Mo., 2008 WL 294294, at *17–19, ___ F. Supp. 2d, ___, ___ (E.D. Mo. January 31, 2008) ("The Court does not see Congress's decision not to make the program mandatory as restricting a state or local government's authority under the police powers.").

50. Chicanos Por La Causa v. Napolitano, 544 F.3d 976, 985–86 (9th Cir. 2008).

51. *See* League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 769 (C.D. Cal. 1995) (finding that certain provisions of state public benefit law amounted to regulation of immigration because law created its own, independent standards to classify and verify immigration status of applicants).

52. *League of United Latin American Citizens,* 997 F. Supp. at 1253.

53. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified at 8 U.S.C. §§ 1601 *et seq.* (2006)).

54. 8 U.S.C. § 1601 (2006).

55. 8 U.S.C. §§ 1612(b), 1621(d), 1622(a) (2006).

56. League of United Latin American Citizens v. Wilson, 997 F. Supp. 1244, 1253–55 (C.D. Cal. 1997) (finding that Congress had intended to displace state power in field with limited exceptions).

57. *League of United Latin American Citizens,* 997 F. Supp. at 1255.

58. 8 U.S.C. §§ 1612(b), 1622(a) (2006).

59. *See* National Immigration Law Center, "Overview of Immigrant Eligibility for Federal Programs, Table 1" (rev. March 2005), www.nilc.org/pubs/guideupdates/tbl1_ovrvw_fed_pgms_032505.pdf (excerpt from National Immigration Law Center, *Guide to Immigrant Eligibility for Federal Programs* (4th ed. Los Angeles, CA: National Immigration Law Center, 2002).

60. Kurti v. Maricopa County, 33 P.3d 499 (Ariz. Ct. App. 2001) (finding that state law that permanently restricted eligibility of qualified immigrants entering United States after August 22, 1996, for indigent health care benefits violated Equal Protection Clause of U.S. Constitution).

61. 8 U.S.C. § 1621(d) (2006).

62. *See* 215 Ill. Comp. Stat. 170 (2006) (All Kids, Illinois); N.Y. Pub. Health Law § 2511 (McKinney Supp. 2009) (Child Health Plus, New York); Wash. Rev. Code §§ 74.09.402, 74.09.470 (2008).

63. League of United Latin American Citizens v. Wilson, 997 F. Supp. at 1256–57 (C.D. Cal. 1997) (finding that state classification of "alien in the United States in violation of federal law" differed from federal classification of immigrant who is "not qualified").

64. *League of United Latin American Citizens*, 997 F. Supp. at 1257.

65. *See* Alaskans for a Common Language v. Kritz, 170 P.3d 183, 189 (Alaska 2007) ("There are now English-only laws in twenty-four states."); N.C. Gen. Stat. § 145-12(b) (1987) (hereinafter G.S.) (stating only, "English is the official language of the State of North Carolina.").

66. *See* Ruiz v. Hull, 957 P.2d 984, 994 (Ariz. 1998) (stating that "forty municipalities have official English statutes."); Jerry Allegood, "Not in English? Not in Our County, Beaufort Says," *Raleigh News & Observer,* February 18, 2007, www.newsobserver.com/front/story/544604.html; Cabarrus County Board of Commissioners, Minutes of the Meeting, January 22, 2007, www.cabarruscounty.us/Commissioners/archive/2007/minutes/BOC_minutes_jan222007.pdf; Dare County Board of Commissioners, Minutes of the Meeting, April 7, 2008, www.co.dare.nc.us/BOC/Minutes/ 2008/OM040708.pdf.; Davidson County Board of Commissioners, Minutes of the Meeting, November 14, 2006, www.co.davidson.nc.us/media/pdfs/32/4045.pdf.; Official English Resolution, Town of Landis (adopted on September 11, 2006) (on file with author); Resolution Declaring English as the Official Language of Southern Shores (adopted on April 22, 2008) (on file with author).

67. These laws generally provide for exceptions if use of a foreign language is required to ensure compliance with federal laws, such as federal voting laws.

68. *Alaskans for a Common Language*, 170 P.3d 183 (finding that portion of state law that required use of English by all government officers and employees in all government functions violated federal and state free-speech rights of government officers and employees and of citizens with limited English proficiency to petition their government); *In re* Initiative Petition No. 366, 46 P.3d 123 (Okla. 2002) (finding that proposed state law restricting all governmental communications to English language was unconstitutional on state free-speech grounds); *Ruiz*, 957 P.2d 984 (striking down, on First and Fourteenth amendment grounds, law that required all government officials and employees in Arizona to use only English during performance of all government duties).

69. *See generally, e.g., In re* Application of Melkonian, 85 N.C. App. 351, 355 S.E.2d 503 (1987) ("G.S. 160A-174 establishes . . . that local ordinances are preempted by North Carolina State law when local ordinances are not consistent with State law.").

70. 42 U.S.C. § 2000d (2006).

71. *See* Lau v. Nichols, 414 U.S. 563 (1974) (holding that public school system's failure to provide English-language instruction to Chinese students who did not speak English discriminated on basis of national origin, in violation of Title VI); *see also* Exec. Order No. 13166—Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121 (Aug. 16, 2000); Guidance to Federal Financial Assistance Recipients regarding Title VI Prohibition against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002).

72. *See* Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination against Persons with Limited English Proficiency, 65 Fed. Reg. 50,123 (August 16, 2000). There are multiple sources of guidance, depending on the sources of the agency's funding. Most of the information is available at www.lep.gov.